

Political Differentiation and the Problem of Dominance

Segmentation and Hegemony

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## ABSTRACT

At first glance, one might view the political differentiation in the European Union as a reflection of the autonomy of its member states, signifying flexibility and the dispersion of democratic control. However, under conditions of complex interdependence and economic integration, political differentiation can undermine the fundamental conditions for democratic self-rule. Political differentiation may cause dominance. I argue that we must move beyond Philip Pettit's conception of dominance as the capacity to interfere with others on an arbitrary basis, in order to properly identify the undemocratic consequences of differentiation. Political freedom is also a question of institutional provisions to co-determine laws. From this vantage point, differentiation raises the spectre of dominance in the form of decisional exclusion and the pre-emption of political autonomy. Drawing on a re-conceptualisation of dominance, I examine the effects of differentiation on the possibility of self-rule. I identify two systematic effects of political differentiation. I argue that *segmentation* is the systemic effect of differentiation in the vertical dimension of integration. Here, dominance occurs in the form of exclusion from decision-making bodies and the denial of choice opportunities. In the external horizontal dimension, the systemic effect of differentiation is *hegemony*. Some states are vulnerable to arbitrary interference and the pre-emption of public autonomy. I discuss developments within the Eurozone as a case of segmentation and the statuses of associated non-members as a case of hegemony. With regard to the latter, we are faced with the phenomenon of self-incurred dominance.

Keywords: Differentiation, The European Union, Democracy, Dominance

## INTRODUCTION

Brexit has been a shock, awakening us to the instability of the present European political system.<sup>1</sup> However, it has also awoken us to the depth of economic, legal and administrative integration that has been reached in Europe, as well as the multifaceted ways that European states are interrelated. Most European countries are members of the European Union (EU); those that are not are associated with the EU through a complex set of arrangements of varying density. The EU is also internally differentiated: for example, not all EU members are members of the Eurozone, and some are not parties to the Schengen Treaty. The EU is flexible – some states enjoy opt-outs and opt-ins – but whether this reflects a Europe of *different speeds* or a Europe of *permanent concentric circles* has not been determined. The EU was differentiated before the 2008 financial crisis; however, these differentiated arrangements were not considered a defining trait of the system, but rather as temporary exemptions. Integration was a ‘one-way street’, albeit with a variable speed limit.

The Eurozone crisis may put an end to the idea of teleology. In terms of agreements, the Fiscal Compact formalized the distinction between members and non-members of the Eurozone, while fundamental issues regarding the EU’s competences are executed outside of EU treaties. These developments raise the prospect that European states may come to permanently occupy different roles and statuses, and that this will be considered a defining feature of the EU. If so, we can speak of a uniquely structured political order in which the present level of political dispersion of power will be maintained or increased.

The nature and causes of European differentiation have been examined and analysts have established that differentiation has both a vertical and a horizontal dimension.<sup>2</sup> Vertical differentiation – ‘where policy

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<sup>2</sup> For an overview of political differentiation, see Leruth and Lord (2015). See also Fabbrini (2015); Avbelj (2013); Schimmelfennig (2014); Leuffen, Rittberger and Schimmelfennig (2012); Piris (2012); Genschel and Jachtenfuchs (2016); and Bickerton, Hodson and Puetter (2015), Eriksen and Fossum (2015). See further Kreuder-Sonnen (2016); Schwarzer (2015); Verdun (2015); Niemann and Ioannou (2015).

areas have been integrated at different speeds and reached different levels of centralisation’ – has to be distinguished from horizontal differentiation along a ‘territorial dimension’ in which ‘many integrated policies are neither uniformly nor exclusively valid in EU’s member states’ (Schimmelfennig, Leuffen and Rittberger 2015: 767). The different forms of differentiation however share a minimum common denominator, namely that within the scope of EU competences, not all member states are subject to the same uniform EU rules (Avbelj 2013: 193). Political differentiation hence raises the specter of arbitrary rule, of *dominance*. Analysts need to grasp the systemic effects of political differentiation with a view to the democratic problems involved. Moreover, analysts also need to come to grips with the idea that there may be patterns of differentiated integration *and* differentiated disintegration operating simultaneously.

This article analyses political differentiation from a democratic point of view and clarifies the puzzle it poses: what may seem to be an example of autonomy with connotations of flexibility and the dispersion of power is in fact an instance of dominance. The pluralist contention that fragmentation without supranational coordination may in fact be democracy enhancing (Krisch 2010) does not hold when actors are not able to shield themselves from ‘alien’ law. But why exactly does political differentiation amount to dominance? In order to elucidate the problem involved, we must move beyond the idea of freedom understood as ‘non-domination’ (Pettit 1997). Political freedom is not merely a question of interference on an arbitrary basis, but also of the free exercise of rights in a self-ruling republic.

Further, in order to analyse the problems that a vertically differentiated European political order pose for popular rule, I develop the concept of *segmentation*. It refers to circumscribed domains of problem-solving - autonomous systems of governance in different policy domains – that are largely uncoordinated by a centre. The hypothesis is that the EU due to the management of the Eurozone crisis has become segmented. A segmented political order in Europe is a source of arbitrary power as there would be no public coercive framework in place capable of tracking the interests, views, or wills of the citizens, nor of ensuring equal rights’ protection. However, differentiation also has an external horizontal dimension.

The problem of dominance arises not only for members of the Eurozone but also for the associated non-members. Countries like Norway and Switzerland are excluded from the EU's decision-making sites, but not from the effects of the EU's decisions. Under conditions of complex interdependence and economic integration, the problem of dominance in the differentiated European political order is most severe for legislators in associated non-member states. This pertains in particular to the European Economic Area (EEA) Agreement, which the EU offers as a second-best alternative to full EU membership. Dominance emerges because of asymmetric power relations: there is no parity of power that would render the use of threats or counter-measures credible under international law, nor are there possibilities for participation in systems of joint decision-making that would allow associated states to wield influence or demand justification under EU law. In addition to identifying the basic problem of differentiated integration, this article contributes to the debate on the essence of dominance.<sup>3</sup>

In Part I of this article, I define dominance and discuss the many forms differentiation takes in Europe. In Part II, I clarify the concept of segmentation, which has been brought to the fore by the new intergovernmental treaties of the Eurozone, which compromise European unity and the principle of equality among member states. In Part III, I discuss the associated non-members' affiliation with the EU and its negative consequences for the core component of modern citizenship – that of being a co-legislator. In Part IV, which also holds the conclusion, I discuss why only democratization can banish dominance.

## PART I: ARBITRARY RULE AND FLEXIBLE INTEGRATION

### On dominance

Dominance refers to subjection and rule without justification. To be dominated is to be subject to arbitrary power or alien control. Unlike freedom conceived as mere 'non-interference' (Hobbes 1651),

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<sup>3</sup> On domination see, e.g., Pettit (1997, 1999, 2004, 2008, 2010); Richardson (2002); Forst (2012); Niederberger and Schink (2013); Ripstein (2009).

freedom as non-domination, according to Pettit (1997), entails being and perceiving oneself as someone who is not at the mercy of the arbitrary will of others – not subject to their whims, pleasure, or discretion, even if these others were to mostly leave one alone.<sup>4</sup> Domination is thus dependence on the arbitrary will of another. Non-domination is the ideal of ‘the free individual [...] protected against the domination of others by the undominating and undominated state’ (Pettit 2010: 77). Pettit understands ‘non-domination’ as ‘the social status of being relatively proof against arbitrary interference by others, and of being able to enjoy a sense of security and standing among them’ (Pettit 1997: viii). Although often associated with hierarchies – as when states, in reducing the private abuse of *dominium*, interfere on an arbitrary basis (*imperium*) – domination can occur in networks or other less structured forms of governance that lack proper procedures of justification or participation.

This approach focuses on the potential of arbitrary interference; it favours the rule of law, checks and balances, and counter-majoritarian institutions. Non-domination can be ensured through opportunities for control and contestation by argument. According to this particular understanding of arbitrariness, ‘dominating power’ refers to an agent’s unchecked capacity to interfere with others without being obliged to consider their legitimate interests. Conversely, non-domination reflects that individuals are protected against harmful interventions. If agents are subject to control mechanisms that force them to consider the relevant interests of those potentially affected by their power to interfere, they do not possess dominating power.

Pettit’s approach to dominance establishes criteria for the study of dominance, which must be supplemented. The ideal of freedom puts ‘dominators’ under a burden of legitimation. Governments stand under the obligation of legitimation because they wield power under a claim to authority. They affect interests and they impose duties with a purported right to do so. Freedom is therefore a normative notion that relates to individuals’ rights and obligations and dominance is the capacity to ‘arbitrarily imposing duties on them’ (Richardson 2002: 34). Dominance is the purported normative power to

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<sup>4</sup> Pettit (1997: 52) argues that ‘someone dominates [...] another, to the extent that (1) they have the capacity to interfere (2) on an arbitrary basis, (3) in certain choices that the other is in a position to make’.

modify the rights and duties of others. In order to ensure conditions necessary for the legitimate authorising of power holders, there is need for a concept of dominance that is pinned on structures and acts that undermine the political statutes of the citizens regardless of their consent.

Whereas for Pettit, a decision is arbitrary and a source of un-freedom whenever it is taken or rejected without considering the interests or opinions of those affected, for Kantians, the freedom of individuals should be protected regardless of their interests or opinions. In this latter perspective, non-arbitrary power is not foremost a matter of tracking the preferences of the affected, but rather of institutions securing the equal freedom of persons. Freedom can only be restricted for the sake of freedom itself. Political authority is based ‘on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws’ (Kant 1797/1996: 389). The core of dominance is dependence on others’ decisions. Only democracy can banish it, hence the motto *extra republicam nulla iustitia*.

I understand dominance primarily as a question of *political status*, in terms of barriers to citizens’ public autonomy and their ability to politically determine their common action norms. Freedom entails relationships of mutuality and power bound by law. ‘In a legal community, no one is free as long as the freedom of one person must be purchased with another’s oppression’ (Habermas 1996: 418). The legal standing of the individual requires ‘a full adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties [...] are to be guaranteed their fair value’ (Rawls 1993: 5). Freedom necessitates the existence of authoritative institutions for collective opinion and will formation and not merely mechanisms of non-intrusion, contestation, and control. When powerful and democratically authorized institutions are lacking, dominance relations may not be addressed, as evidenced by the consequences of anarchic international relations and unfettered capitalist markets.

A similar dominance problem occurs when actors, under conditions of complex interdependence and economic integration, are excluded from political influence but not from the effects of political

decisions. This is the case in some forms of political differentiation. As we will see, a segmented political order obstructs collective action and undermines the idea of a political community organized such that citizens can be seen to act recursively upon themselves.

Dominance can thus occur not only in the absence of exit options from political or social relationships that actors can exercise at a reasonable cost, but also in the absence of *balanced, reciprocal relationships* that ensure symmetry, as well as in the absence of *institutional provisions* that allow actors to co-determine their common action norms.<sup>5</sup> Freedom is thus not merely a question of intrusion on an arbitrary basis but, more importantly, of political authorship.

#### Differentiated integration in the EU

Most European countries want to be members of the EU, and thus far, only the UK has started the process of leaving the Union.<sup>6</sup> All European states are dependent on the EU for economic, social, and political reasons; for one thing, they are all interested in access to the internal market, and they may believe that membership is advisable for security reasons and for the other common goods it provides. Being an outlier is risky, whereas being a member of a well-recognized political order can boost states' self-esteem and reputation. Complex interdependencies have developed in Europe, and no state, national ministry, or economic, social, or cultural group is unaffected by the EU. Although the trend lines point towards further integration, one should not overlook the important interplay between integration and differentiation that characterizes contemporary Europe.

Some European states are members of the Eurozone, but a number of these are not members of the Schengen zone, even though certain non-EU members are.<sup>7</sup> Some EU members have opted out with regard to citizenship, and some with regard to the EU's foreign and security policy. What is variously known as

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<sup>5</sup> This is a modification of Pettit (1997: 66f). I have added the third element.

<sup>6</sup> Article 50(1) TEU states that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements' (Official Journal of the European Union 2012).

<sup>7</sup> 19 EU states are full members of the monetary union; 22 are full members of the Schengen Treaty.



asymmetric, differential, or flexible integration pre-dates the 2008 financial crisis. But it has not been evident that European integration had departed from the initial assumption of striving towards a uniform *acquis communautaire* in which the same policies apply similarly and simultaneously under the same criteria of validation in all participating countries.

The EU's internal differentiation is also reflected in its relations with non-members, ranging from the European Neighbourhood Policy to Turkey's Customs Union, Switzerland's bilateral approach, and the multilateral EEA Agreement for Norway, Iceland, and Lichtenstein. However, differentiated integration can mean a variety of different things. It can describe differences in sectoral, territorial, or temporal dimensions, such as the concepts of variable geometry or Europe *à la carte*, core Europe or the Europe of concentric circles, and two- or multi-speed Europe, respectively. The temporal dimension is of particular interest, as the different forms of association have to date been seen as interim arrangements to EU membership and as precursors of EU membership based on equal rights. But if these arrangements for non-members are not actually stepping stones towards membership, we find ourselves in uncharted territory. What if integration is no longer viewed as inevitable, as the telos of Europe?

We must come to grips with the fact that there may be patterns of differentiated integration *and* differentiated disintegration operating simultaneously (Fossum 2015). The concept of segmentation is an alternative to the literature's one-sided preoccupation with integration as a unidirectional process. Segmentation paves the way for a more balanced approach open to the possibility of simultaneous integration and disintegration – of 'spill over' as well as 'spill back'. Specifically, it lays the groundwork for an assessment of the effects of politically unregulated interdependencies.

## PART II: A SEGMENTED POLITICAL ORDER

### Segmentation

From the writings of classical sociologists, and taken further by systems theory, we learn that

differentiation is the core feature of modern society: it is a way of dealing with the complexity in systems' environment. Differentiation is seen as the dividing of parts of the structure in order to uphold the identity or stability of the system (Luhmann 1987). Segmentation describes one such dividing of parts (see Cohen, March and Olsen 1972). Applied to the EU, the concept of segmentation highlights that the political order has been divided into different functional domains because of insurmountable obstacles to collective decision-making through ordinary legislative procedures. There is a lack of a higher-level consensus on procedures; instead, specific tasks are handled by particular institutions, technologies, and actors. Each segment involves certain participants, specialized forms of professional expertise, entrenched worldviews, and situational depictions, and it will typically define away or exclude others (those from outside the segment or from other segments). Each segment will accordingly exhibit framing effects and a certain *path dependence* that can be traced in decision-making processes (Eriksen and Fossum 2018). Segmentation reflects the fact that differentiation takes distinctive forms due to necessity and functional need. Segmentation patterns can be identified through decentralization levels with direct bearing on the functional scope and territorial reach of policies, divergent membership statuses, and the associated differences in member states' rights and obligations. A segmented political order is characterized by structures of functional differentiation constituted by varying and distinct circles of participants and subsets of actors relating problems to choices in specialized structures of decision-making.

The concept of segmentation underscores how functionally specific arrangements that can develop internal cohesion are steeped in distinct patterns of power and specialized knowledge regimes, or *régimes de savoir* (Foucault 1982: 781). It highlights the problems that occur when a cross-cutting unified framework of decision-making is lacking. A segmented political order is marked by strong built-in constraints on coordination across functional domains, with implications for the system's ability to handle problems and conflicts coherently, as well as for how the system addresses and responds to its citizens. Policy-making within segmented contexts is *biased* towards some parties as well as towards certain types of professionalized expertise and the competency traps of epistemic communities. Segmentation may enhance decision-making efficiency even if rationality is bounded and local (cp. Cyert and March 1963). Yet, segmentation represents an instance of arbitrary rule because of actors'

dependence on others' decisions.

Segmentation is a source of dominance because citizens are affected by decisions made by bodies they cannot control, as the access structure that relates problems to solutions is decoupled from the authorized structure of decision-making. The concept describes selectively integrated domains of problem-solving where there is no legal unity – no coercive public framework to track preferences and ensure the equal protection of citizens' rights. The decoupling of functional problem-solving from superior coordination and democratic control means that the affected citizens have no safeguard from arbitrary interference. From this perspective, a number of developments in the wake of the financial crisis buttress the hypothesis of a Eurozone segment.

### Structural decoupling

The crisis and the manner in which the EU has handled it have laid bare the Union's structural flaws; however, the crisis has also increased differentiation in the EU. This is primarily the case because the Economic and Monetary Union (EMU), a product of the Treaty on European Union (TEU), has produced new treaties of its own, establishing the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) or the Fiscal Compact.<sup>8</sup> These agreements were established outside of the Lisbon Treaty and the Stability and Growth Pact (SGP), in application of the amended Article 136. They have their own intergovernmental decision-making bodies and operate behind a shield of extensive immunity and confidentiality. Neither treaty provisions on the principle of transparency nor

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<sup>8</sup> The European Financial Stability Facility (EFSF) was created as a temporary rescue mechanism by the Eurozone member states in 2010 to safeguard financial stability in Europe. In October 2010, the EU decided to create a permanent rescue mechanism, the European Stability Mechanism (ESM), which entered into force in October 2012. With the Euro-Plus Pact (adopted in March 2011), some member states have made concrete commitments to political reforms intended to improve their fiscal strength and competitiveness. The EU economic governance Sixpack, a set of European legislative measures designed to reform the Stability and Growth Pact (SGP) and to introduce new macroeconomic surveillance, entered into force in December 2011. Finally, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG or the Fiscal Compact), is effectively a new, stricter version of the SGP (European Commission 2012a). The TSCG has been signed by all member states except the Czech Republic and the UK and entered into force in January 2013 for the 16 states that completed ratification prior to this date.

complementary secondary legislation apply, and hence parliamentary and public control is ‘extremely difficult’ (Tuori 2012: 47). The purpose of these treaties was to provide *conditional assistance* to Eurozone member states in financial difficulty due to banking failures, fiscal imprudence, or both (European Commission 2012b: art. 3).

Conditionality is intended to avoid *moral hazards* – that is, to prevent actors from assuming unnecessary risks when others are liable for the damages – and to help sovereign states to get back on track. Under such conditionality, access to aid packages is provided in exchange for domestic reforms. Heads of government who lack a European mandate in these matters have agreed to a series of financial, economic, social, and wage policies that affect the well-being of many European citizens. According to the Lisbon Treaty,<sup>9</sup> such issues belong to the remit of the member states. Although the Fiscal Compact, the EFSF and ESM are heavily dependent on the supranational Commission and the European Central Bank (ECB), they are intergovernmental treaties with an alienating effect on the EU’s representative institutions. It is also difficult to invoke the EU’s Charter of Fundamental Rights in the areas regulated by the Fiscal Compact.

What we observe is a comprehensive *Eurozone specific regime of economic governance* made up of new rules and ‘creeping’ competences. It consists of new bodies as well as new tasks for existing institutions. The ECB was allocated new tasks including the important banking supervision function, alongside, its main monetary policy function. There is an upgrading of macro-economic surveillance in relation to all EU members initiated by ‘the Troika’.<sup>10</sup> The Commission was required to develop its expertise in this field, which led to a more central role for its Directorate-General for Economic and Financial Affairs. The Eurogroup has become the main venue for informal decision-making.<sup>11</sup> It has become crucial for the management of the euro area on a daily basis (De Witte 2015: 440). The Euro

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<sup>9</sup> The Lisbon Treaty entered into force on 1 December 2009 (Official Journal of the European Union 2007).

<sup>10</sup> ‘The Troika’ consists of the European Commission, The European Central Bank and the International Monetary Fund.

<sup>11</sup> The Eurogroup is an informal body where the ministers of the euro area member states discuss matters relating to their shared responsibilities related to the Euro (European Council 2017).

crisis reforms adopted since 2010 have changed the EU's institutional and legal order. The EMU has undergone a 'metamorphosis' and created a new rulebook (Amtenbrink 2015).

First, there is a *structural decoupling*, because the Fiscal Compact formalizes the distinction between members and non-members of the Eurozone. It compromises European unity and the principle of equality among member states. The Fiscal Compact structurally decouples Eurozone functioning from the general authorizing structure of law-making as it has side-lined the European Parliament (EP), in addition to weakening parliamentary democracy in many EU member states. The Fiscal Compact has thereby legally codified the inequality between member states.

Second, EU institutions have multiplied through a set of *de novo* issue-specific bodies such as the European Stability Mechanism (ESM), which has a lending capacity of up to 500 billion Euros and a bank resolution fund of 55 billion Euros (Genschel and Jachtenfuchs 2016: 47). These institutions complement the other two Eurozone 'mechanisms' of banking union: the Single Supervisory Mechanism (SSM) for Eurozone banks and the Single Resolution Mechanism (SRM). To ensure the effectiveness of the new regulatory system, there was a general shift 'from soft law measures without binding consequences toward a binding framework' (Keppenne 2014: 211). In addition, the Commission's role was considerably enhanced in order to ensure order and discipline (Dehousse 2015: 9).

Third, the *de novo* 'European semester' effectively establishes European and national institutions as joint fiscal authorities for managing the salient questions of taxing, borrowing, and spending. Its main objectives are to promote differentiated, growth friendly consolidation and restoring normal lending credibility. The semester's concept of preventive fiscal monitoring serves as a means of handling difficulties resulting from the Stability and Growth Pact (SGP). The European semester ensures contact between national governments and the Commission before budgets are finalized. The Commission can therefore supervise and issue specific recommendations that, if approved by the Council, must be respected in the drafting of national budgets.

Fourth, the diminished role of the EP and national parliaments reduces oversight and limits transparency and accountability; consequently, insiders have greater scope for discretionary actions, and outsiders find it more difficult to determine what is actually taking place at the inside. Of the eight pieces of secondary legislation in the Six-pack and the Two-pack, four of them explicitly address only Eurozone member states. The Commission does not establish national plans on the basis of a majority of the European states; rather, it decides on the basis of a qualified minority of the member states – the creditor club (see Menéndez 2017).

Fifth, the strengthening of within-domain integration and coordination has been accompanied by the instrumentalization of supranational institutions. These institutions are called upon to monitor and enforce complaints on the basis of new and stricter criteria. Both the European Council and the Eurozone Council, the latter of which consists of the Council's Eurozone members, make use of the supranationality of the EU to compensate for the Eurozone's lack of legal personality.<sup>12</sup>

The result of these reforms is a policy domain in which problems and solutions are accessed in technocratic decision-making sites under the auspices of an empowered European Council. That is 'through the six-pack and two-pack regulations and the fiscal pact, a permanent Euro regime has been installed that seems designed to avoid the possibility of open political confrontation. Its economic policy represents a generalisation of the conditionalities placed on debtor countries' (Scharpf 2015: 269). The Eurozone is buttressed by a network of like-minded epistemic agents across a broad range of institutions. In the making of this regime 'the institutional routines designed to enable contestation, including parliamentary timetables and debates, have repeatedly been sidestepped or compressed' (White 2015: 589). There are violations of both European law and democratic principles (Enderlein 2013). The Eurozone regime of economic governance amounts to a special regime outside EU law, which is biased

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<sup>12</sup> According to Article 138 (1) TFEU, 'only members of the Council representing Member States whose currency is the euro shall take part in the vote. A qualified majority of the said members shall be defined in accordance with Article 238(3)(a)' (Official Journal of the European Union 2012).

towards some EU members.

The supranational arrangements' system-wide governing abilities have been weakened. Decoupling problem-solving from super-conditioning may be required for functional reasons as some pending tasks must be completed and some contingencies must be attended to in order to preserve the identity or stability of an institution. This crisis response was however not exclusively externally generated in the global financial markets; rather, it reflects political choices that could well have gone in different directions (see Dorn 2015: 795). Irrespective of causes, this decoupling raises the spectre of arbitrary intrusion, as institutional provisions that allow actors to control or moderate the social and political causes of their own dependency have been bypassed. The crisis management of the Eurozone, the new fiscal governance provisions in the Treaties and austerity politics, affects citizens' duties and rights. When the mapping of choices onto decision-makers (the decision structure) is decoupled from the mapping of problems onto choices (the access structure), there is a case for arbitrary rule. In other words, decision-making is arbitrary when there is *decisional exclusion*; when the linking of problems, participants, solutions and choice opportunities are not authorised through democratic procedures.

Foreign and defence policies are also operated through a distinct set of institutions, thus providing some added impetus to segmentation (see Rettman 2016; Cremona 2009). The Common Foreign and Security Policy allows for the 'constructive abstention' of one-third of all member states from its actions, and the Treaties now include a general procedure whereby sub-groups of member states can make decisions on their own (reinforced co-operation). A structured form of cooperation is possible between '[t]hose Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions' (Official Journal of the European Union 2012: Art 42.6).<sup>13</sup> This structure is biased because some EU-members do not participate.<sup>14</sup> Other segments may also emerge; for example, the internal EU tensions sparked by the

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<sup>13</sup> See also in Protocol 10 of the TEU where conditions are listed and Martinico (2015: 7).

<sup>14</sup> In 2017, 23 of the European Union's member states signed in the permanent structured military co-operation ("PESCO") plan to boost their defence budgets and joint capabilities.

refugee crisis may give rise to further segmentation with regard to Justice and Home Affairs.

The pre-emption of choice

Why exactly is the Eurozone segment an impediment of freedom? In Kant's perspective, freedom is understood as structural because it concerns conditions whereby the freedom of each can co-exist with that of all. In a political context, the autonomy of citizens is respected only when they are included as equal members of a self-governing association (Kant 1785: 85). Political autonomy requires 'the formal and material existence of equal rights and opportunities' to participate in collective self-rule (Forst 2012: 135). A segmented political order undercuts the value of political rights also by eliminating choice opportunities.

The SGP commits Eurozone members to balanced budgets (the structural deficit is not to exceed 0.5 per cent of GDP) and to public debts of less than 60 per cent of GDP. There are automatic penalties for non-compliant states, with supervision by the European Commission. The Fiscal Compact and the *de novo* task-specific EU bodies were introduced as a new and stricter version of the previous SGP. These arrangements for monitoring and ensuring compliance severely limit the fiscal policy space of the member states, which have already ceded national control of interest rates and currency exchange rates by adopting the Euro. Crisis-ridden states cannot devalue their currency and have little room for overspending in order to recover from recession and to correct and compensate for unjust market outcomes. The instruments for national fiscal policy are largely unavailable. Some macroeconomic policies are ruled out by the debt limits enshrined in domestic law.

As noted, the conditionality mechanisms introduced by the Fiscal Compact, target individual states and insert sharp asymmetries between EU members, making the Eurozone debtors dependent on the Eurozone creditors. While this may not break with international law, it breaks with the norm of equality between the states enshrined in the Treaties and the EU's democratic procedures. In order to reassure the markets, the consent of some EU members are much more important relative to others (Offe 2014:



98). Some European citizens are marginalized and disenfranchised because their states are deprived of bargaining power. These troubled states face a take-it-or-leave-it situation: '[...] the present euro-rescuing regime is institutionally entrenched as an extremely asymmetric intergovernmental negotiation system in which debtor governments have practically no bargaining power' (Scharpf 2014: 11). The consequence is thus that the conditions of *balanced, reciprocal relationships* required to ensure symmetry are not in place nor are *institutional provisions* that allow actors to co-determine their common action norms.

The members of the creditor club of the EU are privileged by the rules of the Eurozone. The debtors' freedom of choice is limited because their unbalanced budgets compel them to accept the conditions imposed by creditor countries. The debtors are placed in a subjected position: they are unable to control or moderate the causes of their own vulnerability. Loans and credit are conditional on reforms, which are not initiated by or justified to the affected citizens. There is a pre-emption of choice: debtors must obey the rules and instructions if they are to be viewed as reliable borrowers and trusted members of the Eurozone. This is the effect of the conditionality mechanisms in the Eurozone's macro prudential regulations. To choose between macroeconomic alternatives like that of Keynesianism versus neo-liberalism, investment versus austerity, is not possible. There is an elimination of choice opportunities when left wing policies are deemed incompatible with the Euro (see Sandbu 2015: 235).

Political differentiation entails segmentation when policy fields escape ordinary democratic control. Segmentation entails dominance under conditions of complex interdependence and economic integration because actors are excluded from influence but not from the effects of others' decisions. Segmentation entails imbalances and unequal relations that are in breach with the principle of equal citizenship. The changes to the Eurozone have sectioned off the management of decisions by removing them from parliamentary agendas and by compartmentalizing them in convoluted, technocratic-driven decision-making processes. Thus, in the EU, dominance emerges not only as arbitrary interference in zones of freedom but also as a hindrance to co-legislation. The *decisional exclusion* and the *pre-emption*

*of choice* resulting from the handling of the Eurozone crisis testify to a type of dominance that ultimately affects citizens' political autonomy.

Segmentation causes dominance and also uncertainty and instability because it multiplies the possibilities for negative externalities, opacity, blame-shifting, and shirking. Eurozone policies have triggered protests from disenfranchised citizens, most visibly in Greece (Grasso and Giugni 2016). There are calls for reform, also from within. The European Parliament is critical of the development, stating that:

Any formal differentiation of parliamentary participation rights with regard to the origin of Members of the European Parliament represents discrimination on grounds of nationality, the prohibition of which is a founding principle of the European Union, and violates the principle of equality of Union citizens as enshrined in Article 9 TEU

(European Parliament 2013)

There is nothing deterministic about segmentation; it may be abolished through democratic reform.<sup>15</sup> A differentiated political order is, however, a concern not only for the European Union and its member states but also for some non-member states.

### PART III: SELF-INCURRED DOMINANCE

#### Dominance through association

The EU's internal differentiation is, as mentioned above, reflected in its relations with associated non-members. Some non-EU members are signatories to the EEA Agreement, others are part of the Customs Union, and others have signed special association agreements. The case of Norway illustrates the extent

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<sup>15</sup> The Fiscal Compact states that 'within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken [...] with the aim of incorporating the substance of this Treaty into the legal framework of the European Union'(European Commission 2012a: Art. 16).

to which differentiated integration allows a country to participate in the EU without being a member state. Despite a majority of ‘no’ votes in Norway’s referendum on EU membership in 1994, the EEA, which entered into force earlier the same year, was not abolished, as Norwegian politicians came to realize that they could not afford to remain outside. The EU controls certain resources that are of vital interest, especially for those with a stake in the single market. The EEA Agreement provides access to the EU’s single market for Norway, Iceland, and Liechtenstein. The single market ~~involves~~ a regulatory regime. In order to monitor and ensure that EU rules are correctly applied in EEA countries, the EEA has its own supranational institutional arrangement, a court, and a surveillance body. The Agreement is dynamic, both in terms of depth and breadth: new relevant legislation is transposed to the domestic law corpus in an ongoing manner, and the Agreement is expanded territorially in line with every expansion in EU membership. The total number of EU legal acts, regulations, and directives has grown at an exponential rate, and most of them are EEA relevant. About 75 per cent of the EU laws and regulations, which Norwegians cannot influence, apply to Norway (NOU 2012:2). Since 1994, Norway has adopted 11013 EU directives, and rejected none (Norwegian Ministry of Foreign Affairs 2016: 9).

The dynamic aspect of the EEA Agreement is important for comprehension of the Agreement’s basic intention: the maintenance of a homogeneous market throughout the whole area. In other words, homogeneity trumps sovereignty. The legal norms of EEA countries are excluded as a legal basis for interpreting EU market rules (see Fredriksen 2015). Regulations and directives must be uniform and have the same effect for all EU member states as well as for the EEA countries. This homogeneity requirement can be found in the preamble of the EEA Agreement, but is also an ‘unwritten rule’ governing the Schengen Agreement and other agreements with associated non-members. The EEA countries are obliged to adopt EU regulations, interpret, uphold and live by them, just as EU member states do. There is no veto right, but a so-called ‘reservation right’ – to put EU legal acts on hold – but thus far, this right has not been invoked, as such use would put the entire arrangement at risk. In practice, the EEA Agreement reduces national parliaments to rubber-stamping EU legislation that they cannot themselves affect. The Swiss arrangement is less comprehensive but perhaps no less problematic.

Switzerland, which rejected membership in the EEA Agreement, has concluded more than 120 bilateral sectoral agreements with the EU.<sup>16</sup> In the unique Swiss form of sectorial bilateralism, there is no set of supranational arrangements to ensure coherence; the Swiss affiliation is less hierarchical than the EEA Agreement. However, sectorial bilateralism comes at the cost of greater uncertainty. In contrast to the dynamic EEA Agreement, the Swiss arrangement is a static system, thereby allowing Swiss authorities to retain more autonomy and control than the EEA countries enjoy. However, in a comprehensive study, Vahl and Grolimund (2006: 3) argue that ‘the relationship between Switzerland and the EU is highly dynamic’. Since the late 1980s, the doctrine of *autonomer Nachvollzug* (autonomous adaptation) has been in play, representing a policy of voluntary alignment with the EU. In practice,

[...] the main characteristics of ‘pragmatic bilateralism’ between the EU and Switzerland are the fluid junctions between formal obligations and informal practices and the organisational complexity, highlighting the sectoral diversity of forms of association to EU structures. While at first sight the negotiated issue specificity of the Bilateral Agreements, their mainly static nature as well as the lack of supranational enforcement mechanisms promise a stronger preservation of Swiss sovereignty vis-à-vis the EU than the more comprehensive, dynamic and hierarchical EEA, in practice the scope for derogations from the dynamically evolving *acquis* is similarly limited, thus reducing the relevance of these formal differences.

(Lavenex and Schwok 2015: 43)

Thus, despite important formal distinctions, the practical implications are not very different. As long as the homogeneity principle applies, adaption takes place on the EU’s terms. As a result, there is little to suggest that the distinctive Swiss democratic tradition is any more resilient than its Nordic non-EU counterparts (Eriksen and Fossum 2015:234). The EU would prefer to reduce the number of affiliations – moving away from the sectoral bilateral Swiss form of affiliation and towards the multilateral EEA form – in order to ensure legal certainty and the coherence of the single market. In line with this objective,

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<sup>16</sup> This is in addition to its 1972 free trade agreement with the European Economic Community.

the EEA is referred to as the ‘blueprint’ model for the EU’s relations with its neighbours or as the ‘second-best’ model after full EU membership (Gstöhl 2015: 32). The EU would like to abolish the Swiss *Sonderweg*.

The EU dominates the associated non-members – it makes them ‘rule takers’ – because of the agreements’ built-in asymmetries. One peculiarity of the form of dominance experienced by associated non-members (Switzerland and the EEA members) is that it is effectively *hegemony in disguise*.

### Hegemony by default

The EU itself is an experiment in the domestication of international relations – in establishing a system of ‘undominating and undominated’ states in Europe. The development of a segmented political order is a response to the difficulties of resolving problems within the common framework, i.e., the ordinary legislative procedure. Segmentation is driven by (perceived) necessity and functional need. For the associated non-members, their own choices have been the cause of dominance. They have brought it on themselves by prioritizing access to the single market over political autonomy in terms of the ability to live by self-determined laws. This is self-inflicted harm in breach of the Kantian approach, in which the means do not justify the ends and freedom can only be restricted for the sake of freedom itself. The associated non-members have restricted their freedom for economic reasons when other options were available. Dominance or subjection is the effect, regardless of how voluntary or beneficial the arrangement may be.

At first, it seems strange to describe the associated non-members as dominated by the EU. In fact, they are often seen as free riders on European public goods and as creating negative externalities for the Community. Nonetheless, the associated non-members have voluntarily – through referenda and parliamentary decisions – subjected themselves to the EU, which as an unintended consequence has become a hegemon. The EU was never intended to become a hegemon, and it has invited the associated non-members to become members. It is paradoxical that it is the states with the strongest and best-

entrenched democratic traditions – states that are wealthy, well-organized, and that qualify for EU membership – that have opted not to become members, instead agreeing to be subjected to alien will. This is a form of self-abdication and harm to self (Eriksen 2015:92). The states have traded democracy for access to the single market. They have chosen to protect their sovereignty by rejecting membership in, while accepting agreements with, an entity that is more than an international organization and thus difficult to limit the effects of. The arrangements curtail citizens' sovereignty and infringe upon their right to self-determination.

The associated non-members would like access to the EU's common goods. But to get access to resources vital for their welfare, prosperity, and security they must accept being subject to the EU's legal acts. These countries are dominated by the EU because they prioritize access to the European common goods within a contractual framework in which it is the states' interests that count. The EEA Agreement is a contract between very different parties – certain very small countries and a Union with 500 million inhabitants. The *asymmetry of power relationship* involved makes it hard, if not impossible to change the conditions. The EEA members are unable to back their claims towards the Community with credible threats – external sanctions or reciprocity – whereas the EU could unilaterally destroy the whole arrangement with negligible costs. Hence, there is a violation of the requirements of a fair bargaining process. The associated non-members are free to annul their arrangements with the EU but have chosen not to face the costs of such an act. Exit options are not perceived as realistic. However, for every year that passes, the associated non-members become ever more entangled in the Union's affairs. These countries are dominated because there is no parity of power to render the use of threats and counter-measures credible under international law, nor are there opportunities for participation in joint decision-making to wield influence over or demand justifications under EU law.

#### PART IV: DOMINANCE AND DEMOCRACY

##### The European experiment

The EU was established to domesticate international relations, to abolish dominance in Europe (including US dominance), and to eliminate the use of currency exchange rates as a beggar-thy-neighbour strategy. European states have pooled and shared their sovereignty and have gained the right of co-determination of common matters in return. The EU system is organized such that the different ‘peoples’ of the Community rule themselves through institutions to which they have direct access and through which they can exert influence. As a political system, the EU has clear experimental features: it establishes its own criteria of democratic legitimacy while not being a state. The Union’s democratic credentials are reflected in its quasi-federal structure, in its allocation of rights, and in the procedures that involve states and citizens in joint decision-making. The co-decision procedure – elevating the [European Parliament](#) to a legislator on par with the Council – signalled the advent of supranational democracy, but the response to the financial crisis aborted the ongoing democratization process. The EU’s ability to prevent dominance in Europe has been undermined by the development of a segmented political order that decouples functional areas from central conditioning.

The EU’s relationship with the associated non-members reflects a different type of dominance. The EU has reconfigured state sovereignty by pooling it and sharing decision-making power through the co-determination procedure. Lack of access to the relevant bodies, notably to the [European Council](#) and the [EP](#), also entails lack of influence in processes that determine the scope and terms of self-determination for associated states. It is the EU that determines which law will prevail in the associated countries, since the Court of Justice of the European Union (CJEU) does not recognize the EEA countries as sources of EU law. But why is democracy a precondition for non-dominance?

Arbitrary rule

Greater interconnectedness and interdependence impact the sovereignty and autonomy not only of states, but also of citizens, as their ability to govern themselves through institutions they can control is affected. Interdependence increases states’ ability to impose negative externalities on other states and decreases their ability to provide their own citizens with the positive externalities of public goods, i.e., goods that

benefit more than just those who pay for them (Lord 2011; Collignon 2003). Differentiated integration on its part creates new opportunities for some EU member states to impose negative externalities on others, as well as, conversely, new opportunities to exploit others by free riding on their provision of positive externalities.

In order to avoid moral hazard and banish dominance there is a need for democracy, not only between the states but also above them. Supranational institutions are required to prevent nation states from violating citizens' rights, to prevent one state from infringing on another, and to ensure that the policies of one state do not produce externalities that others end up paying for. Also democratic states sometimes operate as free loaders, inflicting costs on others without compensation (Grant and Keohane 2005). The states themselves may therefore be sources of dominance, as they can undermine non-dominance conditions at the global level. All states could be perfectly democratic without that adding up to a non-dominating [world](#) order.

Supranational orders are needed not only to deal with negative externalities and moral hazard, but also to address conflicts of rights and of norms. Even actors motivated to do good must act within a structure that factors in the reality of foreign will and prevents unintentional harm to others. Thus, the normative meaning of democracy does not stop at the borders. When more encompassing orders are required to prevent dominance, there is an evident need to expand the political community to make it capable of action – that is, to establish the power, resources, and competence necessary to protect the freedom and integrity of the citizenry.

A judge, an international lawyer or an executive can only be empowered consistently and non-arbitrarily through the actions of democratic legislators. A liberal rule-of-law regime, which stabilizes expectations through a recognized set of rules, permissions and prohibitions, runs the risk of being arbitrary from the point of view of affected parties. Only the involvement of the affected parties (of the citizens or their representatives) in the legislative chain of power can establish the necessary conditions for non-arbitrary interpretation, application, and enforcement of the rules. The public coercive framework, with its



separation of legislative, executive, and adjudicative functions, is an enabling condition for public autonomy. Each function represents a right that no private person can have. Granting individuals civil and economic rights without due process implies that they are subject to arbitrary rule. One is not free if one is dependent on the will, even the goodwill, of others. It is impossible to resolve the assurance problem (i.e., that others will comply if I do) without the presence of a public authority that represents the will of all and that determines the boundaries of sovereignty, competence, and rightful possession via legislation and adjudication. There is no rightful solution without a legislature that can authorize acts that ‘change, enforce or demarcate rights’ (Ripstein 2009: 173). Hence, dominance is more than merely the capacity for arbitrary interference. Dominance also emerges when the political status of the citizens – their public autonomy – is diluted. Dominance can be brought about by citizens themselves when they limit their freedom for reasons other than freedom itself. Dominance occurs when power is not bound by law. It occurs when

- a) non-authorized power is wielded;
- b) affected parties are excluded from participation in decisions;
- c) affected parties experience the system as unjust without being able to control or amend it;
- d) affected parties are subject to forms of rule that are non-transparent;
- e) the bargaining power of affected parties is weak or non-existent; or
- f) exit options cannot be exercised at a reasonable cost.

Consequently, hierarchy as such has no bearing on dominance; rather, it is the manner in which it is institutionalized that matters. The mere fact that coercive institutions have been established to implement and uphold rules is not evidence of dominance.<sup>17</sup> Such institutions become agents of dominance only when they are not democratically authorized and controlled. A hegemon wields arbitrary power over subordinate states; it dominates by limiting the sovereignty of subordinate states through direct intrusion as well as when the arrangement is voluntary but states cannot withdraw because the costs and penalties are perceived to be too high.

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<sup>17</sup> Such a suggestion would be tantamount to asserting that the essence of democracy is the collective people as the absolute sovereign (Pettit 2006: 315).

A more loosely coupled European political order results in greater coordination problems. There is also heightened vulnerability to defection due to utility calculations and/or value differences between member states when no unified procedure exists. Internal and external differentiation – with a plurality of access structures decoupled from the legislative structure – is therefore inherently unstable. Under conditions of complex interdependence and economic integration, political differentiation in the form of a segmented political order subjects actors to arbitrary rule, which undermines the conditions of stability that functional differentiation requires. Differentiated integration may thus lead to fragmentation and a struggle over occupation of the power centre of core Europe.

## CONCLUSION

Curbing dominance would necessarily entail the democratization of international systems of rule-making. In Europe, citizens are not just members of nation states but also of the EU, in which they have participatory rights. The member states of the Union have a place at the table in the Council, and their citizens are represented in the [European Parliament](#)<sup>EP</sup>. There is pooling and sharing of sovereignty, as well as a procedure for co-determination. However, the 2008 financial crisis led to radical changes. The handling of the crisis propelled the Eurozone into a decision-making segment with wide ranging effects. One effect is the deterioration of the integrative forces that drive certain unifying processes of EU integration: constitutionalization and democratization. Another is that the patterns of segmentation within the European political order implies the weakening of supranational bodies' system-wide governing abilities.

By identifying the consequences of being an associated non-member, this article has also highlighted the dominance effects of a Europe with permanently divergent roles and statuses. The EU offers member states the opportunity to participate in the co-determination of policies in exchange for restrictions on their individual sovereignty. However, if countries – for whatever reason – end up adopting EU policies without becoming full members of the EU, they experience the individual loss of sovereignty without

being compensated with participatory rights in EU decision-making. Through this exclusion from joint decision-making procedures, the citizens of the associated states have been subjected to an alien will; in essence, they have become *second-rate Europeans* because others are controlling their conditions for self-determination.

Still, there is a right not to be dominated that confers obligations on the actors and institutions responsible for any harms and injustices inflicted. As we have seen, this triggers calls for unification. Overall, political differentiation is unstable as it causes dominance, leading to instability and calls for its abolition. The problem facing Europe is then not merely uncertainty and fragmentation, lack of efficiency and political clout, but also the likely increased struggle for power.

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