

From capacity to sovereignty: Legislative politics and differentiated integration in the European Union

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Abstract. The literature suggests that legislative politics among European Union Member States is characterised by economic exchanges, and constrained by the social norms of a European community of legislators. Both views draw a clear line between the legislative process and the conflicts over sovereignty that have left their mark on treaty making and European public opinion since the 1990s. This article suggests revisiting this view, based on an analysis of why Member States have opted out of legislation from the 1970s to today. It argues that differentiation, while once a response to capacity problems of relatively poor countries, has recently become driven by sovereignty concerns of the Union's wealthy and nationally oriented Members that oppose the EU's intrusion into core state powers. The article presents evidence for the impact on legislative outcomes of factors so far thought not to matter. The results indicate greater European-level legislative responsiveness towards national sovereignty demands than previously recognised. They underline that the nature of European politics has been changing with the EU's push into core state powers.

Keywords: European Union; differentiated integration; legislative politics

Introduction

Failed and protracted treaty negotiations, persistent and intense intergovernmental diplomacy, nationalist populations and parties – observers increasingly see these developments as a consequence of the growing importance of the European Union in salient ‘core state powers’ (e.g., Bickerton et al. 2015; Genschel & Jachtenfuchs 2016; Hooghe & Marks 2008; Schimmelfennig & Winzen 2014). As the EU moves into these areas, it leaves the domain of sectoral interests and relatively inconspicuous regulatory decisions. Instead, integration generates intense conflicts over the sovereignty losses that Member States do or do not want to accept for the sake of collective European policy making. Yet, notwithstanding these views of the political development of the Union, studies of the day-to-day legislative process suggest a rather different picture. Rationalist perspectives encourage us to think about EU lawmaking as an exchange process among countries with different economic and financial interests (e.g., Bailer et al. 2015: 440–441; Moravcsik 1998). Sociologically oriented studies see national negotiators as members of a European community of legislators with dual loyalties to Brussels and their home government (e.g., Lewis 2005; Beyers 2005). Both literatures agree that the legislative process is removed and insulated from salient identity and sovereignty conflicts.

Considering the changing nature of EU authority, this article suggests an extension to existing views of legislative politics among EU Member States. Unlike rationalist studies, it draws attention to the impact of sovereignty-seeking behaviour on legislative outcomes.

The argument, thus, also differs from sociologically oriented studies that have put more emphasis on the formation of a Brussels-based legislative community than on the identity and autonomy demands of the Member States. Finally, though in line with the view that a ‘constraining dissensus’ has taken hold of EU politics (Hooghe & Marks 2008), the article emphasises that this dissensus casts a long shadow beyond treaty bargaining on legislative politics.

I make these points based on an analysis of why Member States opt-out of new legislation. Opt-outs (or ‘differentiations’) lift the legal validity of parts of laws for selected countries. They are now a well-known feature of treaties but have received hardly any attention in the study of legislative politics (e.g., Holzinger & Schimmelfennig 2012; Kölliker 2001; Schimmelfennig & Winzen 2014; Stubb 1996; Warleigh 2002). Scholars of secondary law have paid more attention to the ‘informal opt-outs and the discretionary aspects of transposition and implementation’ (Andersen & Sitter 2006: 314; Dimitrova & Steunenberg 2000; Franchino 2007; Thomson & Torenvlied 2010; Thomson 2011; Zhelyazkova 2014). The few existing studies on differentiation in EU legislation focus predominantly on preference constellations and issue properties in a limited number of cases (Dimitrova & Steunenberg 2000; Jensen & Slapin 2012; Kroll & Leuffen 2015). This analysis offers an account of the patterns and factors that have shaped legislative differentiation from the 1970s to today.

The main theoretical and empirical point is that the logic of differentiation in secondary law has changed over time, alongside developments in the major integration projects and in the politics of the EU. Initially a response to capacity problems arising in relatively poor Member States and in the Union’s market, agricultural and regulatory policies, differentiation has recently become a result of Member State efforts to protect their sovereignty. Post-Maastricht, opt-outs have declined in the Union’s ‘old’ competences. They have, instead, come to accompany Europe’s efforts to integrate ‘core state powers’ in justice, internal and external security, and monetary policy. Instead of poor countries with capacity problems, the new ‘laggards’ are wealthy and nationally oriented countries willing and able to safeguard their sovereignty.

As discussed further in the conclusion, the results tentatively indicate greater European-level responsiveness towards national sovereignty demands than previously recognised. On the other hand, however, differentiation is also a strategy that preserves a common legislative process and, thus, possibilities for informal mutual influence among insiders and outsiders that limits the consequences of national opt-outs (Adler-Nissen 2009; Naurin & Lindahl 2010; Zhelyazkova 2014).

Going beyond economic exchange under social constraints

The sovereignty demands that, I argue, have become critical to understanding differentiation in the post-Maastricht EU, have been thought of little relevance for the EU’s day-to-day policy process. A rationalist strand of literature focuses on the economic determinants of legislative politics. Echoing arguments that Moravcsik (1998) makes about treaty bargaining, scholars maintain that economic and financial interests of Member States, and of powerful organised groups and sectors within countries, determine negotiation positions, coalition patterns and voting behaviour in the Council (Bailer et al. 2015; Thomson 2009; Zimmer et al. 2005). Despite the Union’s economic heterogeneity, Member States nonetheless reach

agreement for two reasons: because extensive consultation procedures prevent hopeless legislative proposals from ever being made; and because the Council offers plentiful opportunities for log-rolling at any point in time and in any given policy domain (Aksoy 2012; König & Junge 2009). The biggest log-roll, this literature argues, is the single market itself – an interest of the rich Member States for which they pay with budgetary contributions and concessions to the poor in day-to-day legislative politics (Bailer et al. 2015: 440–441; Moravcsik 1998).

Sociologically oriented studies, though not doubting that Member States fight for their economic interests, draw attention to the constraining effects of norms, ideology and identity. However, while analyses of treaty making show that sovereignty-seeking populations, parties and parliaments have started to constrain government positions and negotiation outcomes at intergovernmental conferences (Finke 2009; Hooghe & Marks 2008; Jachtenfuchs et al. 1998; König & Slapin 2004), studies describe the legislative process not only as removed from domestic politics but also as constrained by European norms of mutual accommodation (Heisenberg 2005; Lewis 1998, 2005; Smeets 2015). Identity matters not as a constraint but as a facilitating condition for compromise. The civil servants and diplomats that run most day-to-day legislative negotiations are said to develop dual loyalties – not only to their home government, but also to their Brussels-based community of co-legislators (Beyers 2005). Compromises, from the sociological perspective, become possible because legislators, seeking to comply with the norms of their community, exercise self-restraint, avoid saying ‘no’ frequently and make voluntary concessions without well-defined repayments.

Far from suggesting that the insights of the literature are mistaken, they may nonetheless be historically contingent as well as a description of legislative politics in certain policy areas. They come from studies in the 1990s and 2000s, a time period that lies after many path-breaking choices in the EU’s market, agricultural and regulatory policies, and may thus be conducive to relatively amicable decision making. Furthermore, many studies focus on areas other than the EU’s new competences in core state powers – that is, domains likely to be inhabited and driven by economic groups and interests. Recent studies explicitly stress the need to consider other policy areas (Bailer et al. 2015). Focusing on the whole range of the Union’s competences, and an outcome that has so far received little attention, may yield new insights into the EU’s legislative process.

Capacity, sovereignty and differentiation in EU legislative politics

This article understands differentiation as a consensus-building strategy for countries with deviant preferences. Differentiation is different from another popular legislative technique – namely giving countries flexibility in how they implement common agreements. Flexibility is a feature of a piece of legislation and thus applies to all countries. It is a promising strategy when objections are widespread, such as when country preferences are widely dispersed or polarised (e.g., Thomson 2011). Differentiation leaves the legal rules untouched but lifts their validity for selected countries. It is a promising choice when individual Member States hold views far away from the rest (Dimitrova & Steunenberg 2000: 212).

The decision-making environment of the EU places countries with deviant preferences that demand differentiation in a favourable bargaining context. The consensus norm that

has prevailed in the Council of the European Union, at least since the 1990s (Heisenberg 2005; Lewis 2005), and the ‘Luxembourg compromise’ that existed before (Teasdale 1993), limit the application of majority voting and place reluctant countries in a powerful position to prevent disliked outcomes, unless granted opt-outs.

The following focuses on Member State characteristics that are likely to generate differentiation demand on a regular basis. Due to the consensus-orientation of decision making, demand should be crucial for differentiation outcomes. Adding a caveat, I will discuss neither why exactly log-rolling or normative concessions sometimes fail nor more substantive, case-specific questions such as what externalities opt-outs create (Kroll & Leuffen 2015). While without doubt important for a full explanation of differentiation, these considerations are hard to take into account credibly in the analysis of many years and countries undertaken here.

Ultimately, Member States seek opt-outs because they see EU regulation as detrimental to the nation-state and national actors. However, different logics lead to this view, one focusing on capacity problems and one on sovereignty concerns (for a comparable distinction in treaty law differentiation, see Schimmelfennig & Winzen (2014)). Capacity problems arise if Member States are not able to meet EU demands. They exist in the EU’s relatively poor countries with fragile economies and administrations. Sovereignty concerns occur whenever countries regard the EU as the inferior legislator compared to the nation-state. It is important to note that sovereignty concerns, in this understanding, are not *only* the result of the nationalist sentiment of domestic publics (Hooghe & Marks 2008). They also stem from the inclination of state agents to defend their core competences in the absence of functional benefits deriving from supranational legislation (cf. Genschel & Jachtenfuchs 2016: 9–11). Capacity and sovereignty demands emerge in distinct policy domains as well as in different eras of European integration. I first introduce these two types of problems that lead to differentiation before arguing that sovereignty concerns have become dominant post-Maastricht.

Capacity problems occur whenever the EU creates burdens that not all Member States are ready to meet. Relatively poor Member States have to fear the Union’s market-making policies that expose their economies to international competition; agricultural policies that impose standards on domestic producers; and regulatory policies that demand expensive health, labour and environmental rules. Before these countries join the EU, they are in a disadvantageous position. Seeking accession, they have to accept discriminatory differentiation imposed by the rich Member States that fear the ineffective implementation of common rules and the redistribution of subsidies (Plümpner & Schneider 2007; Schimmelfennig 2014). Once members, poor countries enjoy equal legislative rights. They can then threaten to obstruct decision making unless granted exemptions from burdensome rules.

H1: The poorer Member States are, relative to the EU average, the more likely they are to opt out of EU legislation in market, agricultural and regulatory policies.

Sovereignty concerns become relevant whenever the EU acts in areas that are, symbolically or factually, close to the core competences of the nation-state. So-called ‘core state powers’ are policy domains that have historically been under the exclusive control of the state or are essential for its identity and security (Genschel & Jachtenfuchs 2014; see also

Hoffmann 1966). Within the EU's policy portfolio, this is the case in particular for monetary policy, foreign and defence affairs, or justice and internal security policies. Scholars have also considered the EU's competences in taxation as an intrusion in core state powers (Genschel & Jachtenfuchs 2011), but here the Union's impact remains indirect and regulatory so that sovereignty concerns are less likely to arise.

Core state powers not only mobilise sovereignty-seeking behaviour, they also de-emphasise economic interests. They are less relevant for organised domestic interest groups that are said to be important in market, agricultural and regulatory policies (e.g., Bailer et al. 2015; see also Moravcsik 1998). In core state powers, the dominant actors are state agents such as politicians, diplomats and senior bureaucrats. Compared to interest groups, these actors are more likely to share or listen to nationalist sentiments in the population and, at the same time, more inclined to safeguard the authority of the nation-state – authority that they themselves exercise (Genschel & Jachtenfuchs 2016: 9–11).

Sovereignty concerns are more likely in some Member States than others. First, they are particularly pronounced in countries with populations that identify exclusively with their nation (Carey 2002; Hooghe & Marks 2005). Exclusive national identification is related to, yet different from Euroscepticism. As Hooghe and Marks (2005, 2008) show, Euroscepticism reflects economic concerns as well as identity conceptions of populations. Resistance to the integration of core state powers, which de-emphasise economic concerns and mobilise nationalist sentiment, should, however, result mainly from the exclusive identity component of Euroscepticism (Genschel & Jachtenfuchs 2016; see also Schimmelfennig et al. 2015). Euroscepticism, more generally, captures exclusive identity conceptions that underlie Member States' sovereignty-seeking behaviour in core state powers only partly.

Second, opposition to the EU's intrusion in domestic affairs can also emerge in rich countries. In order to appreciate why this is the case, it is important to think of 'wealth' broadly not only as an indicator of economic success but also of a country's regulatory and governance quality.¹ Generally, wealth gives countries the autonomy necessary to participate selectively in European integration. The key issue, however, has to do with the calculations of the dominant actors in core state powers. State agents that dominate this policy domain can, as a matter of principle, be assumed to value their autonomy and power or, as Mattli (1999: 12) puts it, the 'absence of interference by supranational agents'. At the same time, however, their 'professional reputation and career prospects depend' on successful policies in core areas over which they hold authority and for which they bear responsibility (Genschel & Jachtenfuchs 2016: 10). Their support for supranational legislative interference in core state powers will, thus, depend on whether they perceive the EU as a superior legislator whose actions contribute significantly to the successful resolutions of policy challenges that they face (Genschel & Jachtenfuchs 2016; Mattli 1999: 12–13). Yet, in relatively rich and well-governed countries, state elites can claim that they already have successful policies and therefore have no reason to restrain their efforts to protect their core competences compared to their counterparts in poorer Member States. On the contrary, they have to fear being locked into common rules with countries and their state agents, which they perceive to be inferior legislators.

H2: The more exclusively national or the wealthier Member States are, relative to the EU average, the more likely they are to opt out of EU legislation in core state competences.

Core state powers are already strongly differentiated in EU treaty law, particularly for nationally minded Member States (see Schimmelfennig & Winzen 2014). Britain, for instance, has negotiated the right to opt in and out of decision making in Justice and Home Affairs policies on a case-by-case basis. Neither Denmark nor Ireland participates in this area. Several countries have not adopted the common currency. Against this background, similar patterns of differentiation are, of course, likely in secondary legislation. Yet, it is possible that Member States do not fully realise their treaty opt-outs in the legislative process (cf. Adler-Nissen 2009). Moreover, countries without treaty differentiation may demand exemptions in subsequent decision making. Thus, it is worth analysing whether and how much sovereignty-seeking matters for legislative differentiation.

Capacity and sovereignty concerns not only arise in different policy domains but also in different phases of European integration: the market-making early history, and the post-Maastricht period of the gradual integration of core state powers. That sovereignty-driven differentiation should matter more since the 1990s than before is obvious enough. Only then did the EU begin to legislate seriously in core state powers with the help of new treaty-based competences such as in Justice and Home Affairs and monetary policy.

Yet, the relative importance of sovereignty over capacity problems also stems from a second development – namely the consolidation of the ‘old’ competences of the Union. The principles of the EU’s market-making and regulatory activity and the idea that it should subsidise agriculture were agreed on before 1990. The Single Market Programme was officially concluded in the early 1990s. By that time, ‘old’ Member States should have obtained the differentiations that they needed, while later accession candidates had no choice but to adopt all existing EU legislation before seen fit for membership, or negotiate treaty-based differentiation. Of course, market legislation continues to emerge and the common agricultural policy continues to be reformed. Nevertheless, with much of the market, regulatory and agricultural regime of the EU in place, legislative differentiation should have become less frequent, and the systematic effect of capacity problems less pronounced in the 1990s.

H3: The impact of wealth on differentiation in EU legislation in market, agricultural and regulatory policies should decline in the 1990s and 2000s.

Data

The research design builds on new directives and regulations that the EU has adopted between 1973 and 2011.² The data excludes so-called ‘tertiary legislation’ of the European Commission, as well as legal acts that exclusively introduce changes in existing directives and regulations. Commission legislation falls outside of the scope of the theoretical argument of this article, which focuses on conflicts arising in legislative politics between the Member States. Excluding purely amending legislation is also meant to increase the homogeneity of the analysed legal acts. Some of the literature suggests that amending legislation is easier to pass or implement because the basic principles of a policy have already been set

(e.g., Steunenberg & Rhinard 2010: 502). One could object that this is not necessarily the case; the point, however, is that amending legislation can be quite diverse in purpose and importance. Focusing on new legislation does not resolve this problem entirely, but it does raise the comparability of the cases.

Additionally, there is an empirical reason to focus on differentiation in new laws: the initial enactment of these laws is categorically more important for understanding differentiation than their subsequent development, including all effects of later amending and tertiary legislation. The dataset introduced shortly shows that about 40 per cent of all opt-outs that exist in EU secondary law (including opt-outs created by amending and Commission acts) originate in the initial adoption of the laws investigated here. The remaining 60 per cent originate in the remaining lifetime of these laws. While this may seem a lot on first sight, the second year accounts for only 7 per cent on average, and later years for less. The vast majority of years account for 1 per cent of new differentiations or less. The implication of this fact is twofold. First, the enactment of new laws appears to create categorically different problems than subsequent amendments and should, therefore, be analysed separately. Second, while this analysis does not cover the whole universe of secondary law differentiation, it can claim to say something about the most important segment of it.

On the basis of the population of new laws, the outcome of interest is whether a given country acquires a differentiation when the EU adopts a given act. I rely on the EUDIFF2 dataset,³ which identifies whether a legal act explicitly exempts a given country from at least some of its legal rules. I do not make a difference regarding the number or importance of the legal rules that are covered by such an opt-out. This can be seen as a problem since some differentiations are presumably more important than others. At the same time, however, EU secondary legislation is highly detailed and issue-specific. Convincing and transparent criteria to judge whether a given opt-out is important or not (not to speak of *how* important) are, as far as I am aware, not available. Against this background, measuring the presence of absence of differentiations is, though not perfectly precise, nonetheless a clear indicator that a law does not fully apply to a given country.

How do differentiations look in practice? For instance, in an EU directive on the interconnection of European telecommunications markets (Directive 97/33/EC), we read that certain Member States identified in a corresponding Council resolution should benefit from a '[d]eferment of the obligations under Articles 3(1), 3(2), 4(1), 4(2), 9(1) and 9(3) insofar as those obligations concern direct interconnection between the mobile networks of that Member State and the fixed or mobile networks of other Member States'. The Council resolution⁴ states:

In order to allow Member States with less developed networks, i.e. Spain, Ireland, Greece and Portugal, to achieve the necessary structural adjustments, in particular of tariffs, these Member States are granted an additional transition period of up to five years.

Another legal act, a regulation on the rules governing the movement of persons across Schengen Area borders, provides as follows (Recital 27):

This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

The first example comes from the market area. One would expect that legislative differentiation in this area results from capacity problems in relatively poor countries – in this case, the expectation would largely be borne out, albeit with Ireland not perfectly fitting in. The second example from the area of Justice and Home Affairs should generate differentiation in the Union’s Eurosceptic and rich countries, which also works in this particular case. Whether these examples have more general validity will be examined in the following.

Let us turn to the explanatory variables. The hypotheses specify effects of variables conditional on policy areas. The EUDIFF2 dataset identifies policy areas of legal acts with the help of their legal bases. Each legal act has a legal basis: an article in an EU treaty. Treaty articles are sorted into treaty chapters. The titles of these chapters are used to define a policy area. For the purpose of the analysis here, these disaggregated areas are aggregated into four broad policy domains as shown in Table A1 in the online appendix: market, agriculture, regulation and core state powers. A significant number of legal acts stem from substantively uninformative treaty chapters, ‘approximation of laws’ and ‘general and final provisions’, and from enlargement treaties. These legal acts were manually allocated to meaningful policy areas.

The main explanatory variables are measured as follows. *Wealth* is measured in terms of gross domestic product (GDP) per capita in US\$1,000 in 2005 prices, based on data compiled by Gleditsch (2002). Wealth is measured per country and year as the distance from the EU average, and lagged by one year.⁵ *Exclusive national identity* is based on the Eurobarometer survey item that relevant previous studies have also relied upon (Carey 2002; Hooghe & Marks 2005, 2008): the share of citizens in a country and year saying that they see themselves as ‘national only’ (rather than ‘European only’ or a combination of European and national). Again, I take a one-year lag and, by year and country, the distance to the EU average.⁶ This measure should capture the exclusiveness of a country’s national identity. Unfortunately, however, the necessary data exists only from 1993 onwards. In order to approximate exclusive national identity for the time period before 1993, I will rely on the share of citizens saying that EU membership of their country is ‘a bad thing’ (rather than ‘a good thing’ or ‘neither good nor bad’). Data is available from 1973 to today. As noted above, this measure captures the kind of identity-based opposition to integration that the theoretical argument describes to some extent (cf. Hooghe & Marks 2005). Euroscepticism and exclusive identity correlate at about a level of 0.5. I also report the results of using the ‘membership question’ in the analysis of the time period from 1993 onwards. Finally, the analysis includes a measure of the ideological heterogeneity of Member State governments as a possible alternative or complementary explanation of differentiated integration based on the left-right scale of the party manifesto project data (Volkens et al. 2012; Budge et al. 2001). Within each country, the government’s position is measured as the average position of

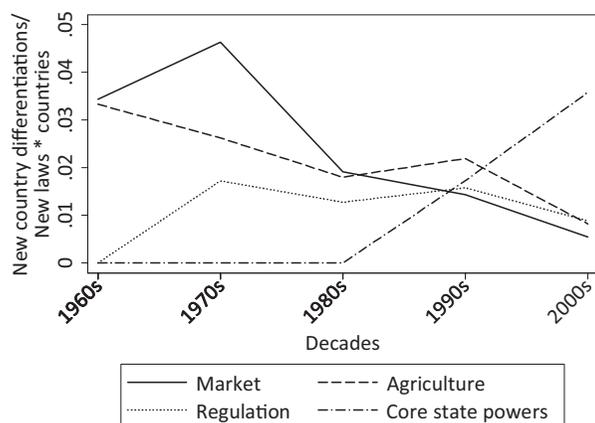


Figure 1. Differentiation in EU legislation over time.

all governing parties, weighted by their parliamentary seat share. Then, we take the *absolute distance* of a country in a given year from the EU average, assuming that governments that are further away from the average are likely to demand opt-outs. The analyses below include the square root of this original measure, which normalises the distribution of the data and effectively means that unit differences between larger values of the original scale shrink.

Figure 1 presents the development of differentiation in EU legislation over time, showing averages for each decade since the 1960s.⁷ The figure shows, first of all, that opt-outs have been a regular feature of EU legislative politics for a long time – albeit not a very frequent one. The Member States have never used more than 5 per cent of all available opportunities for opt-outs. Furthermore, whereas market and agricultural differentiations dominated in the early days of the community, they have steadily declined since then. In the 1990s, opt-outs from core state powers have replaced the ‘old’ priorities of the Union as the focus of differentiated integration. Differentiation has never played a large role in European regulatory policies. For reasons of space, an extended descriptive section is included in the online appendix (see ‘Extended description of differentiation in EU legislation’). The insights gained from this section are, however, in line with the results of the regression models presented here.

Logistic regression models of new differentiations in EU legislation

This section presents two sets of logistic regression models of new differentiations in EU legislation. The first set covers the time period 1973–1989 and the Union’s market, agricultural and regulatory policies. In this period, there are hardly any laws affecting core state powers so that it does not make sense to include this area in the analysis. In addition to the main explanatory factors of interest, wealth and Euroscepticism, the models include the control variable for governments’ absolute ideological distance from the EU average. The second set of models is identical to the first except that it covers the period 1993–2011 and substitutes the more appropriate measure of exclusive identity for Euroscepticism. However, the discussion will also highlight the empirical difference between these two

Table 1. Models of new differentiations, 1973–1989

	1	2	3	4
Period	1973–1989	1973–1989	1973–1989	1973–1989
Domain	Market	Agriculture	Regulation	Core state powers
Wealth	-0.106** (0.042)	-0.153** (0.046)	-0.217** (0.040)	Not applicable
Euroscepticism	0.014* (0.009)	0.033** (0.013)	0.046** (0.017)	
Ideology	0.235** (0.079)	0.066 (0.181)	-0.120 (0.075)	
Yearly trend	-0.093** (0.025)	-0.049 (0.034)	-0.013 (0.021)	
Constant	-3.036** (0.585)	-3.657** (0.877)	-4.250** (0.500)	
Observations	4,867	7,586	2,141	
Pseudo R ²	0.056	0.055	0.075	
Pseudo-likelihood	-612.166	-758.311	-138.032	

Notes: Country-clustered standard errors in parentheses. * $p < 0.1$; ** $p < 0.05$. Core state powers: There are only 23 new laws without any differentiation in this area before 1990.

measures. The year 1993 is a suitable starting point because the Treaty on European Union entered into force and gave the Union competences in core state powers. Additionally, in the first years of the 1990s, in the aftermath of reunification, Germany acquired an exceptionally large number of new differentiations for which the theoretical argument here does not claim to account. It therefore makes sense to omit these years. All models below also include a yearly time trend.

Models of new differentiations in the period 1973–1989

Table 1 presents the first set of models of Member State differentiations from new EU laws in the period 1973–1989. Beginning with the significance and direction of the effects, as expected, wealthy countries are consistently and significantly less likely to opt-out from new laws than poor countries. At the same time, Eurosceptic countries tend to acquire differentiations. The effects of government ideology are not as clear-cut. It makes sense that ideologically distant countries are likely to opt-out of market legislation, but otherwise no significant relationships exist and the direction of the effect is opposite of what was expected in agricultural and regulatory policies.

Turning to the substantive relevance of these findings, Figure 2 shows the magnitude of the effect of wealth on new differentiations. Moving from the poorest to the richest countries in the data, the probability that a country opts-out declines from around 5 per cent to between 0 and 2 per cent, depending on the policy domain. The confidence intervals are relatively wide, particularly in the market and agricultural areas and for the poor Member States, so that the change in the probability of a new differentiation could be as small as around 1 per cent but also possibly much larger. Bearing in mind the relative rarity of differentiations, these effects can be considered substantially important (cf. Figure 1).

The effect of Euroscepticism is substantially small in the market while being comparable to that of wealth in agricultural and regulatory policies (see Figure A2 in the online appendix). Moreover, there are comparatively few observations in the data for levels

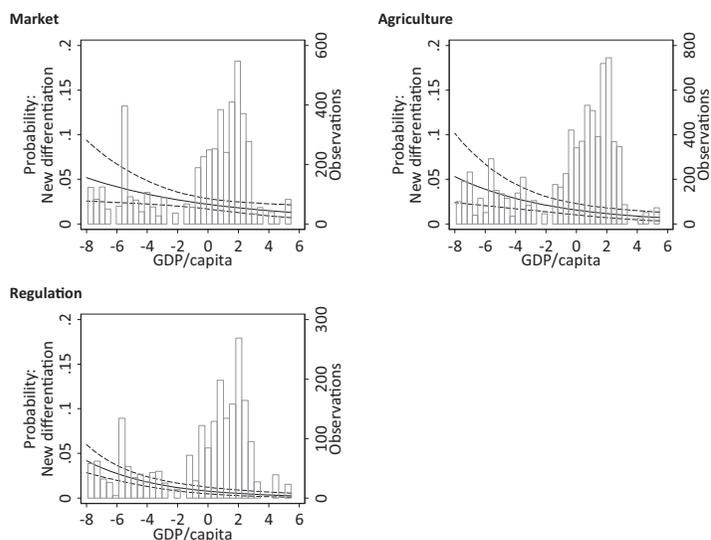


Figure 2. The effect of wealth on differentiation, 1973–1989.

Notes: The vertical axis on the left and the trend lines display the probability of a new differentiation, estimated with CLARIFY (Tomz et al. 2003). The estimated effects are based on the results in Table 1. Euroscepticism is held at ‘0’ (no distance from the EU average in a given year); the yearly trend and ideological distance are set to their means.

of Euroscepticism for which countries really have a substantially higher differentiation probability than the more Europhile Member States. Growing ideological distance from the EU average enhances the probability that a country opts-out of legislation in the market but not in the other two domains, albeit slightly less so than wealth (see Figure A3 in the online appendix).

In sum, in the early history of the EU, capacity problems that arise in poor Member States are the most important explanation of differentiation. Other factors also play a role, however. Euroscepticism enhances the likelihood of country opt-outs, while being less important in practice than wealth in the sense that only a few Member States are so Eurosceptic that their differentiation probability differs significantly from the rest. Ideology matters – albeit only in the EU’s market policies.

Models of new differentiations from 1993–2011

Table 2 shows the results of a second set of models that focus on the period 1993–2011 and which include a measure of the exclusiveness of a country’s identity instead of its Euroscepticism. Turning to the direction and significance of the results, we observe that the effect of wealth, although still consistently negative in the market, agriculture and regulation, has become generally smaller, and insignificant in model 1. Regarding these three domains, exclusive identity has a positive effect on differentiation in agriculture. Ideological distance has a significant (at the 0.1 level) and positive effect in regulatory policies, while no longer being important in the market. In contrast, all explanatory variables have significant effects in the area of core state powers, the main domain of differentiation in the post-Maastricht

Table 2. Models of new differentiations, 1993–2011

	1	2	3	4
Period	1993–2011	1993–2011	1993–2011	1993–2011
Domain	Market	Agriculture	Regulation	Core state powers
Wealth	-0.019 (0.022)	-0.033** (0.012)	-0.038** (0.016)	0.138** (0.019)
Identity	0.015 (0.015)	0.021** (0.010)	-0.006 (0.016)	0.077* (0.040)
Ideology	0.070 (0.142)	-0.063 (0.080)	0.138* (0.074)	0.276** (0.132)
Yearly trend	0.013 (0.040)	-0.063** (0.013)	-0.021 (0.032)	0.015 (0.033)
Constant	-5.481** (0.701)	-3.613** (0.301)	-4.849** (0.453)	-4.975** (0.810)
Observations	11,843	6,755	8,696	5,265
Pseudo R ²	0.003	0.017	0.010	0.139
Pseudo-likelihood	-452.845	-474.318	-477.909	-649.501

Note: Country-clustered standard errors in parentheses. * $p < 0.1$; ** $p < 0.05$.

era. In core state powers, wealth matters – albeit positively. Instead of poor countries with capacity problems, rich ones that are willing and able to preserve their autonomy opt-out. Furthermore, the more nationally oriented Member States are more likely to obtain differentiations in core state powers than their cosmopolitan counterparts (note that this effect misses the 0.05 significant threshold, with $p = 0.06$). Finally, ideological distance encourages differentiation in the EU's new competences.

Examining the magnitude of the effects of wealth, identity and ideology, Figure 3 focuses on core state powers. Comparing rich to poor Member States, the probability of a national opt-out increases from close to 0 to slightly below 10 per cent. The effect is approximately similar when contrasting cosmopolitan and nationally oriented countries. Ideological distance also matters, but the effect is substantially weaker. One should note that all estimates are affected by considerable uncertainty. They could be very small, but on the other hand, also potentially enhancing the chance of differentiation by up to 20 percentage points. The next section considers the explanatory relevance of the variables in further detail. Outside of the area of core state powers, poor states are still more likely to acquire differentiations than rich ones in agricultural and regulatory policies, but this effect is substantially negligible (see Figure A4 in the online appendix). This is not surprising, bearing in mind that the overall number of differentiations in these policy areas has become small in the 1990s and 2000s.

While several robustness tests will be discussed below, one should note one particular caveat at this stage. The models presented here include a measure of exclusive identity rather than of Euroscepticism. The reason is that, according to the literature, Euroscepticism is driven by economic as well as identity consideration (Hooghe & Marks 2005), while only the latter should theoretically be expected to drive differentiation in core state powers (Genschel & Jachtenfuchs 2016; see also Schimmelfennig et al. 2015). Indeed, a measure of Euroscepticism does not have a significant effect in model 4 (see Table A2 in the online appendix). A model including the identity measure is, however, clearly preferable in terms of the Akaike Information Criterion (1309 compared to 1357 for the model with

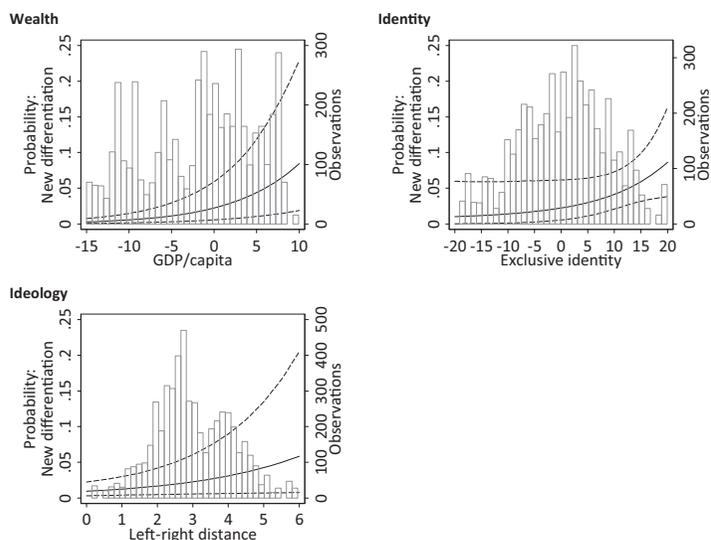


Figure 3. The effects of wealth, identity and ideology on differentiation in core state powers.

Notes: The vertical axis on the left and the trend lines display the probability of a new differentiation, estimated with CLARIFY (Tomz et al. 2003). The estimated effects are based on the results of model 4 in Table 2. Wealth and identity, unless plotted, are held at '0' (no distance from the EU average in a given year); the yearly trend and ideological distance, unless plotted, are set to their means.

Euroscepticism instead of identity) and Bayesian Information Criterion (1342 compared to 1389).

Summing up, whereas capacity problems in poorer countries were the most important source of differentiation in market, agricultural and regulatory policies in the early EU history, the focus of differentiation has shifted towards core state powers in the post-Maastricht era, and the drivers are no longer poor but rich and nationally oriented, sovereignty-seeking countries. Outside core state powers, opt-outs continue to exist, although they have become less common, and they appear still to be connected to capacity problems in agriculture and regulation, yet the link is weaker than in earlier years. Interestingly, ideological distance, which used to be a relevant additional driver of differentiation in the market before 1990, has lost its relevance there and has instead started to matter in the newly contested core state powers area alongside wealth and identity.

Explanatory power

Figure 4 illustrates the explanatory power of the model of differentiations in core state powers in the post-Maastricht period (i.e., model 4 in Table 2), which is of greatest contemporary interest. The figure shows how many out of all observed differentiation outcomes the model identifies. Classification performance, measured in this way, obviously varies with the probability that one demands a model to estimate before one classifies an outcome as a positive case of differentiation. The figure compares the full model with three reduced versions: respectively, without wealth and identity, only without wealth and

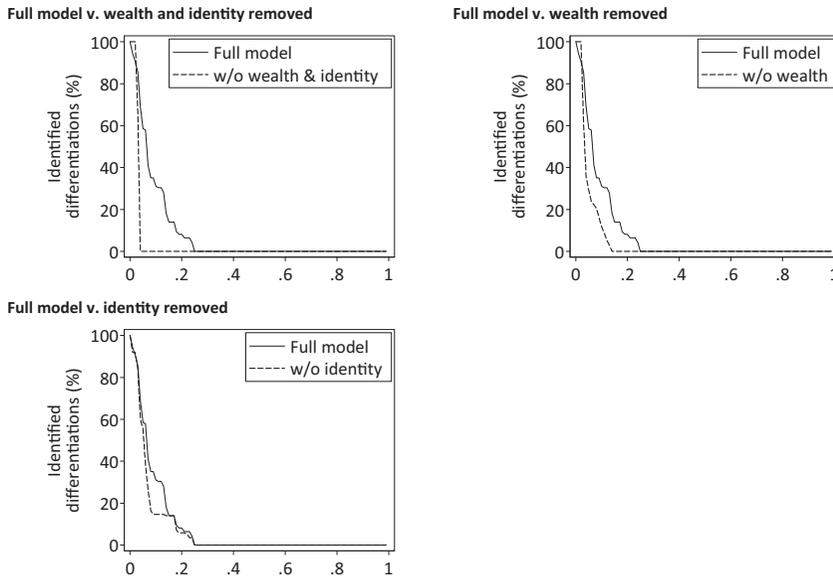


Figure 4. Classification performance.

Notes: Based on model 4 in Table 2. Horizontal axis: Classification cut-off. If the model estimates a differentiation probability exceeding this cut-off point, a case is classified as a positive outcome. The classifications are then compared to the observed outcome.

only without identity. It should be highlighted that we examine ‘positive classification performance’ here rather than the overall rate of correct classifications (positive or negative). The reason is that, due to the large number of ‘zeros’ in the data, the rate of overall correct classifications is very high and the effect of adding or removing selected variables correspondingly difficult to see – the conclusions from examining the correct classification rate would, however, be in line with the following.

The figure yields two important insights. First, the explanatory variables of interest make a large contribution to identifying cases of differentiation in core state powers. With both wealth and identity removed, the model essentially fails to identify any opt-out, while the full model does far better, up to 50 percentage points for some probability thresholds. Removing wealth or identity individually depresses the model performance less strongly but still consistently and by ten percentage points and more for some probability thresholds. The measure of wealth appears to be more relevant for identifying differentiations than that of identity, although both are substantially very important.

The second significant lesson from the figure is that, particularly at high thresholds, many instances of opt-outs go undiscovered, implying that the analysis here makes a notable, yet by no means a comprehensive, contribution to explaining differentiation. There is a need for additional arguments that help identify positive differentiation cases. Of course, to some extent this insight was to be expected. Primarily due to practical constraints, the analysis here could not consider issue-specific preference constellations and substantive policy implications of opt-outs, which may further help account for differentiated legislative outcomes (e.g., Dimitrova & Steunenberg 2000; Kroll & Leuffen 2015).

Robustness tests

Excluding Britain or Denmark, including Luxembourg. Britain and Denmark are countries with many differentiations and comparatively nationally oriented populations. They might be driving the findings, especially regarding the effect of exclusive identities on differentiated integration. Tables A6 and A7 in the online appendix show the models presented above, respectively, excluding observations from Britain and Denmark. Excluding observations from the latter does not change the findings in relevant ways. Excluding British observations, however, undermines any effect of Euroscepticism before and exclusive identity after 1993. The effect of wealth remains stable – that is, poor countries opt-out from market, agricultural and regulatory policies in the EU’s early history, while rich countries obtain differentiations in core state powers afterwards. However, the effect of exclusive identity strongly depends on Britain. One could have different interpretations of this finding. On the one hand, the dependence of the identity effect on observations from one country warrant doubts as to whether it can be considered a general explanation of differentiation. On the other hand, it is perhaps not surprising that the results become unstable if we remove the paradigmatic case of a country characterised by sovereignty-based opposition to integration. Regardless, it is clear that Britain is an influential case for the results regarding the effect of exclusive identity on national opt-outs. Furthermore, the analysis excluded Luxembourg, which is an outlier on the GDP measure. Table A8 in the online appendix shows the results with Luxembourg included. First, the effect of GDP before Maastricht becomes marginally weaker but nonetheless remains significant. Second, after Maastricht, including Luxembourg strengthens the identity effect and slightly weakens the wealth effect without, however, justifying any substantially different interpretation of the results.

Legal act level confounding factors. One possible criticism of the models presented here is that they do not control for legal act level confounding factors. While such factors would only disturb the results if they correlate with the explanatory variables of interest, this possibility is of course hard to rule out conclusively. Legal act level confounding factors could be measurable, such as the type of legal instrument. However, in a dataset of thousands of legal acts, one could also encounter heterogeneity that is harder to capture directly, such as variation in the substance, salience or complexity of laws. A strong way of controlling for *any* legal act level variation is to add legal act dummy variables to the models. The downside of this approach is that we can only analyse legal acts with variation on the outcome – that is, with at least one country obtaining an opt-out – implying a large loss of observations. Tables A3 and A4 in the online appendix reproduce the models shown here with legal act dummy variables. The main results, notably the negative wealth effect before Maastricht, and the positive wealth and identity effects after, are, if anything, more pronounced. The substantial effects are also significantly *stronger* (not shown). The findings are also robust to controlling for the type of legal instrument (directive or not) and the legislative procedure (co-decision or not) instead of relying on legal act dummy variables (Table A5 in the online appendix shows this for the post-Maastricht period).

Rare-events specification. One might argue that the outcome of interest is rare and therefore requires a model for rare-events, as for instance, King and Zeng (2001) suggest. One should note that the criterion for classifying events as rare is not the ratio of positive and negative outcomes but rather the absolute number of positive cases. Two of the three models before Maastricht have around 150 positive outcomes – only in model 3 is the outcome truly a rare event with 28 positive occurrences. After Maastricht, there are 171 positive observations in core state powers, but less than 100 in the other three domains (75, 91 and 86, respectively). Re-estimating all models with King’s and Zeng’s rare events specification yields nearly identical results (not shown).

Conclusion

Based on an analysis of differentiation in new European laws, this article has sought to extend and qualify existing views on EU legislative politics. Member State opt-outs have long been a regular feature of the Union’s lawmaking process. Moreover, while best seen as a solution to capacity problems of selected Member States before Maastricht, they have recently resulted primarily from sovereignty demands of the EU’s rich and nationally oriented countries. Whereas the ‘old’ EU competences in the market and agriculture have become increasingly uniform in terms of their legal coverage, differentiation has risen sharply alongside the gradual European integration of core state powers, such as internal and external security and monetary policy. Britain is the paradigmatic and, in terms of the results of the analysis, empirically influential example of a country characterised by identity-based opposition to EU intrusion in its core competences. Wealth encourages opt-outs from core state power legislation more generally.

Regarding studies of the economic determinants of legislative politics, these findings draw attention to the thus far under-appreciated relevance of sovereignty-seeking Member State behaviour (e.g., Bailer et al. 2015; Moravcsik 1998). In respect of sociologically oriented research (e.g., Beyers 2005; Lewis 2005; Smeets 2015), the results show that the legislative process, in the area of core state powers, has become constrained by opposition to EU intrusion in national competences. Finally, the insights gained here underline the importance of the ‘constraining dissensus’ that is said to have taken hold of EU politics (Hooghe & Marks 2008), showing that its effects are felt far beyond treaty outcomes in day-to-day negotiations over legislation.

The findings underline the view that the nature of European politics has been changing with the EU’s push into core state powers (e.g., Bickerton et al. 2015; Genschel & Jachtenfuchs 2016; Hooghe & Marks 2008; Schimmelfennig & Winzen 2014). New conflicts over the loss of national sovereignty and identity arise in these policy domains, and they unfold repercussions not only for treaty law, public opinion or the style of negotiations, but also for the outcomes of the day-to-day legislative process.

The relevance of sovereignty conflicts and the ensuing legislative differentiation can be seen in different ways. On the one hand, they indicate European responsiveness towards national reservations against selected legal obligations. Governments, be it out of self-interest or appreciation for public opinion, successfully secure exemptions from disliked legislation. On the other hand, opt-outs from legislation are also an EU-friendly approach to sovereignty concerns at least insofar as they preserve a common legislative process despite

divergent integration preferences and an ever more variable treaty framework. It is possible, as studies indicate, that shared legislative arenas encourage Member State negotiators to mitigate the real impact of opt-outs through informal mutual influence, information exchange and selected opt-ins (Adler-Nissen 2009; Naurin & Lindahl 2010; Zhelyazkova 2014).

Finally, the findings here also highlight that conclusions about differentiation and about the nature of EU legislative politics more generally depend on the policy domains, years and countries that scholars decide to study. This fact gets forgotten easily, particularly at a time when political and scholarly attention focuses on salient intergovernmental conflicts such as over the future of economic and monetary union, or the distribution of migrants across the Member States. While core state powers are becoming differentiated and subject to salient sovereignty conflicts between Member States, market, regulatory and agricultural policies have become increasingly consolidated, producing few opt-outs and capacity problems, and hardly any sovereignty concerns. Thus, studies that combine too heterogeneous policies may not find anything and those that focus on selected areas will provide only a partial view of how legislative politics in the EU works.

Acknowledgements

The research for this article has been carried out in the context of the project ‘Differentiated Integration in Europe’, co-directed by Katharina Holzinger (University of Konstanz) and Frank Schimmelfennig (ETH Zurich), and funded by the German Research Foundation (DFG) and the Swiss National Science Foundation (SNSF). For very helpful comments, I thank Frank Schimmelfennig and Sandrino Smeets, and the *EJPR* referees and editors. I also benefitted from the hospitality of Harvard University’s Minda de Gunzburg Center for European Studies, where I wrote parts of this article.

Supporting Information

Additional Supporting Information may be found in the online version of this article at the publisher’s web-site:

Table A1. Policy areas at different levels of aggregation

Table A2. New differentiations in core state powers, 1993-2011: Models with Euroscepticism instead of exclusive identity

Table A3. Models for 1973-1989 with legal act dummy variables

Table A4. Models for 1993-2011 with legal act dummy variables

Table A5. Procedural control variables, 1993-2011

Table A6. The models, excluding British observations

Table A7. The models, excluding Danish observations

Table A8. The models, additionally including observations from Luxembourg

Figure A1. New laws by policy domain

Figure A2. The effect of Euroscepticism on differentiation, 1973-1989

Figure A3. The effect of ideological distance on differentiation, 1973-1989

Figure A4. The effect of wealth on differentiation in agricultural and regulatory policies, 1993-2011

Figure A5. Differentiations over time by groups of member states and policies

Figure A6. Differentiation and GDP per capita

Figure A7. Differentiation and exclusive identity

Figure A8. Differentiation and Euroscepticism

Figure A9. Ideological distance and differentiation

Notes

1. While one could plausibly argue that wealth and governance quality are not identical concepts, the two, measured by GDP per capita and the World Bank governance indicators, correlate nearly perfectly in the group of EU Member States.
2. The data also includes a limited number of decisions that were the prevalent legal instruments in Justice and Home Affairs for a number of years until the EU started to use the same legal instruments as in other areas.
3. The EUDIFF2 dataset has been collected at Konstanz University and ETH Zurich. It will become publicly available in 2016 (Duttler et al. 2015).
4. See Official Journal C 213, 6 August 1993, p. 1ff, here: p. 3.
5. Note that the analysis below excludes Luxembourg, which is an extreme outlier on this GDP measure. The section on robustness tests below does, however, show that the results remain substantially similar with Luxembourg included.
6. New Member States are an exception where one has to assume that responses in the year prior to accession are the same as in the accession year, as no prior Eurobarometer surveys are available.
7. See Figure A1 in the online appendix for an overview of the number of new laws adopted over time in different policy domains.

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