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Abstract

Europol has become a hub for differentiated integration. Initially a small anti-drugs unit, the EU's police agency is now a fully-fledged body where law enforcement agencies from all around the world work together. Seen through the organisational dimension of differentiation, police cooperation through Europol has shaped differentiated integration modalities based both on the uneven participation of actors in the policy cycle and on the differentiated access to Europol's mechanisms for exchange of information. Albeit limited, this multi-layered arrangement of police cooperation through Europol has provided the grounds for a more flexible approach towards the fight against organised crime in Europe. The various differentiated integration mechanisms at play have ultimately significantly increased transactions between law enforcement authorities in Europe and have improved cross-border cooperation in the areas within Europol's mandate.

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Executive summary

Europol, the EU's police agency, is a hub for differentiated integration. There are five layers of differentiated integration within Europol: (1) cooperation with non-EU, non-Schengen members which are not candidates for accession, like the US; (2) cooperation with non-EU, non-Schengen members which are candidates for accession, like the Western Balkans (WB); (3) cooperation with non-EU, Schengen members, like Switzerland; (4) cooperation with EU, Schengen members which have an opt-out, like Denmark; and (5) cooperation with outgoing non-Schengen EU members, like the United Kingdom.

There are three main things Europol partners appreciate from their cooperation with the agency: the informal network of law enforcement officers housed at Europol's headquarters in The Hague; the quality of the data stored in Europol's databases; and the help in capacity building that Europol provides to third countries.

Both the Brexit negotiations and the 2015/2016 migration crisis have had an impact on differentiated integration within Europol. The former have complicated Europol's relationship with its partners, as the EU has been understandably wary of granting special status to non-EU members while talks with Britain are ongoing. The latter has had a mixed effect on differentiated integration at Europol: on the one hand, it increased the need for law enforcement cooperation between the EU and countries of origin and transit, like the Western Balkans; on the other, it pushed other priorities to the backburner, downgrading the importance of cooperation with partners which were not involved in the migration cycle.

After looking at the different layers of differentiated integration within Europol, with a particular focus on the cases of the Western Balkans and the United Kingdom, we suggest the following policy recommendations:

- 1) Focus on Europol's operational value. As a law enforcement agency, Europol's added value to both EU and non-EU countries is that it makes their operations more efficient. The EU should not let politics get in the way of helping countries co-operate better at the operational level, whether in or outside of Schengen.
- 2) Set up a common framework for Schengen countries. To be more effective in fighting irregular migration and secondary movements, the EU should ease some of the restrictions over access to databases for trusted and necessary partners, like Schengen-associated countries.
- 3) Negotiate an all-encompassing deal between Europol and the UK going beyond the limited December Brexit Trade and Cooperation Agreement (TAC). Once the dust has settled on the Brexit drama, the UK and the EU may be able to find a way to seal an all-encompassing partnership deal which will benefit both parties. In the meantime, the UK could help Europol's fight against irregular migration by pooling intelligence and resources. Britain could assist Europol's fight against irregular migration through the sharing of actionable intelligence.
- 4) Enhance and streamline cooperation with the Western Balkans on the institution and data-sharing level. The WB countries have a limited access to Europol's information systems. This eventually creates problems for these countries' contributions to the EU's operations in which they have particular interest. Seconding national experts (SNE) from these countries including providing direct access to Europol information databases would

significantly facilitate the smooth policing of the EU's external borders.

5) Use differentiated integration to up Europol's resources. Non-EU partners value Europol. As the agency will have to renegotiate its agreements with many of them soon, it could use its leverage to get more staff, training and intelligence.

Introduction

Since the outset, the EU's Area of Freedom, Security and Justice (AFSJ) has been a prominent example of differentiated integration (DI). Member states and third parties have been adopting flexible legal and institutional arrangements for cooperation in sensitive policy areas traditionally related to core aspects of sovereignty, like internal security.

Meanwhile, the growth of trans-border organised crime in Europe has prompted increased cooperation between national law enforcement authorities, increasing the propensity for further integration of justice and home affairs policies at the EU level. The institutional dimension of these integration processes is particularly important. Policy-specific AFSJ agencies such as Europol, Frontex or Eurojust have evolved into key actors in the fight against new security threats. Having gone from a purely intergovernmental organisation to a somewhat centralised EU agency, Europol's main role is the coordination of national law enforcement authorities responsible for collection, analysis and exchange of information related to cross-border criminal activities. In this sense, Europol is an example of national commitments to engage in a more integrated approach at the European level of police cooperation in the fight against terrorism and organised crime.

Despite the evolving homogenisation of Europol which has been fostered by the Lisbon Treaty, the agency can also be perceived as a model for DI as the current design of Europol incorporates integrated cooperation frameworks for the majority of member states, opt-outs for others and intensified cooperation with non-EU partner states. On the one hand, those EU member states that do not have an opt-out from Europol fully participate in all phases of the policy cycle, from policy formulation and decision making to implementation and evaluation. In contrast, non-EU members are primarily rule takers, as their participation is limited to the implementation and in some cases to the preparatory and evaluation phases. This is the case also for non-EU members which are part of the EU's borderless Schengen area; and even for the one EU member which has opted out of Europol (Denmark).

This arrangement facilitates heterogeneity as it operates through different levels of cooperation involving both EU member and non-member states. In this sense, Europol can be categorised as a typical case of differentiated integration in the context of the general EU IDEA definition (Lavenex and Križić 2019: 3) as "any modality of integration or cooperation that allows states (members and non-members) and sub-state entities to work together in non-homogeneous, flexible ways".



While the current architecture of Europol¹ has been generating somewhat successful outcomes (Europol 2020), the recent stream of European crises has been challenging for EU integration in all areas, including police cooperation. This raises the question of whether Europol's model of DI is up to speed to face emerging challenges such as Brexit and the EU's migration crisis. While the former has complicated Europol's relationship with its partners, the latter has increased the need for law enforcement cooperation between the EU and countries of origin and transit, like the ones in the Western Balkans. Both events have had a direct impact on Europol's operational work with non-EU countries (and Denmark). The Brexit negotiations have made it more difficult for partners to access Europol resources because the EU did not want to establish a precedent for the Brits; while the migration crisis increased the need to work on-site in countries of both origin and transit, sometimes with little planning or notice.

Against this backdrop, this policy paper examines the conditions and consequences of differentiation in the case of Europol. With a particular focus on the external dimension of differentiated integration in the case of Europol, the paper analyses the levels of cooperation between Europol and third countries in relation to the recent migration and Brexit crises.

Drawing on policy and academic sources of primary and secondary data, combined with data from interviews conducted with experts and Europol officials, the paper provides an overview of the degrees of differentiation in the operation of Europol and critically assesses the effectiveness of these differentiated arrangements with a specific interest in the fight against irregular migration. In particular, the paper examines how the migration crisis and Brexit have affected the dynamics of cooperation between Europol and third states. The paper shows that the gradual inclusion of non-EU members in the structures of Europol can have an encouraging effect on the local law enforcement authorities and that Europol's mechanisms of flexible cooperation have significantly increased transactions between law enforcement authorities in Europe and improved cross-border cooperation in the areas within Europol's mandate.

The analysis is based on three case studies of cooperation between Europol and third states, each of which has a particular position within the EU's framework of cooperation on justice and home affairs (JHA). The first case study analyses cooperation with Denmark (an EU member state with an opt-out from justice and home affairs) and Switzerland (a non-EU, Schengen country), which have strong associations with the AFSJ through their participation in the Schengen agreement. The second case study focuses on the UK as a former EU member state, and the third analyses the increased cooperation with the Western Balkans candidate countries. The structure of the paper is as follows: the first section describes the evolution of Europol and its DI arrangements. The second section presents the analysis of the case studies. The third and concluding section provides a critical assessment and establishes a set of policy recommendations.

1 For a comprehensive description of the institutional organisation and competences and tasks of Europol see Cîrlig (2019).

1. Europol and differentiated integration: Triggers and modalities

Europol officially started its operations on 1 July 1999 as a consequence of the adoption of the Europol Convention (1995). Back then, Europol's main tasks were to improve and facilitate law enforcement cooperation in combatting terrorism, drug trafficking and other serious forms of international crime, by facilitating information sharing. The 2009 Europol Council decision expanded the scope of crimes in Europol's mandate and tasked the agency to prepare threat assessments and strategic analysis (Council of European Union 2009).

The Lisbon Treaty further integrated police cooperation, by expanding the ordinary legislative procedure to all non-operational aspects of police cooperation (Treaty on the Functioning of the European Union, Articles 87 and 88). This resulted in the Europol Regulation, which completed the transformation of the agency into the EU's main information exchange hub in the fight against terrorism and organised crime (European Parliament and Council of the European Union 2016). The Regulation further expanded the mandate of Europol. Most importantly, the Regulation provided the grounds for increased accountability of the work of Europol with the establishment of a new oversight body, the Joint Parliamentary Scrutiny Group which is comprised of members of the European Parliament and national parliaments of the member states, and is tasked to "politically monitor Europol's activities in fulfilling its mission" (Article 51).

As an international police agency, Europol naturally sought to co-operate with non-member countries and organisations from the outset. Currently, Europol has partnership agreements with 22 non-EU countries, an agreement with Denmark and another with the UK. Europol can sign two types of deals with third countries: (1) strategic agreements, which are looser deals that allow for the sharing of general intelligence and information such as threat assessments; and (2) operational agreements, which permit closer cooperation and the transfer of personal data as well. No third country has direct access to the agency's databases (the Europol Information System, EIS; and Europol's messaging system SIRENE) (Besch et al. 2018). Article 23 of the 2016 Europol Regulation allows the agency to exchange all information that is relevant for the performance of its tasks with authorities of third countries without an agreement.

The 2016 Regulation changed the way differentiated integration works within Europol. Before, Europol could negotiate and conclude agreements directly with third countries. Now, partnerships between Europol and non-EU countries have to be negotiated by the European Commission and approved by both the Council of the EU and the European Parliament. Existing agreements all have sunset clauses and will need to be renegotiated under these procedures once they expire.

This external dimension of cooperation has become particularly important for one of Europol's key tasks: the fight against irregular migration and the trafficking in human



beings. The EU's 2015 migration crisis put border controls and law enforcement at the forefront of the bloc's migration plans. After over one million people arrived in Europe irregularly, the EU focused its efforts on two main things: securing Schengen's external borders by stopping people from coming to Europe, and protecting the EU's passport-free area by reducing secondary movements. Europol has a crucial role in both.

To help break down the business of smugglers, Europol set up its European Migrant Smuggling Centre in 2016. To track and disrupt secondary movements, back in 2016 the European Commission suggested giving Europol access to the Eurodac database (a database storing the fingerprints of asylum seekers, originally built to determine the country responsible to examine their applications). The New Migration Pact, unveiled by the Commission on 23 September 2020 (European Commission 2020a), insists on this idea by putting forward a new proposal for granting the agency access to Eurodac (Carrera 2020). The New Pact also gives Europol a bigger role in the EU's migration cooperation with third countries. For example, the Commission wants both Europol and Frontex to work with non-EU countries in combatting the smuggling of migrants through new Counter Migrant Smuggling Partnerships (European Commission 2020b).

In sum, the flexible arrangements that enable the operation of Europol provide a fertile ground for differentiated integration. As a multi-actor, multi-level venue for police cooperation, the architecture of Europol facilitates cooperation between actors at different levels that are established through intra-EU arrangements between member states, but also through different modalities of participation of non-EU states in police cooperation that range from cooperation with non-members which fully participate in other AFSJ policies, to arrangements with candidate countries for membership.

In this sense, police cooperation can be viewed as an instance of both internal and external differentiation (Leuffen et al. 2013, Lavenex and Križić 2019). Internal differentiation, defined as the situation where member states choose to stay out of the uniform application of EU rules that have been agreed by other EU members, is evident in the Danish opt-out from the AFSJ policies within the framework of Protocol 22 of the Lisbon Treaty. On the other hand, Europol can be also viewed as prominent case of external differentiation, which refers to situations where non-members participate in EU policies. The varied modalities of cooperation and utilisation of Europol's resources by non-EU members constitute an instance of external differentiation, which can be analysed through the perspective of the organisational dimension of DI (Lavenex and Križić 2019).

Roughly speaking, there are five layers of differentiated integration within Europol:

1. Cooperation with non-EU, non-Schengen members which are not candidates for accession, like the US or Canada.
2. Cooperation with non-EU, non-Schengen members which are candidates for accession, like the Western Balkans.
3. Cooperation with non-EU, Schengen members, like Switzerland.
4. Cooperation with EU, Schengen members which have an opt-out, like Denmark.
5. Cooperation with outgoing/former EU, non-Schengen members, like the UK.

The focus of this paper is the cooperation between Europol, the UK and the Western Balkans in the fight against irregular migration. But, in order to have a complete picture of how differentiated integration works in practice, the paper will make a brief mention of the other two layers of cooperation (namely Switzerland and Denmark).

2. Europol's cooperation with third countries

2.1. Schengen countries: Switzerland and Denmark

Switzerland is not part of the EU but has a Schengen association agreement with the bloc. According to officials, Switzerland shares more data with Europol than the other way around.² Switzerland would like to have more access to Europol's information systems, as this would help it in its own fight against irregular migration. But the Brexit negotiating process, and the EU's unwillingness to give special treatment to any third country as a result, have put a (perhaps) temporary stop to these ambitions (Interviews 2 and 3). Switzerland has the added complication of its referendum tradition, whereby Berne must put many major policy decisions, including complex matters affecting operational cooperation with the EU, to a popular vote.

According to Swiss officials, the EU does not distinguish between Schengen and non-Schengen third country partners when it comes to their cooperation with Europol (Interviews 2 and 3). This complicates Switzerland's partnership with the agency, particularly as the lack of border controls makes closer cooperation on secondary movements and irregular migration all the more important. As one official put it, "if Switzerland cannot check whether or not a person who enters the country is allowed to do so against European law enforcement databases, then the whole Schengen area is in danger" (Interview 2).

Despite these hurdles, Switzerland values being a part of Europol. As for many other countries, one of the main benefits Europol brings to Swiss law enforcement in its fight against irregular migration is the agency's network. Again in the words of an official, "if you send a request for cooperation through SIENA to, say, Germany, and you have no answer for a week, you can go upstairs and talk to your German colleague. This does not happen either with Interpol or with bilateral arrangements. It is the give and take that makes Europol so attractive to law enforcement" (Interview 2).

Europol's fight against irregular migration is the largest area of Swiss-Europol cooperation, only after cyber-security. Berne participates in Europol's European Migrant Smuggling Centre and its efforts against the facilitation of illegal migration (the so-called FIM) (Europol 2020). Switzerland also takes part in the operational project AP Phoenix, which co-ordinates law enforcement efforts against the

² Interview 1; In-person interviews with Swiss officials for a Centre for European Reform (CER) project, Spring 2018.

trafficking of human beings in six priority areas: sex workers, labour exploitation, forced criminality and begging, forced marriages, child trafficking and human organ trafficking.³ The prevention of secondary movements is Switzerland's main priority when it comes to Europol's migration work.

An EU member, Denmark held its own exit referendum in 2015. The Danes voted to pull Denmark out of the EU's justice and home affairs structures, including Europol. The timing for renegotiating Denmark's relationship with the EU coincided with the run-up to the Brexit referendum and the British vote to leave the EU. Many officials think that the EU was particularly strict with Denmark because it did not want to create a precedent of a "bespoke" arrangement with Europol, lest the Brits use it as a bargaining chip in their own negotiations.⁴ Eventually Denmark ended up with a clunky arrangement which responded more to political constraints than to operational ambitions (Interview 5).

Denmark's 2017 agreement with Europol allows Copenhagen to request information from the agency. But Danish police and security services can no longer interrogate databases directly: they need to ask Danish liaison officers stationed at Europol to access the Europol Information System for them, which means that searches take more time. Denmark cannot link its national police systems with Europol's through the so-called QUEST (Querying Europol's Systems) interface. Neither can Copenhagen participate in the designation of investigative priorities through the agency's Standard Operating Procedure on the Selection of High Value Targets and Establishment of Operational Task Forces (Interview 4).

Denmark's limited access to data creates problems for the country's contribution to the EU's fight against irregular migration, particularly as Denmark is part of the bloc's passport-free Schengen area. Because of Denmark's new status as a third country, Europol can only share data with Denmark if the member state which has pooled those data into the agency's databases agrees. While the majority of member states have given a sort of blanket pre-consent for Europol to share data with Copenhagen, this is not enough to facilitate the smooth policing of internal and external borders in the EU.

2.2 Non-Schengen, non-EU countries: The Western Balkans and the United Kingdom

2.2.1 In-depth case study 1: The Western Balkans

One of the key objectives of the 2016 Global Strategy for the European Union's Foreign and Security Policy was to promote resilience in its neighbouring regions, including the WBs (EEAS 2016). The countries from the region are recognised as an "integral

³ Europol website: *Europol Analysis Projects*, <https://www.europol.europa.eu/node/2048>.

⁴ In-person interviews with Danish, Norwegian, Swiss, Commission and Europol officials for a CER project, Spring 2018; Interviews 4 and 3.

part of the EU's own regional space" (EEAS 2019: 17). The EU's engagement with the region is significant in the area of justice, freedom and security (Trauner and Nechev 2017). This is mainly because migration management is at the top of the EU agenda. The key to success is enhanced operational activity through the EU's JHA agencies such as Europol and the European Border and Coast Guard Agency (Frontex). Placed between Greece in the south and Hungary/Croatia in the north, the countries of the WBs have become a transit zone towards the EU and Schengen area, traversed by around a million migrants and refugees in 2015 and 2016 (European Commission 2019). According to Europol, more than 90 per cent of these people used illegal facilitation and smuggling services which were, to a great extent, provided to them by organised crime groups (Europol 2016).

Europol cooperates with the WB countries under the framework provided by operational agreements. Such agreements have been signed with North Macedonia (2011), Albania (2013), Serbia (2014), Montenegro (2014) and Bosnia and Herzegovina (2016). In July 2020, Europol also signed a Working Arrangement establishing cooperative relations between the law enforcement authorities of Kosovo, as well as with the Kosovo Specialist Chambers and Specialist Prosecutor's Office (2020). This is the same kind of agreement that Europol has with Switzerland.

In essence, the cooperation between the countries of the WBs and Europol follows the same structure. Their relations are determined on the basis of cooperation agreements that identically regulate all aspects of mutual cooperation (with the exception of Kosovo⁵), including the setting up of a national contact point, the designation of the competent national authorities for cooperation, general provisions for the exchange of information, personal data protection clauses and others.

All WB countries except for Bosnia and Herzegovina and Kosovo have National Units for Cooperation with Europol at home, and their own National Liaison Bureaus at the headquarters of Europol (Europol Liaison Bureau), staffed with individual liaison officers. They are thus embedded in the network of liaison officers at Europol headquarters, where on a daily basis all countries represented (26 EU member states) and 24 third parties cooperate and exchange information on ongoing investigations.

In 2018, the European Commission launched an 18-month pilot project of deployment of Europol liaison officers in the WBs (Albania, Bosnia and Herzegovina and Serbia) with the intention to step up the fight against organised crime and terrorism, to intensify the exchange of information and to improve the linkages between various investigations. EU member states fiercely oppose this project, as they consider that

5 Initially this cooperation had been implemented through the European Union Rule of Law Mission in Kosovo (EULEX) for two reasons: one, Europol under the then applicable legal framework could not conclude an operational agreement with Kosovo, and two, EULEX was the only Kosovo civilian mission with executive authority to conduct investigations. This changed in 2020, when Europol established a Working Arrangement with Kosovo. Under this arrangement, Kosovo will be able to establish a national contact point for cooperation with Europol, gain access to the Europol information exchange platform and be able to deploy a liaison officer to Europol headquarters. However, the exchange of operational information with personal data is available only in the direction from Kosovo authorities to Europol, and not the other way around.

there is no justification for such an engagement. According to officials, the project duplicates resources and activities (Interview 6).

Operational cooperation works through exchange of information and requests in accordance with the mandate of Europol. The 2016 Regulation introduced the possibility of using the Europol platform for information sharing between countries, without even involving the agency and even in cases and investigations that go beyond Europol's mandate. The WB partners participate in joint action days, joint operations and joint investigation teams. One such international operation managed by the operational centre at Europol involved law enforcement officers from 30 EU and non-EU countries, as well as eight agencies and international organisations such as Frontex, Interpol, UNODC and SELEC, and targeted activities dedicated to weapons, drugs, illegal migration and document fraud, which resulted in the arrest of 175 offenders and 329 refusals of entry, as well as the interception of 164 clandestine entries, 71 forged or falsified documents, 895 pieces of ammunition and others (Europol 2019).

In 2018, the WB partners were invited for the first time to participate in the preparatory phase for the operational action plans under EMPACT (European Multidisciplinary Platform against Criminal Threats), in the areas of crime that most affect them and the EU. By means of participation, these countries contribute to the EU Policy Cycle on organised crime as well as to the EU's SOCTA (Serious and Organised Crime Threat Assessment).

According to Europol's established practice, only EU member states can participate in drafting Europol's operational action plans, while partners are only involved later on, during the so-called implementation phase (the Joint Action Days). However, in 2019, for the first time, countries in the region were chosen to lead certain operational activities. Montenegro led an operational activity in the field of illegal arms trade, while Serbia led an operation in the field of illegal drug trafficking. Albania plans to take on the role of leader in one of the operational activities for next year in the field of property crime (Interview 6).

The signing of operational agreements with the countries of the WBs also enabled the exchange of operational information, which contains personal data and classified information. This means that the WB countries with the exception of Kosovo have access to Europol's message system, SIENA.⁶ However, the current arrangements with the countries from the WBs allow only indirect access to the Europol information system (EIS). To get certain information, they need Europol as an intermediary to the member states. And, EU member states can decide not to share certain data with the WBs.

This trend of constantly increasing involvement of the WB countries is set to continue in the years to come, taking into consideration the "Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans" (European Commission

⁶ SIENA is a secure information exchange tool that facilitates the exchange of operational intelligence related to crime between member states, Europol and operational cooperation partners.

2018). According to the Communication, the Commission foresees to enhance significantly the cooperation with EU agencies in the fight against international organised crime, to further promote Joint Investigation Teams involving the WB and EU member states, to expand the EU Policy Cycle on organised crime to the extent possible to include the WB in its operational activities (European Commission 2018: Annex). When it comes to migration and border management, the WB countries are in the process of signing status agreements with Frontex.

The deepened integration between the EU and the Western Balkans is also visible in the plan to establish an “EU inter-agency Task Force coordinated by the Commission involving Europol, the European Border and Coast Guard Agency, Eurojust, the European Monitoring Centre for Drugs and Drug Addiction, the European Union Agency for Law Enforcement Training” (European Commission 2018: Annex) as a follow-up mechanism of the various actions and activities EU agencies are undertaking in the WB region.

2.2.2 In depth case study 2: The United Kingdom

The UK’s relationship with Europol is an interesting example of differentiated integration in the making. As Britain officially left the EU on 31 January 2020, its police and judicial cooperation agreements, agreed on Christmas Eve alongside a trade deal, offer a glimpse of what the EU may do in future talks with third countries, and has added an extra layer of complexity to Europol’s differentiated integration.

The UK has been a part of Europol since the agency first started limited operations in 1994. Despite Britain’s ambiguous relationship with the EU, successive British governments have been cheerful supporters of Europol and of the UK’s role in the agency. This is not because the British police community is particularly Europhile but rather because Britain has long understood that fighting crime is better done with partners than alone. In the words of Europol’s previous director, former MI5 analyst Rob Wainwright, “[the UK] has decided – rightly – that, as a multilateral hub for law enforcement cooperation in Europe, [Europol offers] better value-for-money access to cooperation mechanisms than much more expensive other options – e.g. bilateral links” (Wainwright 2012: 2-3).

Under Wainwright’s mandate, the UK helped transform Europol’s investigative culture. With the agreement of all other members and the encouragement of the United States, from 2009 onwards Europol became a hub for intelligence-led policing, pretty much mimicking Britain’s approach to fighting all sorts of crimes, from human trafficking to smuggling to terrorism. After 2009, both the volume and the quantity of data shared within Europol improved. The US would, for example, share large quantities of data on its Europe operations every so often (Interview 2).

Britain has helped modernise Europol and the agency has borrowed heavily from British law enforcement and police practices. For example, Europol divides its operational staff into two categories: specialists and analysts; conducts yearly strategic threat reviews that it compiles into the so-called SOCTA reports; and has set up the EU Internet Referral Unit, which monitors online terrorist activity. All of

these things are almost a carbon copy of the way law enforcement operates in Great Britain.

Britain is also a special partner of Europol because it is the only European member of the “Five Eyes” intelligence alliance, a security partnership between the UK, US, Australia, New Zealand and Canada. All five countries have liaison officers posted to Europol, and the agency serves as a much-valued informal meeting point. Beyond Europol’s operational value, members of the Five Eyes alliance often emphasise how important personal networks they develop through their physical presence in the agency’s Hague headquarters are for their day-to-day work.

The UK formally left the EU on 31 January 2020. But it remained a member of Europol until 31 December, because the EU and Britain negotiated a “Brexit transition period” so that EU laws and policies would apply to the UK while both parties were negotiating their Trade and Cooperation Agreement. But once the Brexit transition period ended, Britain has gone from being the only EU country which is also part of the Five Eyes to being an outsider, much like the other “Four Eyes” are now. Brexit will be a loss for the other Four Eyes, too – as they will not have a direct way in any longer. No member of the alliance wants to be put in the awkward position of having to choose between a close relationship with Britain or with Europol.

After the referendum, Britain hoped to retain a close relationship with Europol. This helped the agency’s work on fighting irregular migration, as the British government decided to invest more money in this area and sent specially trained analysts. The strategy was to both show goodwill in the hope of getting a good deal on Europol and to influence the agency’s approach to irregular migration before exiting the EU (Interview 2). For that, the UK was amongst the first countries to send staff to Europol’s European Migrant Smuggling Centre.

The timing of Britain’s beefed-up contribution to the agency’s fight against irregular migration could not have been better. In 2015, over a million people arrived in Europe irregularly, triggering the continent’s biggest migration and refugee crisis since World War II. Before 2015, Europol’s main focus was the organised smuggling of migrants within and across the EU. Back then, it was mostly a matter of interest for north-western member-states like France, Belgium, Germany, Sweden and Austria. Britain was part of that group, too. But after the migration crisis laid bare major deficiencies at the EU’s external border, so-called frontline countries like Spain, Italy and Greece became more active in combatting irregular migration through the agency, seeking Europol’s support to secure and police their borders (Interview 1). Europol began sending so-called guest officers to hotspots (migrant processing centres in Greece and Italy). The UK was somewhat slower in sending experts to hotspots than it was in staffing the European Migrant Smuggling Centre. But it did contribute to the EU’s external border management strategy during the crisis with the pooling of intelligence and the deployment of naval missions.⁷

7 The UK and France deal with migrant movements across the Channel through bilateral cooperation, with little involvement of EU bodies, including Europol.

The relationship between the UK and Europol is currently and temporarily governed by two treaties: ongoing cooperation (operations that began before the end of the Brexit transition period in December 2020 and have not yet finished) falls within the scope of the Withdrawal Agreement. The future relationship is governed by the EU-UK Trade and Cooperation Agreement, signed on 30 December 2020.

According to the Withdrawal Agreement Europol investigations which are ongoing at the end of the implementation period should be covered by existing arrangements until their conclusion.⁸ These include Europol's Joint Investigation Teams which were still operative on 1 January 2021. British police officers should be allowed to continue being members of those teams until they complete their tasks. The UK should also be able to access Europol's message-exchange system SIENA for a year if the information requested by Britain refers to ongoing cases.

As for future cooperation, Title V of the Trade and Cooperation deal lays down the basis for cooperation between Europol and the United Kingdom. How this cooperation will work in practice, though, will be defined in a further deal between Europol and the UK, in line with the agency's practice of concluding both operational and strategic agreements with third parties as explained above.

The deal says that the UK and Europol should co-operate in the exchange of information and personal data and other operational tasks such as training or support in individual criminal investigations (Article LAW.EUROPOL.49). In contrast with other Europol-third country arrangements, the treaty also says that the UK may have direct access to Europol information "if considered appropriate by both Europol and the relevant competent authorities" (Article.LAW.EUROPOL.50). Such direct access will presumably only be possible once, or if, the Commission grants the UK a data adequacy decision.

Before allowing the UK to have non-direct access to security databases like SIENA or EIS, though, the EU needs to accept that Britain's privacy regime provides equivalent protections to its own. The EU does this by granting so-called adequacy decisions, which are usually limited in time and can be annulled at any time by either the European Commission (at the request of the European Parliament or the Council of Ministers) or the European Court of Justice, if they consider standards to have dropped.

3. Looking ahead: Critical assessment and policy recommendations

As shown by the case studies, Europol is a multi-actor, multi-level venue based on flexible arrangements of differentiated cooperation and non-homogeneous

⁸ EU-UK Withdrawal Agreement (2019). At the time of writing, the deal still needs to be ratified by the European Parliament. In the meantime, it will be provisionally applicable until 28 February 2021.



institutional participation of both member and non-member states. Seen through the organisational dimension of differentiation, police cooperation through Europol has shaped DI modalities based on both the uneven participation of actors in the policy cycle and the differentiated access to Europol's mechanisms for exchange of information.

And yet, our research shows that the gradual inclusion of non-EU members in the structures of Europol can have a very encouraging effect on the local law enforcement authorities (Interview 7). This is the case for the WBs, where cooperation with Europol has resulted in a significant level of participation in policy making for certain venues (e.g., EMPACT and SOCTA).

Second, differentiation is also shaped by variation in access to Europol's information hub. While EU member states have full access to Europol's data, there are notable limitations for third countries, including Schengen-associated countries. Our case studies show that access to Europol databases is limited for most partners, and subject to the agreement of the member state (or member states) responsible for the data. Denmark and the UK are in a slightly better position, but still do not have direct access to EIS and SIENA.

Albeit limited, this multi-layered arrangement of police cooperation through Europol has provided the grounds for a more flexible approach towards the fight against organised crime in Europe. The various DI mechanisms at play have ultimately significantly increased transactions between law enforcement authorities in Europe and improved cross-border cooperation in the areas within Europol's mandate.

Differentiated integration on law enforcement cooperation has generally worked well. One of the reasons why DI has been a success in Europol is because of how quickly the agency was able to make deals with third countries and even with its own members. Until 2016, Europol was pretty much free to mind its own operational matters, with little to no participation of other EU bodies. Since the new Europol regulation gave the European Parliament the right to approve agreements between the agency and third countries, and boosted the powers of the European Data Protection Supervisor vis-à-vis Europol's activities, the process has become slower and more cumbersome, according to officials. Working with Europol is now more bureaucratic, and it takes much more time and effort to seal operational deals. This could, in time, reduce Europol's appeal to third countries (Interview 3). In a way, increased accountability has reduced the effectiveness of Europol. As is true for any law enforcement body, Europol finds it easier to work when away from the political spotlight. This is less possible now than before because of the Parliament's oversight of the agency's operations.

The Brexit process has had a negative impact on differentiated integration within Europol. Because of the tense and lengthy negotiations between the UK and the EU, the European Commission has been stricter with non-EU partners than it would otherwise have been.⁹ Somewhat understandably, the EU did not want to create

9 In-person interviews with officials from the US, Norway, Switzerland, Canada and Australia, Spring

precedents of special treatment for any third country, lest Britain should take it as a clue for its own negotiating strategy. But this approach has complicated, and sometimes halted altogether, negotiations on several operational matters between Europol and some of the EU's main security partners, like the US or Canada. Even Switzerland and Norway, non-EU members of Schengen, have had a tough ride over the past four years. Both countries have been asking for more access to Europol databases, without success. Denmark is a case in point: officials at Europol feel that cooperation between Europol and Denmark has suffered as a result of an agreement that was politically motivated – and left both parties less able to react to threats in a timely manner.

The 2015/2016 migration crisis had a mixed effect on differentiated integration at Europol: on the one hand, it increased the need for law enforcement cooperation between the EU and countries of origin and transit; on the other, it pushed other priorities to the backburner, downgrading the importance of cooperation with partners that were not involved in the migration cycle (Interview 3). Cooperation with the WB countries has further intensified and deepened as a result of the migration crisis. These countries are substantially involved in the EU Policy Cycle on organised crime and in many cases are invited to contribute to projects of the European Multidisciplinary Platform against Criminal Threats.

As a result of this analysis, we have come up with the following policy recommendations:

I. Focus on Europol's operational value

Most of Europol's partners like the agency because it allows them to set up formal and informal networks that help get things done faster. As a law enforcement agency, Europol's added value to both EU and non-EU countries is that it makes their operations more efficient. But lately, some of these partners have felt that politics has gotten too much in the way: mostly because of Brexit, the EU has been very reluctant to be more flexible with its law enforcement partners, insisting on what some regard as an artificial distinction between EU and non-EU countries and Schengen and non-Schengen members. Now that the Brexit negotiations are done and dusted, the EU institutions should capitalise on Europol's good reputation (some partners may be wary of using Interpol because of China's and Russia's membership in the agency) and use it as leverage to up the EU's stance in the world arena. But, for that, the EU should be more open to comparatively flexible agreements with third parties, perhaps by rethinking the rigid distinction between Schengen and non-Schengen countries.

II. A common framework for Schengen countries

To be more effective in fighting irregular migration and secondary movements, the EU should ease some of the restrictions over access to databases for trusted and necessary partners, like Denmark or Switzerland. Both countries are part of Schengen. The EU should insist on the link between a common migration and asylum

2018 and Winter 2019 for various CER projects; Interviews 1, 2 and 3.

policy and membership in the Schengen area. This is true for redistributing asylum seekers across the EU and sharing the burden of returning them if their application is unsuccessful; and it is also true for letting countries in the Schengen area access the necessary databases to help with secondary movements and the policing of Schengen's external borders. This can be done either by changing the rules under the Europol regulation or by a common understanding among EU member states that data can be shared with non-EU and EU members of the Schengen area (Interview 4).

III. An all-encompassing deal between Europol and the UK

It is unfortunate, although understandable, that negotiations on police cooperation between the EU and the UK have been dragged into the mud of the more general Brexit animosity between the parties. Because of the UK's early red lines, the EU favoured an agreement on police and security cooperation which could be made alongside a trade deal, so as to facilitate the Parliament's ratification and to avoid a cliff-edge. But this sadly meant that a timely deal on Europol depended very much of both parties' willingness to compromise on trade. And the resulting deal, no matter how "bespoke", has diminished the UK's role within Europol. No person working at the agency wanted this to happen. Nor did either the EU or the UK government, for that matter. It was just the logical practical consequence of the Brexit political mess.

Over time, however, the UK and the EU may be able to overcome the political drama and find a way to seal an all-encompassing partnership deal which will benefit both parties. In the meantime, the UK could help Europol's fight against irregular migration by pooling intelligence and resources. Britain could assist Europol's fight against irregular migration through the sharing of actionable intelligence. For example, Britain's highly trained security services could help Europol identify the main players on human smuggling in particularly relevant countries, like Libya, Syria or Afghanistan. Europol has no legal mandate to use EU intelligence services for such tasks, so it would welcome any outside informal help it could get from friendly partners.

The UK may also contribute to combatting irregular migration at the EU level by pooling intelligence and good practices on following the money used to fund smuggling operations. Additionally, Britain could help strengthen the links between the police and the military: Britain has a long tradition of good civil-military cooperation and it could help member states with less history or more reluctance around such partnership to see the benefits of it (Interview 1).

IV. Enhanced and streamlined cooperation with the WBs on the institution and data-sharing level

The Western Balkan countries have limited access to Europol's information systems. This eventually creates problems for these countries' contributions to EU operations in which they have particular interest. In accordance with their current status, Europol can only share data with WB countries if the EU member state that owns those data or information agrees. Seconding national experts from these countries, including

providing direct access to Europol information databases, would significantly facilitate the smooth policing of the EU's external borders.

As a result of the enhanced involvement of various EU agencies in the area of AFSJ, including Europol, Frontex, Eurojust, the European Monitoring Centre for Drugs and Drug Addiction, CEPOL and others in the Western Balkan region, the need for better cooperation and communication among themselves and with the countries' authorities is required. The acknowledged need for the establishment of the EU inter-agency Task Force is a step in the right direction, however further efforts are needed to make it fully operational by also including representatives of national authorities.

V. Use differentiated integration to up Europol's resources

A common complaint amongst officials is that Europol lacks the necessary resources to be more efficient in its fight against irregular migration, people smuggling and human trafficking. As the agency will soon have to renegotiate its agreements with many of its current partners (all the deals negotiated before the new Europol regulation entered into force have sunset clauses and must be renegotiated under the new conditions), it could use its leverage to get more staff, training and intelligence. As this paper has shown, the EU's main security partners think very highly of Europol. None of them wants to lose access to the agency's valued network and information resources. And most of them, especially those who share a common border with EU members, have an interest in the EU being better at combatting irregular migration, people smuggling and human trafficking.

Some of those countries, like the US and the UK, have very long law enforcement traditions and fat budgets that can help staff Europol's emerging initiatives in the area. They can also provide valuable intelligence and training to less experienced countries. The UK could, for example, contribute to Europol's activities in the EU's priority crime areas of facilitating irregular migration and trafficking of sex workers, labour exploitation and child trafficking by sending both money and trained staff. This would not only help the EU, it would also be beneficial for Britain, as it will help curb irregular movement of people and criminal networks across Europe, the British islands included.

Britain could also assist Europol in capacity building: Britain's law enforcement bodies could provide training to EU police staff and partners like the WBs on matters of cyber security and online crimes. The UK could do this through CEPOL, the EU's agency for law enforcement training. Finally, Britain could facilitate law-enforcement cooperation outside of Europe. The UK, along with France, has the world's most extensive network of bilateral law enforcement cooperation channels. These could help the EU deal with major security challenges like migrant smuggling, cyber crimes or drug trafficking.

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Annex 1. List of interviews

Interview 1: Europol official 1, phone, 6 November 2020

Interview 2: former Europol official, phone, 5 November 2020

Interview 3: Europol official 2, phone, 6 November 2020

Interview 4: Danish law enforcement officials, phone, 27 November 2020

Interview 5: Europol official 2, phone, 5 November 2020

Interview 6: liaison officer to Europol 1, phone, 19 November 2020

Interview 7: Europol liaison officer 2, 2020



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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