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Differentiation and Self-determination in European Integration

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SOVEREIGNTY & SELF-DETERMINATION



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Abstract

Differentiated integration is a core feature of European integration. It allows the EU to manage heterogeneity while avoiding integration deadlock. Differentiated integration follows two basic logics. Instrumental differentiation is a pragmatic, short-term tool to overcome distributional conflicts and efficiency concerns. By contrast, constitutional differentiation accommodates persistent diversity among its member states regarding the desired level and scope of European integration. It reflects a postfunctional logic of concerns about self-determination, affects predominantly the integration of core state powers, and gives rise to a durable (but permeable) core-periphery structure in European integration. Differentiated integration is a largely unintended, still not fully recognized but highly beneficial constitutional principle of European integration. It has been a facilitator of integration and a fundamental institution of a “demoi-cratic” union. Yet it only accommodates territorially structured heterogeneity, and it has not established itself to as a strategy to support the self-determination of sub-state demoi in European integration.

Keywords: Core Europe, differentiation, European Union, European integration, heterogeneity, multi-speed Europe, self-determination

Differentiation and self-determination in European integration

Introduction

European integration has fundamentally transformed the relevance of national borders, the exercise of sovereignty, and the notion of self-determination in Europe. In the internal market with its four freedoms of movement for goods, services, labour, and capital, national economic borders have lost much of their significance. Even more strikingly, the states of the Schengen Area have largely relinquished control over their internal borders in the interest of the free movement of persons. Whereas the member states retain constitutional sovereignty vis-à-vis the European Union, which includes the right to veto treaty changes and the right to exit, the exercise of sovereignty is often delegated to supranational organizations like the Commission in commercial and competition policy or the European Central Bank in monetary policy. Alternatively, it is pooled, i.e., jointly exercised by the member state governments on the Council, in matters of Union competence. As a result, the meaning of self-determination is changing. There is scant evidence that a national “self” is being replaced by a European “self” with a European “self” but European integration means that the self-determination of any national or regional community is embedded in a larger European community. The Treaty on European Union (TEU) respects the national identity and integrity of its member states but also calls on them to act in “sincere cooperation” and create an “ever closer union.” In that sense, European integration has resulted in what John Gerard Ruggie has termed a “multiperspectival polity” (1993).

At the same time, the “de-bordering” and sovereignty-sharing process of European integration has always been hotly contested. European integration brings together governments, parties, and peoples with highly divergent preferences on how low national borders ought to be and how much sovereignty and self-determination should remain exclusively with the nation states. Governments constantly renegotiate the borderlines in intergovernmental treaty conferences and in the policy-making process of the European Union. The high consensus requirements and veto opportunities in these negotiations force the EU to accommodate the diversity of preferences. A prominent instrument for managing diversity in the integration process is differentiated integration. It overcomes the stark choice between uniform integration and no integration at all and enables states to participate in European integration while asserting their sovereignty and self-determination through “opt-outs.”

Consequently, European integration has not only removed or lowered national borders but also created new ones at the European level. Far from establishing a uniform EU in which all member states—and member states only—participate equally in all policy areas, it has resulted in a “system of differentiated integration” (Leuffen et al. 2013; Schimmelfennig et al. 2015). Its members and borders vary across policy areas—sometimes excluding member states (as in the Eurozone), sometimes including non-member states (as in the European Economic Area), and sometimes excluding member states and including non-member states (as in Schengen).

My contribution explores the link between sovereignty, self-determination, and differentiated integration in the EU. I distinguish between two logics of differentiated integration: instrumental and constitutional. Whereas instrumental differentiation is a pragmatic, short-term tool to overcome integration conflicts predominantly in the context of enlargement and with issues of market regulation, the EU has used constitutional differentiation to accommodate persistent diversity among its member states regarding the desired level and scope of European integration. In relation to the general theme of the book, I argue that these differentiations reflect a post-functional logic of concerns about sovereignty and self-determination. Constitutional differentiation originates in treaty revisions, mainly affects the core powers of state, is utilized by member states with comparatively strong national identities, and gives rise to a durable core-periphery structure in European integration.

Why differentiated integration?

The concept

To define differentiated integration, it is easiest to start with its opposite: uniform integration. In the EU context, uniform integration means that the rules of the EU are equally valid for all member states (and member states only) resulting in a homogeneous regulatory and organizational border for the EU. Uniform integration can still be considered the official model and the formal norm of the EU; differentiated integration is not mentioned among its constitutive principles in the Treaties (Art. 5 TEU). Differentiated integration, on the other hand, refers to a situation in which EU legal rules are not equally valid for all member states.

The main differentiations are codified in the EU Treaties. Accession treaties contain the terms of entry for new member states. Whereas new member states are in principle obliged to adopt the entire *acquis communautaire*, they may be exempted or excluded

from some rights or obligations for a given period. The relevant treaties are, first and foremost, the Treaties of Rome, the TEU and their various revisions, as well as several treaties that were eventually incorporated into the main treaties such as the Schengen Agreement and the Prüm Convention. In other cases, governments intend to incorporate them at a later stage like the Treaty on the European Stability Mechanism or the intergovernmental agreement on the banking resolution fund.

Heterogeneity and differentiation

The literature on differentiated integration is based on an apparently universally accepted assumption that differentiated integration is an institutional design or instrument responding to the increasing heterogeneity of member states (e.g., Dyson and Sepos 2010, 5-6, 14-15; Majone 2009, 221; Stubb 1997; Warleigh 2002). The increasing heterogeneity has been a consequence of the widening and deepening of European integration. Heterogeneity makes the EU both more diverse and more divisive.

As the EU expands to include additional countries, it is likely to have an increasingly diverse membership with heterogeneous preferences and capacities, including member states that are less willing or able to integrate. As it expands its policy scope, it is more and more likely to include value-laden, coercive, or redistributive policies that provoke more intense and emotional conflict than its initial focus on the market and regulatory policies. Finally, as European integration deepens, it triggers concerns about the loss of national sovereignty and identity.

Because both treaty revisions and accession treaties require unanimous intergovernmental agreement and domestic approval, heterogeneity threatens the EU with deadlocked negotiations and ratification failure. Governments with different positions on what the EU should do and how far integration should go find it difficult to agree on a common course. The same is true for member states with different levels of socio-economic development and policy traditions. Governments that are unequally affected by international interdependence will also run into problems devising a common policy that serves them all. Finally, if state capacity varies strongly, the more capable member states will be reluctant to cooperate with weak-capacity states that might not be able to contribute effectively to a common policy and ride on the backs of high-capacity countries' efforts. By expanding the range of possible integration outcomes beyond uniform integration and the status quo, differentiated integration offers a way out of stalemates by allowing member states to cooperate at different levels of integration that fit their preferences and capacities.

Yet differentiated integration does not follow a unified logic. Whereas member states pursue a functional logic of “instrumental differentiation” in the context of widening and market integration, differentiation integration is driven by a post-functional logic of “constitutional differentiation” in the context of deepening and in the domain of core state powers (Schimmelfennig and Winzen 2014; Winzen and Schimmelfennig 2016).

Instrumental differentiation

Instrumental differentiation typically results from accession negotiations between the EU and candidates for membership. The Union requires candidates to adopt the entire body of EU rules, the *acquis communautaire*, and it normally expects them to follow these rules from the first day of membership. The EU and the candidates may agree, however, on transitional arrangements. They determine a period of time during which particular rules do not apply: the new member states either do not enjoy certain rights (such as free movement of labour) or they are exempted from certain obligations (such as the implementation of environmental standards).

Transitional arrangements are used to overcome impasse in accession negotiations deriving from conflict about the distribution of gains and losses from new members (Plümper and Schneider 2007; Schneider 2009). Old member states, or powerful interest groups in these states, fear economic and financial losses. Disadvantages may result from market integration with the new member states (e.g., resulting from opening up labour markets), the redistribution of EU funds (e.g., in agriculture or regional policy), or weak implementation capacity (e.g., by joining the Schengen Area before effective border controls are in place). Aspiring members are concerned about pressures on domestic producers resulting from opening their markets and about losing competitiveness by having to implement costly regulatory rules.

To the extent that the candidate states are in an inferior bargaining position, i.e., have no credible alternatives to membership while old member states can afford to reject them, senior members can credibly threaten to veto enlargement unless the new members agree to forego those rights and entitlements that cause net losses for the old members. This bargaining situation is constrained in two ways. First, the old member states cannot discriminate against the new member states for an indefinite amount of time since that would violate fundamental principles of the EU as a legal order. Second, the new member states’ costs of discrimination cannot exceed their benefits of membership, otherwise the candidates would forego joining the EU.

The old member states have always granted new member states temporary exemptions. Their purpose has been to facilitate adaptation to market pressures and regulatory obligations, to

phase out traditional rules and market relations (with former colonies or the Commonwealth in the UK's case), and to forestall popular fears and apprehension (e.g., about foreigners buying up land and holiday homes on a massive scale).

Differentiation originating from enlargement follows an instrumental logic in the sense that it reflects efficiency and distributional concerns. This constellation has several implications for the pattern of differentiation we should observe (Schimmelfennig and Winzen 2014; Winzen and Schimmelfennig 2016). Differentiation originating from enlargement is likely to be temporary and to cluster in market-related and (re)distributive policy areas, and it will probably affect low-capacity member states.

Constitutional differentiation

Constitutional differentiation is the outcome of intergovernmental negotiations on treaty revisions that strengthen the supranational policy competences of the EU. These negotiations may reveal heterogeneous preferences regarding the scope of policy competences the EU should have or the adequate level of supranational integration. Some member states and societies have principled objections to transferring powers to the EU for fear of hollowing out national sovereignty. These objections make it harder to reach intergovernmental agreement and they are prone to triggering popular opposition to integration, which ties the hands of government in the negotiation process or causes domestic ratification to fail. The failed referendums on Denmark's or Sweden's adoption of the euro are cases in point. The likelihood that such principled sovereignty concerns arise varies across policies and member states.

As Stanley Hoffmann (1966) pointed out, "integration in areas of high politics" should yield higher autonomy costs compared with "low politics" integration. Taking Hoffmann's distinction as a point of departure, Genschel and Jachtenfuchs (2014: 10) define "core state powers" (such as a state's army, police, and justice system, currency, or public administration) as those functions and policies that have particularly strong "institutional significance for state building" and are thus closely linked to sovereignty.

Sovereignty concerns are not liable to arise in all member states but in those that tend towards strong national identities. Earlier research has shown that exclusive national identities reduce support for European integration (Carey 2002; Hooghe and Marks 2005). Hooghe and Marks (2009, 13) argue that exclusive national identities are likely to be activated if the scope and depth of integration increase perceptibly. Moreover, "Eurosceptic parties on the right rally opposition by stressing the defence of national sovereignty and identity considerations" (De Vries and Edwards 2009, 6). As a result,

the domestic ratification of treaty revisions is at risk. Governments of member states with strong national identities either seek opt-outs from deepening during the negotiations or are granted them after a failed referendum. Where referendums are not possible, governments still risk losing electoral popularity if they ignore nationalist sentiment. A strong national identity increases a country's opposition to, and demand for differentiation from, treaty revisions, albeit only in the area of core state powers where principled opposition to integration is relevant.

Opponents of further deepening are in a particularly strong bargaining position during negotiations on treaty revisions. They defend the status quo and can block treaty revisions that require unanimous agreement. This leaves member states who want to move beyond the existing conditions with two options: they can either offer the status quo states an opt-out from the deepening provisions of the treaty revision or they can conclude an intergovernmental treaty outside the European treaty framework. We have seen examples of both in the history of EU treaty-making. The British and Danish opt-outs from monetary union in the Treaty of Maastricht are the most prominent examples of the first option and the 1985 Schengen Agreement, which was only incorporated into the main treaties in Amsterdam in 1997, is the prototypical case of differentiated integration via separate treaty-making. Both cases lead to differentiated integration, in which a group of member states is exempted from areas of further deepening.

Differentiation originating from treaty revisions primarily follows a constitutional logic in the sense that it reflects concerns about identity, sovereignty, and the nature and powers of the EU. Constitutional differentiation is likely to follow a "post-functionalist" scenario in which identity concerns play a prominent role (Hooghe and Marks 2009), whereas instrumental differentiation adheres to the "functionalist" scenario of efficiency-based integration. This constellation has several implications for the pattern of differentiation we should observe (Schimmelfennig and Winzen 2014; Winzen and Schimmelfennig 2016). Differentiation originating from treaty revisions is more likely to be permanent than differentiation originating from enlargement, it is likely to cluster in the domain of core state powers, it is likely to affect market-related and (re)distributive policy areas, and it tends to be more prominent in countries with strong Eurosceptic populations or governments.

In the following sections, I will explore these conjectures empirically drawing on the EUDIFF1 dataset of treaty-based differentiations in the EU. ¹A "differentiation" is

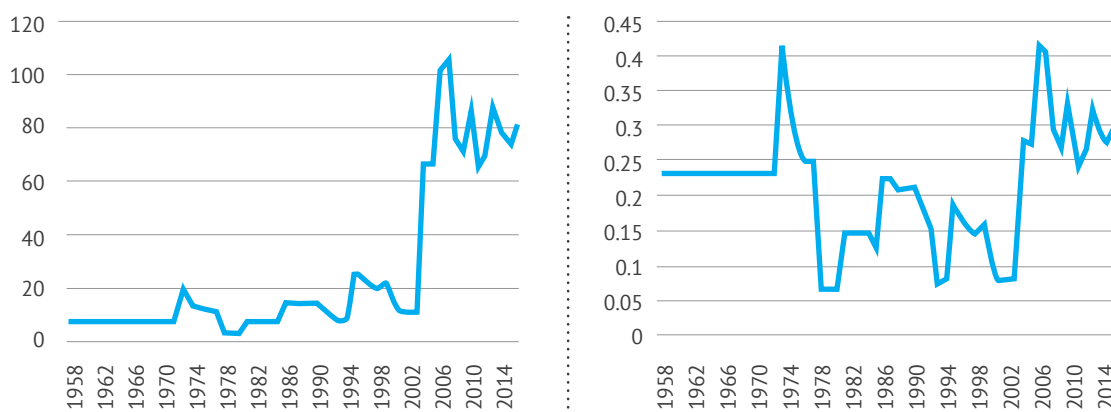
¹ The project was jointly funded by the German Research Foundation (DFG) and the Swiss National Science Foundation (SNF) and codirected by Katharina Holzinger (University of Konstanz) and myself. For a description of the dataset, see Schimmelfennig and Winzen (2014). For an analysis of the data, see also Winzen and Schimmelfennig (2016). All figures in this paper are based on the EUDIFF1 dataset.

constituted by the legal exemption of a member state from an article in a treaty and lasts as long as it is valid uninterruptedly. Simultaneous exemptions of several member states from the same article count as multiple differentiations; so do simultaneous exemptions of one member state from several articles. Differentiations that belong to the same policy area, affect the same country, and start in the same year, however, are counted as a single differentiation (Schimmelfennig and Winzen 2014). Based on this conceptualization, I identify 229 differentiations in EU treaties between 1952 and 2016.

Developments and patterns of differentiated integration in the EU

Differentiated integration over time

Figure 1 shows the number of differentiations active in each year, first in absolute numbers, then weighted by “differentiation opportunities.” The second diagram takes into account that each new member state and each new integrated policy creates new opportunities for differentiation. Both panels suggest that the enlargement rounds of the EU have been the main driver of differentiations in the EU. We see temporary peaks starting in 1973 (northern enlargement), and then in 1981 (accession of Greece), 1986 (accession of Portugal and Spain), 1995 (EFTA enlargement), and 2004 and 2007 (eastern enlargement). Relative to the number of integrated policies and member states, the northern enlargement was as disruptive for uniform integration as the eastern enlargement. However, the northern enlargement’s effect was much more short-lived. In addition, various extensions of the treaty framework (the Prüm Treaty in 2007 and the consolidation treaties of the Eurozone between 2012 and 2016) have increased the number of differentiations. Weighted by the expansion of the EU’s policy scope and membership, differentiated integration today is not dramatically higher than in the early years of European integration; it is, however, at a different level than during the 1980s and 1990s.

Figure 1: *The development of differentiated integration in the EU*

Note: Left panel: number of differentiations valid in each year; right panel: number of differentiations valid in each year divided by differentiation opportunities (number of member states minus one multiplied by the number of integrated policy areas).

Duration and termination of differentiation: multi-speed Europe

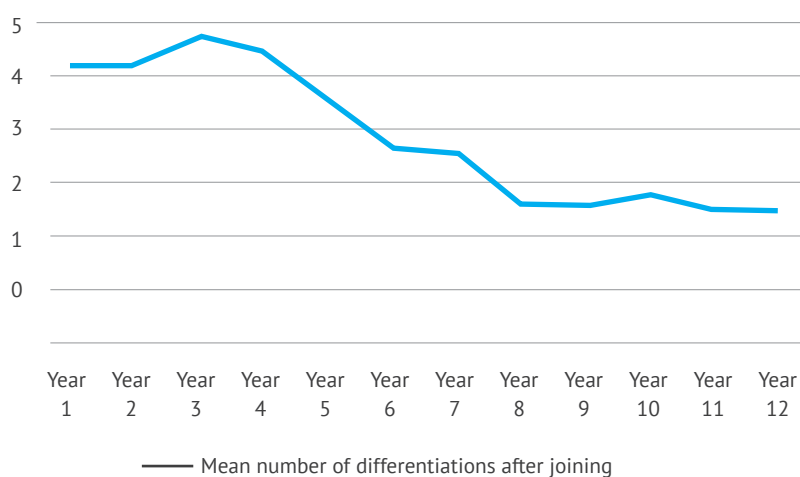
The strong fluctuations in the number of differentiations active in each given year already suggest that most are temporary. Of the 229 in our dataset, 147 or two-thirds had expired before 2016. We can assume that many of the differentiations active in 2016 will expire at some point in the future, too.

The mean duration of differentiations is six years and nine months. On average, therefore, differentiations expire after a moderate time period. Only 24 (or roughly 10 percent) of the 229 differentiations have lasted longer than 12 years (i.e., more than one standard deviation above the mean). Of the 82 differentiations still ongoing in 2016, only 17 have lasted more than 12 years. These differentiations are the most likely instances of durable differentiations: the Eurozone non-membership of the UK, Denmark, Sweden, the Czech Republic, Hungary, and Poland; the Schengen non-membership of the UK, Ireland, and Cyprus; Denmark's exemption from the common defence policy; minor exemptions from the free movement of capital for Denmark, Estonia, Malta, and Hungary; and exemptions from Justice and Home Affairs for Denmark, the UK, and Ireland. The list suggests that long-lasting differentiation clusters in a small number of member states (above all Denmark, Ireland, and the UK) and policy areas (especially monetary and interior policies).

We observe clear differences in duration and termination between differentiations originating in enlargement and those negotiated in the revision of EU treaties. Member

states have the most differentiations when they join and they decrease over the time of their membership. Figure 2 shows that the average number of differentiations per member state drops from 4.1 in the year of accession to 1.5 after 12 years of membership. As the figure shows, new member states often acquire additional differentiations in their first years but reduce their differentiated integration sharply between years three and eight. The line also suggests that, on average, differentiations that have lasted for more than eight years after accession tend to become long-term or permanent differentiations.

Figure 2: *Differentiated integration of new members*



Note: Mean number of differentiations per year of new members from year one to 12 of EU membership. Only member states with 12 and more years of membership in 2016.

The duration of membership has no visible effect on the number of ongoing differentiations in 2016. Countries joining at the same time may differ considerably with regard to how differentiated their membership currently is. Eastern enlargement countries had between zero and seven ongoing differentiations in 2016 and northern enlargement countries between four and eleven. In addition, we find the same small amount (or even absence) of ongoing differentiations for the original member states, the southern enlargement countries, two of the EFTA enlargement countries, and the most integrated Central and Eastern European countries (the Baltic countries, Slovakia, and Slovenia). Duration of membership appears to be a poor indicator of the extent to which the European integration of member states is differentiated.

Finally, differentiations originating from enlargement are much more likely to expire than differentiations originating from treaty revisions and treaty extensions. All differentiations

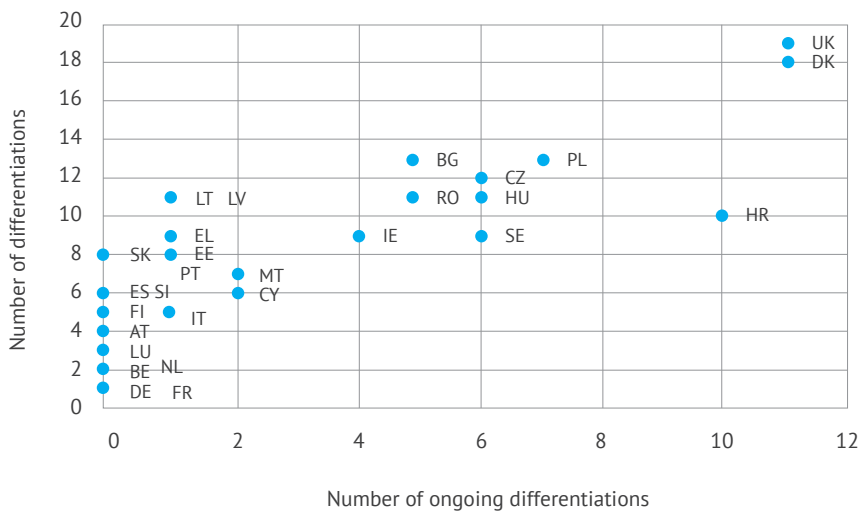
originating in the northern and southern enlargements, 90% of those originating in the 1995 and 2004 enlargements, and 70% of the differentiations of the 2007 accession treaty with Bulgaria and Romania have already terminated. By contrast, only 20% of those negotiated in the Treaties of Maastricht, Amsterdam, and Lisbon have terminated.

Differentiated integration originating in enlargements is generally transitory and short-lived. It is a typical instance of “multi-speed integration,” which means that member states integrate at different paces but eventually reach the same level. Enlargement tends not to create permanent institutional borders and institutional core-periphery relations within the EU: it is instrumental rather than constitutional. By contrast, differentiations agreed in the context of treaty negotiations are durable. Since the early 1990s, they have created long-term and, in all likelihood, permanent institutional borders. As I will show in the next section, these differentiations respond to sovereignty and self-determination considerations and create a core-periphery structure among the member states.

Differentiation by member states: core and periphery

Figure 3 shows both the number of differentiations that each member state has had since the beginning of its membership in the EU and the number of differentiations ongoing in 2016.

Figure 3: *Differentiations by member state*



Note: Number of differentiations for all member states, 1958-2016. Ongoing differentiations at the end of 2016 ($r = .82$).

These numbers suggest that we can broadly distinguish three tiers of membership: a core group of member states with zero to two differentiations; a second tier of member states with four to seven; and a peripheral group with ten to eleven. As we move from the core to the periphery, the size of the groups becomes smaller: 18 states are in the first tier; seven in the second; and three in the third. Because Croatia only joined in 2013, its classification is less clear than that of the other member states: many of its differentiations are likely to end over the coming years. This top-heavy pattern indicates that differentiated integration in the EU is not characterized by a small avant-garde of highly integrated countries but rather by a small group of refusers or laggards. The distribution of member states across the three tiers does not simply reflect the duration of membership. Whereas it is true that all founding members and all countries in the southern enlargement of the 1980s are in the core, northern, EFTA, and eastern enlargement countries are located in different tiers.

The correlation between a country's overall differentiations and ongoing differentiations is strong but the core countries show considerable variation. Whereas the integration of the founding members (and some late joiners such as Austria and Finland) has never been strongly differentiated, other core member states have started from levels of differentiation that were as high as those of the peripheral members. For instance, Latvia and Lithuania have had as many differentiations as the UK and Denmark have currently but they have reduced them to a single differentiation over the course of time. Other successful cases of catching up are Greece, Estonia, and Slovakia. The countries from the other two tiers have also moved closer to the core by ending roughly half of their differentiations over time but they have retained a significant number of long-term differentiations that continue to distinguish them from the core. Second-tier countries in particular do not differ much from many of the core countries with regard to their overall number of differentiations.

In combination with figure 2, figure 3 suggests that new member states sort themselves into the different tiers of membership depending on how many of their initial differentiations end during the first years of membership and how many new differentiations they acquire afterwards. In line with the theoretical expectations, the initial number of differentiations is an indicator of capacity. In each tier, the poorer and less capable countries have had more than the wealthier countries: see the founding members, Austria, and Finland vs. the southern and eastern member states in the core, and Ireland and Sweden vs. the eastern member states in the second tier. By contrast, the number of ongoing differentiations is an indicator of willingness or Euroscepticism. The high number for the UK and Denmark reflects a strong popular opposition to sovereignty transfers to the EU, which is underpinned by an energetic national identity (especially in the UK). The second tier mixes countries which are outside the core because of low

capacity (especially Bulgaria and Romania) and others which are outside the core because of Eurosceptic publics (such as Sweden) or governments (as in the case of Poland, the Czech Republic, and Hungary).

Differentiation by policy: Europe à la carte?

Differentiated integration in the EU is not only structured by tiers of member states but also by significant and durable variation in the level of differentiation across sectors or policy areas. The EUDIFF1 dataset uses a classification of policy issues, policy areas, and policy domains based on the treaties and the headings of treaty sections (table 1). Less than 60 percent (26 out of 44) of the policy issues in table 2 have experienced any differentiation at all. I will therefore move immediately to the more aggregated levels of policy areas and policy domains (table 2).²

Table 1: *EU policies*

Policy domain	Policy area	Policy issue (44)
Market	Free movement Flanking policies	Free movement of workers, goods, services, capital; freedom of establishment Competition, taxation, economic policy, industry, tourism, research and technology
Expenditure	Agriculture Cohesion	Agriculture Economic and social cohesion
Regulation	Consumer protection Social policy Environment & energy Transport	Consumer protection, public health, civil protection Social policy, employment policy Environment, energy, ECSC; EURATOM Transport, Trans-European Networks
Core state powers	Foreign policy Interior policies Monetary policy	Common foreign and security policy, development cooperation Justice and home affairs; visa, asylum, immigration Schengen, Prüm; Charter of Fundamental Rights Monetary policy; ESM Treaty; Fiscal Compact; Single Resolution Fund
Institutions		Principles; Institutional, financial, general, and final provisions; approximation of laws; administrative cooperation Protocol European Investment Bank Protocol Privileges and immunities Overseas territories

Note: Based on Duttler et al. (2017); Winzen and Schimmelfennig (2016).

² The allocation of policy issues to domains and areas is debatable in some cases (especially with regard to market and regulation) but alternative allocations do not make a big difference for the analysis.

In the domain of “institutions,” we find no differentiated integration at all. In expenditure and regulation, more precisely agriculture and social policy, we find few differentiations, all of which have expired. The market and core state powers are the two relevant policy domains for differentiated integration. Almost 40 percent of all differentiations belong to the domain of the market whereas nearly 60 percent refer to core state powers: foreign and defence, interior and justice, and monetary policies. Overall, the difference in how long these differentiations last is not large (7.25 and 6.1 years) but whereas only 11 percent of market differentiations are still ongoing more than half of the differentiations in the domain of core state powers were in effect in 2016. Put differently, 72 of the 82 differentiations ongoing in 2016 (or 88 percent) are in policies in core state powers. Although all policy areas of the core state power domain differ significantly from the market areas, the distinction is strongest for monetary policy, whereas interior policies are in between monetary policy and market policies with regard to the share of ongoing differentiations (excluding foreign policy, which only has two differentiations related to the Danish exception).

Differentiated integration is limited to a few policy areas. At the level of treaty rules, institutions, expenditure policies, and regulatory policies apply equally to all member states. In the internal market and its flanking policies, differentiations are typically temporary. By contrast, the European integration of core state powers has resulted in enduring differentiation.

Combining table 2 and figure 3, we see a strong overlap of spatial and sectoral differentiation. Typically, the core countries participate completely in the European integration of

Table 2: Multi-menu integration in the EU

Policy domain	Policy area differentiations	Number of	Average duration differentiations	Share of ongoing
Institutions		0	0	0
Regulation	Social policy	1	6	0
Expenditure	Agriculture	7	10.7	0
Market	Free movement	72	7.8	0.13
	Flanking policies	16	4.6	0.06
	Total	88	7.25	0.11
Core state powers	Foreign policy	2	15.5	1
	Interior policies	72	6.2	0.39
	Monetary policy	59	5.6	0.71
	Total	133	6.1	0.54

core state powers: external, interior, and monetary policies. The only exception is Cyprus, which does not fully participate in Schengen. Eurozone membership is the best predictor of core membership. Only Ireland is (slightly) outside the core because of its extensive exceptions in the area of interior policies, mainly owing to privileging its Common Travel Area with the UK over the Schengen Area. To say it another way, all countries with less than five ongoing differentiations belong to the Eurozone.

Semi-peripheral countries are typically outside the Eurozone but participate fully or largely in the EU's interior policies (again with the exception of Ireland). By contrast, peripheral Denmark and the UK do not have the euro and are exempt from large parts of interior policy integration. In addition, Denmark has an opt-out from defence cooperation. As a Eurozone non-Schengen country, Ireland is the only "odd" country in the EU's stratification of membership.

Discussion

The analysis started with the claim that differentiated integration in the EU followed two different logics. According to the instrumental logic, differentiated integration is a pragmatic tool to facilitate intergovernmental consensus. It helps to alleviate member state concerns about the costs and efficiency of integration by temporarily exempting member states from the rights and obligations of membership. The analysis shows that most differentiated integration in the EU is temporary and short term. It is predominantly used to facilitate EU enlargement through transitional exemptions and exclusions for new member states. New member states with comparatively low levels of wealth and capacity are most affected (Schimmelfennig and Winzen 2014; 2017). This instrumental differentiation is unrelated to issues of sovereignty and self-determination and the institutional borders it creates are transitional.

Differentiated integration also follows a constitutional logic, however. Constitutional differentiation is less frequent but more durable. It predominantly addresses fundamental concerns that several member states have with European integration in domains of core state powers such as monetary policy, interior policies, defence, and foreign policy. Constitutional differentiation accommodates states and societies seeking to protect national sovereignty and self-determination without blocking other member states from moving ahead with integration. Constitutional differentiation has created durable (but permeable) institutional borders between core, semi-peripheral, and peripheral member states depending on how intensely they participate in the integration of core state powers. The main differentiation is between Euro area countries and the rest of the EU, with Schengen Area membership being a secondary differentiation. The stratification

of core and periphery, in particular, is based on willingness rather than capacity. The UK and Denmark would arguably be more capable of participating in the Eurozone and the Area of Freedom, Security, and Justice than many of its members

Conclusions

In principle, the EU faces the same “paradox” of integration as the nation state: the replacement of territorial boundaries within while establishing or maintaining a rigid territorial boundary without. In the EU’s case, however, the tension is less pronounced. That the EU aspires to establishing an “ever closer” union of states and peoples rather than becoming a nation state itself has facilitated experimentation with flexible territorial borders both inside the EU and in its relationship with non-member states. Internal and external differentiated integration allows the EU to adjust the borders of its integrated policies to the international heterogeneity in Europe.

European integration has taken a fundamentally different route than state formation, which consisted in creating unified territorial borders across all policy areas rather than policy-specific borders. As a union of states, the EU fundamentally builds its borders on the frontiers of its member states. It does not remove state borders or the states’ responsibility for protecting them: developments in the migrant crisis of 2015 have demonstrated how important it is for states to retain ultimate sovereignty and operational control over their borders. Yet the EU regulates what states can and should do at their borders. The increasing permeability of state borders reflects the deepening and widening of the European integration process. The differentiated permeability for goods, money, and people results from the gradualism of European integration, the voluntary intergovernmental and international nature of the process, and self-determination interests that vary across states and policies. It is therefore unlikely that differentiated integration is just a transitional stage on the way to a unified and hard EU border.

Integration and differentiation have gone hand in hand in the historical development of the EU. As European integration has expanded into additional policies beyond economic integration, decision making has become more supranational, and as additional European countries have joined the EU, European integration has also become less uniform. Depending on the viewpoint, differentiation has facilitated the expansion of European integration or it has been the price to pay for the rapid and massive growth of the EU.

Differentiated integration has proven a successful instrument for a balanced exercise of sovereignty and self-determination in European integration. On the one hand, it

has allowed member states who would like to preserve a higher degree of sovereignty and self-determination to opt out of further integration and—in the case of Brexit—to exit from the EU altogether. On the other hand, it has made sure that these member states could not exercise their sovereignty to prevent other member states from making sovereign decisions to move ahead with integration. In comparison with a binary membership scheme—where states are either in or out—differentiated integration is likely to better reflect national preferences.

Differentiated integration is a fundamental institution of “demoi-cracy” in the EU (Cheneval and Schimmelfennig 2013; Nicolaidis 2013). If we assume that the EU is a union of demoi rather than the polity of a single demos, it is essential for these demoi to retain the sovereign right to determine their preferred level and scope of integration in line with their national democratic procedures. Differentiated integration is the expected outcome if these preferences diverge among the European demoi.

Differentiated integration has been a facilitator of integration. Under conditions of uniform integration, the EU would presumably not only be smaller but also not have a charter of fundamental rights, a common currency, and free movement of persons across its internal borders. Moreover, differentiated integration has always been combined with “more integration.” So far, member states have never used differentiated integration to reduce the level or scope of their European integration. The UK will be the first country to do so but it will leave the EU altogether. Finally, differentiated integration has been permeable. No member state is institutionally precluded from moving towards the core if it meets the conditions. More often than not, peripheral and semi-peripheral positions are caused by the unwillingness of member states to participate in some integrated policies.

It is therefore likely that differentiated integration will play an important role in various future scenarios for the EU rather than being a distinct scenario (“those who want more do more”) as in the White Paper of the European Commission (2017). “Carrying on” would mean carrying on in a differentiated Europe; “nothing but the single market” would still mean a single market that is larger than the EU and extends to the European Economic Area and partially beyond (e.g., Switzerland). Finally, if the EU seeks to “do much more” or “do less but more efficiently,” experience suggests that some member states—most probably in the east and the north—will pull out.

On the other hand, “differentiated disintegration” can help to accommodate disintegrative tendencies or soften the effects of exits from the EU. For an exiting member state such as the UK, there is a large number of differentiated integration options available, ranging from internal market participation via a customs union to a free trade area,

which have been or are being used by European non-member states, that accommodate different levels of capacity and self-determination and mitigate the costs of an “either-in-or-out” binary choice.

There are, however, limits to what differentiated integration can achieve in pursuit of self-determination. For one, differentiated disintegration within the EU is much more difficult to agree on than differentiated integration. This has to do with the superior bargaining power of the defenders of the status quo. When the EU decides to deepen or widen, they can successfully bargain to opt out, as Denmark and the UK have done on many occasions. Pro-integration member states accept cherry-picking to be able to move ahead with integration. When member states seek to repatriate policies or competencies, however, as in the case of the UK trying to limit free movement of labour, they are in an inferior bargaining position. Pro-integration member states become the defenders of the status quo and reject cherry-picking.

Other limitations result from the nature of differentiated integration as an instrument of national territorial differentiation. Differentiated integration cannot adequately deal with conflicts and cleavages that run through and across the states. The current problems of European integration reflect a transnational cleavage between pro- and anti-integration voters and parties, which has manifested itself in Brexit as well as in recent national elections and divides highly educated, well-off, and urban voters from low-educated, poorer, and rural voters. Differentiated integration provides no method to deal with this social divide.

Treaty-based differentiated integration so far has not been used to accommodate regional self-determination within its member states. Because regional differentiation within member states is territorial, there is no principled reason why differentiated integration in the EU should not be able to handle it. Yet whereas some temporary exemptions have been applied to regions within a country in the EU’s secondary law—most importantly in the context of German reunification in 1990 and a few years thereafter—as well as with regard to territories off the mainland, substate regionalism does not feature in treaty-based differentiated integration.

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