Patterns of differentiated integration in the European Union

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Abstract

Differentiation has become a salient feature of European integration. Yet we currently lack systematic empirical evidence about its origins, duration, and variation across countries and policies. We provide such evidence from a new dataset on differentiation in European Union treaty law. In addition, we argue that two logics of treaty-based differentiation are at work. “Instrumental differentiation” originates in enlargement and is motivated by efficiency and distributional concerns. “Constitutional differentiation” has its origins in treaty revisions and is motivated by concerns about national sovereignty and identity. It is driven by Euro-sceptic member states that are opposed ideologically, or fear popular resistance, to the supranational centralization of core state powers.
1 Introduction

Whereas we can easily draw a map of the member states of the European Union (EU), it is increasingly unreliable in telling us where the rules, rights, and obligations of EU membership really are valid. For some of the most prestigious EU policy projects, the boundaries of organizational and policy membership are incongruent. The euro zone is smaller than the EU, whereas the internal market extends to the European Economic Area. Moreover, the border-free Schengen area excludes some member states yet includes several formal outsiders. The ESM Treaty and the Fiscal Compact have recently produced further differentiation. Progress in European integration – deepening and widening – has gone hand in hand with differentiation. More than 40 per cent of all primary law articles are now differentiated.

Theory and research have not kept pace with this development, however. Although differentiated integration (DI) has received considerable political and scholarly attention, this attention has mainly resulted in an abundance of concepts and policy proposals (such as recently Piris 2012). Some of the literature has attempted to provide an overall characterization of the EU as a differentiated entity: e.g. a “condominio” (Schmitter 1996), a “neo-medieval empire” (Zielonka 2006), or a “system of differentiated integration” (Leuffen et al. 2013). Others have made suggestions for designing and labelling different forms of differentiated integration (for an overview, see Holzinger and Schimmelfennig 2012). Stubb’s (1996) distinction between “multi-speed”, “variable geometry” and “à la carte” differentiation is widely cited.

Empirical work has strongly focused on the intergovernmental negotiations regarding the “closer cooperation” or “enhanced cooperation” clauses (e.g. Philippart and Edwards 1999;
Theory-based accounts have dealt with specific aspects and issues of DI – such as Alkuin Kölliker’s work on the centripetal or centrifugal effects of DI (2006), Christina Schneider’s (2009) bargaining analysis of DI as a result of accession negotiations; and Rebecca Adler-Nissen’s (2009) study of how informal norms and institutional practices have mitigated legal differentiation in EMU and justice and home affairs. Finally, Dyson and Sepos (2010) bring together analyses focusing on various dimensions, geographical regions, and policy areas of the EU. What is missing in the literature, however, is a systematic assessment of differentiated integration based on a comprehensive data basis.

In this paper, we provide a systematic description of differentiated integration in the EU based on a dataset covering the primary law of the EU until 2012. In addition, we argue that there are two types of differentiation in EU treaties, which differ in origin. “Instrumental differentiation” has its origins in the enlargement rounds of the EU (“widening”). It is motivated by efficiency and distributional concerns. Old member states exclude new member states temporarily from policy areas if they are concerned about economic or budget competition from the new member states or about their ability to meet the policy requirements. But they also grant new members temporary exemptions to give them more time to adapt to EU rules and market pressures. Instrumental differentiation is transitional; it has mainly to do with the extension of market freedoms; and it is typical for the relatively poor southern and eastern new members of the EU.

By contrast, “constitutional differentiation” originates from treaty revisions among existing member states, which transfer additional competences to the Union (“deepening”). It is motivated by concerns about national sovereignty and identity. It is driven by comparatively Euro-sceptic countries that are opposed ideologically, or fear popular resistance, to supranational centralization. Constitutional differentiations have a tendency to last for a
long time and even remain in place permanently. They occur mostly in policy areas, which centralize core state powers supranationally and predominantly concern the northern member states: Britain, Denmark, Ireland, and Sweden.

Because the focus of this paper is on the presentation of the dataset and descriptive analysis of the data, we do not provide a rigorous test of theoretical arguments. Yet our analysis of the distribution of DI across countries and policies and of the bivariate relationships between DI, wealth and identity lends initial plausibility to the idea of two logics of differentiation. It also shows that widely used conceptual labels such as “multi-speed integration”, “variable geography”, or “Europe à la carte” capture the patterns of DI only partly and insufficiently.

We proceed as follows. In Section 2, we conceptualize DI, describe its general development, and its variation across countries and policy-areas. Section 3 puts forward our theoretical argument about the logics of differentiation. In Section 4, we analyse the data to substantiate our argument. Section 5 concludes.

2 Differentiated integration in the EU: definition and measurement

2.1 Legal rules and “differential validity”

We follow the most common definition of DI: the differential validity of formal EU rules across countries. In principle, our unit of analysis is the legal rule: a statement in a legally binding and generally applicable act that makes a behavioural prescription towards the addressees of this act. In accordance with the European Court of Justice (ECJ), an act has general application if the rule it contains has an abstract and general (i.e., normative) character (Lenaerts and van Nuffel 2005: 571). The entirety of EU legal rules constitutes the
set of formal obligations associated with EU membership. Each legal rule must normally be assumed to be valid for all member states, representing uniform integration. Yet a legal rule may exempt one or several member states. A rule that exempts at least one member state for at least one year is considered a case of DI.

By this definition, DI does not include non-total harmonisation. Minimum harmonisation, for instance, requires all member states to comply with a certain minimum standard but allows them to adopt more stringent standards. This is likely to result in differences across member states since some will adopt stricter domestic rules than others. It does not, however, result in the differential validity of EU legal rules because the positively stated minimum standards apply to all. By the same token, our definition does not include de facto differentiation caused by unequal member state compliance with EU rules (Andersen and Sitter 2006) or informal forms of cooperation among groups of member states (e.g. Dyson and Marcussen 2010).

Whereas it is theoretically ideal to analyse the single legal rule, it is difficult in practice, as rules are not easy to identify and delimit. Nor are they necessarily congruent with formal subdivisions in legal texts: treaty articles or paragraphs differ regarding the number of rules they contain. We nevertheless propose to focus on articles of legally binding sections of EU treaties because they can be identified easily. It is also a reasonable assumption that most treaty articles deal with one substantive issue and, thus, come at least close to the concept of a single legal rule.

We are interested in the duration and country coverage of differentiation (cf. Tuytschaever 1999). As to duration, any article may be differentially valid across countries for a given time. For instance, the EU15 member states are allowed to restrict access to their labour markets
for nationals of the new member states only for up to seven years. While differentiations may legally be defined as temporary or permanent, “permanent” exemptions may be cancelled and “temporary” exemptions may last for a very long period in practice. We analyse how long differentiation lasts in fact. Country coverage refers to the set of countries exempted by a differentiated article.

There is a further distinction between potential and actual differentiation. For instance, the transitional provisions on the free movement of workers from the 2004 accession countries introduced only potential differentiation into the free movement rules of the EU. Each old member state then had to decide whether to turn potential into actual differentiation. Potential differentiations are, however, rare in primary law. Moreover, actual differentiation is the politically relevant form and reflects the “real” extent of formal differentiation in European integration. For these reasons, we limit the analysis to the duration and coverage of actual differentiation.

Treaty articles are found in all legally binding primary law instruments. These are, first and foremost, the Treaty establishing the European Economic Community (TEEC) and the Treaty on European Union (TEU), their various revisions such as the Single European Act, and the enlargement treaties.

We focus on the legally binding parts of EU treaties: the main parts, protocols and annexes. This excludes declarations. Additionally, we exclude protocols dealing with EU overseas territories and international agreements concluded by the EU on behalf of its member states. Moreover, DI is not necessarily codified in European treaties. DI can either result from differentiations introduced into EU law or from EU-related treaties concluded by a subset of EU members outside the EU framework as in the cases of the Schengen
Agreement, the Prüm Convention, and the ESM Treaty. We included such separate intergovernmental treaties into the DI dataset if at least one of the three following conditions were fulfilled: a treaty was originally proposed as a European treaty but blocked by some of the member states (Schengen, Fiscal Compact); a treaty is explicitly designed to be incorporated into EC or EU law at a later point in time (Prüm, Fiscal Compact); a treaty is anchored in EU law and defines a formal role for EU institutions (ESM Treaty, Fiscal Compact). Disregarding this alternative legal route to DI would leave out an important source of differentiation and bias the analysis in favour of uniformity. 

Finally, the source of differentiation is not necessarily to be found in the text of the differentiated rule. The British opt-out from the EMU, for instance, originates in a “Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland” attached to the Maastricht Treaty. Moreover, the accession treaties also contain provisions that introduce transitory differentiation into existing treaty articles for new and old member states.

Whereas our raw data has the article-year as its unit of observation, we aggregated the data to “differentiations” for most of the analyses in this paper in order to capture the origins and the duration of individual differentiation decisions and agreements. A “differentiation” is constituted by the legal exemption of a member state from a treaty article and lasts as long as this exemption is valid uninterruptedly. Simultaneous exemptions of several member states from the same treaty article count as multiple differentiations; so do simultaneous exemptions of one member state from several articles. Each differentiation has a starting point and (possibly) an end point. 

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In addition, we count differentiations that belong to the same policy area, affect the same country and start in the same year as a single differentiation. This further aggregation has two reasons: first, such differentiations usually result from a single decision (e.g. to exclude a country from Schengen or not to participate in EMU) and therefore cannot be treated as independent observations; and, second, we would otherwise implicitly give a higher weight to differentiations in policy-areas covering many articles.

2.2 The rise of differentiated integration

Figure 1 shows how differentiation in the EU’s treaty law has progressed over time by counting the share of differentiated treaty articles. By this measure, differentiation has not been a relevant issue in treaty law until 1992. Roughly one to two per cent of all treaty articles had an actual differentiation. A step change in differentiation has come with the Treaty of Maastricht and the entry into force of the Schengen agreements, bringing the share of differentiated treaty articles to above 30 per cent. Eastern enlargement, the Treaty of Lisbon, and most recently the ESM Treaty have pushed the share of differentiated treaty articles to around 43 per cent at the end of 2012.

Measuring DI at the level of articles is, however, insensitive to the number of countries affected by differentiation. As argued above, it also tends to inflate the extent of DI resulting from a single decision if it affects many treaty articles at the same time, as in the case of the
Schengen rules. Figure 2 therefore displays the development of independent differentiations over time as a share of differentiation opportunities. The number of annual differentiation opportunities is the product of the number of integrated policy areas (ranging from 18 at the beginning to currently 39) and the number of member states. For each policy area, there are as many differentiation opportunities as there are member states.\(^7\)

<Figure 2 about here>

This measure puts both the extent of differentiation in European integration and its growth over time in perspective. First, even at its peak in 2006, only 12 per cent of all differentiation opportunities were actually used. The share is currently at just seven per cent. Second, this share is lower than in the first two years after the 1973 enlargement of the EC. Generally, DI has increased with each enlargement round but only temporarily so. The Treaty of Maastricht and Schengen have also led to a rise of DI according to this measure, but in contrast to the article-based count, the rise has been neither extraordinary nor permanent, as both the Schengen and the Euro zones have expanded over time. Currently, the EU is still recovering from the “differentiation shock” of Eastern enlargement – around half of the impact is already absorbed. At the same time, however, the Prüm Convention, the Treaty of Lisbon, and the ESM Treaty have contributed to further differentiation among the old member states. Figure 2 shows that growth in DI is neither linear nor irreversible. At the end of each enlargement-induced spike, however, the level of differentiation has remained higher than before. Overall, we may therefore still conclude that DI is on the rise.
In addition, growth in differentiation is accompanied by considerable variation across member countries and policies. For the member states, the count of differentiations is “0” for Germany and “1” for all other original member states except Italy. Because we assign differentiations caused by enlargement to the new member states, even though some of them have been initiated by the old member states, it is probably more instructive to focus on differentiations originating from treaty revisions. In this respect, Austria and Spain are at the top of the list with no differentiations at all. At the other extreme, Denmark and the UK have had 17 differentiations since joining the Community in 1973, 12 (Denmark) and 13 (UK) of which have resulted from treaty revisions.

As for policy areas, more than 90 per cent of all differentiations belong to three policy fields. 40 per cent relate to the internal market: the four market freedoms, competition, and taxation policy. Another 32 per cent stems from the Schengen regime of free travel; almost 20 per cent result from Economic and Monetary Union. Other policy areas are not differentiated at all: rules relating to institutions, decisions, and financial provisions; and the EU’s regulatory and expenditure policies such as transport, research and technology, public health, and consumer protection. Only agriculture has a few differentiations. We need to bear in mind, however, that our findings are only based on treaty law. We may still find significant differentiation in all of these policy areas in the EU’s secondary law.

These descriptive results show that differentiated integration is itself differentiated – by time, countries, and policy areas. First, differentiations vary considerably in time: from a few months only to more than 20 years. More than one third of all actual differentiations agreed after 1958 were still valid at the end of 2012; one in six of which have been in force for 14 years and longer. DI has thus clearly moved beyond “multi-speed integration”, in which all member states eventually end up at uniform integration. Nor can it be described adequately
as either “variable geometry” (variation across countries) or “Europe à la carte” (variation across policies; Stubb 1996). Rather, differentiated integration in the EU varies significantly across both countries and policies. In the following sections, we propose an explanation for this pattern and probe its plausibility on the basis of our data.

3 Logics of differentiation in European integration

There is a conventional story about DI that can be found throughout the literature on the subject (e.g. Dyson and Sepos 2010: 5-6; Majone 2009: 221). According to this story, DI is an institutional response to the increasing diversity and divisiveness of the EU, which has resulted from successive rounds of enlargement (“widening”) as well as the “deepening” of European integration. The more countries the EU integrates, the more likely it is to have a membership with heterogeneous preferences and capabilities. The more policy sectors it integrates, the more likely they will include value-laden or redistributive policies that provoke intense conflict and are difficult to manage and settle. Finally, the more supranationally centralized European integration becomes, the more it reduces state autonomy and the more likely it provokes nationalist backlash. Increased heterogeneity and conflict, in turn, threaten to create deadlock in an organization based to a large extent on intergovernmental consensus – in particular in the case of intergovernmental treaty negotiations that require unanimous agreement. DI then helps to overcome deadlock by allowing the member states to cooperate at different levels of integration that fit their preferences and capabilities.
We build on and elaborate this conventional account by suggesting that two distinct logics or processes of differentiation are at work among the member states of the EU. We label them “instrumental differentiation” and “constitutional differentiation”. The two logics originate in different problems and contexts, involve different constellations of countries and policies, and generate different dynamics. We claim that, for an adequate understanding of the phenomenon of DI, the two logics need to be distinguished analytically.

Our argument starts from a broadly intergovernmentalist framework, which assumes that integration outcomes, including differentiation, result from the constellation of member state preferences and intergovernmental bargaining (Moravcsik 1998). Accordingly, instrumental and constitutional differentiation are caused by different preference constellations and bargaining settings in intergovernmental negotiations.

3.1 Instrumental differentiation

Instrumental differentiation typically results from accession negotiations between the EU and candidates for membership. The EU requires candidates for membership to adopt the entire body of EU rules, the *acquis communautaire*, and it normally expects them to follow these rules from day 1 of membership. The EU and the candidates may, however, agree 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 of membership (such as free movement of labour), or they are exempted from certain obligations of membership (such as the implementation of environmental standards).

Transitional arrangements are used as an instrument to overcome deadlock in accession negotiations deriving from conflict about the distribution of gains and losses from the
accession of new member states (Plümper and Schneider 2007; Schneider 2009). Old member states, or powerful interest groups in these states, fear economic and financial losses as a result of market integration with the new member states (e.g. resulting from the opening up of labour markets), the redistribution of EU funds (e.g. in agriculture or regional policy), or weak implementation capacity (e.g. by joining the Schengen regime before effective border controls are in place). New member states are concerned in turn about pressures on domestic producers resulting from the opening up of their markets and about losing competitiveness due to the obligation of implementing 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, old member states can credibly threaten to veto enlargement unless the new member states 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 the new member states for an indefinite amount of time, as this 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 reject joining the EU. As a corollary, candidates that are highly and asymmetrically dependent on the EU are also likely to accept a high number of instrumental differentiations.

In addition, the old member states have always granted new member states temporary exemptions from the obligations of membership to facilitate their adaptation to market pressures and regulatory obligations (such as in the area of environmental standards), to phase out traditional rules and market relations (with former colonies or the Commonwealth in the UK case) and to forestall popular fears and concerns (e.g. about foreigners buying land and holiday homes on a massive scale). For two reasons, then, poorer new member states
are prone to having a higher number of differentiations resulting from accession: they are more dependent on the EU and less competitive than wealthier new member states; the EU is therefore both more capable of discriminating against them and more willing to accommodate them by granting exemptions.

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.

1) **Differentiation originating from enlargement is likely to be temporary and short-term.**

The new member states have an interest in ending discrimination as soon as possible, and the old member states have an interest in limiting exemptions that benefit the new member states. Moreover, accession-based exemptions and discriminations are generally declared and justified as transitory arrangements softening the impact of enlargement and buying time for adaptation.

2) **Differentiation originating from enlargement is likely to cluster in market-related and (re)distributive policy areas or policy areas involving substantive economic, financial, or security risks.** This follows from the assumption that old member states use transitional arrangements to prevent or postpone redistribution and such risks. New member states try to avoid losses from market opening and market regulation.

3) **Differentiation originating from enlargement is likely to be more prominent in enlargement rounds with poorer candidates and to affect comparatively poor new member states more strongly.** Wealthy candidates are less likely to undermine the efficiency of existing policies and to qualify for redistributive schemes than poor candidates. In addition, wealthy candidates are less dependent on the EU and therefore more able to reject discriminatory membership than poor candidates, and they are less
likely to demand exemptions because their economies are strong enough to withstand increased market pressure. In concrete terms, we expect to see more instrumental differentiation in southern and eastern enlargement than in the two northern enlargement rounds of 1973 and 1995.

3.2 Constitutional differentiation

Constitutional differentiation is the outcome of intergovernmental negotiations on treaty revisions that strengthen the supranational policy competences and capacities of the EU. These negotiations may reveal heterogeneous preferences regarding the scope of policy competences the EU should have – should it, for instance, deal at all with defence policy or social policy? – or the adequate level of supranational integration: will states retain national policy-making competences or veto powers? Because treaty revisions require unanimous agreement, such conflict about the distribution of authority across levels of governance may generate deadlock and lead to the failure of further integration. If constitutional conflict occurs, DI provides a way out of deadlock because it allows those countries that object to deepening to opt out from an entire policy or remain at a lower level of integration while the other member states move ahead.

Because the less integration-friendly state is closer to the status quo and a veto player, it wields superior bargaining power and can credibly threaten to block treaty reform. This leaves the avant-garde states with two options if they want to move ahead with integration. They can accommodate the veto player by granting an opt-out, and thus secure agreement within the Community or Union framework – this is the EMU solution. Or they can move out of the EU framework and conclude a separate intergovernmental treaty. This is often the
second-best solution, which the avant-garde group chooses if the opponents remain uncompromising or demand unacceptable side payments. This was the solution in the case of the Schengen regime and, more recently, the Fiscal Compact. Either way, intergovernmental bargaining results in DI.

Such an outcome is likely if the status quo government is heavily committed ideologically and/or constrained domestically and thus unable to negotiate a compromise agreement. This is the case in particular when governments are bound by a negative referendum on a negotiated treaty. Some prominent instances of DI have their origins in such popular votes: for instance, Denmark's and Sweden's non-participation in the euro zone, and Denmark's additional opt-outs from defence policy, and certain aspects of justice and home affairs. In the case of the UK, ideological commitments, backbench opposition, and referendum threats have worked together to produce a high number of opt-outs.

Domestic constraints of this sort are most likely to obtain in countries in which European integration is contested and fringe parties or movements are able to mobilize the population. Mobilization potential is high where exclusive national identities and popular Euro-scepticism are strong. In other words, constitutional differentiation is likely to follow a “post-functionalist” scenario, in which identity concerns play a prominent role (Hooghe and Marks 2008), whereas instrumental differentiation adheres to the “functionalist” scenario of efficiency-based integration.

Differentiation originating from treaty revisions follows predominantly a constitutional logic in the sense that it likely reflects concerns over identity, sovereignty, and the nature and powers of the EU. The constellation of preferences and bargaining power in constitutional differentiation also has several observable implications:
4) **Differentiation originating from treaty revisions is likely to be longer-term or even permanent.** This has to do with the fact that, while opt-outs or separate treaties outside the Community framework may be based on the informal expectation of later re-integration, they do not come with an agreed deadline. More importantly, however, constitutional differentiation often results from stable, identity-based preferences. Whereas in cases of government ideology, the next change in government may terminate the differentiation (see the UK’s opt-out in social policy that ended after the Labour party had won the elections), popular Euroscepticism and national identity patterns are unlikely to change (quickly). Whereas in the case of enlargement, the countries outside the uniform legal framework have a strong interest in ending differentiation, the non-participating governments in the case of deepening either have no such interest or are heavily constrained domestically.

5) **Differentiation originating from treaty revisions is likely to cluster in policies affecting core state powers.** Supranational integration in areas such as taxation, welfare, monetary and fiscal policy, domestic security, political and civil rights, judicial policy, and defence policy affects the sovereignty of the state (or its symbols) more directly than market integration or cooperation in “low politics” areas such as research and environmental protection. It thus produces particularly strong value-based concerns and opposition in the member states of the EU – especially in the most Euro-sceptic ones.

6) **Differentiation originating from treaty revisions is likely to be driven by and focus on Eurosceptic countries.** We assume that Eurosceptic countries are most likely to oppose further encroachment on national sovereignty.

In the remainder of the paper, we present data and descriptive analyses in order to test their observable implications regarding duration, policies, and countries.
4 Patterns of instrumental and constitutional differentiation

According to our argument about the two logics of differentiation, we should be able to observe clearly distinct patterns of differentiation. “Instrumental” and “constitutional” are latent concepts that we do not observe directly. Yet they manifest themselves in distinctive and observable patterns of origins, duration, affected policies, and affected countries. We conduct our analysis on the basis of the origins of differentiations. We expect differentiations that result from an accession treaty or start with accession to follow an instrumental logic: shorter and temporary duration, a focus on the market and distributive policies, and prominence of poorer countries. By contrast, differentiations resulting from treaty revisions should display the features of constitutional differentiation: a higher share of long-term or permanent differentiations, a focus on core state powers, and prominence of Eurosceptic countries. Our analysis is based on the distinct differentiations that have started after 1958 and been in force for at least one year. We count 194 differentiations, 82 of which have been introduced by treaty reform (“deepening”) and 112 by accession (“widening”).

For the analysis of duration, we exclude differentiations that have resulted from the Treaty of Lisbon and the ESM because they have only started recently and would distort the average duration of differentiations originating from treaty revisions. The average duration of the remaining differentiations is six years: 6.4 years for differentiations resulting from deepening and 5.8 years for those having the origin in enlargement. Whereas instrumental differentiation thus seems to be more short-term than constitutional differentiation on average, the difference is not huge. The difference becomes clearer if we take into account
long-term and ongoing differentiations. If we define “long-term” as double the average duration, we find that 10 of the 11 differentiations that have been in force for more than 12 years result from treaty revisions. Ongoing differentiations are those still in force at the end of 2012. This is true for 38 per cent of all differentiations. Whereas deepening accounts for 42 per cent of all differentiations, it has produced 70 per cent of the ongoing differentiations. Thus, reflecting the constitutional logic, deepening is much more likely to produce long-term and unlimited differentiation than widening.

Our second set of expectations refers to the distribution of differentiation across policies. To test this expectation, we aggregate our 39 policy areas from the treaties to 10 larger fields: the market; regulatory policy; agriculture; social policy; Economic and Monetary Union (EMU); the Common Foreign and Security Policy (CFSP); the Area of Freedom, Security, and Justice (AFSJ); Schengen/Prüm; the Charter of Fundamental Rights (CFR); and institutions. Figure 3 shows three bars for each field: the top black bar represents the total number of differentiations in each field; the grey bar those differentiations originating in treaty revisions, and the white bar those originating in accession.

Figure 3 illustrates the fact mentioned above that more than 90 per cent of all differentiations are in the fields of the market, Schengen, and EMU, whereas regulatory policies and institutional provisions do not produce any treaty-based differentiations at all. It further shows that there are, indeed, extreme differences in origins across the policy areas.
In the areas of market and agriculture, differentiation originates almost exclusively from enlargement. In the other policy fields, differentiation originates exclusively (AFSJ, CFR, CFSP, and social policy) or predominantly (Schengen, EMU) from treaty revisions. All of these policy areas can be classified as “high politics” and/or policies relating to the integration of core state powers: internal and external security, monetary policy, and human rights. This variation is in line with the stipulated logics of instrumental and constitutional differentiation. It is surprising, however, that agriculture is the only (re)distributive policy of the EU affected by (enlargement-based) differentiation, and that regulatory policies are not affected at all. Again, this might be a consequence of our exclusive focus on treaty law.

Monetary policy and Schengen are characterized by more mixed origins than the other policy fields. Arguably, both policies blend constitutional and instrumental differentiation logics. They are, on the one hand, about the supranational centralization of core state powers: the power to regulate and control the border and the power to issue legal tender are traditional state monopolies. On the other hand, EMU has strong financial and potentially redistributive implications, as the current debt crisis reveals, and Schengen requires efficient controls of the external EU border. Monetary and border policy differentiation should follow the constitutional logic in the EU’s sovereignty-sensitive and Eurosceptic countries, whereas enlargements should lead to the exclusion of the poorer, southern and eastern member states of the EU for instrumental reasons. We therefore now turn to the variation of differentiation across countries.

Figure 4 shows the distribution of differentiations originating from enlargement and treaty reform respectively across member states. The axes capture each country’s share of all differentiation-years resulting from deepening (vertical axis) and widening (horizontal axis). 100 per cent represent the total number of differentiations multiplied by their duration. The
more countries are located to the right of the diagram, the more they are affected by instrumental, enlargement-based differentiation; and the closer they are to the top of the diagram, the more they contribute to differentiation resulting from treaty revisions. Ireland, for instance, has 4 differentiations resulting from its accession in 1973 with a total duration of 27 years, amounting to a share of 4.2% of all differentiation-years resulting from enlargement. The country also has 5 differentiations resulting from treaty revisions with a total duration of 44 years. This amounts to a share of 10.9%.

The distribution shown in Figure 4 strongly supports the expectations derived from the logics of instrumental and constitutional differentiation. First, we find the original six member states very close to the origin because they have been integration-friendly, unlikely to be excluded from integration steps, and obviously have not been subject to any differentiations upon accession. Second, and in line with the instrumental logic, the poorer new member states are more strongly subject to enlargement-based differentiation than entrants that are as wealthy as or wealthier than the original member states. Ireland and the countries of the EU’s southern and eastern enlargements are located in the right half of Figure 4 (roughly beyond a share of 3.5 per cent of differentiations based on enlargement), whereas Denmark, the UK, Austria, Finland, Sweden can be found in the left-hand part of the diagram.

When it comes to differentiation originating from treaty revisions, variation among most member states is low. Britain, Denmark, Ireland, and Sweden, however, account for two
thirds of the differentiation; Britain and Denmark alone for almost half of it. This is again in line with the expectations, as exclusive national identities and popular Euro-scepticism tend to be strong in the UK, Denmark, and Sweden. In addition, elite divisions over European integration are strong, too (Marks and Hooghe 2003: 21). By contrast, Ireland’s high share has mostly to do with its geographic position rather than with Euroscepticism. Because Ireland’s border regime is closely interconnected with that of the UK, Ireland decided to follow the UK in staying out Schengen.

Finally, Figures 5 and 6 show bivariate relationships that lend initial support to the hypothesis that differentiations resulting from treaty revisions increase with identity-based Euroscepticism (measured by positive responses to the Eurobarometer question “In the near future, do you see yourself as a citizen of [nationality] only”). By contrast, differentiations resulting from enlargement increase with poverty (measured as GDP per capita). Conversely, wealth does not significantly affect differentiation in deepening, and national identity does not affect differentiation in widening (not shown here). However, these relationships have to be tested further in controlled, multivariate analyses.

In sum, we see clearly distinct patterns of differentiated integration that can be explained plausibly by the logics of instrumental and constitutional differentiation. In a nutshell, differentiated integration tends to be caused either by comparatively Euro-sceptic countries opting out quasi-permanently from the deepening of integration in areas of high politics or...
by the temporary exclusion of new member states from policies that trigger efficiency and
distributional concerns.

5 Conclusions

In this paper, we have tried to move beyond the widespread metaphorical descriptions and
classifications of differentiated integration and to provide a systematic empirical analysis of
a comprehensive dataset of the EU’s primary law. In addition, we have attempted to account
for the observable general patterns in differentiated integration by specifying two logics of
differentiation and their empirical implications.

Instrumental differentiation originates from enlargement, which regularly produces
“instrumental” concerns about detrimental distributional and efficiency implications of
accession. Constitutional differentiation originates from the deepening of EU authority,
which generates concerns about the preservation of national identity and sovereignty in the
EU’s more Euro-sceptic member states. The descriptive analysis shows that there are indeed
two distinct patterns of differentiation that correspond to the instrumental and
constitutional logics respectively. Constitutional differentiation is more durable than
instrumental differentiation; it kicks in when the EU introduces the supranational
centralization of core state powers; and it involves mainly the most Euro-sceptic members
that are most affected by the “constraining dissensus” (Hooghe and Marks 2008) on
European integration. By contrast, instrumental differentiation affects primarily the EU’s
internal market and expenditure policies and involves the poorer new member states.

Instrumental differentiation has peaked with each EU enlargement but decreased
significantly in a few years’ time. As transitional arrangements from the accession treaties
have ended and the new members have joined the Schengen border regime and adopted the euro, even the massive differentiation effects caused by the eastern enlargement rounds have quickly faded. By contrast, constitutional differentiation, which has been growing since the early 1990s, has durable effects.

This paper leaves a number of questions for further investigation. First, while our aim has been to explain and show that DI follows two distinct general logics, the different patterns and relationships that underlie the two logics can be operationalised and tested further, e.g. by multivariate analysis of variation across countries, policies or in the duration of differentiation. Second, we need to keep in mind that this paper is based entirely on the EU’s treaty law. It remains to be seen whether secondary-law differentiation corresponds to the patterns described here. Third, it would be useful to distinguish the effects of DI for individual countries in order to describe and explain who benefits and who suffers from DI.

Finally, it would be interesting to examine how both informal institutions and compliance with EU law are related to the formal differentiation we have analysed here. Informal institutions may arguably either reinforce or mitigate DI by providing for cooperation between the formal ins and outs. And DI may either boost compliance (by excluding those countries that are unwilling or unable to comply) or weaken compliance (by undermining the norm of legal unity).
Notes

1 We analyse what the treaties explicitly identify as articles by providing the according heading (e.g. Article 1 of the Treaty on European Union) rather than paragraphs or other sub-divisions. We count an article as differentiated even if only a sub-section is differentiated. For instance, if article 104c(1) does not apply to the UK, we code an opt-out for article 104c.

2 Nevertheless, we confirmed that our conclusions are robust if we replicate all Figures without data from the Schengen, Prum and ESM treaties.

3 The treaty law of the EU was coded on the basis of the Official Journal. Coding has been an iterative process. After a first round of coding, the positive cases of DI were coded again by a second coder, and discrepancies discussed and removed. The two authors of this paper have independently aggregated the raw data into “differentiations” and again discussed and removed the discrepancies.

4 We work with a detailed list of 39 policy areas derived from the chapter titles of the main treaties and the titles of additional treaties such as the Schengen Agreements.

5 For instance, exclusion from the freedom of movement for workers, a fundamental economic freedom, would count as a single differentiation, whereas exclusion from the Schengen regime can affect up to 175 articles.

6 Figure 1 excludes the European Coal and Steel and Atomic Energy Treaties. Including them leads to an even lower share.

7 Note that this measure still slightly overstates the extent of differentiated integration. As we aggregate a country’s differentiations by policy area if they have the same starting point and end point, for any given year there may be two or more differentiations with different durations in the same policy area.

8 The exemption of the UK from social policy had to with social rights, not with financial aspects of welfare policy.
References


Figure 1  Development of differentiated integration by treaty articles in force

![Graph showing the development of differentiated integration by treaty articles in force.](image)

Note: Without Treaties on the European Coal and Steel Community and the European Atomic Energy Community.

Figure 2  Development of differentiated integration by distinct differentiations and differentiation opportunities

![Graph showing the development of differentiated integration by distinct differentiations and differentiation opportunities.](image)

Note: The horizontal axis displays treaty revisions and new treaties starting with the accession treaties of 1973 and ending with the ESM Treaty in 2012.
Figure 3  Deepening and enlargement differentiation by policy

![Graph showing deepening and enlargement differentiation by policy]

Figure 4  Enlargement and deepening differentiation by member state

![Graph showing enlargement and deepening differentiation by member state]

Note: The axes show a country's percentage share in the total number of differentiation-years based on treaty revisions (vertical axis) and enlargements (horizontal axis).
Figure 5  National identity and differentiation


Figure 6  Wealth and differentiation

Note: Founding member states are excluded. Dotted line represents OLS regression results: $a=9.04$, $b=-.25$ ($p=.00$), $r$-square=.55. GDP data: Worldbank World Development Indicators, GDP per capita, PPP, in 2005 constant dollars. Data from 1980 is used for DK, IE and UK.