

# POLICY BRIEF

## Integrating Diversity in the European Union (InDivEU)

### External Differentiated Integration: Legal Feasibility and Constitutional Acceptability

#### Introduction

Considerable attention has been paid in academic literature and in politics to the concept of differentiated integration. This is conceived in the main as being concerned with differentiation *between* EU Member States (internal differentiation). By contrast, this policy brief and the Working Paper on which it is based focuses on *external* differentiation.<sup>1</sup> The concept of external differentiation is intended to capture the fact that some EU laws reach beyond the boundaries of the EU and are applicable in countries that are not EU Member States (third countries).

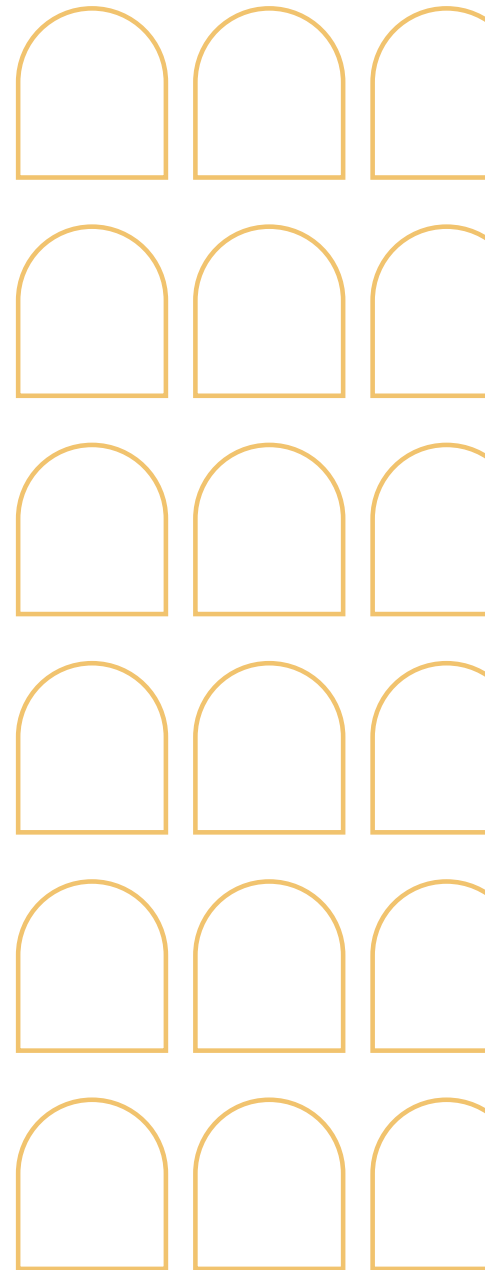
External differentiation arises in two principal forms. First, the application of EU law in third countries may be achieved by the conclusion of an international agreement, such as the EEA Agreement or the EU-UK Withdrawal Agreement. Second, external differentiation may arise when a unilateral EU act seeks to regulate ‘foreign’ conduct or

<sup>1</sup> Luigi Pedreschi & Joanne Scott, ‘External Differentiated Integration: Legal Feasibility and Constitutional Acceptability’ (RSCAS 2020/54 Robert Schuman Centre for Advanced Studies The European Governance and Politics Programme).

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the content of 'foreign' law. The General Data Protection Regulation offers a well-known example. Personal data may be transferred from the EU to third countries which ensure an adequate level of data protection. For the data protection law of a third country to be considered as adequate, it must achieve a standard of protection that is at least equivalent to that of the EU. This results in an externalization of EU data protection norms.

The Working Paper on which this policy brief is based makes a three-fold contribution. First, it develops a novel analytical framework to measure the degree of 'legalization' inherent in international agreements giving rise to external differentiation. Second, it analyses the concept of unilateral external differentiation and explores EU practice in this regard. Finally, it identifies and appraises the different legal constraints that may limit or shape the phenomenon of external differentiation.

## Key Findings

### a) International Agreements

- International agreements which extend the application of EU law beyond EU borders deploy a wide range of mechanisms including direct adoption, homogeneity, equivalence, approximation, cooperation and participation. The presence of these mechanisms is both fact and scenario dependent. A summary of the mechanisms used in different agreements is included in the table in Annex i
- The concept of 'legalization', with its components 'obligation', 'precision'; and 'delegation', offers a productive way, when tailored to specifics of external differentiation, to compare different mechanisms utilized in EU international agreements giving rise to external differentiation.
- EU international agreements do not utilize a single mechanism to extend the application of EU law. Rather, they mix and match mechanisms depending on their aims. The breadth of EU acquis extended by an agreement will also depend on its specific aims. The concept of legalization provides a useful lens to contrast mechanisms found across different agreements.
- The mechanisms of direct adoption and homogeneity give rise to the greatest degree of external differentiation and are typically

combined with strong enforcement and surveillance of implementation. In contrast, weaker mechanisms are often coupled with less effectual forms of enforcement and surveillance.

- The principal legal constraints that may limit or shape external differentiation in international agreements have their origin in EU law and international law. These legal constraints are summarized in Annex ii.
- The most salient legal constraint is that which arises due to the CJEU's insistence upon the need to maintain the autonomy of EU law.

### b) Unilateral External Differentiation

- Two kinds of unilateral external differentiation are found in EU law; legal alignment external differentiation which promotes the alignment of third country law with EU law and conduct-related external differentiation which appraises foreign conduct in light of standards laid down in EU law.
- As with external differentiation, the legal constraints that may limit or shape unilateral external differentiation have their origins in both EU and international law. These are summarized in Annex ii below;
- Both the CJEU and the WTO have adopted a broadly permissive approach to unilateral external differentiation but measures of this kind must be carefully designed and applied to ensure that they comply with substantive and procedural requirements;
- The rules governing internal differentiation in the form of enhanced cooperation have the potential to constrain unilateral external differentiation. This is because acts adopted through enhanced cooperation must respect the competences, rights and obligations of non-participating Member States.

## Recommendations

- Policy-makers should aim to achieve a high level of awareness of the different categories of external differentiation present in EU law, and of the wide variation within these categories. This will clarify the different options available to them when they seek to extend the geographical reach of EU law;
- Policy-makers should acquire a keen awareness of the legal constraints that may limit or shape external differentiation. While these legal constraints are of key importance, they are often more flexible than is often suggested in the literature. This is particularly true in relation to WTO law.

## Annex i: Principal mechanisms external differentiation in international agreements

<i>Type of agreement</i>	<i>Name of agreement</i>	<i>Centre of gravity</i>	
		<i>Mechanism</i>	<i>Scope</i>
<b>Multilateral</b>	European Common Aviation Area	Direct adoption + homogeneity	Narrow
	Energy Community Treaty	Direct adoption + homogeneity	Narrow
	European Economic Area	Direct adoption + homogeneity	Broad
<b>Bilateral</b>	Swiss Sectoral Agreements	Equivalence	Sectoral
	EU-UK Withdrawal Agreement	Direct adoption + homogeneity	Broad/time-limited
	Ankara Agreement	Binding approximation + homogeneity	Moderate coverage
	AAs with Deep and Comprehensive Free Trade Area	Binding approximation	Broad
	Stabilisation and Association Agreements	Non-binding approximation + directed cooperation	Broad
	Euro-Med Association Agreements	Non-binding approximation + directed cooperation	Broad
	Enhanced PCAs	Binding approximation + directed cooperation	Moderate coverage
	PCAs	General cooperation	Moderate coverage
<b>Institutional</b>	Participation in EU agencies	General cooperation	Narrow
	Participation in EU programmes (Horizon 2020)	Direct adoption + binding approximation	Narrow

## Annex ii: Principal legal constraints on external differentiation

	<i>International agreements</i>	<i>Unilateral external differentiation</i>
<b><i>Legal constraints originating within the EU legal order</i></b>	Autonomy of EU Law Charter of Fundamental Rights	External differentiation and the rules governing enhanced cooperation EU constitutional norms governing EU external action including Article 3(5) and 21 TEU
<b><i>Legal constraints originating in international law</i></b>	GATT, Article XX(IV)(V)	Customary international law including limits on the exercise of prescriptive and enforcement jurisdiction Treaty provisions governing substantive area governed by unilateral EU act WTO law

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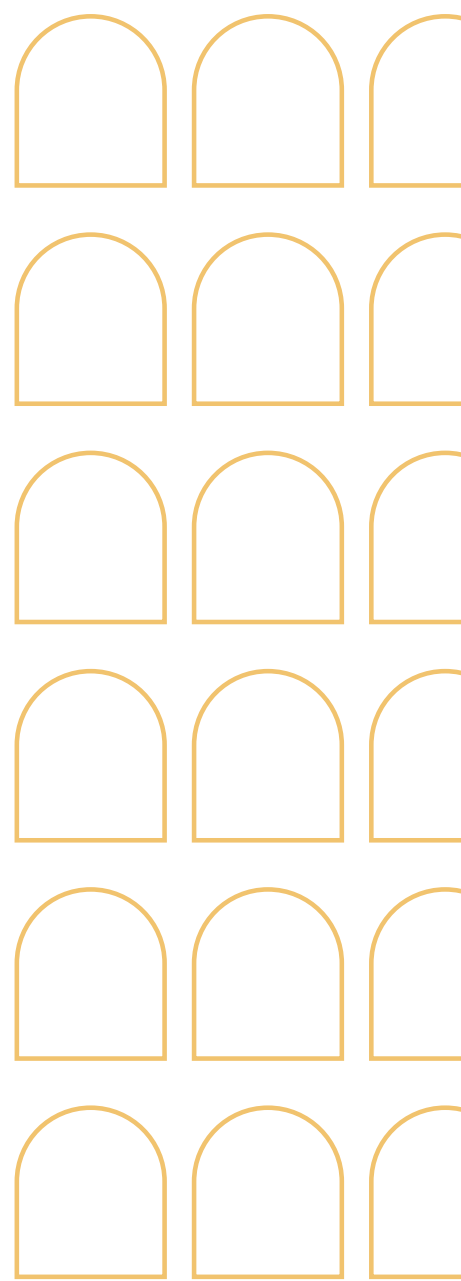
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