

LIECHTENSTEIN-INSTITUT

25 October 2018

Demand for and supply of different institutional arrangements in the EEA: Will Brexit change something?

Christian Frommelt

Informal workshop, Liechtenstein Institute

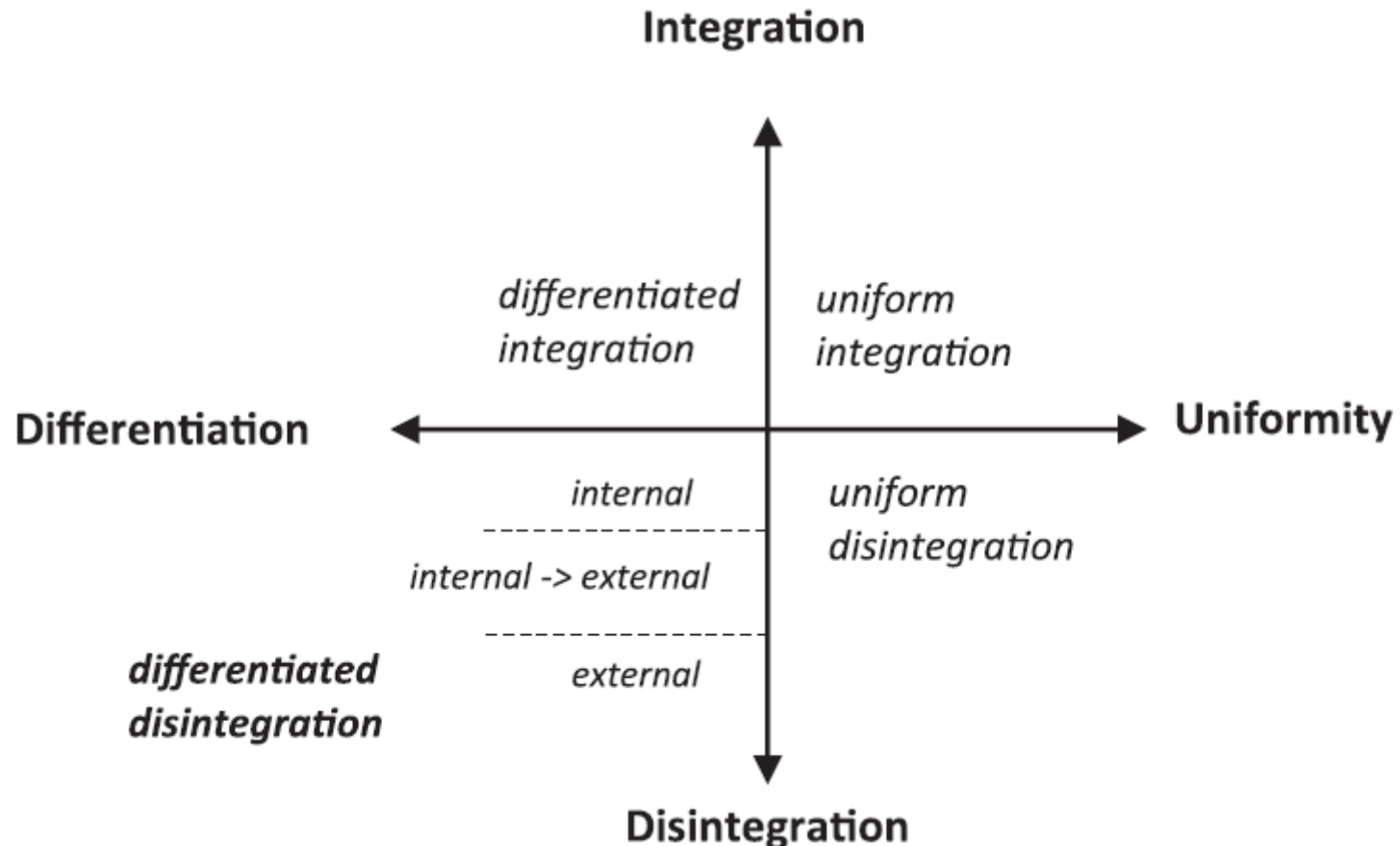


Structure

- Analytical framework: differentiated integration
- Puzzle: Dynamic differentiated integration of the EEA EFTA states
- Analytical framework: external DI
- Empirical analysis
- Conclusions



Theorizing differentiated (dis)integration

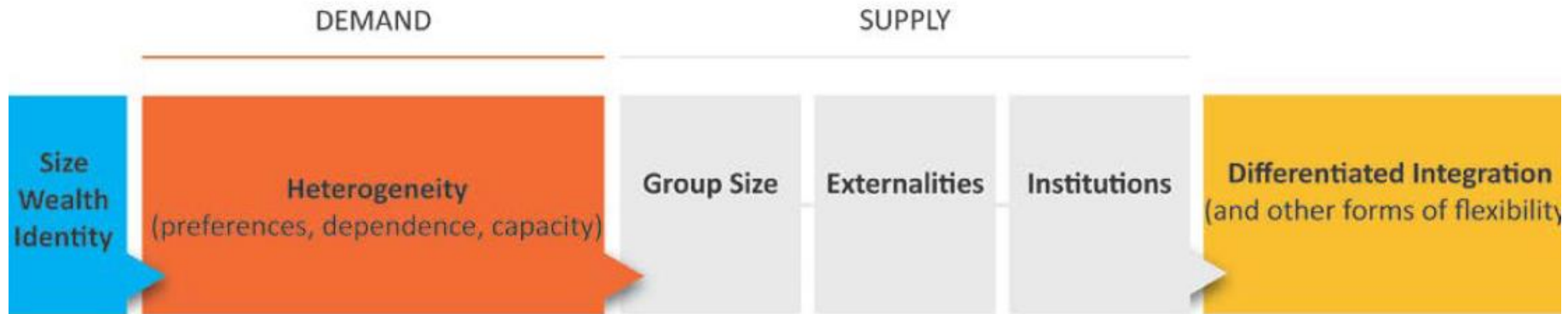


Research on DI

- DI is a key governance strategy of the EU
 - Variation in the integration preferences and capabilities
 - Allowing cooperation at different levels of integration
 - Intrinsic to the dynamic of integration
- Different Models, causes and effects of DI
 - Classification of forms and models of DI
 - Historical drivers, trajectories and scope conditions of DI
 - Position of governments, parties and citizens on DI
 - Dynamics: centrifugal or centripetal?
 - Informal practices of DI
- Design of DI and alternative models of flexibility



Demand and supply factors of DI



Source: Frank Schimmelfennig, Integrating Diversity in the European Union (InDivEU), 2018



Supply factors of external DI [1]

- Group size: Is it better to negotiate external DI bilaterally or multilaterally?
 - Transaction costs of creating and sustaining new institutions
 - One or two pillar model
 - Total number of institutions
- Externalities: Risk of negative externalities reduces leeway
 - EU's wish to exclude any kind of unwanted precedence
 - Higher leeway if no externalities (Liechtenstein's special solution for Free Movement of Persons)
 - Need to keep external DI less attractive in order to prevent free-riding



Supply factors of external DI [2]

- Institutional factors :
 - Decision-making rules
 - LIE and Free Movement of Persons
 - No amendments to the EEA Agreement but sectoral adaptation to the relevant annexes
 - Institutionalized norms (informal and formal)
 - Indivisibility of four freedoms
 - Preservation of decision-making autonomy and integrity of legal order
 - Balance of benefits and obligations
 - Actors and their legal and political properties
 - Supranational or intergovernmental?
 - Incorporation of decentralized bodies into the EEA Agreement -> recurrent two-pillar challenges
 - Path-dependence
 - High number of ad hoc rules in order to fill gaps of EEA's two-pillar structure instead of substantial revision of the two-pillar structure



**Where can we allocate the EEA EFTA states
in the EU's system of DI?**

***Puzzle: How does the EFTA states'
historical reluctance towards integration
corresponds with the obligation to
dynamic integration?***

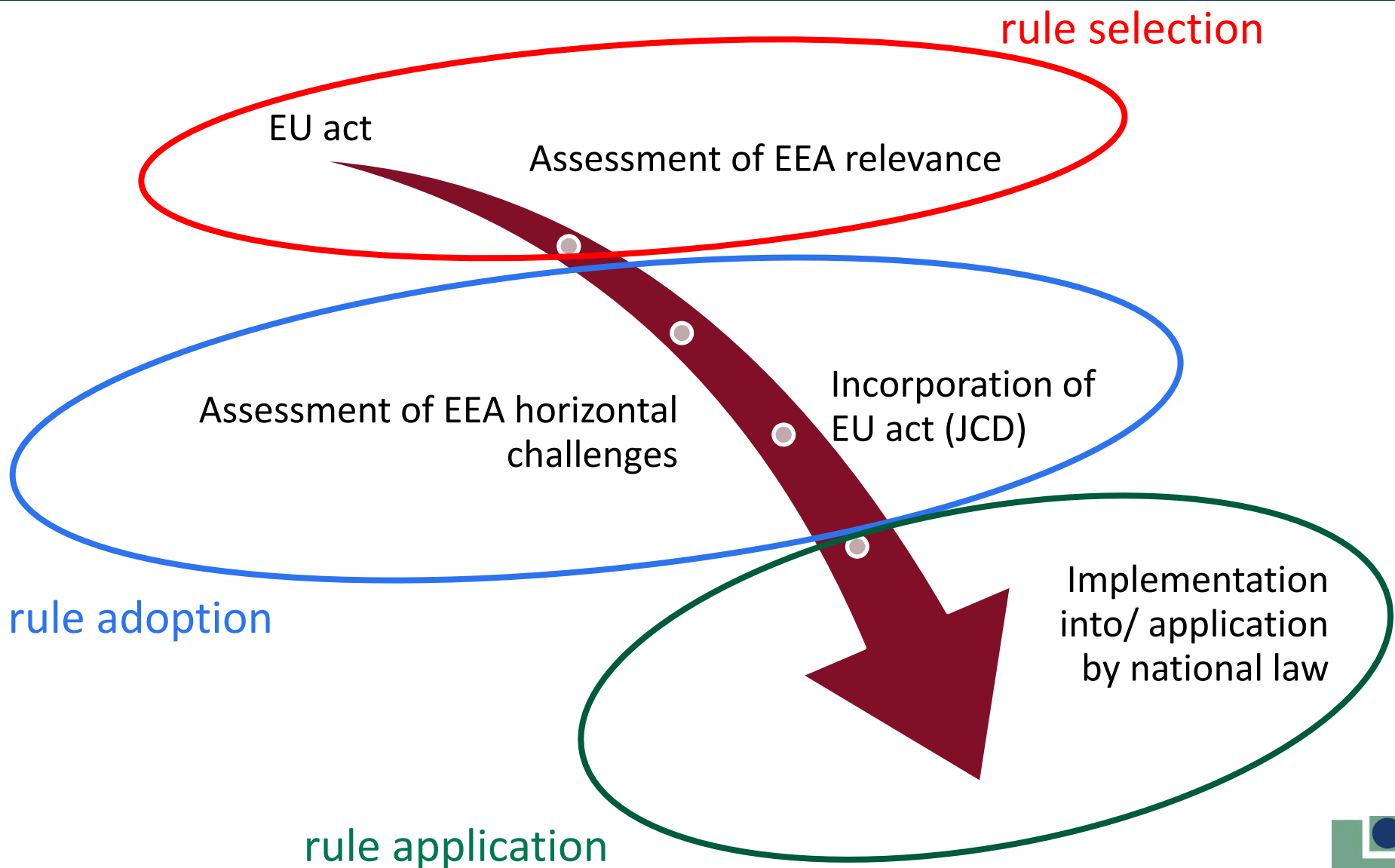


Origins of their integration

- EFTA states' historical reluctance towards EU membership
 - Economic incentives to integration (interdependence) but popular constraints on political integration
 - idiosyncratic factors (e. g. direct democracy; periphery vs. centre)
 - Selective opt-in in highly interdependent but weakly politicized policy areas
- Lengthy EC-EFTA negotiations on EEA Agreement
 - Scope: Global vs. selective approach?; Permanent or temporary derogations? Etc.
 - Institutions: Rejection of EEA Court; involvement in EU policy-making; single voice etc.
 - Money: Contribution to Cohesion Funds
 - Outcome for EEA EFTA states less favourable than expected
- Outcome of negotiations
 - Dynamic and homogenous economic area
 - Two-pillar model
 - Agreement under international law



EEA policy cycle: Dynamic integration



Effectiveness of the EEA: different concepts/ perspectives [1]

- Effectiveness is the *'degree to which something is successful in producing a desired result'*
- Perspective of the EEA EFTA states
 - no pooling of sovereignty and no delegation of decision-making autonomy
 - access to internal market (level playing field)
 - greatest possible participation in EU policy-making
- Perspective of the EU
 - shift of EU regulatory boundary beyond EU membership
 - maintenance of integrity of the EU's internal market (indivisibility) and EU institutions (no common institutions)
 - consolidation of EU's external relations



Effectiveness of the EEA: different concepts/ perspectives [2]

- Economic perspective
 - removal of static barriers to trade and market entry
 - mechanism to enhance innovation, growth, and competitiveness
- EEA institutions
 - capacity of the EEA's institutional arrangement to reconcile difference within the EEA's functional scope and institutional setting
 - capacity of contracting parties and their institutions to find mutually accepted solutions for common challenges



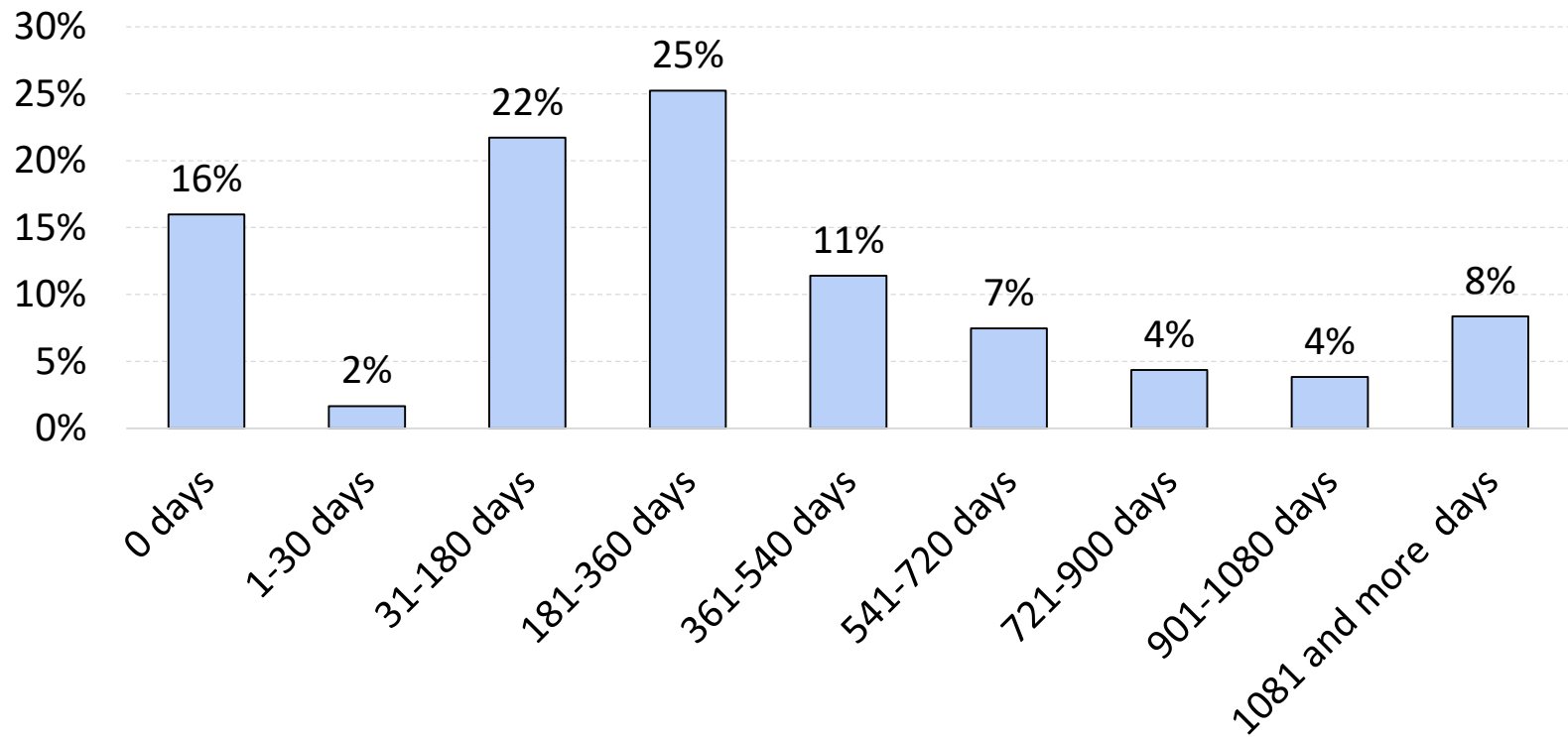
Challenges: Case study 1 “the deepening of the EEA’s institutions”

- Intergovernmental cooperation within the EEA JC
 - Exclusive decision-making by EEA JC; exemptions for individual EEA EFTA state possible and no threat of suspension
- Intergovernmental cooperation within the EEA JC but under a shadow of hierarchy
 - Exclusive decision-making by EEA JC but obligation to speak with ‘single voice’ and potential suspension of affected parts of EEA Agreement in case of non-incorporation
- Quasi-supranational centralisation
 - Within the EFTA pillar due to exclusive decision-making by ESA
 - across EU and EFTA pillars due to decision-making by ESA based on draft enacted by EU institutions
- Subordination to the EU pillar
 - Exclusive decision-making of EU institutions



Challenges: Case study “the EEA’s backlog”

Share of EU acts with different compliance dates in the EU and the EEA (N=4 573)



Note: Only directives and regulations



Types of DI in the EEA [1]

- EEA is not an automatic policy transfer from the EU to the EEA EFTA states
- EEA EFTA states can make adaptations to EU acts by a JCD
 - Right is mentioned in Protocol 1
 - But: less than 15 per cent of the incorporated EU acts have adaptations
 - Purely technical vs. substantive adaptations -> majority of adaptations are technical
 - Only a very limited number of the adaptations trigger differentiation



Types of DI in the EEA [2]

- Sectoral vs. ad hoc DI
 - Ad hoc DI refers to a distinct EU act and is based on a specific adaptation
 - Sectoral DI does not refer to a specific EU act but to an entire EU policy in terms of a whole annex or chapter of an annex of the EEA Agreement
- General vs. country-specific DI
 - General DI applies to all EEA EFTA states
 - Country-specific DI applies only to a specific EEA EFTA state
- Other analytical distinctions
 - Full or partial DI
 - Temporary or permanent DI
 - Actual or potential DI



Typology of external DI

- First-order DI
 - Close to the traditional understanding of external DI
 - Those parts of the EU acquis that a non-member state has not taken over are a case of first-order DI.
- Second-order DI
 - Occurs within the functional scope of the agreements that the EFTA states have concluded with the EU.
 - Considers specific opt-outs clauses to EU secondary law that is covered by an agreement between the EU and an EFTA state.
- Types of second-order DI
 - Sectoral DI
 - Ad hoc DI
 - **Informal DI**

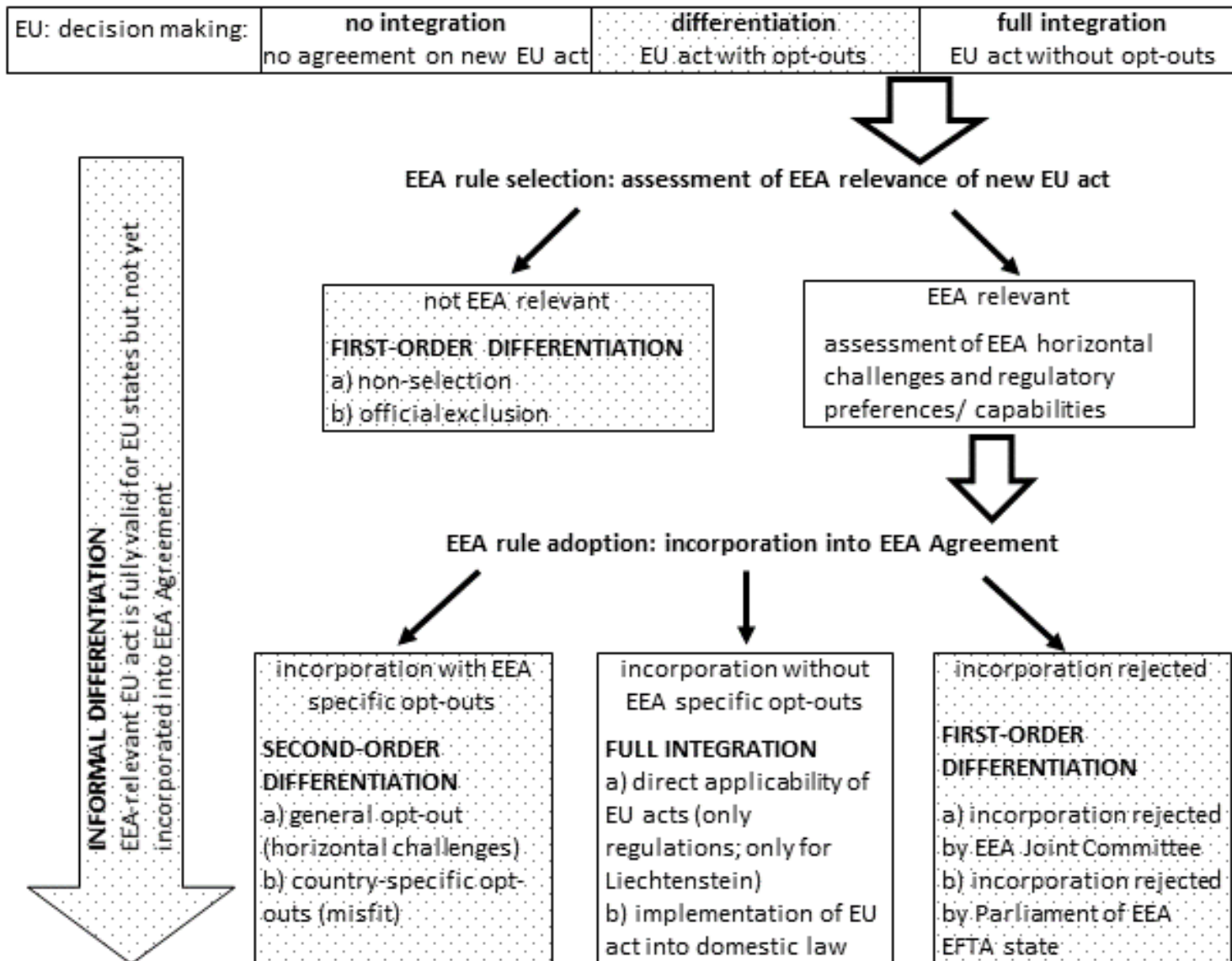


Typology of external DI: Informal DI

- Background
 - Lengthy EEA decision-making process
 - There should be no time difference between the date of compliance for the EU and the EEA EFTA states but EEA EFTA states were temporarily exempted from the validity of 84 per cent of the EEA relevant EU secondary law
- Concept
 - Informal DI is not based on a formal decision
 - Temporary exemptions of the EEA EFTA states from the validity of an EEA relevant EU act during the process of incorporation of this EU act into the EEA Agreement
 - Close to variations in the trans-position and implementation of EU law across the EU states but
 - Such variations in transposition and implementation of EU law can also be observed among the EEA EFTA states after they have formally incorporated an EU act into the EEA Agreement
 - From a quantitative perspective, informal differentiation plays a much more prominent role than any patterns of non-compliance with EU law

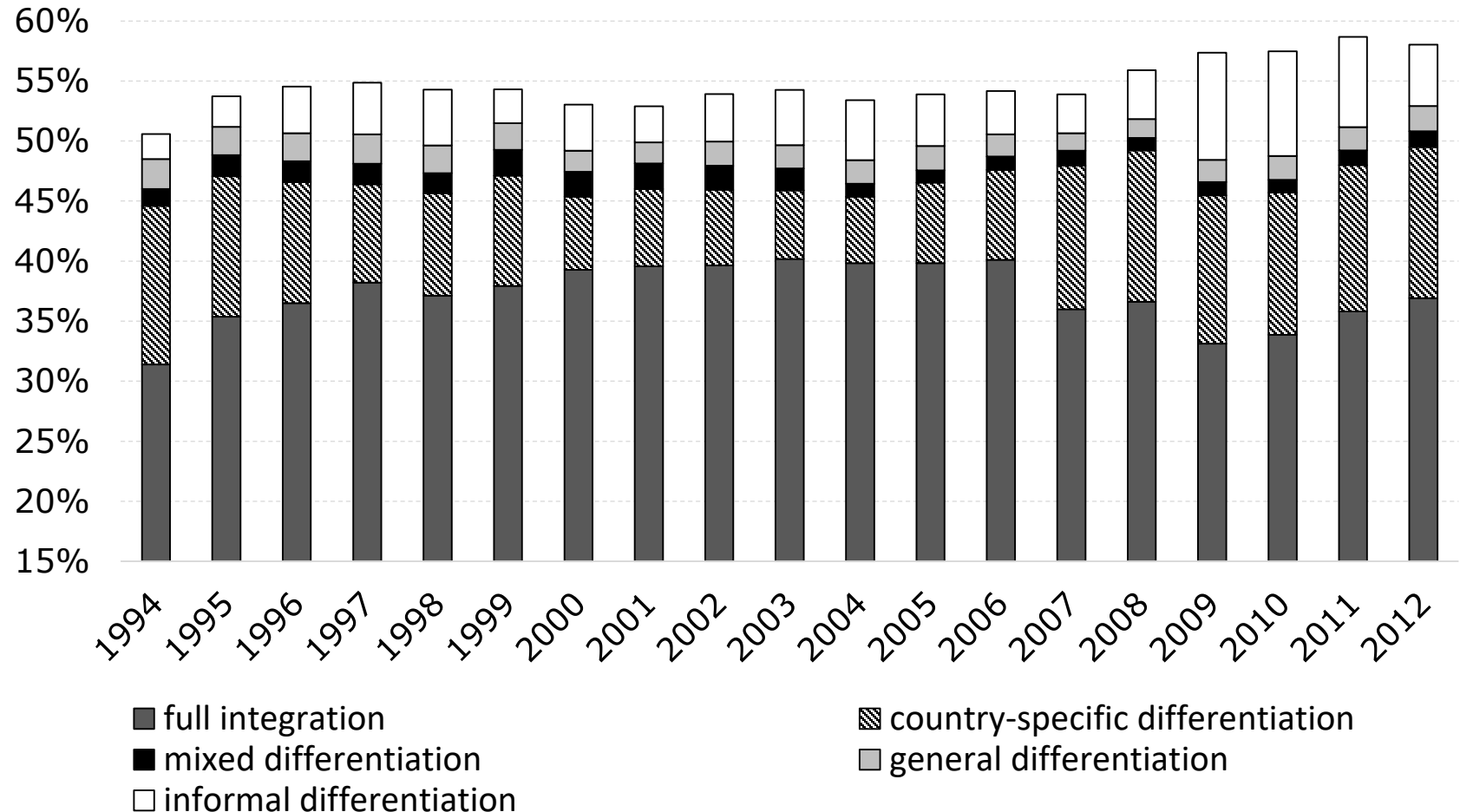


Integration and DI at the level of EU secondary law



Extent of integration of the EFTA states

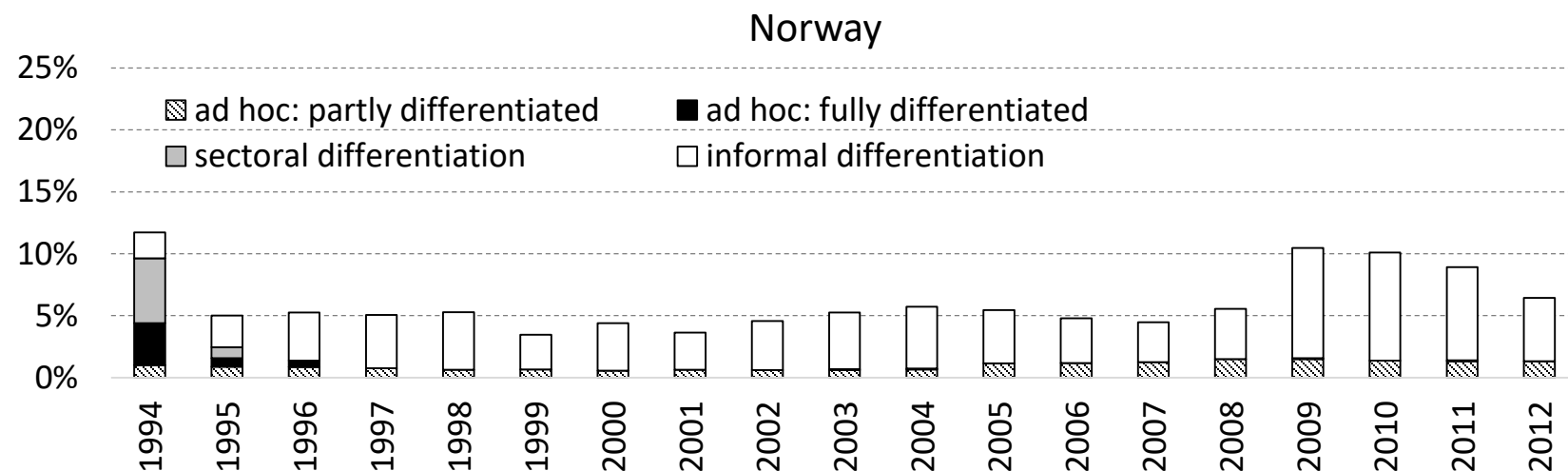
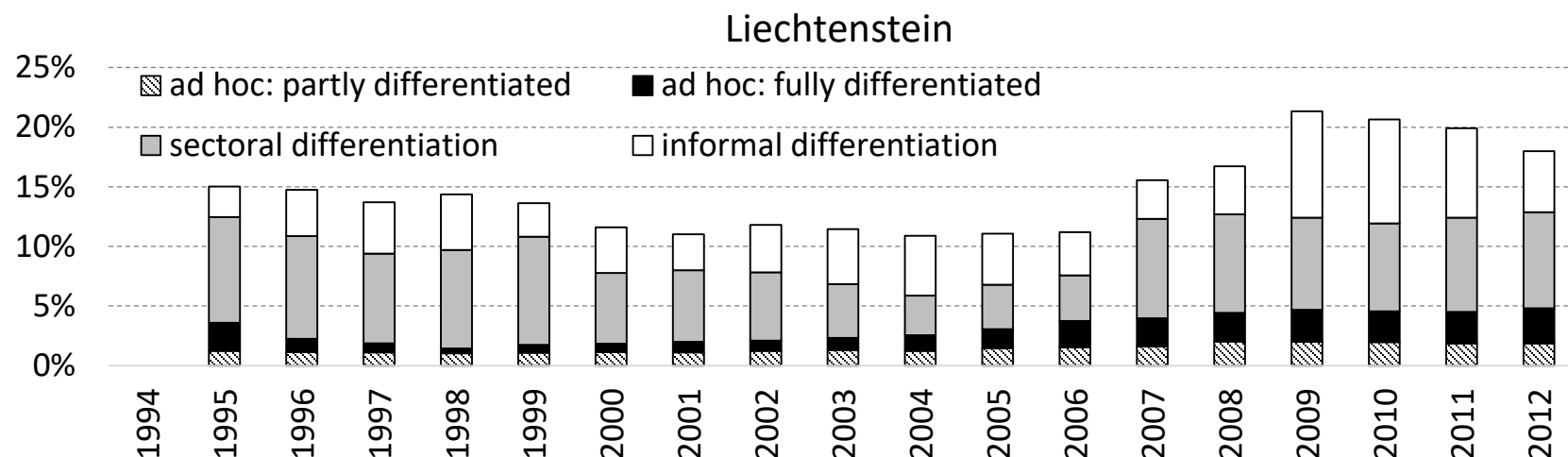
Types of integration/differentiation of the EEA EFTA states



Note: Only basic directives and regulations



Extent of differentiation of the EFTA states



Note: Only basic directives and regulations



Logics of external DI [1]

- Constitutional DI

- Causal factors that are related to the limited functional scope and level of centralization of the EEA
- Underlying logic of general DI
- On average 3.5 per cent of the EU acts in force between 1992 and 2012 acquired constitutional DI (but demand is likely to be higher)

➔ *By realizing constitutional differentiation, the EEA EFTA states are exempted from the validity of an EU act or provisions of an EU act that overall is relevant for the functioning of their legal relationship with the EU but would extend the EEA's functional scope or deepen its level of centralization.*



Logics of external DI [2]

- Instrumental DI

- Causal factors that are related to the EEA EFTA states' preferences and capabilities
- Underlying logic of country-specific DI
- On average 10.9 per cent of the EU acts in force between 1992 and 2012 acquired country-specific DI (but most of it was related to LIE)

➔ *By realizing instrumental differentiation, an EEA EFTA state is exempted from the validity of an EU act or provisions of an EU act that conflicts with its specific preferences and capabilities.*



Logics of external DI [3]

■ Process-based DI

- Originates in the EEA's specific institutional and functional features but not necessarily based on a conflict of preferences
- Triggered by the institutional complexity of the EEA as well as the lack of parallelism of the EU and EEA decision-making
- Underlying logic of informal DI
- On average 4.5 per cent of the EU acts in force between 1992 and 2012 were subject to informal DI (most common type of second-order DI).

➔ *By realizing process-based differentiation the EEA EFTA states are temporarily exempted from the validity of an EU act in order to prepare the incorporation of this EU act into the EEA Agreement.*



Conclusions

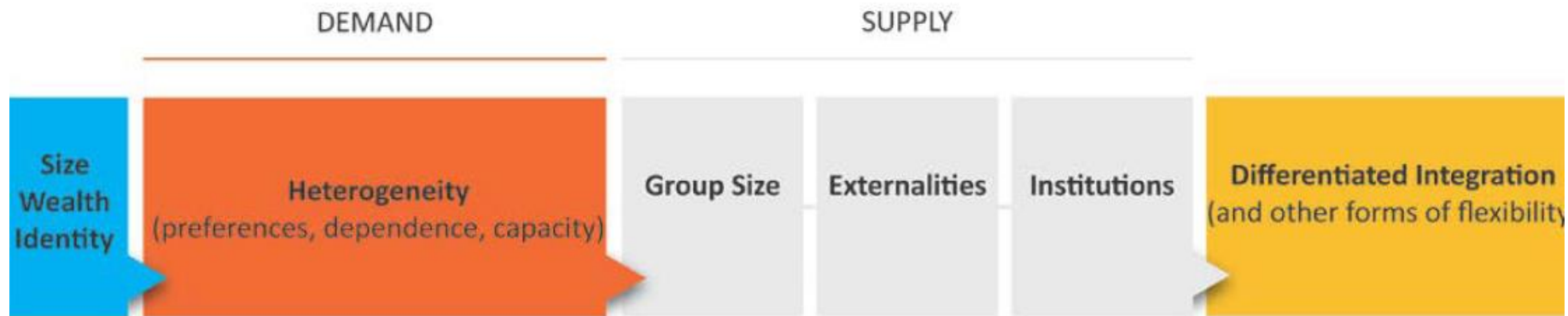


Theoretical lessons to be drawn from the EEA

- External DI in the EEA is inherently dynamic – at least at the level of secondary law.
- Extent and effectiveness of the EEA EFTA states' integration with the EU are continuously being redefined.
- EEA EFTA states may be an integral part of the EU's system of differentiation but the EEA EFTA states' extent of integration is still much lower compared to full EU membership.
- The overall patterns of external and internal differentiation may be similar but there are distinct types and logics of external differentiation.
- DI between the EU and the EEA EFTA states within the jointly agreed institutional framework and functional scope of the EEA Agreement is not necessarily the result of a material heterogeneity of preferences and capabilities.
- DI is inherent in the two-pillar system due to the institutional complexity of the EEA.
- Most of the exemptions that apply to Norway only concern specific provisions of an EU act and most of those EU acts also contain exemptions for some EU states.



Demand and supply factors of DI



- Demand for DI has not changed since the EEA Agreement has been signed and still creates new cases of DI (constitutional and instrumental DI).
- EEA EFTA states' initial demand for differentiation continues to trigger DI in the way of the EEA's institutional complexity.
- In order to understand second-order DI group size and externalities are more or less constant and thus less relevant.



Supply conditions: Explanations for high amount of second-order DI

- Decision-Making
 - Limited access to the EU policy-making
 - Obligation to speak with a single voice
 - Inefficient administration of the EEA -> limited authority of EFTA Secretariat to fill the role of a monitoring institutions (same applies to EEAS in the EU pillar)
- Institutionalized norms
 - EU's traditional commitment to compromise and consensus instead of hard bargaining
 - Indefinite wording of Article 102 of the EEA Agreement
 - Europeanization of the EEA EFTA states may compensate for DI
 - Continuous political dialogue ensures credibility
- Path dependency
 - Constitutional restrictions in the EEA EFTA states (due to popular constraints on political integration)
 - Locked in prior integration e. g. need to find solutions within two-pillar model



Supply conditions: Explanations for little constitutional DI

- High adaptability of EEA Agreement
- Executive dominance
- Little politicization
- EEA EFTA states form a world of law observance
- Political, economic, institutional and geographical factors determine effectiveness of the EEA



**Thank you very much
for your attention!**

www.liechtenstein-institut.li

