

Opting out from European Union legislation: the differentiation of secondary law

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ABSTRACT

Differentiated integration in the European Union (EU) has been primarily discussed and analysed at the treaty level, whereas lack of systematic data has hampered the examination of secondary-law or legislative differentiation. We present a new data set of differentiation in EU legislation from 1958 to 2012, a descriptive analysis and a comparison of the patterns of primary- and secondary-law differentiation across time, member states and policies. We find that differentiation facilitating the accession of new members and constitutional differentiation accommodating the opposition against the integration of core state powers drive both primary- and secondary-law differentiation. In addition, we find complementarity between differentiation in treaty law and secondary legislation depending on the availability and salience of differentiation opportunities.

KEY WORDS Differentiated integration; European Union; legislation; opt-outs; secondary law

1. Introduction

Differentiation is a core feature of European integration. Since the 1970s, it has been debated as a strategy to come to terms with the growing diversity of member state preferences and capacities. 'Multi-speed integration', 'core Europe' and 'variable geometry' were discussed as ways to overcome potential integration deadlock resulting from conflict about the progressive enlargement of the European Union (EU) and its further deepening (e.g., Holzinger and Schimmelfennig 2012; Stubb 1996; Warleigh 2002). Since the 1990s, differentiated integration has been a regular and permanent feature of EU treaty revisions. The best-known examples are the British and Danish opt-outs from the single currency and much of the Justice and Home Affairs policies, and the British and Irish opt-outs from the Schengen border regime. These prominent cases have attracted broad scholarly attention (Adler-Nissen 2009, 2011; Dyson and Marcussen 2010; Gehring 1998; Kölliker

2006; Leuffen *et al.* 2013). More recently, the first large-n studies of differentiated integration have appeared (Schimmelfennig and Winzen 2014).

The one thing all of these studies have in common is their focus on the *treaty-based* differentiation of EU integration. Differentiated integration can, however, result from EU legislation, too. The EU's general and binding legal acts, directives and regulations may exempt specific member states from individual provisions or introduce special rules for them, and thus contribute to uneven levels of integration beyond the treaties. And yet, we know very little about legislative differentiation in the EU apart from the rare cases falling under the EU's Enhanced Co-operation clause (Kroll and Leuffen 2015) and studies focusing on a few individual policy areas (e.g., chapters in Dyson and Sepos [2010]; and Martinsen and Wessel [2014]). By and large, differentiation in EU legislation is *terra incognita* not only in research on differentiated integration, but also in the study of EU legislation, where scholars have focused more on the 'informal opt-outs and the discretionary aspects of transposition and implementation' (Andersen and Sitter 2006: 314) rather than the formal opt-outs constituted by exemptions in the legal acts themselves.

In this article, we break new empirical ground. We provide a descriptive analysis of differentiation in EU secondary law based on a recently established dataset (EUDIFF2) covering EU legislation from 1958 to 2012. This dataset closes a gap in the study of differentiated integration and the study of EU legislation. We show how legislative differentiation has developed over time and how it has varied across member states and EU policies. In addition, we ask whether differentiation in EU legislation follows the patterns of treaty-based differentiated integration or differs with regard to its development and the countries and policies affected.

In a nutshell, we argue that the instrumental differentiation facilitating the accession of new members and the constitutional differentiation accommodating principled opposition against the integration of core state powers drive both primary-law and secondary-law differentiation to a large extent. In addition, we find complementarity between differentiation in treaty law and secondary legislation depending on availability and salience. As for availability, secondary law was initially the instrument of choice in differentiation for both old and new member states; after 1990, there has been a shift to treaty law. In addition, some policies (such as market freedoms) are typically regulated at the treaty level, whereas others (such as market regulation) are typically the subject of secondary legislation. Finally, conflicts in areas of high salience and politicization such as the integration of core state powers advance treaty-based differentiation, whereas heterogeneity in low-salience policy fields is often dealt with through legislative differentiation.

The article is organized as follows. In the next section, we give an overview of primary-law differentiation to set the stage. This is followed by a description

of the data collection and structure of the EUDIFF2 dataset. In the main sections of the article, we examine the development and variation of secondary-law differentiation over time, by countries, member cohorts and policy areas, and draw brief comparisons with treaty law. In the discussion section, we summarize the patterns and trends of differentiation and suggest explanations for the similarities and differences between treaty-based and legislative differentiation.

2. Differentiated integration in the EU: rationales and patterns

In this section, we draw on theoretical reasoning and empirical findings from primary-law differentiation to set the stage for the analysis of legislative differentiation. Generally, differentiation serves as an instrument to manage and accommodate heterogeneous preferences and capacities among the member states (Dyson and Sepos 2010: 5–6; Majone 2009: 221). Some member states may not be willing to accept more competence transfers or the opening up of markets to new member states. Others may not be able, or only at prohibitive political or economic cost, to (immediately) adopt and implement policies. States unwilling or unable to adopt an EU policy may obtain an exemption to facilitate intergovernmental agreement.

Treaty-based differentiated integration has responded to the widening and deepening of European integration.¹ In the case of widening, governments and interest groups in old member states are typically concerned about commercial competition, migration, the reallocation of EU cohesion funds and the implementation capacity of new member states. New member states similarly worry about pressures from market integration and the costs of adopting EU regulation. Transitional exemptions agreed in the accession treaties and in early post-accession legislation help both old and new member states to facilitate the adaptation ('instrumental differentiation'). In the case of deepening, transferring more competences from the state to the EU level and delegating more authority to supranational actors regularly triggers controversy among the member states. Opt-outs permit less integration-friendly member state governments, and those facing strong popular opposition, to remain at their preferred level of integration and refrain from using their veto against the more ambitious projects of the majority ('constitutional differentiation').

In line with this rationale, treaty-based differentiation has regularly increased as a result of accession treaties and revisions of the main treaties. The increase in differentiation was particularly pronounced in response to the major expansion of the EU's policy scope in the 1990s and to the large-scale enlargement of the 2000s. Typically, differentiation recedes after several years as transitional arrangements expire and states adapt to the integrated policies. In cases of principled rejection, such as the United Kingdom's opt-out from the euro and Schengen, however, differentiated integration has

been enduring. As a result, the level of differentiation has increased on the whole since the early 1990s.

In treaty-based differentiated integration, we further observe pronounced variation across policies and member states. More than 90 per cent of differentiations can be found in three policy areas: the internal market; Schengen; and monetary union. Moreover, differentiation in internal market policies is almost exclusively related to enlargement, whereas differentiation in border and monetary policies is prominent in both accession treaties and treaty revisions. Generally, we find that policies related to core state powers such as internal and external security, as well as fiscal and monetary policies, show a strong propensity for differentiated integration (Schimmelfennig *et al.* 2015).

Finally, the differentiated integration of member states varies considerably. Original member states have few exemptions because they lack accession-based differentiation by definition and continue to set the agenda for European integration according to their preferences and capacities. Member states with more strongly exclusive national identities such as the United Kingdom (UK) and the Nordic countries opt out more frequently from treaty revisions. Exclusive national identities generate principled public opposition towards European integration (Hooghe and Marks 2005, 2008). In addition, poorer member states are more affected by differentiated integration in the context of accession. Poorer member states are in stronger need of exemptions to facilitate their adaptation to the internal market and the costs of EU policy regulation. They are also more likely to be discriminated against by old member states fearing migration pressure, wage competition and high agricultural and infrastructural subsidization (Schneider 2009).

In sum, treaty-law differentiation increases as a result of enlargement and treaty revisions, most strongly since the early 1990s; second, differentiation varies across accession cohorts and policy areas. More specifically, differentiation triggered by enlargement affects the internal market and the poorer Southern and Eastern new members in the shorter term, whereas treaty revisions lead to longer-term differentiations in the integration of core state powers, above all in the Northern member states.

There are two reasons to expect that these patterns also hold for legislative differentiation. First, policy and member state characteristics and differences are likely to have an impact that is independent of the rule-making context. There is reason to assume that the instrumental and constitutional logics of differentiation apply regardless of the type of legal act. In addition, there is an institutional logic linking the two arenas: primary-law differentiations presumably affect the secondary legislation that implements and further elaborates the treaty rules. On the other hand, we may expect differences and complementarities of primary and secondary law resulting from the diverse political and institutional contexts of treaty-making and ordinary legislation. The institutional power of actors varies between treaty-making and law-

making because of different rules of access, agenda-setting, and decision-making. Moreover, treaties and secondary legislation typically vary in substance: for instance, treaties are more concerned with market creation while market correction is pursued by regulations and directives. Finally, legislation is on average less politicized than treaty-making.

3. The EUDIFF2 dataset

In order to capture secondary-law differentiation, we collected a new dataset, EUDIFF2, covering all exemptions or opt-outs that have been granted to member states in secondary law since the founding years of the EU. In this section we introduce the dataset, outlining the basic concept of secondary law differentiation, the observation period, the unit of analysis, the relevant sources, the coding process and the measurements.

We define differentiated integration as the *territorially unequal formal validity of EU legal rules*. For secondary law, a 'differentiation' is conceived of as a provision that formally exempts at least one member state from applying a legal rule otherwise valid for all EU member states. According to this definition, differentiated integration does not pertain to variations in compliance with EU law. The operationalization of differentiations used for EUDIFF2 is based on Tuytschaever's (1999) dimensions of source, time, immediacy and specificity.

The source of differentiation may be primary law (i.e., the treaties) or secondary law (i.e., the EU's legislative acts). The EUDIFF2 dataset covers secondary law only. The period of observation ranges from 1958, the establishment of the European Economic Community and the European Atomic Energy Community, to the end of 2012. With regard to time, a differentiation may be codified as *temporary* or *permanent*. Immediacy distinguishes between *actual* differentiation, which is immediately applicable by the member states, and *potential* differentiation, which requires further action. Such further action usually consists in the member states' notification of the European Commission (or, in rare cases, the Council of the EU). Finally, a rule is *specifically* differentiated if the differentiation concerns one or several member states and *generally* differentiated if it applies to all member states. By definition, actual differentiation is always specific, and all general differentiations are potential.

The EUDIFF2 dataset draws on legislative acts as the primary unit of analysis and on individual articles within legal acts as a secondary unit of analysis. EU legal rules would be the appropriate units of analysis. A legal rule is a single statement in a legally binding and generally applicable act that makes a behavioural prescription. It is, however, difficult to determine and distinguish individual legal rules in practice. Some legislative acts or articles therein contain a single rule, whereas others contain several rules. Even though

legislative acts or articles may be made up of different numbers of legal rules, they have two advantages as units of analysis: they are easy to identify and they are relatively coherent. They are thus good substitutes for legal rules.

A legislative act is marked by three characteristics: it is legally binding; generally applicable across the EU member states; and it has passed through a legislative procedure laid down in the Treaty on the Functioning of the European Union (TFEU) or its previous versions. According to these legislative procedures, a legislative act is always initiated by the European Commission and adopted by the EU legislature, i.e., by the Council or by the Council and European Parliament jointly. Following this definition, there are three relevant types of legislative acts and, hence, three possible sources of differentiation in EU secondary law: regulations; directives; and (certain) decisions (see Article 288 TFEU). Furthermore, decisions adopted by the EU legislature (i.e., the Council) in the Third Pillar (Area of Freedom, Security and Justice) between 1993 and 2009 had the same function as regulations adopted by the EU legislature in the First Pillar (European Community). Unlike other decisions, this subset of decisions is covered by our definition of a legislative act.

By contrast, regulations and directives of the EU legislature that merely amend, supplement, prolong, suspend or implement previous legislative acts or adjust parameters (trade volumes, prices, levies, duties, subsidies, etc.) on an annual basis do not constitute units of observation because they do not introduce new legal rules. Nevertheless, we included them in the coding process to ascertain whether a differentiation has been inserted into or removed from a previous legislative act.

For a similar reason, we coded Commission and Council decisions (although not as units of observation). Some treaty articles, legislative acts and, in particular, the catch-all article 114 (4)–(6) of the TFEU (and its predecessors) provide the member states with the possibility of an exemption (or ‘derogation’) subject to an authorization by the Commission or the Council. Usually, this authorization is granted through a Commission or Council decision. These decisions are the standard instrument to grant a member state an actual exemption from a potentially differentiated legal rule or, based on the catch-all article, from a non-differentiated legal rule. Thus, even if we do not include all legal acts as independent entries, we cover all differentiations of legislative acts – whether introduced immediately with the legislative act in question or later by another legal act.

The data were assembled by reading through and coding the Official Journal L year by year, based on the print version for the first decades and on the electronic version provided by EUR-Lex later on.² Each legislative act that qualifies as a unit of analysis according to the above definition and was in force in a given year of observation was included in the dataset and coded along the following dimensions: year of entry into force; temporal

status of the legislative act (permanent vs temporary); year of expiry (in case of a temporary legislative act); treaty basis; policy area; type of EU legislative act; decision-making procedure; decision rule in the Council; number of articles (to approximate the number of legislative rules); presence of actual and potential differentiations; specificity of the differentiation; and number of differentiations in total and per member state. Owing to the panel structure of the dataset, each legislative act remains in the dataset from the year of its entry into force to the year of its expiry.

In the following descriptive analysis, the extent of differentiated integration (DI) in secondary EU law is measured by the number of *cumulative* actual differentiations per year, member state or policy field. Cumulative actual differentiations are those that *are in force* in a given year – but may have already entered into force in previous years. We also use *new* actual differentiations, i.e., those that *enter into force* in a given year. In addition, the extent of DI is measured in relation to overall legislation, i.e., as the *share* of differentiated acts of all legislative acts in a given year.

It is an important caveat that we cannot account for the variation in relevance of individual differentiations. An opt-out from monetary union, for example, may be much more important than a differentiation in the declaration of waste types for transport to dump sites. We believe, however, that the aggregate of all EU legislation from 1958 to 2012 nevertheless provides us with a good statistical picture of trends in differentiated integration. Moreover, correcting for relevance, e.g., by introducing weights, is likely to introduce bias, too.

4. Secondary-law differentiation over time

We start with a description of the overall development of secondary-law differentiation across the full period of observation, 1958 to 2012. During this time, 752 out of 4,456 newly adopted legal acts and 2,052 out of 58,439 articles were actually differentiated for at least one member state. With 17 per cent of new legal acts, actual differentiation is an exception in EU secondary law but not a negligible quantity. Another 17 per cent of new legal acts were potentially differentiated (see Table A1 in the Appendix). It is important to note that these data just count new instances of differentiation but present no information on the duration of a differentiation or the state of differentiated integration at a certain point in time.

The first panel of [Figure 1](#) shows the *number* of acts containing actual differentiations which are in force in a given year. We observe a gradual rise over time with a steep increase in 1973, a massive peak in 1990 and another increase in the early 2000s, peaking in 2004. It is important to note that the differentiations to individual legal acts do not always occur immediately at adoption. On average 38 per cent of differentiations occur in the initial

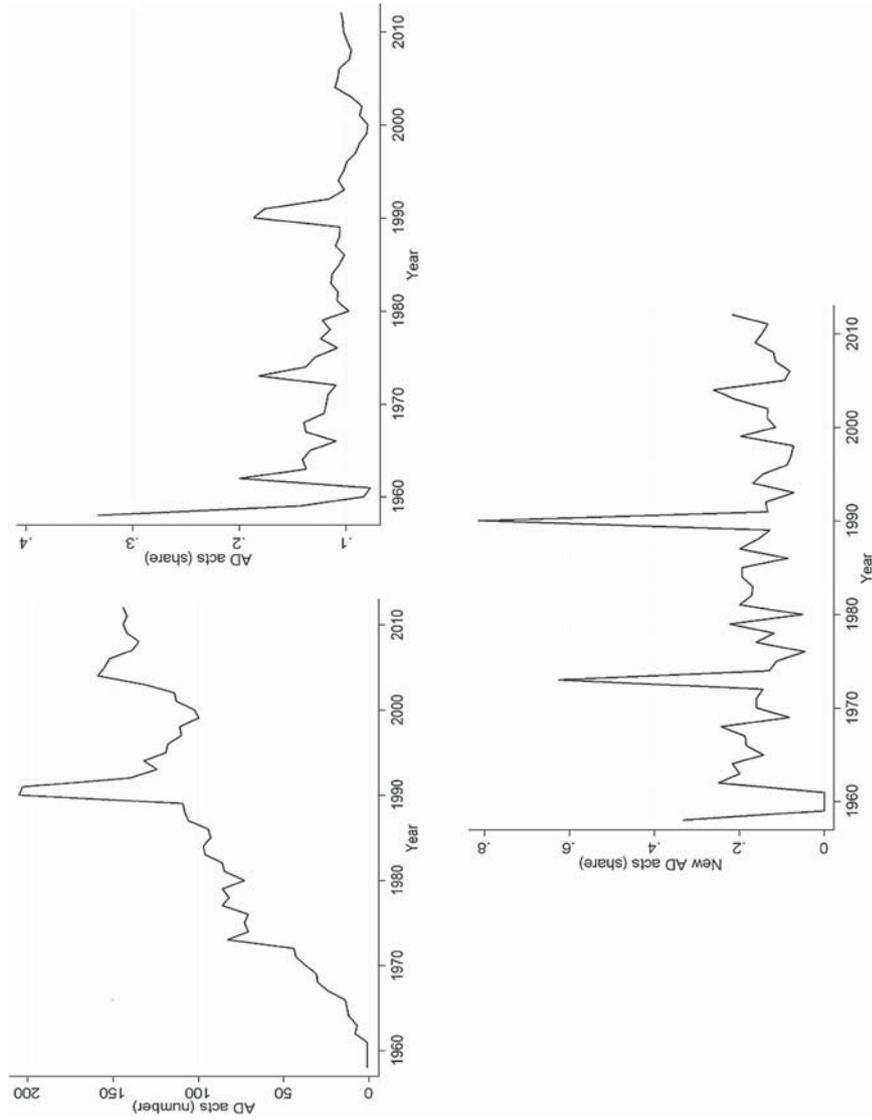


Figure 1. Actual differentiations in force, legislative acts, 1958–2012.

Note: Upper-left panel: number of actually differentiated legislative acts; upper-right panel: share of actual differentiations in total legislative acts; lower panel: share of new actual differentiations in new legislative acts.

stage; after seven years this figure reaches 66, after 11 years 75 and only after 44 years 100 per cent.

The second panel of Figure 1 shows the same data as a *share* of legislative output per year to control for the increasing legislative activity of the EU. The graph starts in 1958 with a share as high as 33 per cent. The initial years should, however, be taken with caution, because the number of legal acts in force was very low. Nevertheless, a slightly decreasing trend can be observed over the remaining years. While we see a variation between 10 and 20 per cent until 1990, the share varies between 5 and 10 per cent afterwards. A comparison of the two lines shows that the increase exhibited in the first panel is to a large degree the consequence of an increase in legislative activity. The steady rise in numbers of the 1960s and 1970s, for example, reveals a more stationary picture if measured as a share. The peaks remain visible, however.

The bottom panel in Figure 1 presents the share of new legal acts with actual differentiations in all *new* legislative acts. Except for peaks in 1973 and 1990, we observe a variation of new differentiations between almost 10 and 25 per cent of new legal acts. This broad band reaching from 1960 to 2012 basically indicates a stationary development.

We observe, first, that secondary-law differentiation started at the very beginning of European Community legislation. Second, there is no general tendency to ever more differentiation. Rather, there seems to be a stable demand for differentiation in about 15 to 20 per cent of legislative acts.

What accounts for the various peaks? Assuming alignment of primary- and secondary-law differentiation, there are two candidates: treaty revisions and enlargements. We find no systematic correlation between treaty revisions and legislative differentiation, however. The Maastricht Treaty (1993) and the Treaty of Nice (2000) coincide with local minima for all three measurements. The Single European Act (1987) finds itself on an increasing segment for numbers and represents a local maximum for new differentiations – but a local minimum for share. The year of the Treaty of Amsterdam (1997) lies in a decreasing segment for numbers and share and shows a local minimum for new differentiations. Finally, the year of the Lisbon Treaty exhibits a local minimum for numbers and share, even though the share of new differentiations is high.

Enlargement rounds offer a stronger explanation. The Northern enlargement (1973) coincides with clear peaks for all measurements, and so does the Eastern enlargement (2004). Smaller local peaks are visible around the EFTA enlargement (1995). Less clear is the effect for the Southern enlargement (1981–1986): we observe an increase in the cumulative number in this period; an increase in the share of acts in force after the accession of Greece, but a decrease around the accession of Spain and Portugal; finally, we see a rise of the share of new differentiations after 1981 and after 1986.

Apparently, the Southern new members were not granted flexibility as generously as other new member state cohorts.

The most outstanding peak, visible across all figures, is a result of German reunification in 1990 – an unusual instance of EU enlargement. In contrast to all other enlargements, this one was not preceded by negotiations and a gradual process of approximation of national law. After German reunification had been accepted by the other EU member states, Germany had to extend the EU *acquis* immediately to its new Eastern *Länder* in 1990. Germany was granted a high number of temporary exemptions (98 new ones), most of which expired after five years. Overall, we therefore conclude that peaks in secondary-law differentiation were to a considerable degree a consequence of enlargement.

Comparing secondary-law and primary-law differentiation, we find that enlargement has been an important driver for both, whereas treaty revisions have had a much less visible direct impact on secondary law. The trajectory of both differentiation processes is going in different directions, however. Whereas primary-law differentiation is almost non-existent until the end of the 1980s and increases sharply afterwards, secondary-law differentiation is present from the beginning, starts at a rather high level and then decreases slowly.

5. Secondary-law differentiation by countries

Differentiation varies strongly by member state. Whereas the Netherlands and Belgium obtain less than two new actual differentiations per year on average, Britain and Denmark obtain five and more (see [Figure A1](#) in the Appendix). Generally, countries of the same accession cohort develop in parallel, whereas cohorts show marked differences in levels and trends of differentiation between each other (see [Figure A2](#) in the Appendix).

[Figure 2](#) shows the actual differentiations (as shares of legislation in force) aggregated by cohort. The founding members and the Northern cohort were able to negotiate more differentiation right from the beginning, whereas later cohorts used the first years of membership to obtain additional exemptions. This could be explained as a compensation for the weak bargaining power that these countries have typically had during accession negotiations with the EU. The founding and the Northern cohorts developed in similar ways between 1980 and the early 1990s. The Southern cohort joins the founding members in 1992. At the end of our observation period we see that all member states with the exception of the Northern cohort converge at almost similar levels of actual differentiations in force. The Northern countries are therefore the main drivers of the increase in the overall share of differentiations since 2000 ([Figure 1](#)). The European Free Trade Association (EFTA)

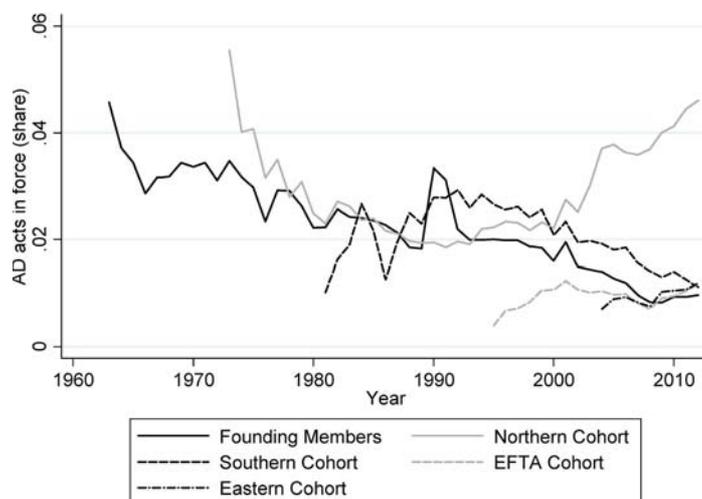


Figure 2. Share of actual differentiations in force, by cohort, 1962–2012.

enlargement countries appear to follow the Northern pattern of increasing differentiation more recently.

A comparison of developments at the cohort level again reveals clear differences between treaty-based and legislation-based differentiation.³ Whereas in primary law the founding members and the Northern cohort start with low levels of differentiation compared to the Southern and Eastern accession rounds, the trend is reversed for secondary law differentiation. Moreover, we cannot observe the generally converging trend in the 2000s (excluding the Northern cohort) in primary law.

6. Secondary-law differentiation by policies

Turning to the question of how the trends over time and across countries that we have seen so far vary across the EU's areas of competence, we first categorize policies.⁴ Relying on the legal basis of a piece of legislation, we identify the treaty chapter from which a legal act in our dataset originates, and use this chapter as the act's 'issue area'. Whenever the legal basis points towards the treaty section 'approximation of laws' or to an enlargement treaty, we manually classify a legal act into one of the other, substantively more meaningful areas. In the case of approximation of laws, this increases in particular the amount of EU legislation in regulatory policies before the Union acquired the corresponding treaty-based competences. Legislation resulting from enlargement treaties is almost exclusively about agriculture. Because it is impractical to work with a large number of policy areas, we suggest further aggregation to ten and, finally, five policy domains, in which scholarly

debates and analyses are often embedded: the EU's 'old competences' of market-making and agricultural support; its positive legislative capacity that is typically held to be primarily regulatory in nature (Majone 1998); and 'core state powers' that have increasingly become the focus of scholarly debates, partisan conflicts and European public opinion in the post-Maastricht era (Bickerton *et al.* 2015; Genschel & Jachtenfuchs 2014; Hooghe & Marks 2008).⁵ In the following, we omit the last domain, 'institutions', since it contains very few legal acts.

Figure 3 shows the development of actual differentiations across nine policy areas, relative to what would be possible at most. Evidently, the slight downward trend over time that we have seen earlier (Figure 1) was driven predominantly by the consolidation of the EU's market and, to a lesser extent, agricultural policies. Regulatory policies have always been differentiated to some extent, but rarely at a high level, except for health and consumer protection legislation that significantly precedes the EU's acquisition of formal competences and that initially features similar amounts of opt-outs as the market or agriculture. In recent years, health and consumer policies tend to become more differentiated again; so does environmental and energy legislation. The most obvious insight is the rise of differentiation in justice, interior and monetary policies. Whereas the Union's 'old' competences have become increasingly consolidated, and its regulatory endeavours reveal

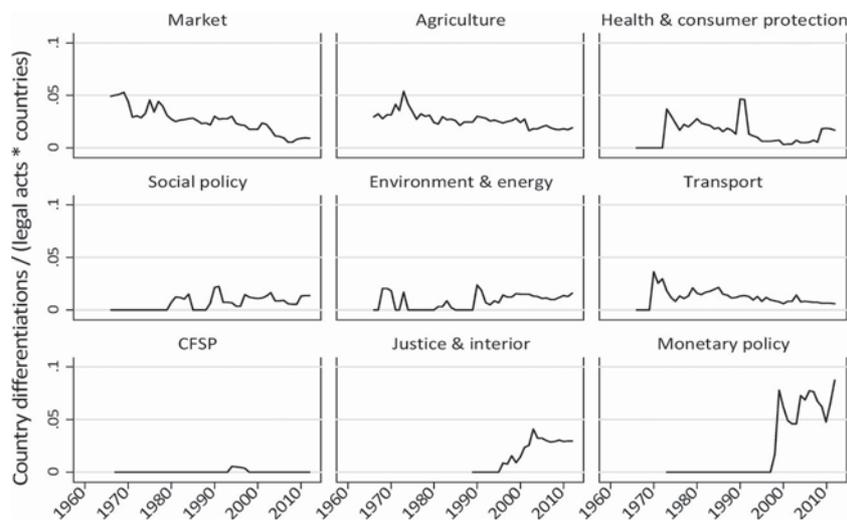


Figure 3. The development of actual differentiations across policy areas, in acts, 1960–2012.

Note: The plots show the total number of differentiations that member states had in a given policy area and year, relative to the total number of opportunities, where each legal instrument, in each year, is an opportunity for each member state.

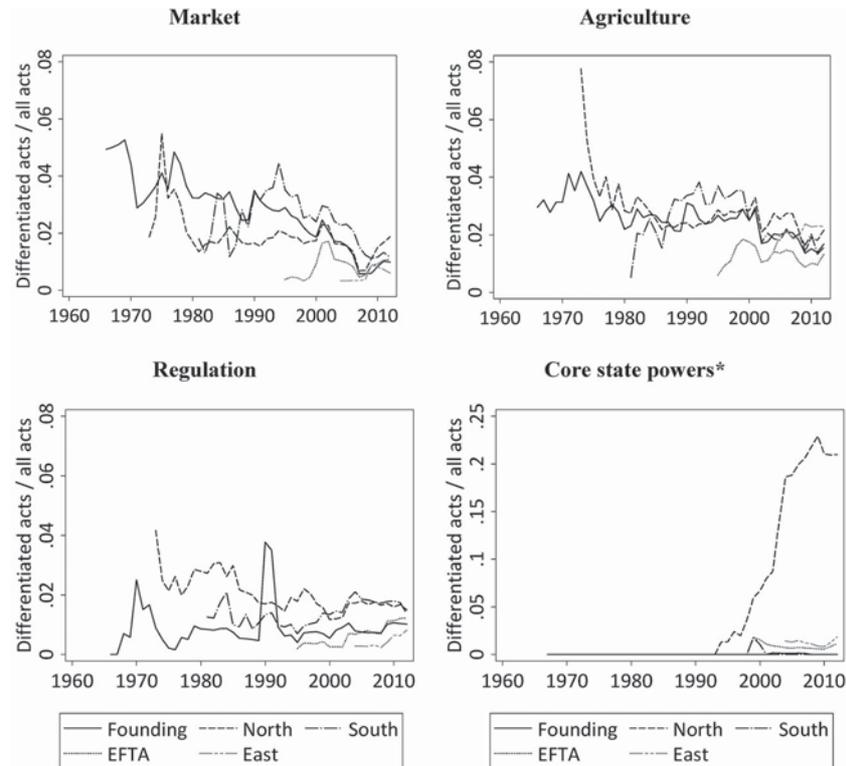


Figure 4. Differentiation across policy domains and member state accession cohorts. Note: The lines show the share of differentiated legal acts out of all EU legal acts in force in a year, for the average member state of a given accession cohort. * Note the adjusted y-axis scale.

only limited longitudinal trends, core state powers have become the principal domain of differentiated integration.

Figure 4 illustrates patterns of differentiation across policy domains and member state cohorts. We see the trends shown in Figure 2 clearly in the areas of market and agricultural policies: countries tend to acquire opt-outs either immediately at accession (Northern cohort) or soon after (all others). Subsequently, all countries converge towards very similar levels of differentiation. Such an accession effect is less visible in regulatory areas and core state powers. In the regulation domain, all cohorts follow, if tentatively, an upward trend since the 2000s. The strongest incline, though, exists in the Southern and EFTA countries, presumably as a result of, respectively, below and above EU-average regulatory standards. The Eastern cohort has also obtained opt-outs from regulatory policies but it is unclear at this point whether this is an accession effect that will dissipate or whether the most recent member states will follow similar trends as the Southern accession

group. The real source of the ‘Northern bathtub’, however, is their exceptionally high level of differentiation in core state powers. Countries outside of the eurozone have not adopted corresponding legislation, and Britain, Denmark and Ireland have participated only highly selectively in the EU’s justice and interior policies. Note, however, that, in addition, some countries from other cohorts, notably Sweden and several Eastern enlargement countries, have not participated fully in all core state power legislation.

Compared to differentiation in treaty law, the patterns of opt-outs in legislation reveal similarities and differences. First, as in treaty law, accession countries tend to acquire opt-outs from market and agricultural policies after they join and then gradually converge towards the rest of the member states. Yet, unlike what we see in primary law, there is an overall decline in market and agricultural exemptions so that, in the 2000s, they have become relatively rare for all countries including recent member states. The increases after accession are still visible but they do not reach record heights, in contrast to the numerous opt-outs found in recent accession treaties.

Second, treaty and secondary-law differentiation are clearly similar in that we observe a steep rise of differentiation in core state powers since the early 1990s. This rise, moreover, is brought about through opt-outs of the same countries: primarily the Northern member states and, to a lesser extent, Eastern European countries that were excluded from adopting the common currency and joining the Schengen area upon accession. As a matter of fact, treaty and legislative differentiation are institutionally connected in the core state powers domain. The British and Irish treaty exemptions from the justice and interior policy area involve a flexible opt-in regime for the legislative process. Recent legislation in monetary policy is, in many respects, not relevant for countries that have not adopted the euro. Third, while treaty law contains no differentiations in the EU’s many regulatory policies, legislative opt-outs have been a regular, albeit not widespread, phenomenon since the 1970s. They have even been increasing since the 2000s.

7. Discussion

In the history of EU legislation, roughly one in six legislative acts has been affected by actual differentiation. Taking into account the increasing legislative activity of the EU, secondary-law differentiation has remained largely stationary over time but may have trended upwardly since the 2000s. The most important peaks in differentiation can be attributed to enlargement, above all the 1973 Northern enlargement, the 1990 inclusion of the new German *Länder* and the 2004 Eastern enlargement.

Differentiation in EU legislation varies considerably by member state and policy area. The differentiation trajectory of member states develops mainly

in line with their accession cohort. All new member states either start with relatively high levels of differentiation when they join or accumulate a high number of differentiations in their first years of membership. Over time, their level of differentiation decreases and converges with the other accession cohorts. This pattern underlines the important role of enlargement in driving temporary secondary-law differentiation. The big exception is the Northern cohort. The UK, Denmark and Ireland have seen an increase in their exemptions from EU legislation since the early 1990s and are the main drivers of the recent upward trend in differentiated legislation.

The examination of differentiation by policy reveals that the special role of the Northern cohort (as well as Sweden and some Eastern European countries) has to do mainly with their large-scale exemptions from the integration of core state powers: monetary policy and justice and interior policies. Whereas differentiated legislation in the internal market and the common agricultural policy has decreased in line with the general decrease in differentiation for most member states, and regulatory policies have remained at low levels of differentiation throughout, legislation concerning core state powers has reached and maintained higher levels of differentiation since the 1990s.

The patterns we observe suggest several similarities with treaty-based differentiated integration. Enlargement is a major driver of differentiated integration at both the treaty and the legislative level. The general decrease in differentiation after the post-accession period in both cases confirms the temporary character of enlargement-based differentiation and its predominantly instrumental logic as a means to facilitate the adaptation of both old and new members. Enlargement is also consequential in that the trajectories and patterns of differentiation in primary and secondary law vary strongly by accession cohort.

Treaty revisions do not produce the marked increases in secondary-law differentiation that we observe in primary law. The sectoral expansion of the EU into areas of core state powers, which has had a major impact on differentiated integration in the EU treaties since the beginning of the 1990s, has, however, left strong traces in EU legislation, too. Whereas legislative differentiation in the policies of market-making and market regulation has generally decreased over time, the integration of core state powers in the EU treaties has triggered new, numerous and stable differentiation in EU secondary law. The fact that the same Northern member states that have been responsible for the bulk of primary-law differentiations in the EU treaties have also made by far the largest contribution to secondary-law differentiation in this area suggests that the same logic of constitutional differentiation driven by identity-based Euroscepticism is at work. Moreover, as pointed out above, there are strong institutional links between treaty-based opt-outs and subsequent legislation in these policy areas.

In addition to these broad similarities, we found several differences between primary- and secondary-law differentiation. First, we observe inverse trajectories overall. Treaty-based differentiation was weak initially and has increased strongly since the early 1990s; legislative differentiation was present from the beginning and has slightly decreased over time. Second, accession cohorts show different relative weights for primary and secondary law differentiation. In the East, treaty-based differentiations have been comparatively more prominent than in the South, where legislative differentiation has played a larger role. Both cohorts started with relatively higher levels of differentiation based on their accession treaties than the Northern cohort, which obtained a very high level of secondary-law differentiation upon accession. Third, at the policy level, we find that internal market differentiation remains strong in accession treaties, whereas it has markedly declined in secondary law. By contrast, regulatory policy differentiation is almost absent in EU treaties but contributes to legislative differentiation.

To some extent, these differences are related to each other. The initial focus on secondary-law differentiation may have reinforced the tendency to deal with exemptions at the level of legislation. By the same token, the increasing consolidation of the EU's market legislation may have shifted enlargement-driven differentiation in these areas to the treaty level. In addition, differentiations related to market freedoms – such as exemptions from the freedom of movement for labour or bans on land purchases by foreigners – require treaty-based differentiation because 'negative integration' is typically enshrined in the treaties, whereas 'positive integration' in the areas of regulatory policy is a matter of secondary legislation. Treaties contain hardly any substantive rules on regulatory policies other than legal bases. These differences point to complementarity between primary-law and secondary-law differentiation depending on the availability of differentiation opportunities in both categories of law.

In addition, the choice of legal instruments for differentiation appears to be a function of policy characteristics. The politicized integration of core state powers clearly works in favour of primary-law differentiation. Many of the differentiations in this area have resulted from vocal domestic opposition and failed treaty ratification referendums. Prominent treaty-based opt-outs are required in these high-salience cases to reach domestic agreement, and they spill over into secondary legislation afterwards. By contrast, the lack of treaty-based differentiation in regulatory policies likely stems from their technical character and low salience. Moreover, in regulatory policies heterogeneous administrative capacities and traditions of the member states drive part of the demand for differentiation. These particularities are difficult to foresee at the time of treaty negotiations.

8. Conclusion

In this article, we presented the EUDIFF2 dataset, a descriptive analysis of legislative differentiation, and a comparison with the patterns and development of primary-law differentiation. Clearly, this is only a first step in the analysis of legislative differentiation in the EU. Most importantly, although many developments could be easily traced back to enlargement rounds and policy domains, we did not yet embark on a systematic explanatory analysis. On the demand side, the findings suggest that, depending on the policy area in question, economic and administrative capacity problems and sovereignty concerns play an important role (*cf.* Winzen 2016). In addition, however, supply-side factors such as constellations of power among the member states and legislative rules and institutions may be relevant.

In addition, our analysis of the data highlighted a number of open questions and future avenues of research. First, there is the question of why the differentiation patterns of countries of the same enlargement cohorts are similar. Can we explain the similar level of differentiation by reference to structural similarities at the country level, such as similar attitudes toward European integration or similar states of the economy? Second, member state variation could be traced back to different traditions of dealing with potential compliance problems: while some countries prefer to ask for derogations, others might prefer to not correctly implement the EU law. To test for this hypothesis, matching datasets on differentiation and compliance seems promising. Third, legislative differentiation could be compared to other instruments suitable for addressing policy conflict and heterogeneity in a multi-level system – such as variation in the precision and legal obligation of rules or in the discretionary room of manoeuvre for implementation.

From a general perspective on EU politics and integration, our study suggests that legislative differentiation is a *modus operandi*, a normal and stable feature, of EU law-making. In contrast to what one might have expected, legislative differentiation has not mirrored the dramatic increase in treaty-based differentiation that we have seen since the 1990s. Nor has the highly visible primary-law differentiation turned out to be just the ‘tip of the iceberg’ of a much larger ‘problem’ of legal differentiation in day-to-day rule-making. Apart from its normal and stable function as an instrument of moderate legal flexibility in a union of heterogeneous member states, legislative differentiation appears to have been largely a function of major developments in treaty-based European integration. In line with treaty differentiation, legislative differentiation has acted as a ‘shock absorber’ for old and new member states in the context of enlargement, providing initial flexibility but resulting in medium-term convergence. Moreover, it has mirrored the rise in treaty opt-outs caused by the expansion of European integration into contested areas of core state powers.

Notes

1. The remainder of this section is based on Schimmelfennig and Winzen (2014).
2. Student research assistants received intensive coder training and retraining after initial inter-coder reliability tests. An independent coder checked our selection of legal acts against our selection criteria and our final dataset for inconsistencies.
3. Figure A3 in the Appendix shows a comparison of primary and secondary-law differentiation per country.
4. For the coding scheme, see Table A2 in the Appendix.
5. Genschel and Jachtenfuchs (2014) favor a wider definition of core state powers rooted in the historical competences of the nation-state.

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Appendix

Table A1. Total number of new acts and rules containing actual and potential differentiations, total number of member states' differentiations, 1958–2012.

Level of measurement	N (observations in the data set: new acts or rules)	AD (new acts or rules containing an actual differentiation)	PD (new acts or rules containing a potential differentiation)
(Differentiated) legal acts	4456	752 (16.9%)	765 (17.1%)
(Differentiated) legal rules	58439	2052 (3.5%)	1948 (3.3%)
Member states' differentiated acts	–	2102	13274
Member states' differentiated rules	–	3870	36489

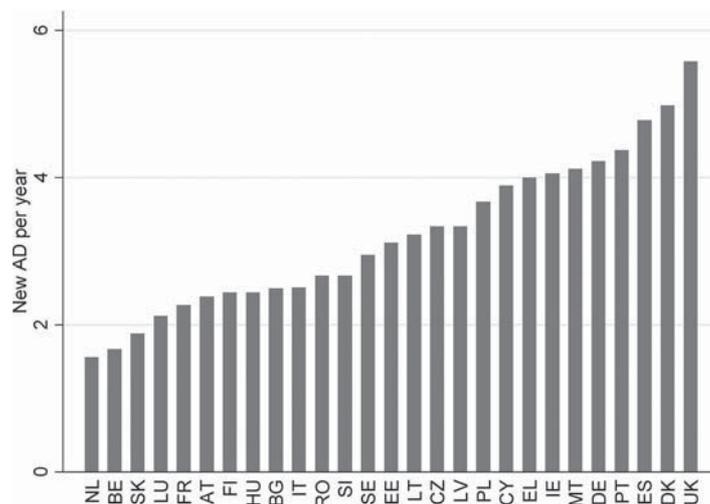


Figure A1. Country average of new actual differentiations, 1958–2012.

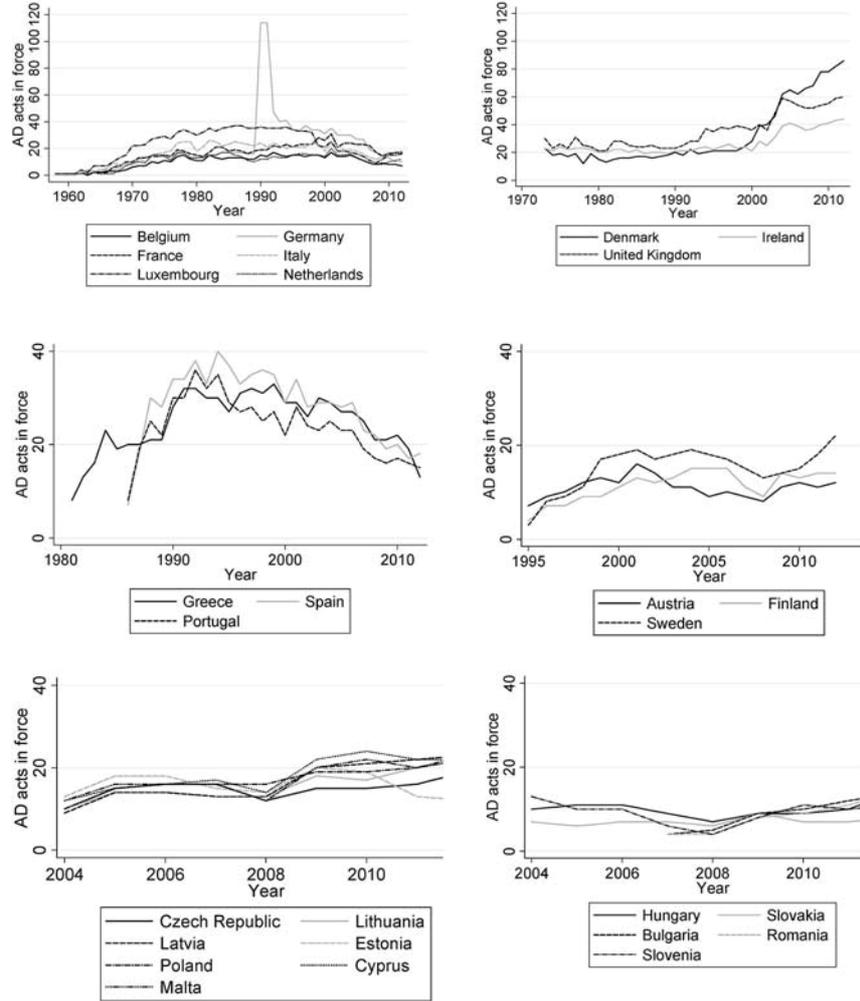


Figure A2. Number of actual differentiations in force 1958–2012.

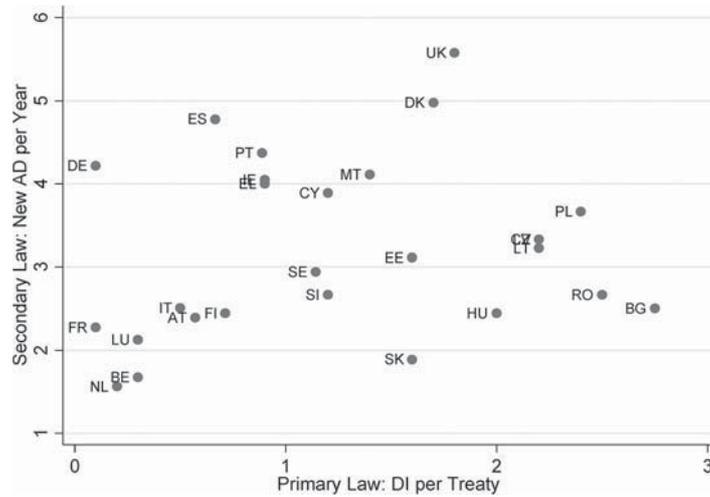


Figure A3. Relationship primary–secondary law differentiation by country, new AD per year/treaty.

Figure A3 compares country patterns in primary-law and secondary-law differentiation. It correlates each member state's average new actual differentiations per year (see Figure A1) with their average actual differentiations per new treaty. The data are taken from the EUDIFF1 data set (Schimmelfennig and Winzen 2014). Figure A3 confirms the pattern of differentiated integration by accession cohorts. By contrast, the correlation between primary-law and secondary-law differentiation is not particularly strong ($r = 0.179$). The original member states (with the familiar German exception) cluster at the low end of differentiation, and the EFTA cohort occupies an intermediate position. The Southern and Northern cohorts deviate, however, by a relatively high amount of secondary-law differentiation, whereas the Eastern cohort has a relatively high number of primary-law differentiations.

Table A2. Policy domains, policy areas and issue areas in the dataset.

Policy domain	Policy area	Issue area
Market N: 216980 DI: 3808	Market N: 216980 DI: 3808	Free movement of workers, goods, services, capital Freedom of establishment Competition Taxation Economic policy Industry Tourism Research and technology Agriculture
Agriculture N: 233301 DI: 5634	Agriculture	
Regulation N: 211662 DI: 2218	Health & consumer protection N: 48489, DI: 602 Social policy N: 22288, DI: 212 Environment & energy N: 49290, DI: 559 Transport N: 91595, DI: 845	Consumer protection Public health Social policy Employment policy Economic and social cohesion Environment Energy EURATOM Treaty Transport Trans-European networks
Core state powers N: 50659 DI: 1327	Foreign policy N: 11540, DI: 4 Justice & interior N: 32457, DI: 940 Monetary policy N: 6662, DI: 383	Common foreign and security policy Development co-operation Justice policies Internal security Monetary policy
Institutions N: 7008 DI: 201	Institutions N: 7008 DI: 201	Principles Institutional provisions Financial provisions General and final provisions Protocol European Investment Bank Protocol privileges and immunities Overseas territories

Notes: N: total observations in the data set. One observation is constituted by a year, a member state and a legal act.

DI: the number of observations in which a country has a differentiation.