

RSC 2022/39
Robert Schuman Centre for Advanced Studies
Integrating Diversity in the European Union (InDivEU)

WORKING PAPER

**Report on patterns of variation in DI across
areas of core state power and instruments of
integration**

Markus Jachtenfuchs, Philipp Genschel, Marta Migliorati

European University Institute
Robert Schuman Centre for Advanced Studies
Integrating Diversity in the European Union (InDivEU)

Report on patterns of variation in DI across areas of core state power and instruments of integration

Markus Jachtenfuchs, Philipp Genschel, Marta Migliorati

RSC Working Paper 2022/39

This work is licensed under the [Creative Commons Attribution 4.0 \(CC-BY 4.0\) International license](https://creativecommons.org/licenses/by/4.0/) which governs the terms of access and reuse for this work.

If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the series and number, the year and the publisher.

ISSN 1028-3625

© Markus Jachtenfuchs, Philipp Genschel, Marta Migliorati, 2022

Published in May 2022 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)

Italy

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in Cadmus, the EUI Research Repository:

<https://cadmus.eui.eu>

www.eui.eu



With the support of the
Erasmus+ Programme
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies, created in 1992 and currently directed by Professor Erik Jones, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21st century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and ad hoc initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

For more information: <http://eui.eu/rscas>

The EUI and the RSC are not responsible for the opinion expressed by the author(s).

Integrating Diversity in the European Union (InDivEU)

Integrating Diversity in the European Union (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states. InDivEU begins from the assumption that managing heterogeneity and deep diversity is a continuous and growing challenge in the evolution of the EU and the dynamic of European integration.

The objective of InDivEU is to maximize the knowledge of Differentiated Integration (DI) on the basis of a theoretically robust conceptual foundations accompanied by an innovative and integrated analytical framework, and to provide Europe's policy makers with a knowledge hub on DI. InDivEU combines rigorous academic research with the capacity to translate research findings into policy design and advice.

InDivEU comprises a consortium of 14 partner institutions coordinated by the Robert Schuman Centre at the European University Institute, where the project is hosted by the European Governance and Politics Programme (EGPP). The scientific coordinators of InDivEU are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

For more information: <http://indiveu.eui.eu/>

Acknowledgments

This project received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement number 822304.

The content of this document represents only the views of the InDivEU consortium and is its sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains

**Integrating
Diversity in the
European Union**

Abstract

The paper summarises different patterns of differentiation and reintegration in core state powers during the post-Maastricht period, based on the EUDIFF-RES dataset. Moreover, it offers a theoretical framework able to explain the observed variation. The framework is further tested by means of short empirical illustrations taken from different policy areas. Overall, the EUDIFF-RES dataset substantially contributes to our understanding of CSP differentiated integration by revealing that the behaviour of states vis-a-vis core state powers varies greatly according to the kind of resource, as well as the costs and opportunities attached to it.

Keywords

Differentiated integration, European Union, core state powers, instruments of integration

Contents

Introduction	8
A step forward: from differentiation opportunities to reintegration opportunities	8
Mapping Differentiation and Reintegration is CSP	10
Understanding patterns of DI and Reintegration of CSP	12
Theoretical Framework	12
Empirical Illustration	13
Multilateral Re-integration	13
Unilateral Reintegration	15
Multilateral and Unilateral Differentiation	17
Conclusions	8
References	19

List of figures

Figure 1. Reintegration and differentiation opportunities	9
Figure 2. Differentiation and Reintegration in EUDIFF-RES	10
Figure 3. Differentiation and Reintegration in EUDIFF-RES, by country	10
Figure 4. Differentiation and Reintegration in EUDIFF-RES, by country and policy area	11
Figure 5. Reintegration strategies	12

Introduction

Throughout the past two project years, WP5 has aimed at uncovering new dynamics of differentiated integration in core state powers. As explained in the context of previous deliverables, WP5 is based on an innovative understanding of core state powers¹. Rather than limiting to the traditional “high politics” vs “low politics” distinction, this research understands CSPs as resources (i.e. money and staff) mobilized for public purposes at the EU level (Genschel & Jachtenfuchs, 2016, 2018)2016, 2018. Hence, to identify CSP substantially, WP5 pushed differentiation research beyond a traditional analysis of the EU legislative framework, by expanding the focus to the actual resources mobilised in different policy sectors. Given the European Union’s multi-level structure (Hooghe & Marks, 2003; Scharpf, 1997), resources can be owned and managed by different governance levels. Hence, to detect core state powers, WP5 has analysed a) whether resources are mobilised for public purposes, and b) at what level (national, joint or supranational) this happens, and c) who decides upon the allocation of such resources.

Against this backdrop, WP5’s teams collected the EUDIFF-RES dataset². EUDIFF-RES has added on to the information provided by EUDIFF 1 and 2 (which look at legislative differentiation) by grasping the differentiation occurring at the material level, e.g. whether certain states are exempted from providing resources while others are not. As already showed in detail in previous reports, EUDIFF-RES covers resources employed in areas of CSP, including common foreign and security policy, economic monetary policies and justice and home affairs. The dataset embraces all kinds of institutionalised resources falling within the general definition of “de novo bodies” (Bickerton et al., 2015), as well as financing instruments (e.g. funds) and tools of capacity building. The early 90s was the benchmark for data collection, given that none of these bodies existed before then. The dataset starts with each body’s year of establishment and ends with 2020, as data for the current year (2021) is not available for all units of observation (yet)³.

The goal of the data collection exercise was twofold: on the one hand, it sought to assess by what level of governance core state powers are financed and managed. On the other, it sought to identify whether the contribution to core state powers in the EU is subject to differentiation dynamics, or not. With the present deliverable, a new step of the research carried out by WP5 is presented: by looking at the degree of participation in the financing of EUDIFF-RES resources by member states enjoying opt-outs, patterns of variation in DI across areas of core state power and instruments of integration are presented. In particular, the report focuses on the differences between legal differentiation policy „re-integration“ through the active participation of opt out states in instruments of capacity building in CSP. This will be described more in detail in the next section.

A step forward: from differentiation opportunities to reintegration opportunities

From a close inspection of EUDIFF-RES, the WP5 team discovered that the division between insider states and states with opt-outs is less clear-cut than what traditional wisdom suggests. While, for instance, Denmark, Sweden and the UK did not participate in the emergency funds European Financial Stability Facility (EFSF) and European Stability Mechanism (ESM), they provided financial assistance to failing EMU-ins nevertheless. Thus, they helped to guarantee the EFSM through which the EU Commission provided financial aid to Portugal and Ireland 2011-14 and to Greece in 2015 (Gocaj & Meunier, 2013) a slim and temporary bailout fund created by the European Union in May 2010 to quell a growing sovereign debt crisis in Europe, became the foundation for a permanent, more powerful institution, the European Stability Mechanism (ESM). On top of this, they provided

1 For further information on the conceptualization please refer to Deliverable 5.2

2 See deliverable 5.4 for reference

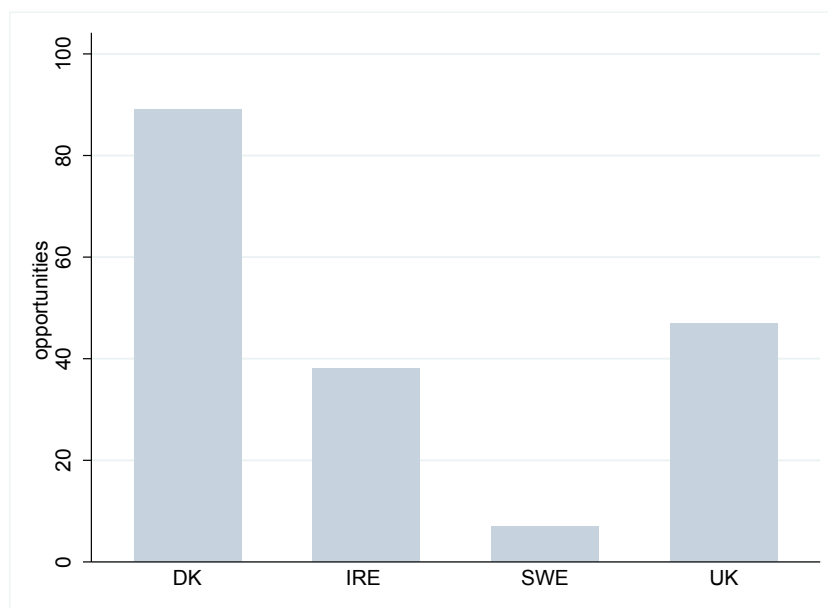
3 Data does not take Brexit into account because the effects of Brexit on agencies’ membership are active only from Feb 2020.

bilateral loans towards the Irish bailouts. Also in other fields of core state powers, the formal outs contribute actively to the policies of the ‘insiders’. Thus, for instance, the UK before Brexit used to make financial contributions to the agency Frontex and participated in Frontex operations, while Denmark participates in the European Defense Fund (EDF) despite its opt-out from CSDP. These examples can be labelled as strategies of ‘reintegration’.

Reintegration, in the context of the instruments contained in EUDIFF-RES, can happen by different means. For the sake of simplicity, reintegration strategies can be divided into two macro-categories: on the one hand, states can ‘bypass’ the opt-outs by using an undifferentiated treaty basis when adopting new legislation (‘Treaty bypass’). Second, states can seek partial opt-out waiver through separate agreements or formal notifications. To map these strategies, this study uses EUDIFF-RES and narrows it down only to those countries with opt-outs in core state powers i.e. Denmark, Ireland, Sweden and the UK (Schimmelfennig & Winzen, 2014, 2020) in Justice and Home Affairs (JHA), Common Security and Defence Policy (CSDP), Economic and Monetary Union (EMU). At every point time a new core state power resource is established, this represent an opportunity for states with opt-outs to re-integrate in that policy area. Thus, in an analogy with Schimmelfennig and Winzen’s concept of ‘differentiation opportunities’ (Duttile et al., 2017; Schimmelfennig & Winzen, 2014, 2020) this report maps, instead, the relationship between formal DI in CSP and the ‘reintegration opportunities’ available to states with opt-outs to participate in CSP.

The resulting, ‘spin-off’ dataset of EUDIFF-RES includes 81 resource-sharing and capacity building initiatives adopted in the whole post-Maastricht era, for a total of 181 observations⁴. As opt-outs vary across states, each of them displays a different number and kind of reintegration opportunities. For example, Denmark has opt-outs from JHA, CSDP and the EMU, hence it can have reintegration opportunities in all these areas. Conversely, Ireland only has exemptions in JHA, thus it is offered reintegration opportunities only in this policy domain. As displayed in Figure 1 and 2, data includes 89 reintegration opportunities for Denmark, 47 for the UK, 38 for Ireland and 7 for Sweden.

Figure 1. Reintegration and differentiation opportunities



⁴ List in Appendix. Some instruments are repeated more than once if they go through substantial reform

Mapping Differentiation and Reintegration is CSP

Once identified the reintegration opportunities available to states with opt-outs, we map the presence or absence of reintegration. Reintegration is present, quite simply, when a state with an opt-out in a specific policy area participates in a resource sharing and/or capacity building initiative in the same area. As displayed in Figure 2, reintegration is predominant, as 73% of opportunities are actually used. In particular, as displayed in Figure 3, Denmark has used 65% of its reintegration opportunities, Ireland 89%, Sweden 57% and the UK 76%. As shown in Figure 4, reintegration is present respectively, in 63% of CSDP opportunities, 57% of EMU and 79% of JHA.

Figure 2. Differentiation and Reintegration in EUDIFF-RES

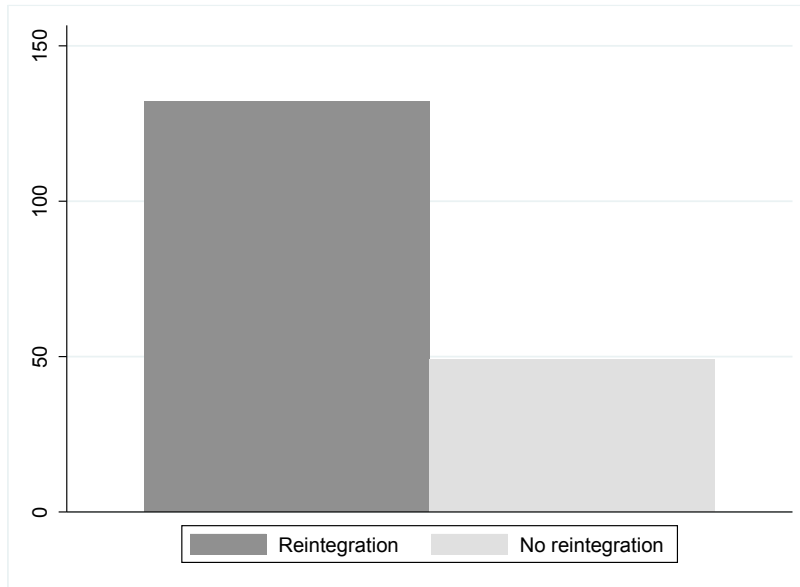


Figure 3. Differentiation and Reintegration in EUDIFF-RES, by country

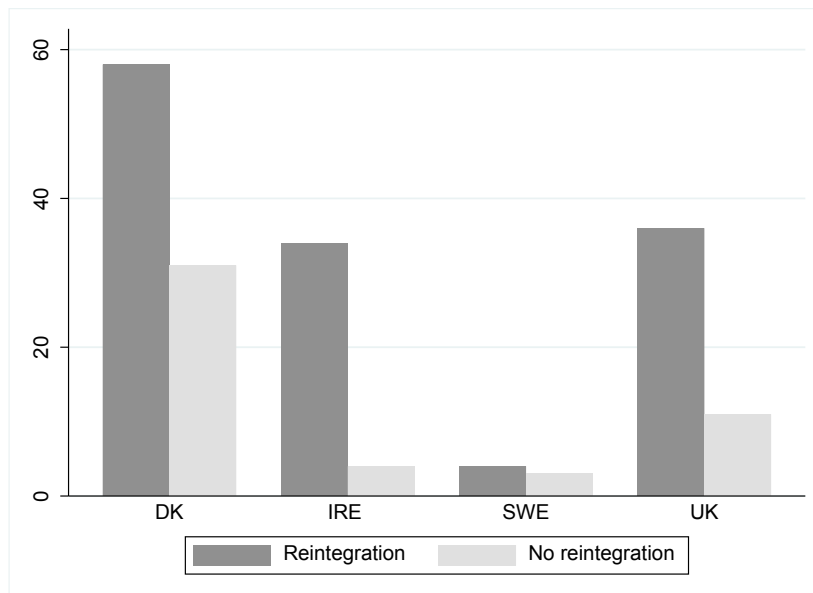
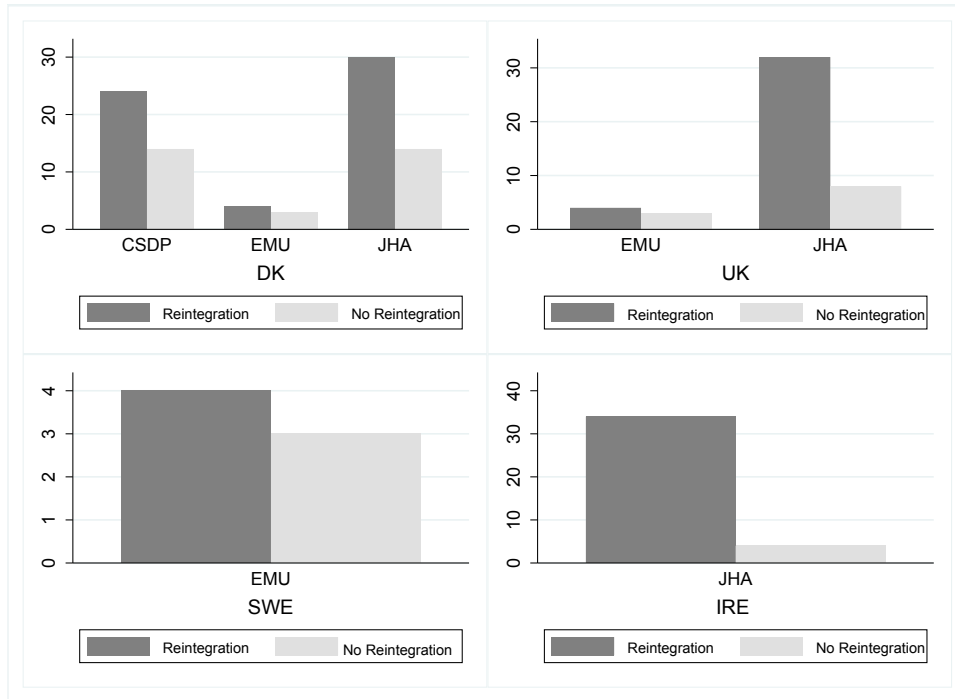
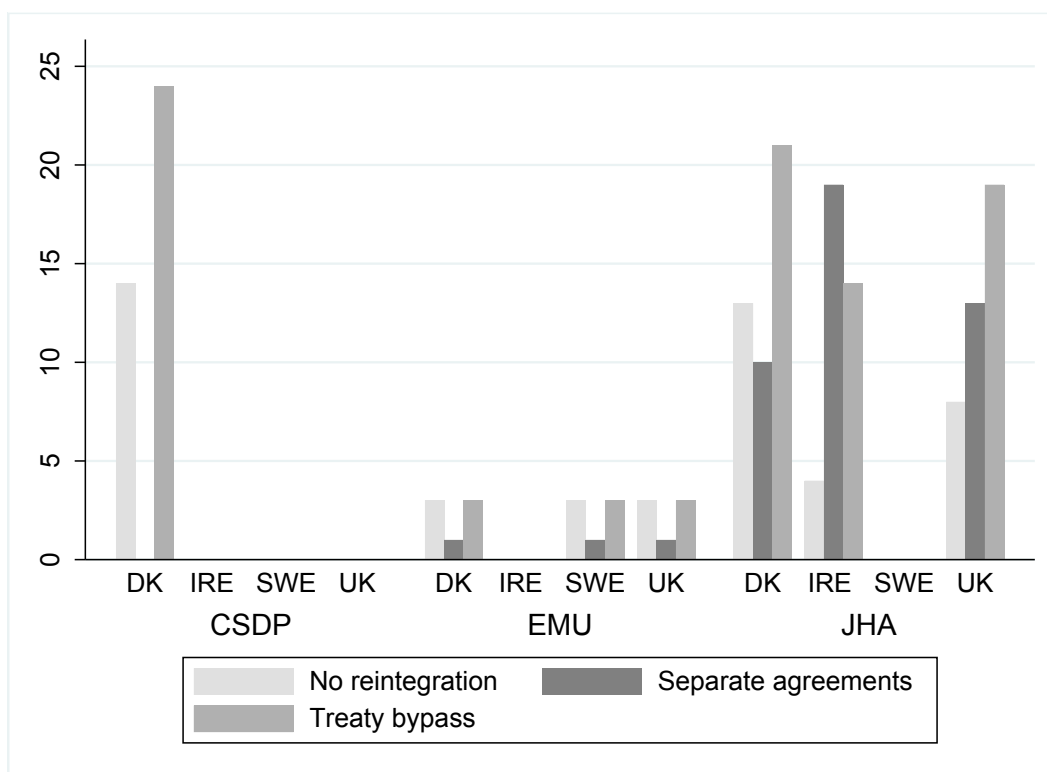


Figure 4. Differentiation and Reintegration in EUDIFF-RES, by country and policy area



As shown in Figure 5, both treaty bypass and separate agreements are used, but they differ across country and policy area. As mentioned earlier, In CSDP, Denmark reintegrates certain aspects of this policy through bypass, by participating in civilian missions on the basis of the fact that they do not have ‘defence implications’, and by partaking in the newly established European Defence Fund, as the latter has been established under Internal Market rules. In the EMU, Denmark UK and Sweden participated in the European Financial Stabilisation Mechanism (EFSM) during the sovereign debt crisis and became members and contributors to EU supervisory authorities in banking and financial sector by bypass, as EFSM was based on the EU budget and as the supervisory authorities were established under uniform single market rules. In turn, the JHA the scenario is much more varied: Denmark, UK and Ireland display a considerable amount of treaty-bypasses in in JHA policies adopted by unanimity between the Amsterdam and Lisbon Treaties. A fair amount of selective re-entry is also present across countries: in the Danish case, such re-entry applies to all instruments building on the Schengen acquis (Adler-Nissen, 2009; Migliorati, 2021) and to selected areas of JHA by means of parallel agreements (e.g. Eurodac database, Europol and Eurojust after their latest reform). In the case of the UK and Ireland the same takes place in selected aspects of Schengen (e.g. the Schengen information System) and JHA by virtue of a flexible opt-in clause negotiated in the Amsterdam Treaty.

Figure 5. Reintegration strategies



Understanding patterns of DI and Reintegration of CSP

Theoretical Framework

In order to explain the variation outlined above, WP5 team has developed a theoretical framework taking into account the opt-out costs faced by both insider and outsider states.

1. The first theoretical assumption is that outsider states may in fact face substantial exclusion costs. This could be, for instance, because the enhanced integration among the insiders produces policy benefits from which the outsider is excluded and/or produce negative externalities that harm and may even exploit the outsider (Genschel & Plümpner, 1997; Kölliker, 2001). If the policy costs of exclusion are high, the outsider state has an incentive to seek de facto reintegration into the policies of the insiders despite its de jure outsider status. Whether, to what extent and in which form this policy reintegration succeeds depends on the insiders. The insiders can make policy reintegration easy for the outsider by offering to shift policy issues of mutual interest to undifferentiated treaty bases. This kind of policy reintegration is a form of 'treaty bypass', as explained in the previous section. They can also facilitate reintegration by offering the outsiders separate agreements for policy cooperation on favorable terms. Yet, the insiders can also make policy reintegration difficult or impossible for the outsider by blocking treaty bypasses and by insisting on tough conditions for separate agreements or refusing them altogether. How they will act depends on the costs they face from the exclusion of the outsider.
2. The second assumption is that constitutional opt-outs are associated with variable costs of exclusion for the 'insiders'. Sometimes the costs of exclusion are high. Thus, arguably, Eurozone member states would prefer the participation of Denmark, Sweden and the UK to increase the resilience and credibility of the Eurozone. At other times, the costs of exclusion are low. For instance, Denmark's formal opt-out from CSDP has few policy consequences

for EU military missions because, to the extent that Danish participation is essential at all, it can be organized through NATO. If the insiders face high costs of exclusion, they have an incentive to encourage and support the policy reintegration of the outs through treaty bypasses or separate agreements. Yet, if the costs of exclusion are low, the insiders may be reluctant to help outsiders reintegrate.

Combining insiders and outsiders' costs of exclusion, we distinguish among four basic situations:

- **High-High:** if both insiders and outsiders face high exclusion costs, they have an incentive to collude on policy reintegration. The insiders should offer opportunities for outsider-participation, and the outsiders should use them: multilateral (cooperative) reintegration.
- **Low-High:** If the costs of exclusion are low for the outsiders but high for the insiders, the latter will encourage reintegration but the latter will refuse to follow. This is the Eurozone case as discussed by Schimmelfennig and Winzen: unilateral differentiation.
- **High-Low:** If the costs of exclusion are high for the outsiders but low for the insiders, the outsiders will seek reintegration but the insiders have limited incentives to help. The formal outs have to either stay out of the policy of the ins or accept reintegration on unfavorable terms: unilateral reintegration.
- **Low-Low:** If the costs of exclusion are low for insiders and outsiders alike, both will be indifferent to the policies of the other. The outs will not seek reintegration and the ins have no incentive to encourage it: multilateral (cooperative) differentiation.

Empirical Illustration

In summary, it is possible to distinguish different patterns of DI and reintegration of CSP (Table 1), which are overviewed in the sections below.

Multilateral Re-integration

Reintegration is 'multilateral' when all states, both outsiders and insiders, value uniform participation in a specific instrument. This is the case of justice and home affairs policies under the third pillar (for Denmark, UK and Ireland), the EFSF led by the three supervisory authorities and the Irish bailout (for Denmark, UK and Sweden). The next two subsection illustrate these two examples of reintegration.

Denmark, UK and Ireland: Justice and home affairs under the third pillar

JHA is the policy area which went through the most impressive development in the post-Maastricht era (Monar, 2001). The Maastricht Treaty was just the 'gate opener' of such development (Monar, 2012) by establishing a third pillar dealing with justice and home affairs in an intergovernmental fashion. This compromise was acceptable for both integrationist and minimalist states, and was strongly supported by Germany and France, 'both of which were perfectly content with this solution which they saw as an intermediate step paving the way to a full or partial "communitarisation" at a later stage' (Monar, 2012, p. 722). The only country that had to negotiate an opt-out in response to a negative referendum was Denmark which through the Edinburgh compromise (Svensson, 1994) obtained exclusion from JHA cooperation in fields not decided by unanimity voting. With the Amsterdam Treaty asylum, immigration, external border controls and civil law matters were moved to the first pillar, while police and judicial co-operation in criminal matters remained under intergovernmental decision making (Monar, 2001). This leap forward in JHA integration pushed UK and Ireland to join Denmark on the 'outs' side (Jensen & Slapin, 2012) by gaining selective exemptions allowing them to control their level of participation in JHA measures (Peers, 2011).

Getting to our 'reintegration opportunities', the first but marginal JHA cooperation funds were established and financed by the member states, unless the Council agreed by unanimity to use the EU budget (Peers, 2016a, p. 335). After that, the Amsterdam Treaty facilitated a higher number of funds across different fields of JHA. Since then, using the EU budget for funds for common initiatives in border management, immigration and asylum, police and judicial cooperation became the standard, unless the Council decided otherwise with a unanimous vote (Peers, 2016a, p. 335). Besides these financial instrument of JHA cooperation, the period between Amsterdam and Lisbon provided several reintegration opportunities, such as the establishment of Europol in 2000, followed by Eurojust in 2002 and CEPOL in 2005. The fact that these agencies and several of the above-mentioned funds operated under the third pillar (meaning that decision-making was still functioning by unanimity) allowed all JHA laggards to reintegrate (actually, participate) in most of them. In fact, exemptions in JHA were truly applicable to Denmark UK and Ireland only to policies adopted by qualified majority. The unanimity requirement for the agreement of measures under the third pillar obviated the need for any real opt-out be negotiated in this area: if any of the outsiders did not like a proposal, it could block it by voting against it (House of Lords, 2013). As a result, for over two decades Denmark, UK and Ireland participated by default in all JHA measures not subject to the community method. On the one hand, for the three outsiders, the policy benefits of participating in these measures exceeded the costs of exclusion, otherwise they would have at least tried to negotiate an opt-out covering all JHA policies, even those decided by unanimity (such as Denmark in Defence, as we will see later). On the other hand, by accepting to keep laggards involved in unanimous decisions, insiders accepted to need their support in order to adopt new policies in these fields. When, JHA policies were progressively moved from unanimity to QMV through Amsterdam and Lisbon, outsiders had to adapt, if they wanted to, by pursuing unilateral reintegration instead

Non-Eurozone countries: the Irish bailout and the ESFS

In the second instance, an example of multilateral reintegration is the EU-wide 2010 reaction to the sovereign debt crisis. One of the first crisis-management measures taken by the EU was the establishment, ex Art. 122 TFEU, of a European Financial Stabilisation Mechanism (EFSM). The EFSM was part of an EU temporary facility (the EFSF) and was funded through bonds issued by the European Commission (up to 60 billion €). The mechanism was then utilised as part of wider multilateral international assistance programmes to Greece and Portugal (Alcidi et al., 2017). The EFSM provided 22.5 billion € of the 85 billion € international bailout package to Ireland (Breen, 2012). As the EFSM was guaranteed through the EU budget, non-Eurozone countries automatically faced a liability equivalent to their share in the EU Budget (Thompson, 2011). Hence, for the limited time the EFSM was functioning (until 2013) Denmark, UK and Sweden shared the liability to bail-out Eurozone countries. At the time of EFSM agreement (Council Regulation (EU) No 407/2010), the UK was in principle against pledging funds to any new EU-wide mechanism because it felt the Eurozone bail-out was a problem of Eurozone countries, even though British banks were heavily exposed to debt holdings in Spain and Ireland (Gocaj & Meunier, 2013). However, the agreement on the EFSM was struck by qualified majority, and the UK could not have unilaterally opted-out of the mechanism (N. de Boer & Koedooder, 2015; Thompson, 2011). Moreover, the UK had an interest in securing a swift bailout for Ireland (Breen, 2012), as well as Denmark and Sweden. In fact, the three countries even took the initiative to arrange, on top of EFSM contributions, a set of extra bilateral loans towards Ireland (Breen, 2012). The UK's participation in the Irish rescue scheme was established in the Loans to Ireland Act of 2010 (Parliament UK, 2010). Through this act, payments of up to 3.8 billion € were authorised. George Osborne, then chancellor of the exchequer stated 'We have made a commitment to consider a bilateral loan that reflects the fact that we are not part of the euro, but Ireland is our

very closest economic neighbour' (quoted in Kollewe, 2010). Moreover, in the UK, small savers had a high exposure to risk in the Irish banking market, partly due to a popular saving scheme offered by the Post Office in cooperation with the Bank of Ireland that attracted 500.000 savers (Bourke, 2009). Denmark, in turn, contributed 400 million euros to the bail-out scheme. Danske Bank, at the time, was strongly engaged in the Irish market through its subsidiary, the National Irish Bank. In 2010, Danske held more than 62 million Danish Kronas in Irish loans, over 20 per cent of which were impaired (Danske Bank, 2011). Finally, Sweden, after lending money to their 'neighbours' Latvia and Iceland (Reuters, 2011) also contributed 600 million euros in exchange of a 'credible but also socially responsible and fair' plan from Ireland (RTE, 2010).

The pattern of multilateral reintegration just described also applies, even if to a lesser extent, to non-Eurozone countries in financial and banking supervision. Although Denmark, Sweden and the UK have been consistently outside the Eurozone since its establishment, during the 2008-2013 financial crisis they became members of the three newly-established supervisory authorities (ESAs), the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA). ESAs were established in 2010, in reaction to the global financial crisis, in order to deal with the 'destructive imbalance in the regulatory and supervisory architecture' revealed by the crisis itself (Moloney, 2010, p. 1319). In order to accommodate the establishment of the ESAs, member states agreed with the Commission on the treaty basis to be Article 114 TFEU (ex Article 95 TEC), which operates under a Council qualified majority voting (Geradin & Petit, 2004; Moloney, 2010). Such decision unveiled a large institutional consensus on a 'somewhat shaky competence' (Moloney, 2010, p. 1341) for a radical institutional reform of financial and banking regulation. This action ensured the integration of all EU members in a 'European System of Financial Supervision' (ESFS) dealing, among other things, with the micro and macro prudential supervision of banks, i.e. the regulation and monitoring of the banking system to ensure its safety and soundness (Mishkin, 2000). Although participation in the financing and management of these agencies does not imply actual reintegration in the EMU, it does have some features hinting to further reintegration in the future. One of the main tasks of the ESAs is the establishment of a 'single rulebook' (including rules on capital requirements, recovery and resolution processes and a system of harmonised national Deposit Guarantee Schemes) which, in turn, is the foundation of the two pillars of the banking union, i.e. the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). In practice, although the two pillars are separated from the ESFS, the rules established through the ESAs are implemented consistently through them in order to avoid a vicious sovereign-bank nexus. With time, this may bear unexpected implications, for example in the field of systemic risk and banking supervision: the three ESAs are part of the European Systemic Risk Board which, in turn, is chaired and governed by the European Central Bank. As a consequence, non-Eurozone countries are embedded in a system often dominated by Eurozone members (Moloney, 2010, p. 1380).

Unilateral Reintegration

Denmark, UK and Ireland: post-Amsterdam JHA

As anticipated, reintegration is 'unilateral', when opt-out states highly value participation in a resource, although it does not make a great difference for the insiders. This is the case of the selective opt-ins of Ireland and UK in JHA, Denmark reintegration in Schengen, Common European Asylum System and other JHA measures. Several examples of this kind of reintegration have occurred in JHA since the Amsterdam Treaty. The Treaty, in fact, integrated into the EC and the EU Treaties the Schengen Agreement of 1985, supplemented by the 1990 Schengen Convention implementing that Agreement and further implementing Measures (Peers, 2011). Moreover, as explained in the previous section,

it moved decision-making to QMV in border management, asylum and cooperation in civil matters. As a result, UK, Ireland and Denmark acquired 'special' positions, broadly characterised by the coexistence of 'legal opt-outs' and a 'political opt-ins' (M. den Boer, 1997). Article 3 of the Protocol annexed to the Treaty permits the UK and Ireland to choose, on a case-by-case basis, whether to opt in to measures proposed by the Commission under Title IV TEU within three months, by notifying the Council of its intention to participate. If it did not choose to opt in it was also entitled, under Article 4, to opt in at any time after its adoption by the Council (but was unable to renegotiate its terms at that stage) by notifying and securing the agreement of the Commission. This means that when the UK and Ireland value the participation in a specific measure, they can opt-in to it. Moreover, Article 4 of the Protocol confirmed that both the UK and Ireland were not bound by the Schengen acquis but might at any time 'request to take part in some or all of the provisions of the acquis', with the Council deciding such requests by unanimity. Article 5 set out provisions on 'Schengen-building measures', which the UK and Ireland were also given the option of applying to the Council to participate in. Following the entry into force of the Treaty of Amsterdam, the Council approved a request from the UK to participate in some aspects of the Schengen acquis and a Decision was adopted in 2000, followed by an implementing Decision in 2004. A similar arrangement was pursued by Ireland in 2002.

While in most cases Ireland and UK are granted access to the measures they seek to opt-in to, there were also cases in which the Council refused access. In particular, it rejected UK and Ireland's request to take part of the agency Frontex (Dodd, 2007). In the UK case, according to the House of Lords, 'just as, in the case of Schengen, the Government would like to have the benefits of being a Schengen State without weakening the United Kingdom's external borders, so they would like to participate fully in the organisation and running of Frontex' (Harrison & Henig, 2007, p. 23). In front of insiders' refusal to let UK and Ireland in, a compromise was struck, in order to allow Ireland and/or the United Kingdom request to participate in some of the Agency's activities without, however, having voting rights (Smyth, 2006): Article 20(5) of the Frontex regulation prescribes that the Frontex Management Board is to decide whether to accede to the request. To this end, the Board examines whether the participation of the requesting state would contribute to the execution of the relevant measure. The decision also sets the financial contribution to be made by Ireland and/or the UK to the measure to which the participation request relates. In practice, the UK frequently takes part in Frontex operations (European Commission, 2018), and both UK and Ireland provide financial contributions to Frontex since 2006.

In general, as JHA decision-making takes place by qualified majority, outsiders' selective participation does not represent a cost for the insiders. Yet, the Frontex example shows how insiders can still prevent UK and Ireland from full reintegration, if their requests are deemed excessive and beyond the boundaries of their membership.

By slightly different means, also Denmark displays a considerable share of unilateral reintegration: To name a few, in spite of its opt-out from asylum policies, Denmark takes part in the EURODAC fingerprint database⁵. Moreover, Denmark implements the Schengen Information System, it contributes to all Schengen-related JHA funds since the late 90s, it has been member of Frontex since its establishment in 2004, and has negotiated special agreement with Europol and Eurojust after the Lisbon treaty moved cooperation in criminal matters to QMV.

⁵ See the 'Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention regarding access to Eurodac for law enforcement purposes'.

The (partial) reintegration in the Dublin system is the result of parallel agreements negotiated ex-post: given the importance of coordinating the processing of Asylum applications, such request was agreed by the Council without complications (Council of the European Union, 2006). Moreover, the recent agreements struck with Europol and Eurojust were moved by Denmark's desire to remain part of police and judicial cooperation in spite of the deepening of their opt-out after Lisbon (Maurice, 2017; Peers, 2016b). In turn, Denmark's reintegration in Schengen instruments is rather dictated by a compromise Denmark struck with insiders during Amsterdam's negotiations (Adler-Nissen, 2009). While the Danish government never put the abolishment of opt-outs on the negotiating table as it feared another negative referendum (Petersen, 1998), they did have to find a way to reconcile their JHA opt-out with their imminent Schengen membership (Peers, 2015). This was accomplished by inserting a clause in Article 5 of the Protocol on the position of Denmark, saying that Denmark should decide within six months whether or not to participate in instruments building on the Schengen Acquis. As a matter of fact, Denmark has been participating in each and every Schengen instrument ever since (Migliorati forthcoming). According to Adler-Nissen, the clause formally leaves Denmark the option to not implement Schengen related measures, but practically threatens Denmark to be 'kicked-out' of the Schengen area should it defect (Adler-Nissen, 2014). From the outsider's perspective, as Denmark attaches great (economic) value to their Schengen membership (Kluger Rasmussen & Sorensen, 2015), the benefits of participating in Schengen measures exceed the benefits deriving from non-participation. From the perspective of the insiders, they never had to worry about Denmark's defection so far. On top of this, Art 5.2 of the Danish protocol gives Member States the chance to take unspecified 'appropriate measures' against Denmark if the clause is not respected. This means, in practice, that insiders do not have to pay any cost for Denmark differentiation in Schengen, as Denmark does not take part in decision making, but has to de facto reintegrate all Schengen policies, including those implying direct costs and resource sharing. If it did not do so, member states could take (unilateral) action against Denmark.

Multilateral and Unilateral Differentiation

When reintegration does not take place, differentiation is present. Differentiation, in turn, can be defined as 'multilateral' if the costs of policy exclusion are low for insiders and outsiders alike. This is the case, for example, of Denmark's opt-out from CSDP. Thanks to the CSDP opt-out obtained in 1992, Denmark has never participated in any EU-led military initiative. It never took part in EU-military missions since they were launched in 2003, it does not take part in the European Defence agency's activities, and does not finance military missions through the intergovernmental 'Athena mechanism'. The full exclusion of Denmark from CSDP decision making and capacity building is explained precisely by the availability of alternative means of military action outside the EU framework. Historically, Denmark has had many other ways to be involved in missions with defence implication within a European (but not EU) framework, in the context of NATO missions and other initiatives (e.g. the European Intervention Initiative).

Finally, differentiation is unilateral when the costs of exclusion are low for the outsiders but high for the insiders. If that is the case, the latter will encourage reintegration but the latter will refuse to follow. This dynamics applies to the case of Sweden, DK and UK and their rejection of Eurozone membership.

Table 1 below summarises the patterns and cases.

Table 1. Patterns of differentiation and reintegration

	Costs of exclusion for insiders		
	High	Low	
	Reintegration		
Costs of exclusion for outsiders	High	Multilateral reintegration: JHA under third pillar, European System of Financial Supervision, EFSM and Irish bailout	Unilateral reintegration: Selective opt-ins of Ireland and UK , Denmark reintegration in Schengen, CEAS and other JHA measures
	Low	Unilateral Differentiation: Eurozone	Multilateral Differentiation: CSDP
	Differentiation		

Conclusions

The present report has summarised different patterns of differentiation and reintegration in core state powers during the post-Maastricht period, based on the EUDIFF-RES dataset. Moreover, it has offered a theoretical framework able to explain the observed variation. The framework is further tested by means of short empirical illustrations taken from different policy areas.

The content of this report will be used by WP5 for a publication in a special issue hosted by the InDivEU Consortium`s leader, Frank Schimmelfennig. The article will build on this report by further expanding the theoretical framework and better explain the patterns of variation just overviewed in the above sections. Moreover, it will extend the case studies just presented and reported in Table 1.

Overall, the EUDIFF-RES dataset has substantially contributed to our understanding of CSP differentiated integration by revealing that the behaviour of states vis-a-vis core state powers varies greatly according to the kind of resource, as well as the costs and opportunities attached to it.

References

- Adler-Nissen, R. (2009). Behind the scenes of differentiated integration: Circumventing national opt-outs in Justice and Home Affairs. *Journal of European Public Policy*, 16(1), 62–80. <https://doi.org/10.1080/13501760802453239>
- Adler-Nissen, R. (2014). Justice and home affairs: Denmark as an active differential European. In *Denmark and the European union* (pp. 65–79). Routledge.
- Alcidi, C., Gros, D., Ferrer, J. N., & Rinaldi, D. (2017). *The Instruments Providing Macro-Financial Support to EU Member States*. 32.
- Bickerton, C. J., Hodson, D., & Puetter, U. (2015). The New Intergovernmentalism: European Integration in the Post-Maastricht Era. *JCMS: Journal of Common Market Studies*, 53(4), 703–722. <https://doi.org/10.1111/jcms.12212>
- Bourke, L. (2009). *Savers in Irish banks face new compensation fears*. Citywire. <http://citywire.co.uk/funds-insider/news/savers-in-irish-banks-face-new-compensation-fears/a331264>
- Breen, M. (2012). The International Politics of Ireland's EU/IMF Bailout. *Irish Studies in International Affairs*, 23(1), 75–87. <https://doi.org/10.3318/ISIA.2012.23.75>
- Council of the European Union. (2006). *EUR-Lex—JOL_2006_066_R_0037_01—EN - EUR-Lex*. https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=OJ:JOL_2006_066_R_0037_01
- Danske Bank. (2011). *Risk Report 2010*. <https://danskebank.com/en-uk/ir/Documents/2010/Q4/Riskreport-2010.pdf>
- de Boer, N., & Koedooder, K. (2015, July 20). *How Europe's least controversial rescue fund became controversial – ACELG*. <https://acelg.blogactiv.eu/2015/07/20/how-europes-least-controversial-rescue-fund-became-controversial/>
- den Boer, M. (1997). Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity despite Communautarization. *Maastricht Journal of European and Comparative Law*, 4(3), 310–316. <https://doi.org/10.1177/1023263X9700400305>
- Dodd, T. (2007, December 10). *House of Lords—European Union—Minutes of Evidence*. <https://publications.parliament.uk/pa/ld200708/ldselect/ldeucom/60/7101709.htm>
- Duttle, T., Holzinger, K., Malang, T., Schäubli, T., Schimmelfennig, F., & Winzen, T. (2017). Opting out from European Union legislation: The differentiation of secondary law. *Journal of European Public Policy*, 24(3), 406–428. <https://doi.org/10.1080/13501763.2016.1149206>
- European Commission. (2018, September 12). *Explanatory Memorandum*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1536742396689&uri=COM:2018:631:FIN>
- Genschel, P., & Jachtenfuchs, M. (2016). More integration, less federation: The European integration of core state powers. *Journal of European Public Policy*, 23(1), 42–59. <https://doi.org/10.1080/13501763.2015.1055782>
- Genschel, P., & Jachtenfuchs, M. (2018). From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory: Crises in Core State Powers. *JCMS: Journal of Common Market Studies*, 56(1), 178–196. <https://doi.org/10.1111/jcms.12654>
- Genschel, P., & Plümper, T. (1997). Regulatory competition and international co-operation. *Journal of European Public Policy*, 4(4), 626–642.

- Geradin, D., & Petit, N. (2004). *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform* (SSRN Scholarly Paper ID 489722). Social Science Research Network. <https://doi.org/10.2139/ssrn.489722>
- Gocaj, L., & Meunier, S. (2013). Time Will Tell: The EFSF, the ESM, and the Euro Crisis. *Journal of European Integration*, 35(3), 239–253. <https://doi.org/10.1080/07036337.2013.774778>
- Harrison, Lord, & Henig, B. (2007). *Information about the Committee*. 243.
- Hooghe, L., & Marks, G. (2003). Unraveling the Central State, but How? Types of Multi-Level Governance. *The American Political Science Review*, 97(2), 233–243. JSTOR.
- House of Lords, 2013. (2013). *House of Lords—EU police and criminal justice measures: The UK's 2014 opt-out decision—European Union Committee*. <https://publications.parliament.uk/pa/ld201213/ldselect/ldeucom/159/15902.htm>
- Jensen, C. B., & Slapin, J. B. (2012). Institutional hokey-pokey: The politics of multispeed integration in the European Union. *Journal of European Public Policy*, 19(6), 779–795. <https://doi.org/10.1080/13501763.2011.610694>
- Kluger Rasmussen, M., & Sorensen, C. (2015). *Denmark: A Pragmatic Euroscepticism*. 10.
- Kollewe, J. (2010, November 22). *Ireland bailout: UK to lend £7bn*. The Guardian. <http://www.theguardian.com/business/2010/nov/22/ireland-bailout-uk-lends-seven-billion>
- Kölliker, A. (2001). Bringing together or driving apart the union? Towards a theory of differentiated integration. *West European Politics*, 24(4), 125–151. <https://doi.org/10.1080/01402380108425468>
- Maurice. (2017, January 5). Denmark clinches Europol 'backdoor' deal. *EUobserver*. <https://euobserver.com/institutional/137730>
- Migliorati, M. (2021). Postfunctional differentiation, functional reintegration: The Danish case in Justice and Home Affairs. *Journal of European Public Policy*, 0(0), 1–23. <https://doi.org/10.1080/13501763.2021.1921831>
- Mishkin, F. (2000). *Prudential Supervision: Why Is It Important and What are the Issues?* (No. w7926; p. w7926). National Bureau of Economic Research. <https://doi.org/10.3386/w7926>
- Moloney, N. (2010). Eu Financial Market Regulation after the Global Financial Crisis; More Europe; or more Risks; *Common Market Law Review*, 47(5). <https://kluwerlawonline-1com-1ztaj4w4y022e.hertie.hh-han.com/journalarticle/Common%20Market%20Law%20Review/47.5/COLA2010058>
- Monar, J. (2001). The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs. *JCMS: Journal of Common Market Studies*, 39(4), 747–764. <https://doi.org/10.1111/1468-5965.00329>
- Monar, J. (2012). Justice and Home Affairs: The Treaty of Maastricht as a Decisive Intergovernmental Gate Opener. *Journal of European Integration*, 34(7), 717–734. <https://doi.org/10.1080/07036337.2012.726011>
- Parliament UK. (2010). *Loans to Ireland Act 2010* [Text]. <https://www.legislation.gov.uk/ukpga/2010/41/section/1>
- Peers, S. (2011). *MISSION ACCOMPLISHED? EU JUSTICE AND HOME AFFAIRS LAW AFTER THE TREATY OF LISBON*. 33.

- Peers, S. (2015, March 17). EU Law Analysis: Denmark and EU Justice and Home Affairs Law: Details of the planned referendum. *EU Law Analysis*. <http://eulawanalysis.blogspot.com/2015/03/denmark-and-eu-justice-and-home-affairs.html>
- Peers, S. (2016a). *EU justice and home affairs law. Volume I: EU immigration and asylum law* (4th ed.). Oxford University Press.
- Peers, S. (2016b). *EU Justice and Home Affairs Law: EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law*. Oxford University Press.
- Petersen, N. (1998). The Danish Referendum on the Treaty of Amsterdam Europas? *ZEI-Zentrum Fur Europaische Ingegrationsforschung*.
- Reuters. (2011, May 13). Irish bailout view deserves hearing, Sweden says. *Reuters*. <https://www.reuters.com/article/sweden-ireland-bailout-idUSLDE74C13G20110513>
- RTE. (2010). *UK loan to Ireland 'in national interest'*. <https://www.rte.ie/news/business/2010/1122/294660-britain/>
- Scharpf, F. W. (1997). Introduction: The problem-solving capacity of multi-level governance. *Journal of European Public Policy*, 4(4), 520–538. <https://doi.org/10.1080/135017697344046>
- Schimmelfennig, F., & Winzen, T. (2014). Instrumental and Constitutional Differentiation in the European Union. *JCMS: Journal of Common Market Studies*, 52(2), 354–370. <https://doi.org/10.1111/jcms.12103>
- Schimmelfennig, F., & Winzen, T. (2020). *Ever Looser Union?: Differentiated European Integration*. Oxford University Press.
- Smyth, J. (2006). *Ireland applies to join new force to protect EU borders*. *The Irish Times*. <https://www.irishtimes.com/news/ireland-applies-to-join-new-force-to-protect-eu-borders-1.997262>
- Svensson, P. (1994). The Danish Yes to Maastricht and Edinburgh. The EC Referendum of May 1993. *Scandinavian Political Studies*.
- Thompson, G. (2011). *The European Financial Stabilisation Mechanism (EFSM)*. <https://commonslibrary.parliament.uk/research-briefings/sn05973/>

Authors

Markus Jachtenfuchs

Hertie School

jachtenfuchs@hertie-school.org

Philipp Genschel

European University Institute

philipp.genschel@eui.eu

Marta Migliorati

University of Malta

marta.migliorati@um.edu.mt