Wilful Non-Compliance and the Threat of Disintegration in the EU's Legal Order

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Abstract: This article focuses on the problem of wilful non-compliance with EU law and the threat it poses of (partial) disorderly disintegration within the EU's legal order. Taking the example of migration and asylum policy following on from the 2015 migration crisis, I posit *differentiated integration (DI)*, which occurs through processes that are formally mediated and collective, and *non-compliance*, which is unmediated and unilateral, as alternative strategies for member states which are unwilling to accept further integrative steps. While DI does carry costs, including the risk of legal fragmentation, I argue that it is a valuable tool for pre-empting wilful non-compliance – a phenomenon which both exposes and compounds the normative limits of EU law and is, consequently, more corrosive of the EU's legal order. Thus, the article suggests that the EU ought to be more open to DI, especially when legislating in policy areas that are highly politicised.

Zusammenfassung: Der Artikel befasst sich mit der vorsätzlichen Nichtregelbefolgung (Non-Compliance) im EU-Recht und der dadurch bedingten Gefahr einer (teilweisen) Auflösung der europäischen Rechtsordnung. Am Beispiel der Migrations- und Asylpolitik in Folge der Flüchtlingskrise von 2015 unterscheide ich zwischen *differenzierter Integration* (DI), die aus formalen Verhandlungsprozessen resultiert, und *Non-Compliance*, die einseitig und unvermittelt erfolgt. Beide Vorgehensweisen stehen Mitgliedsstaaten offen, die zu keinen weiteren Integrationsschritten bereit sind. Obwohl die DI Risiken birgt, einschliesslich des Risikos einer zunehmenden Rechtszersplitterung, stellt diese doch ein wertvolles Instrument zur Vorbeugung absichtlicher Non-Compliance dar. Letztere fügt der europäischen Rechtsordnung vergleichsweise grösseren Schaden zu, da sie die normativen Grenzen des europäischen Rechts in stärkerem Masse herausfordert und dadurch verschärft. Der Artikel schlägt daher vor, dass die EU der DI offener gegenüber stehen sollte, insbesondere in stark politisierten Politikbereichen.

Résumé: Cet article se penche sur le problème du non-respect délibéré du droit de l'UE et la menace qu'il représente de désintégration (partielle) désordonnée au sein de l'ordre juridique de l'UE. Prenant l'exemple de la politique migratoire et d'asile suite à la crise migratoire de 2015, je distingue *l'intégration différenciée* (ID), qui passe par des processus formellement médiatisés et collectifs, et le *non-respect*, immédiat et unilatéral, comme des stratégies alternatives de États membres qui

s’opposent à de nouvelles mesures d'intégration. Bien que DI entraîne des coûts, y compris le risque de fragmentation juridique, je soutiens qu'il s'agit d'un outil précieux pour prévenir le non-respect délibéré - un phénomène qui expose et aggrave les limites normatives du droit de l'UE et qui est, par conséquent, plus corrosif de l'ordre juridique de l'UE. Ainsi, l'article suggère que l'UE devrait être plus ouverte à l'ID, en particulier lorsqu'elle légifère dans des domaines politiques hautement politisés.

Keywords

EU law, Non-compliance, Migration and asylum policy, Disintegration

Differentiated integration (DI) has become a ubiquitous feature of European integration, especially in the post-Maastricht Treaty period. In an increasingly heterogeneous Union, it is a powerful tool for managing preference diversity without foreclosing opportunities for deeper integration (Bellamy and Kröger 2017). An important characteristic of DI, whether it occurs *ex ante* or *ex post* the EU's acquisition of law-making powers in a given area, is that it occurs through formally negotiated, multilateral processes. Wilful non-compliance, on the other hand, is, by its very nature, informal, unmediated and unilateral. It both exposes and compounds the normative constraints under which EU law operates, chipping away at the foundations of the EU as a community of law, which rests on the voluntary compliance of its member states.

Despite these differences, the concepts of DI and non-compliance are related. Particularly in highly politicised policy areas, they may be seen as two possible strategies for EU member states that are unwilling to accept further integrative steps, but either cannot or do not wish to prevent other member states from taking such steps. That is, wilful non-compliance may indicate an unmet demand for DI in situations in which opportunities for DI have been foreclosed.

This article discusses the drivers of wilful non-compliance, as well as its consequences, in the context of what is commonly known as the 2015 "migration crisis". To be sure, migration and asylum policy in the EU is subject only to a low level of vertical integration. However, I argue that the impact of wilful non-compliance with binding EU law – even in an otherwise intergovernmental policy area – reverberates beyond the specific act or acts in question to undermine the normative authority of the EU's legal order. As a consequence, it erodes the coherence of that legal order in a way that may trigger its partial disorderly disintegration.

Given the deleterious political and legal/constitutional effects of wilful non-compliance, it is important to investigate how the EU may avoid, or at least minimise, its occurrence. One option would be to avoid taking legislative action that touches on highly politically salient and contentious issues altogether, or only to do so if and when decisions can be taken by consensus. However, such an approach would greatly circumscribe the possibilities for further integrative steps, including under circumstances in which the functional demand for integration is strong and many (perhaps even most) member states are willing to proceed. Accordingly, I suggest that a better approach may be for the EU's institutions and member states to take a more flexible attitude towards the use of DI.[1]

[1] For a proposal along similar lines, see Scharpf (2017), who suggests a move from consensus/qualified majority voting (QMV) to plurality voting (to improve the efficacy of EU law-making), combined with a flexible system of national opt-outs (to enhance democratic legitimacy).

To be sure, DI is not without its costs, not least of which is legal fragmentation, which may itself undermine the coherence of the EU's legal order, while also entrenching legal, institutional and political divisions between "insiders" and "outsiders" (see e.g. Chopin and Lequesne 2016; Eriksen 2018; Walker 1998). Nevertheless, the costs of DI are, in my view, the lesser of two evils. Heterogeneity, preference diversity and Euroscepticism are also ubiquitous features of the European project, and must be accommodated if their centrifugal force is not to precipitate the disorderly disintegration of EU law. There are no perfect solutions to the challenges the EU faces. Nevertheless, managed legal fragmentation via DI may better serve the purposes of European integration, and better preserve the integrity of the EU's legal order, than either abandoning attempts to legislate difficult questions, such as the creation of a humane and equitable system for distributing asylum seekers, or attempting to impose binding obligations on member states that cannot and will not accept them.

The article proceeds as follows. I begin with an explication of the concept of compliance and its main drivers in the European context. Focusing particularly on the problem of wilful non-compliance (as opposed to non-compliance caused by incapacity), I elaborate on the forms that wilful (non-)compliance may take and the circumstances that may lead member states to choose one or another response to an unfavourable decision. I then contrast wilful non-compliance – as a unilateral strategy that subverts EU law – with DI – which occurs through formally mediated procedures. I suggest that, while the default position of the Commission and member states is against allowing the differentiated application of secondary legislation, greater recourse to DI could be a positive alternative to either no legislative action or legislative action that precipitates wilful non-compliance. In the second half of the paper, these claims are applied to the migration crisis of 2015 and the EU's responses to that crisis. In particular, I argue that the refugee relocation scheme was a case of legislative overreach – i.e. a misguided attempt to solve a political problem with binding legislation – that undermined the legitimacy of EU law.[2] Similarly, the unilateral Schengen suspensions that followed the events of mid-2015 are further evidence of the weakened normative hold of EU law in relation to highly politicised "core state powers" (Genschel and Jachtenfuchs 2018). In conclusion, therefore, I argue that the EU's migration crisis response is precisely a case in which formally mediated DI would have been preferable to the partial disorderly disintegration of the EU's legal order that occurred.

Conceptualising Compliance in the EU

[2] On the propensity of the EU to overburden law by tasking it with the resolution of political problems, see also Joerges (2014) and Scicluna and Auer (2019).

Compliance may be defined as the degree to which an actor's behaviour adheres to what a law or norm prescribes or proscribes. Importantly, (non-)compliance is a spectrum, not a dichotomy (von Stein 2013: 478). Theories of compliance may be broadly divided into two categories: those that focus on *instrumental* explanations of compliance and those that focus on *normative* explanations (see e.g. Brennan et al. 2013; Dunoff and Pollack 2013; Franck 1990; Hurd 1999). The two categories are not mutually exclusive and both offer important insights into the factors that condition an actor's willingness to comply with its legal obligations.

Instrumental approaches, on the one hand, tend to assume that compliance decisions are made on the basis of cost-benefit calculations and, further, that actors will not comply with their obligations unless they are sufficiently incentivised or constrained to do so.[3] Normative approaches, on the other hand, emphasise the inherent power of norms and normative structures to influence actors' behaviour, in contrast to the instrumentalist emphasis on the extraneous rewards and punishments that accompany legal obligations.[4] In the case of the EU, normative approaches point, *inter alia*, to states' internalisation of their roles as members of a community of law, the concomitant socialisation of national elites into habits of compliance, and the perceived legitimacy of the EU's law-making processes and institutions.

Instrumental theories of compliance include what Börzel and Sedelmeier (2017: 198) refer to as enforcement approaches. Enforcement approaches "focus on governments' deliberate decisions not to comply in order to avoid the costs of compliance." Enforcement approaches hold that, to the extent that compliance choices are driven primarily by instrumental cost-benefit calculations, altering the costs of non-compliance (e.g. through sanctions) will alter the decision-making calculus. It follows that a lack of enforcement capacity on the part of the law-maker would lessen states' motivation to comply with otherwise costly rules.

[3] Cf. the managerial approach, which assumes that actors intend to comply with their obligations and that non-compliance is mainly a problem of inadvertence, incapacity, or a failure to understand legal obligations (Chayes et al. 1998). This article focuses on wilful non-compliance, rather than non-compliance caused by incapacity (though, to be sure, the distinction is not always clear-cut as incapacity may, in some cases, be a product of a lack of will to invest in that capacity).

[4] Importantly, laws and norms are not identical (Carbonara 2017). At a basic level, norms may be defined as general requirements that are accepted as valid within a particular group or community (Brennan et al. 2013: 2–5), whereas laws are binding rules that emanate from authoritative bodies via authorised processes, with the law-making authority of those bodies and processes set out in a higher law, such as a constitution. While laws may coincide with norms, they need not; i.e. a law's status as law is not dependent on its normative quality. However, laws that coincide with norms are likelier to elicit compliance, especially in the absence of robust enforcement mechanisms or other instrumental drivers of compliance (Jurkovich 2019). The failure of the refugee relocation scheme illustrates this point, as the relevant Council decision was not supported by a collectively shared understanding among all member states that they ought to share the burden of accommodating asylum seekers that arrive in the EU.

As the EU's capacity to enforce its laws is generally weak, it relies mainly on normative drivers of compliance. To be sure, lack of supranational enforcement capacity may not be such a problem in relation to routine compliance with EU law. In most cases, we would expect that once administrative capacities are built up, they continue to be effective. Likewise, once bureaucracies have internalised EU rule-compliant behaviour, they should continue to observe rule compliance as the norm. These expectations are reflected in Börzel and Sedelmeier's (2017) findings regarding the generally good post-accession compliance records of Central and Eastern European states, which were subjected to pre-accession conditionality.

Moreover, the normative compliance pull of EU law is enhanced by certain innovative institutional features. These include the preliminary reference procedure, which ensures that EU law is spoken through the mouths of national judges, albeit following the authoritative interpretations of the Court of Justice of the EU (CJEU). Since national authorities in liberal democracies are strongly conditioned to obey the rulings of their own courts, even when they go against government policy, the preliminary reference procedure has greatly enhanced the uniformity of EU law's application and reduced the likelihood of non-compliance (Weiler 1994). The perceived legitimacy of EU law-making processes is further bolstered by the fact that member state governments, via their role in the Council, are the authors, as well as the subjects, of EU laws.[5]

Nevertheless, the legitimacy of the EU's legal order does have its limits, which we are more likely to see when the EU attempts to legislate in policy areas – such as migration and asylum - that are highly politicised and only minimally integrated. Under such circumstances, we are more likely to observe non-compliant behaviour.[6] The following section elaborates on the forms that such behaviour may take.

Strategies of (Non-)Compliance with EU Law

In keeping with the insight that (non-)compliance is a spectrum, we may distinguish among several types of (non-)compliant behaviour by EU member states, ranging from full and timely implementation through to an outright and total refusal to carry out legal obligations. For the purposes of this article, we shall highlight three distinct positions on the compliance spectrum:

[5] The 'authorship' of each EU member state is particularly strongly guaranteed when the Council takes decisions either by consensus or by unanimity. The procedural and/or substantive legitimacy of decisions taken by qualified majority may be lessened in the eyes of outvoted dissenters. As I discuss below, this was the case for Council decision 2015/1601, concerning the Commission's proposal to relocate 120,000 asylum seekers from Greece and Italy.

[6] As Scharpf (2017: 331) notes, "… decisions by majority vote that violate highly salient interests or values of the minority would lack legitimacy and might provoke disruptive conflict in a Union that still depends on the consensus principle."

- *Forestalling compliance* through legal and/or procedural challenges to a legislative initiative – e.g. Hungary and Slovakia (unsuccessfully) challenging the use of QMV in relation to the refugee relocation scheme.
- *Avoiding compliance* by exploiting loopholes in a legal regime (a "lighter" form of wilful non-compliance) – e.g. member states declining relocation requests on the basis of unsubstantiated "national security" claims.[7]
- *Outright non-compliance* (a "stronger" form of wilful non-compliance) – e.g. Viktor Orbán refusing any obligation to resettle refugees in Hungary and telegraphing his defiance of EU law for domestic political purposes.

These three options do not exhaust the responses available to a member state that is faced with an EU decision with which it does not agree. Particularly if the domestic political salience of the relevant issue area is low, a member state may choose to comply with an unfavourable decision, or may transpose it in an accurate and timely manner but be less diligent in its application and enforcement (Falkner 2010; Falkner and Treib 2008). Moreover, the forms of non-compliance listed above are not mutually exclusive and states may adjust or shift their strategies over time, or may pursue more than one strategy concurrently. The Hungarian government, for example, was consistently vocal in its rejection of refugee relocation quotas (Diekmann 2016), while also seeking to have the scheme overturned by the CJEU owing to alleged procedural irregularities.

Of the types of non-compliance described here, outright rejection poses the most direct challenge to the legitimate authority of EU law. It is also likely to be relatively rare, not least because member state governments play a large role in the law-making process and so are often able to block, or negotiate the amendment of, legislative proposals to which they object fundamentally. For outright rejection to arise as a (non-)compliance strategy, then, we would expect two conditions to be met: a) the dissenting state has been outvoted on an issue about which the government and/or public feels strongly and b) the outcome is considered significantly worse than the *status quo ante*, rather than merely suboptimal compared to an ideal solution (Scharpf 2017: 331).[8] As in the case of refugee relocation, outright rejection is likely to indicate a government's desire to signal its dissension to a domestic audience and will most likely occur in relation to highly politicised issues that more readily arouse Eurosceptic sentiments. Outright rejection is also the type of non-compliance that may be most

[7] An example from a different issue area would be Sweden, which is formally obliged to adopt the euro, choosing not to meet the conditions necessary to do so.

[8] Outright rejection could also follow from a change in government, as happened with Poland in relation to the refugee relocation scheme. Poland's centre-right government voted in favour of the September 2015 Council decision, but was replaced by the much more Eurosceptic Law and Justice party after the October 2015 parliamentary elections. Law and Justice has maintained a stance of vocal opposition to mandatory refugee relocation (Brzozowski 2020).

straightforwardly defused by the use of DI, insofar as DI could enable willing states to proceed without imposing unwanted obligations on unwilling states.

The factors that drive member states to circumvent their EU law obligations by exploiting loopholes in legal regimes are different. It may be that a member state has willingly assumed a legal obligation that it subsequently feels unable to carry out, owing, e.g., to domestic opposition, changed circumstances, lack of support from EU institutions and other member states (e.g. states of first arrival failing to register asylum seekers in accordance with the Dublin system), or deficiencies in the legal regime (e.g. non-frontline states re-imposing border controls owing to the malfunctioning of the Dublin system). As the circumstances that give rise to avoidance non-compliance emerge *after* the adoption of the legislative measure in question, this type of non-compliance is not easily pre-empted by offering DI *ex ante*. However, if avoidance non-compliance is widespread or persistent, it may point to a need for differentiated *disintegration* – i.e. rolling back the application of certain legal instruments either in particular member states, or across the board (Patberg 2020).

At any rate, both avoidance non-compliance and outright non-compliance undermine the "mutually supportive relationship between legal authority and political trust" on which the EU's legal order is based (Dawson 2020: 52). If member states lose faith in each other's willingness and capacity to meet the legal obligations of EU membership – e.g. the obligation to properly register asylum seeker arrivals as per the Dublin regulation, or to receive refugees in line with binding quotas – then they will lose faith in the EU's capacity to deliver collective goods. This, in turn, will increase the incentives for member states to disregard EU law in favour of unilateral national policies aimed at securing (perceived) national interests. What is at stake here is not just an instrumental rebalancing of the costs and benefits of EU law compliance in a specific instance, but also the normative legitimacy of the EU's legal order. The next section explores further how DI may be deployed to address compliance problems.

Differentiated Integration or Non-Compliance? Member State Responses to Integration Demand in Highly Politicised Areas

DI describes variation in both the territorial extension of the EU's law-making competences (horizontal DI) and their level of centralisation across policy areas (vertical DI). Both types of DI have become increasingly common in the post-Maastricht Treaty era. Horizontal DI, in particular, has played a vital role in enabling simultaneous widening and deepening over the past thirty years (Schimmelfennig et al. 2015: 769). So much so, that the contemporary EU is well conceptualised as a "system of differentiation" (Leuffen et al. 2013), in which more than half of European policy areas contain

legislative instruments that do not apply uniformly across all EU member states (Leruth et al. 2019b: 1385).

More recently, scholarly attention has turned to the possibility and implications of differentiated *disintegration*. Leruth et al. (2019a: 1015) define differentiated disintegration as "the general mode of strategies and processes under which (a) member state(s) withdraws from participation in the process of European integration (horizontal disintegration) or under which EU policies are transferred back to member states (vertical disintegration)". The clearest example of horizontal differentiated disintegration would be a member state's formal withdrawal from the European Union, as has happened with Brexit (Schimmelfennig 2018). Vertical differentiated disintegration (i.e. repatriation of competences to member states), meanwhile, remains more of a conceptual possibility than empirical reality, though it is a possibility that EU institutions and member states ought to be open to, e.g. as a means of correcting legislative overreach (Patberg 2021).[9]

Thus, differentiated integration and differentiated disintegration capture similar phenomena. Both describe formal, mediated processes that may occur along a horizontal or a vertical axis. Wilful non-compliance with EU law, by contrast, is not negotiated or in any way formally mediated between EU institutions and member states. However, the concepts are related insofar as wilful non-compliance may indicate an unmet demand for further DI, either in the degree to which law-making powers are centralised at the European level or in the territorial extension of EU law. Moreover, so long as the demand for DI remains unmet, and depending on the extent and frequency of its occurrence, non-compliance threatens the disorderly (partial) disintegration of the EU's legal order.

Put differently, *disintegration* should not be reduced, either conceptually or empirically, to cases of mediated differentiation. As Vollaard (2014: 8) has noted, disintegration can manifest as "declining behavioural conformity and loyalty to the polity and fellow actors". This type of disintegration shares some commonalities with the neo-functionalist concept of "spill back". According to Lindberg and Scheingold (1970: 137, quoted in Vollaard 2014: 3), spill back describes "a situation in which there is a withdrawal from a set of specific obligations. Rules are no longer regularly enforced or obeyed. The scope of community action and its institutional capacities decrease."

The relationship between DI and non-compliance may be further explicated by drawing on the literature on patterns of DI. Analysing trends in both horizontal and vertical DI over several decades of European integration, Schimmelfennig et al. (2015: 765) distil two key factors: *interdependence*, which drives integration, and *politicisation*, which impedes it. If interdependence is low, then vertical

[9] As Patberg (2021) argues in this special issue, disintegration is not inherently destructive. The possibility of disintegration, insofar as it offers a corrective mechanism for legislative initiatives that go too far, or produce unintended adverse effects, may actually strengthen European integration.

integration will be low because there is insufficient functional demand for it. On the other hand, high interdependence will create a high functional demand for integration, but the actual integration outcome (i.e. whether the EU gains and/or is able to exercise legislative competences in a given area) will depend on the level and horizontal asymmetry of politicisation. Integration in policy areas that are both highly interdependent and highly politicised is likely to be differentiated (Schimmelfennig et al. 2015: 771-774).

The dynamic interplay of interdependence and politicisation may be observed in relation to migration and asylum policy in the EU and its member states. Decisions regarding migration and asylum – the number and demographic composition of migrants and refugees that should be permitted to settle in a state, the processes through which they may gain an entitlement to permanent residency, etc. – are highly politicised in most states. Politicisation impedes collective action, despite clear interdependencies, which are a function of factors that are both endogenous (e.g. common membership of Schengen) and exogenous (e.g. the unexpectedly large number of asylum claimants in 2015 and 2016). Due to its highly politicised nature, the EU's migration and asylum policy has always been governed by an intergovernmental logic. That is, its level of vertical integration has always been low, compared, e.g., to the single market. Thus, while the establishment of the Schengen zone heightened interdependencies, which, in turn, increased the functional *demand* for integration in the area of migration and asylum, it did not lead to the *outcome* of greater vertical integration.

Under which conditions, then, are we likely to see DI and under which wilful non-compliance? In relation to the refugee relocation scheme, the preconditions for DI – a high degree of interdependence coupled with a high level of politicisation – were present. Indeed, these conditions did result in DI when the EU was establishing its competences in the Area of Freedom, Security and Justice (AFSJ, previously Justice and Home Affairs, JHA), including in the form of opt outs for the UK, Ireland and Denmark (Monar 2010: 280). By contrast, dissenting states were not given the option of not participating in the September 2015 refugee relocation scheme. In explaining this discrepancy, we can assume a default preference against DI in secondary legislation in the Commission and among the larger and more influential member states (which are much less likely to be in a position where they may be outvoted by QMV). Therefore, in order to secure exemptions or other forms of differential treatment (either at the treaty-change stage or in secondary legislation), member states need considerable leverage, which they are more likely to have if, for example, a decision needs to be taken by unanimity. Moreover, in the case of the refugee relocation scheme, it was important for the Commission, states of first arrival, and popular destination states to signal solidarity (Trauner 2016). In fact, the symbolic import of the scheme was arguably more significant than its practical effect, since

it only ever aimed to resettle a small proportion of asylum seekers arriving in Italy and Greece (Trauner 2016: 321). The need to signal solidarity, therefore, militated against allowing exemptions.

Thus, a combination of high interdependence and high politicisation may lead to either DI or wilful non-compliance. We are likely to see DI in cases where key stakeholders (Commission, member states) are strongly committed to further integration in a given area and/or to a particular legislative initiative, but member states opposing the initiative are in a position to block it. Conversely, we are likely to see wilful non-compliance where a) the dissenting state/s lacked sufficient leverage to extract concessions, b) the dissenting state/s failed to block or overturn the initiative via legal or procedural means, and c) the dissenting state/s cannot accept the initiative (owing, e.g., to domestic opposition, rhetorical entrapment, etc.).

To be sure, the use of QMV to overrule dissenting states will not always lead to non-compliance, and certainly not to the kind of outright non-compliance that greeted the refugee relocation scheme. In fact, by obviating the need to find lowest-common-denominator solutions, the use of QMV may, in some cases, bring reluctant states along in a way that creates a dynamic towards higher standards in the longer term.[10] However, the use of QMV for an issue as highly politicised and divisive as refugee relocation was an instance of legislative overreach. It both *exposed* and *compounded* the legitimacy constraints under which EU law operates. That is, on the one hand, the scheme's failure exposed the limits of the normative power of EU law to compel compliance in situations in which national preferences diverge significantly and the (perceived) costs of compliance are high. On the other hand, the widespread non-compliance with which the scheme was met compounded the problems it revealed by weakening EU law's normative hold over member state governments. Thus, not only was refugee relocation not an instance of European integration advancing through crisis, the scheme's failure undermined the EU's legal order in a way that is likely to reverberate beyond the specific context of migration and asylum policy.

The Refugee Relocation Scheme and its Reception: Compliance Forestalled, Avoided and Outright Rejected

In 2015, the EU received an unprecedentedly large number of irregular migrant arrivals, coming mainly from Turkey and North Africa, across the Eastern and Central Mediterranean Sea. More than 1.2 million first-time asylum claims were registered in the EU in 2015 and a similar number again in 2016. The refugee relocation scheme was an initiative put forward by the Commission and adopted by the Council of the EU in 2015. While redistributing refugees according to a quota system was generally

[10] I am grateful to an anonymous reviewer for this point.

not a popular idea in national capitals, the Commission was responding to pressure from certain member states for a solidarity-based solution. Popular destination states, such as Germany, Austria and Sweden, in particular, were keen to assuage domestic public opinion by demonstrating that the burden of accommodating asylum seekers was being shared fairly (Zaun 2018). The legal basis for the relocation scheme was Article 78(3) TFEU, which provides for the adoption of provisional measures to assist a member state that is dealing with an emergency caused by a sudden inflow of third country nationals.

The aim of the scheme was to relocate a number of refugees from the frontline states of Italy and Greece throughout the EU. Member state quotas were allocated on the basis of a distribution key based on population size (40%), GDP (40%), unemployment rates (10%), and the number of asylum applications received over the previous four years (10%) (European Commission 2015). Owing to their existing opt-outs, none of Denmark, Ireland or the UK were obligated to participate in the scheme, though Ireland chose to do so. However, for all other member states, relocation was to be mandatory.

The relocation scheme was adopted by the Council of the EU in two decisions. The first decision, which concerned the Commission's original proposal to relocate 40,000 people in clear need of protection from Italy and Greece, was adopted by consensus on 14 September 2015 (Decision 2015/1523) (European Council 2015a). The second decision concerned the Commission's later proposal to relocate a further 120,000 asylum seekers (i.e. 160,000 in total across the two proposals).[11] That plan proved much more contentious. A decision on it was adopted by the Council on 22 September 2015, but only by qualified majority (Decision 2015/1601). The Czech Republic, Hungary, Romania and Slovakia all voted against the measure (European Council 2015b).

From early on, the governments of the outvoted member states signalled the likelihood of their outright non-compliance. Following the vote, Czech Interior Minister Milan Chovanec tweeted that, "very soon we will realise the emperor has no clothes. Today was a defeat for common sense", while Slovak Prime Minister Robert Fico vowed that, "[a]s long as I am prime minister, mandatory quotas will not be implemented on Slovak territory" (Traynor and Kingsley 2015). In October 2016, Hungarian Prime Minister Viktor Orbán attempted to bolster domestic support for his defiance of the EU by asking voters to reject the relocation plan in a referendum (which, in the event, failed to meet the required voter turnout threshold). Nevertheless, Orbán's anti-migrant credentials were also central to

[11] The Commission had originally proposed that Hungary be designated a "frontline state" for the purposes of the second scheme. I.e. Hungary would have been a beneficiary of the scheme, with 54,000 asylum seekers being relocated from its territory to the other member states. However, Hungary refused this designation and so was assigned a quota of refugees to receive instead.

his 2018 election campaign, which delivered his political coalition a comfortable victory that preserved their two-thirds parliamentary majority (Bayer 2018).

At the same time, Hungary and Slovakia also sought to forestall the need for compliance by challenging Council decision 2015/1601 on procedural grounds, including over the use of QMV. That action was dismissed by the CJEU in September 2017.[12] However, given their simultaneous adoption of outright non-compliance strategies, it is not surprising that the ruling did not alter the positions of the Visegrád Four towards refugee relocation. In 2017, the Commission launched infringement proceedings against the Czech Republic, Hungary and Poland. At that point, the Czech Republic had relocated twelve asylum seekers from Greece, while Hungary and Poland had not relocated any. On 2 April 2020, the CJEU found that the three states had breached their EU law obligations by not pledging relocation places and receiving asylum seekers.[13] While the ruling opened the way for the Commission to impose fines on the member states in breach, it has not had much substantive effect as the temporary relocation scheme expired in September 2017.

As suggested above, the strategy of outright non-compliance adopted by the Visegrád Four states reflected the domestic political salience of refugee relocation and the desire of the governments in question to signal a robust defence of perceived national cultural values to domestic audiences. Fico, for example, doubled down on his rejection of mandatory quotas in an interview in May 2016, declaring that "Islam has no place in Slovakia" (Chadwick 2016). To be clear, in arguing that the use of QMV to pass the refugee relocation scheme was a miscalculation, I am not suggesting that xenophobic rhetoric and other behaviour that undermines EU values ought to go unchallenged. Rather, my claim in this case is twofold. Firstly, that the attempt to override the anti-migrant stance of the Visegrád Four states failed – and was bound to fail – because a) the Council decision lacked a normative basis (i.e. it was not grounded in a collectively shared understanding of duties owed towards asylum seekers) and b) it was practically unenforceable. Secondly, that the attempt itself undermined EU law's normative force by revealing its limits – i.e. that the Emperor has no clothes.[14]

Moreover, the refugee relocation scheme was hobbled by compliance problems that went well beyond the outright opposition of the Visegrád countries. Strategies of non-compliance via the

[12] Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, 6 September 2017. Online: http://curia.europa.eu/juris/document/document.jsf?text=&docid=194081&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4638252 [accessed 22.06.21].

[13] Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v Poland, Hungary and the Czech Republic,* 2 April 2020. Online: http://curia.europa.eu/juris/document/document.jsf?text=&docid=224882&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=522040 [accessed 22.06.21].

[14] For a potentially more fruitful way of acting against deviations from the EU's treaty-enshrined values and fundamental rights, see the concept of "value DI" developed by Bellamy and Kröger (2021) in this special issue.

exploitation of legal loopholes were also common and were not only employed by Central and Eastern European states. For example, some member states pledging relocation places were able to frustrate the scheme by specifying long lists of preferences for the kinds of asylum seekers they would take (e.g. nationality, marital status) (European Commission 2016a). Furthermore, while member states were required to provide reasons when declining relocation requests, they were able to invoke a broad and vague justification of "national security" when doing so. There was no appeal procedure to challenge unfounded rejections (Papadopoulou et al. 2016: 29).

In a further downscaling of ambitions, eligibility for the scheme was limited to nationalities with refugee recognition rates higher than 75%. This made the scheme more useful to Greece than to Italy, owing to the different demographic compositions of their asylum seeker populations (Scipioni 2018: 1368). Finally, in another example of an attempt to forestall compliance, two popular host states - Austria and Sweden - lobbied the Commission to have their relocation quotas cut, as they had already received a large number of asylum seekers through irregular routes. Austria received a cut of 30%, but made little effort to fulfil the remaining 70% of its quota (European Commission 2016a). Unsurprisingly, then, the results of the scheme were dismal. As of 7 March 2018, a total of 33,846 asylum seekers (11,999 from Italy and 21,847 from Greece) had been effectively relocated (European Commission 2018).

Schengen Under Strain: Compliance Avoidance as a Mechanism for Coping with Integration Deficiencies

The forms that the EU crisis response took in mid-late-2015 must be understood against the institutional backdrop of the AFSJ, which encompasses policies relating to the Schengen area, immigration, and recognition and reception of asylum seekers. The Schengen regime is a prime example of an EU policy area characterised by both internal and external horizontal DI (Leuffen et al. 2013). The UK and Ireland - two preference outliers - were granted *ex ante* opt-outs. Member states that joined the EU after 1999 did not join Schengen automatically, but rather needed to meet certain conditions first. At the same time, several non-EU members (Iceland, Liechtenstein, Norway and Switzerland) are members of the Schengen area.

As noted above, the Schengen agreement's abolition of internal borders and concomitant creation of a single external border for most EU member states created obvious interdependencies in the fields of immigration, asylum and refugee policy. However, owing to their highly politicised nature, these "core state powers" (Genschel and Jachtenfuchs 2018) were never supranationalised. Rather, it was left to each government to set its own policies in these fields, with the EU taking a "minimum standards" regulatory approach in order to facilitate national policy harmonisation (Scipioni 2018:

1361). The EU legal framework took the form of the Common European Asylum System (CEAS), comprising the Dublin Regulation, which assigned responsibility for registering and processing asylum seekers to the EU state of first arrival, as well as a series of Directives aimed at standardising conditions for the reception of asylum seekers and processing of their claims across member states (Morsut and Kruke 2018: 149).

Despite the clear interdependencies created by Schengen's removal of internal border controls, the CEAS endowed EU institutions and agencies with only weak capacities for monitoring and enforcing member state compliance. Although the CEAS's purpose was to harmonise conditions for the processing of asylum applications across the EU, asylum seekers did not, in fact, face equal standards in all member states. Relatedly, dysfunctionalities in the operation of the Dublin system had become clear well before 2015. Overwhelmed border states, knowing that in many cases they were not migrants' preferred final destination, had little incentive to stop them from moving further across Schengen borders to states with higher recognition rates and better reception conditions. The malfunctioning of the Dublin system, in turn, prompted many popular destination states to reimpose border checks (Bauböck 2018: 151-152).

Indeed, many of the deviations from Schengen rules that were first implemented in 2015 are still in force. A handful of states, including Belgium, Hungary, Malta and Slovenia reimposed short-term border controls in response to the migration crisis, or related issues, in late 2015 and early 2016. More dramatically, a number of states, including Austria, Hungary and Slovenia took a "Robinson Crusoe" approach to crisis governance by completely sealing some borders, and even constructing border fences with Schengen and non-Schengen neighbours (Morsut and Kruke 2018: 154-156). Even more damagingly, several Schengen members have reintroduced controls, at least at some of their borders, *non-stop* since late 2015. France has done so largely on the basis of the assessed terrorist threat, while Austria, Denmark, Germany, Sweden and non-EU Schengen member Norway have cited the ongoing threat posed by large-scale secondary migratory movements.[15]

Clearly, then, there has been a breakdown of trust between border states, especially Greece, on the one hand, and some non-border states, on the other. The Commission itself confirmed serious deficiencies in Greece's management of the external border in May 2016, when it recommended that the states most affected by secondary migratory movements prolong their reintroduced border controls (European Commission 2016b). These deficiencies have never been addressed to the satisfaction of popular host states. For example, Sweden's most recent notifications of its Schengen

[15] Or variations on this theme. For the full list of border control reintroductions, as notified under the provisions of the Schengen Borders Code, see https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en.

derogations explicitly cite "shortcomings at the external border" as one reason for maintaining controls.

In fact, at the time of writing, the current migration and security-related border restrictions are in place until November 2021. At that point, six Schengen members will have suspended internal borderless travel (at least at some of their borders) for six years. While the Schengen agreement does allow for unilateral derogations in emergency situations, re-introduced border controls are meant to be temporary, exceptional, proportionate and a last resort. Thus, even if rolling Schengen suspensions do not violate the letter of the agreement, they certainly are not in keeping with its spirit. In this way, the reintroduction of border controls by the six Schengen states is a clear example of avoidance non-compliance; that is, non-compliance via the exploitation of loopholes in a legal regime.

To date, there has been no differentiated disintegration within the Schengen regime. No state has formally exited Schengen or even expressed a desire to do so. Yet, it is not self-evident that the *status quo* – namely, the indefinite partial suspension of Schengen – better serves the project of European integration. In fact, I argue that this kind of persistent avoidance non-compliance poses a serious challenge to the normative authority of EU law and may be evidence of a partial disorderly disintegration within the EU's legal order. Therefore, in thinking about the possibilities for reforming the EU's migration and asylum policies and their surrounding legal framework, options such as the partial rollback of integrative steps ought also to be considered (Auer 2021).

The EU's Response to the Migration Crisis: Failing in no Particular Direction

It is a commonplace of EU studies that European integration advances via crises (see, e.g., Ioannou et al. 2015). The two leading theories of European integration - liberal intergovernmentalism and neo-functionalism - both share this "functional optimism" (Genschel and Jachtenfuchs 2018: 181). That is, they expect political elites to be able to strike pro-integrative bargains, despite the constraining dissensus of domestic public opinion, because functional pressures will militate towards EU-level solutions (Niemann and Ioannou 2015; Schimmelfennig 2014, 2015). Drawing on both liberal intergovernmentalism and neo-functionalism, the "failing forward" thesis also takes a positive view of the impact of crises on European integration. According to this thesis, the advancement of integration through crisis is not a fortuitous accident, but a feature of EU politics and policymaking. In other words, by striking incomplete bargains in the first place (e.g. monetary union without fiscal union; borderless internal travel without a centralised migration and asylum policy), the EU creates the conditions for the emergence of crises, which, in turn, precipitate further integration (Jones et al. 2016; Scipioni 2018).

This may be too optimistic an assessment of the migration crisis and its aftermath. For all the political and legislative activity the events of 2015 have generated, as Genschel and Jachtenfuchs (2018) note, the EU so far has been unable to resolve the distributive conflicts at the heart of the crisis. They posit that the causes of this failure lie in the distinction between market integration and the integration of core state powers. Since the adoption of the Maastricht Treaty, the EU has increasingly embarked upon projects that aim to do the latter, including EMU and Schengen. In both normal times and emergencies, policy areas that touch on core state powers (e.g. taxation and spending, border control, immigration and naturalisation) may also see strong functional demand for further integration, driven, *inter alia*, by spillover effects and interdependencies. However, in contrast to most matters of market integration, functional demand for the integration of core state powers runs up against "tight political constraints on supply" (Genschel and Jachtenfuchs 2018: 179). That is, politicisation acts as an impediment to higher levels of vertical integration (Schimmelfennig et al. 2015).

Indeed, since a higher degree of vertical integration has not been possible, the EU's responses to the migration crisis of 2015 have instead taken the form of re-regulation - a doubling down on the elaboration of rules that place the burden of adjustment disproportionately on border and popular host states - supplemented only by modest EU-level capacity building. However, the re-regulatory approach has not resolved the underlying issues, including poor compliance and an absence of supranationalised burden-sharing mechanisms, which caused the crisis in the first place. Instead, it has overburdened EU law by tasking it with overcoming major political differences among member states.

Conclusion

This paper aimed to investigate the drivers and consequences of wilful non-compliance with EU law, via an examination of the responses of the EU and its member states to the 2015 migration crisis. As we have seen, the efficacy of the crisis response was significantly impeded by compliance problems. These took multiple forms, including outright non-compliance, avoidance non-compliance, and the forestalling of compliance via legal and procedural challenges. I have argued that, insofar as it allows for a managed form of legal fragmentation, DI is a preferable alternative to either no legislative action in politically contentious areas or legislative action which is likely to be met with non-compliance by dissenting states.

The EU's AFSJ is one area that could benefit from more DI. The entry into force of the Schengen agreement heightened existing interdependencies among member states and created new ones. Accordingly, it created a functional *need* for further integration in migration and asylum policy, but –

as with other highly politicised "core state powers" (Genschel and Jachtenfuchs 2018) – it did not make further integration more *attractive* to member states (Scipioni 2018: 1361-1364). Facing historically large – and unequally distributed – numbers of new arrivals in mid-late 2015, the EU Commission and several member states sought to mediate the tension between a supranationalised internal travel regime and national migration and asylum policies by imposing legally binding quotas for the redistribution of asylum seekers from 'frontline' states throughout the EU. However, the refugee relocation scheme neither facilitated the further vertical integration of migration and asylum policy, nor effectively signalled intra-EU solidarity. On the contrary, it precipitated a wilful non-compliance with EU law by a number of dissenting states. This wilful non-compliance has undermined the coherence of the EU's legal order in ways that are likely to reverberate beyond the particular context of the failed refugee relocation scheme.

Moreover, in the absence of a sustainable EU-level approach to resolving the contradiction between borderless internal travel and nationally-determined and administered migration policies, several member states (including founding members France and Germany) have taken it upon themselves to re-introduce "temporary" border controls, on a rolling basis, for close to six years. While the 2015-2021 Schengen derogations are not qualitatively identical to the outright rejection that greeted the refugee relocation scheme, I have argued that they constitute a "lighter" form of wilful non-compliance, which is characterised by avoiding, delaying or frustrating the full implementation of EU law via the exploitation of legal loopholes.

Taken together, both outright non-compliance and avoidance non-compliance are indicative of a crisis of legitimacy within the EU's legal order. In this way, an important lesson of the events of 2015 is that not every crisis is an opportunity to further European integration. On the contrary, the EU's attempt to address the migration crisis through binding law rested on an overestimation – and, consequently, overburdening – of the Union's legitimacy resources (Scicluna 2018). The EU could not compel compliance with the relocation scheme. Likewise, it could not safeguard the integrity of the Dublin Regulation, which, in turn, led several states to go it alone in reintroducing Schengen border controls. Rather than "failing forward" (Jones et al. 2016), the migration crisis and its aftermath constituted an unproductive failure that damaged the EU's legal order.[16]

While this paper has focused on the specific case of refugee relocation, the issues it raises – namely the challenge posed to EU legal order by wilful non-compliance and the role DI may play in meeting that challenge – concern the EU's future more broadly. Indeed, given the breadth and depth of European integration, "both politicization and the pressures of interdependence are likely to persist"

[16] I am indebted to an anonymous reviewer for this point.

(Schimmelfennig et al. 2015: 780) in areas ranging from migration and asylum, to taxation, to public health, to foreign policy. In many ways, it is a sign of the EU's success that member states are so closely integrated that their actions significantly affect one another, even in areas of national competence. Moreover, it is a sign of the EU's necessity that functional demand for integration continues to arise in areas that touch on highly politicised core state powers.[17] Yet, a functional demand for European-level solutions to common problems, no matter how compelling, cannot obviate the legitimacy constraints within which the EU operates (see e.g. Schmidt 2012, 2020; Weiler 2012). If, in highly politicised policy areas, EU law cannot compel member state compliance through either external inducements or inherent normativity, then European leaders ought to be more open to other means of accommodating divergent preferences without giving up legislative initiative altogether. Formally negotiated DI, even if it cuts against notions of solidarity based on collective action, may better preserve and protect the normative force of EU law, while minimising the risk of wilful non-compliance.

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[17] E.g. the Covid-19 pandemic has vividly illustrated the importance of EU-wide coordination on matters of public health.

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