

POLICY BRIEF

Integrating Diversity in the European Union (InDivEU)

Alternative forms of differentiation

1 Introduction

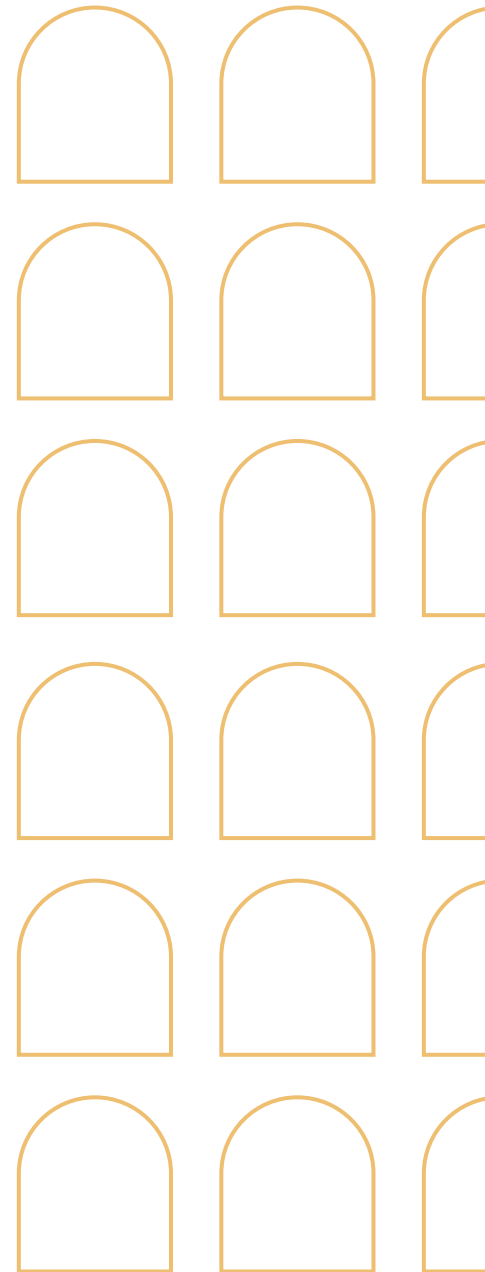
Within the EU, differentiation is seen as a way to cope with diversity among member states. Among the various possible ways to differentiate between member states, most attention has gone to forms of differentiated integration, in which some member states are excluded from an EU-level arrangement (through opt-outs) or a subset of member states moves forward without participation of all (enhanced cooperation).

This, however, is only one form of differentiation in the EU. This brief paper discusses two alternatives which have attracted less attention but are potentially valuable alternatives or complements to differentiated integration: flexible implementation and experimentalist governance. Under flexible implementation, member states are given room to make their own choices during the implementation of EU law and policy arrangement. Experimentalist governance is an arrangement in which policies are developed in an iterative process in which both the policy itself and its implementation are gradually improved through 'learning from difference.'

Flexible implementation and experimentalist governance have the potential to overcome two weaknesses of differentiated integration:

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Under differentiated integration, member states are either part of an EU-level policy arrangement or stay outside of it. As a result, differentiated integration has a distinct ‘all or nothing’ quality; a member is either in or out. Flexible implementation and experimentalist governance allow for more fine-grained forms of differentiation. They include all member states, but enable various shades of differentiation within that common EU-level arrangement.

Differentiated integration, as such, is a static approach. Differences between member states are settled by drawing a line between insiders and outsiders. Although that line may shift over time, the EU-level arrangement itself is seen as relatively fixed. By contrast, flexible implementation and experimentalist governance explicitly include forms of dynamism, in which policies, within the member states and/or at the EU-level, develop over time as a result of the way policy-making is set up.

This is not to say that flexible implementation and experimentalist governance are a panacea. Both approaches possess specific strengths and weaknesses. Moreover, both can be used alongside or together with forms of differentiated integration, thereby allowing for an even greater variation of forms of differentiation in the EU. In this brief paper, we introduce the concepts of flexible implementation and experimentalist governance and discuss their strengths and weaknesses, based on the studies conducted for the Horizon 2020 InDivEU project.

2 Flexible implementation

2.1 What is flexible implementation?

Flexible implementation occurs when member states are given the discretion to make choices during the implementation of EU law and policies. This discretion can take several forms:

- **Elaboration discretion:** member states are allowed (and sometimes required) to specify general EU-level norms further at the national level.
- **Choice discretion:** member states may choose among two or more policy options given in a piece of EU legislation.
- **Scope discretion:** member states may opt to include or exclude certain categories of cases under a piece of EU legislation.
- **References to national law:** member states may use pre-existing definitions in national law to define certain concepts in EU law.

- **Minimum harmonization:** member states may adopt stricter standards than those laid down in EU law.
- **Discretion to deviate in specific cases:** member states may deviate from EU law in specific individual cases.

In most cases, these types of discretion are accompanied by further requirements that set constraints on the way the discretion is used. These constraints may involve, for instance, substantive standards that national choices need to conform to or a procedure in which national choices need to be notified to or even approved by the European Commission or another EU-level body. In this way, EU law offers a wide variety of forms of flexible implementation, in which different types of discretion and constraints are combined and the overall extent of member state discretion varies.

2.2 How is flexible implementation used in the EU?

Uniformity has often been put forward as an ideal for the implementation of EU law and policies. As EU-level policy arrangements are usually meant to harmonize approaches to a certain issue among member states, stress is often laid on ways to reduce disparities in implementation among member states. At the same time, decades of implementation research, in the EU as well as other political systems, show that any policy arrangement involves flexibility for implementers. It is impossible to define legal norms and policies in such a way that they do not require further choices during implementation.

Moreover, offering flexibility in implementation can also be used deliberately, as a way to overcome stalemates in decision-making and/or to tailor overall EU-level arrangements to specific domestic circumstances. Our study of the flexibility offered in EU directives in the period 2006-2015 shows that both of these rationales play a role in explaining the level of discretion offered in EU legislation. The level of discretion in these directives varies widely. When looking at the proportion of substantive provisions that explicitly grant discretion to member states, directives vary from 0% to almost 70%, with most directives scoring around 20%. The data reveal clear differences between policy areas. Policy areas that raise relatively many sovereignty concerns (justice and home affairs, social policy) include a lot of flexibility, while directives in the fields of health & consumer protection and environment & energy score lowest. This suggests that flexibility can be and is in fact used to strike a balance

between EU-wide harmonization and retaining member state autonomy. This is also borne out by the fact that the occurrence of flexibility provisions in a directive is positively related to the occurrence of provisions relating to differentiated integration (i.e. mostly opt-outs).

2.3 How does flexible implementation affect EU policies?

Case studies in the fields of the internal market, justice and home affairs, and environmental policy show that if member states are given flexibility, they make wide use of it. Various underlying rationales can be discerned for the choices member states made in using the flexibility offered to them:

- The main reason for member states to make use of flexibility was to retain existing legal and policy arrangements.
- In addition, member states used flexibility to integrate EU directives into broader domestic frameworks. This included alignment with principles underlying domestic legal systems.
- Flexibility was also used to maintain approaches that were seen as successful. Although this consideration overlaps with the first point above, the rationale here was not simply to retain existing approaches, but to capitalize on proven successes.
- In some cases, finally, differences between member states reflected different levels of ambition and political choices in the member states.

Flexibility therefore served to tailor EU-wide policies to domestic contexts. This allowed member states to align policies with broader domestic legal frameworks and to retain approaches that had worked. At the same time, the fairly conservative use by member states of the flexibility offered to them also meant that relatively little experimentation and cross-border learning took place in the cases we studied. In order to enhance the innovative potential of flexible implementation, EU-level policies could invest more in cross-border learning and provide incentives for member states to consider and/or adopt new approaches that have shown to yield benefits elsewhere.

3 Experimentalist governance

3.1 What is experimentalist governance?

Experimentalist governance is a recursive process of provisional goal setting and revision based on learning from comparative review of implementation experience in different local contexts. In its classic form, experimentalism involves a multi-level governance architecture, whose four functional elements are linked in an iterative cycle. In this governance architecture, framework goals, rules, and metrics for assessing their achievement are established jointly by combinations of 'central' and 'local' actors (such as the EU institutions and member states), typically following consultation with relevant stakeholders. 'Lower-level' units (such as national administrations and regulatory authorities) are then given substantial discretion to pursue these goals in ways adapted to their local contexts. But in return for this autonomy, they must report regularly on their performance and participate in a peer review in which their results are compared to those of others following different means towards the same ends. Where lower-level units are not making good progress, they are expected to take corrective measures, based on a plausible plan for improvement informed by the experience of their peers. The goals, rules, metrics, and decision-making procedures are then periodically revised in response to the problems and possibilities revealed by the review process, and the cycle repeats.

Often, these experimentalist governance architectures are underpinned by 'penalty defaults': mechanisms that induce reluctant parties to cooperate in framework rule making and respect its outcomes, while stimulating them to propose plausible and superior alternatives, typically by threatening to reduce control over their own fate. In the EU, such penalty defaults frequently involve court judgments or (threats of) Commission decisions, which oblige member states and/or private actors to explore how to pursue their preferred goals in ways compatible with the fundamental principles of European law, but without hierarchically imposing specific solutions.

3.2 Benefits and scope conditions of experimentalist governance

Experimentalist governance in this form depends on several scope conditions. The first is strategic uncertainty, where policy makers cannot define their precise goals or how best to achieve them ex ante, but must instead discover both in the course

of problem solving, because they are operating in a turbulent, rapidly changing environment. A second is a polyarchic or multi-polar distribution of power, in which no single dominant actor is able to impose their own preferred solution without taking into account the views of others. A third is a high level of diversity, which increases the difficulty of adopting and enforcing uniform rules. A final scope condition concerns interdependence, which must be sufficient to motivate actors to collaborate in seeking joint solutions to common problems, but not so high as to preclude decentralized experimentation by local units.

Where these scope conditions are met, experimentalist governance architectures have a number of fundamental advantages, relative both to conventional uniform regulation and differentiated integration. First, they accommodate diversity by adapting common goals and rules to varied local contexts, rather than seeking to impose one-size-fits-all solutions or dividing member states into separate groups of “Ins” and “Outs”. Second, they provide a mechanism for coordinated learning from local experimentation through disciplined comparison of different approaches to advancing the same general ends, which can be used to generate new policy solutions and regulatory frameworks that may then be applied in contextually specific ways across the Union as a whole. Third, the same processes of mutual monitoring, peer review, and joint evaluation that support learning from diverse experience also provide dynamic, non-hierarchical mechanisms for holding both central and lower-level actors accountable for their actions in pursuit of agreed goals. Finally, because both the goals themselves and the means for achieving them are explicitly conceived as provisional and subject to revision in light of experience, problems identified in one phase of implementation can be corrected in the next iteration.

3.3. How is experimentalist governance used in the EU?

Although experimentalist governance architectures of this type are neither universal nor ubiquitous in the EU, they are widely diffused across a variety of policy domains. Well-documented examples include: regulation of competition, energy, telecommunications, and finance; food, drug, chemicals, and maritime safety; environmental protection; employment promotion and social inclusion; justice and home affairs; data privacy, anti-discrimination, and fundamental rights. These architectures also play a growing part in EU external governance, where the revisable framework rules they generate are frequently extended to third-country actors.

A typical pattern in recent years has been progressive formalization of EU regulatory networks, without full supranational centralization. In some sectors, under conditions of high interdependence coupled with high uncertainty, concern for the integrity of integrated markets has led to the creation of a single set of harmonized but provisional rules, revisable through ongoing monitoring and review of implementation experience. Our case studies of electricity and banking regulation show that such uniform rules and methodologies for their application have been developed through experimentalist comparisons of different national and regional approaches by collaborative networks of EU and national officials, and are regularly updated and revised through joint review of their implementation in different local contexts.

These cases demonstrate that the combination of high interdependence with high uncertainty may result in the emergence of simplified experimentalist architectures, combining synchronic uniformity with diachronic revisability. In such architectures, framework rules and procedures may be progressively specified and discretion for lower-level actors at any given moment narrowed, but the rules and procedures themselves remain contestable in light of local application, while revisions over time based on learning from comparative review of implementation experience provide a crucial source of improvement and adaptability for the governance system as a whole. We may expect such simplified experimentalist architectures to become increasingly prevalent in other sectors of EU regulation subject to rapid and unpredictable changes in markets and technology, where concerns to promote a level playing field and prevent regulatory arbitrage are similarly strong, such as competition or telecommunications.

Our research finds that while conditions of high interdependence coupled with high uncertainty may require rules and practices to be both uniform and revisable in order to be effective, these can be accepted as legitimate by diverse EU member states, provided they are applied in contextually sensitive ways and regularly revised on the basis of local implementation experience, through review processes in which national officials themselves participate. Our findings thus suggest that *far from uniformity and experimentalism being antithetical to one another, diachronic experimentalism may be a necessary condition for synchronic uniformity of regulation within a heterogeneous polity like the EU.*

4 Conclusions

Based on the analysis above, two points are particularly relevant for debates on the future of Europe.

First, flexible implementation and experimentalist governance are potentially valuable ways of dealing with diversity within the EU. In thinking about the future of the EU, it would be helpful to consider their broader use, alongside forms of differentiated integration.

Second, for flexible implementation and experimentalist governance to be used effectively, flexibility, contextual adaptation, and revisability of policies and rules should not only be seen in terms of compliance and compliance risks, but also in terms of their potential benefits and scope conditions. For this purpose, they should be accompanied by deliberate mechanisms for monitoring and learning from variations in implementation experience across EU member states.

Integrating Diversity in the European Union (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states.

InDivEU is coordinated by the Robert Schuman Centre at the European University Institute, where it is hosted by the European Governance and Politics Programme. The project comprises a consortium of 14 partner institutions and runs from January 2019 to December 2021. The scientific coordinators are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

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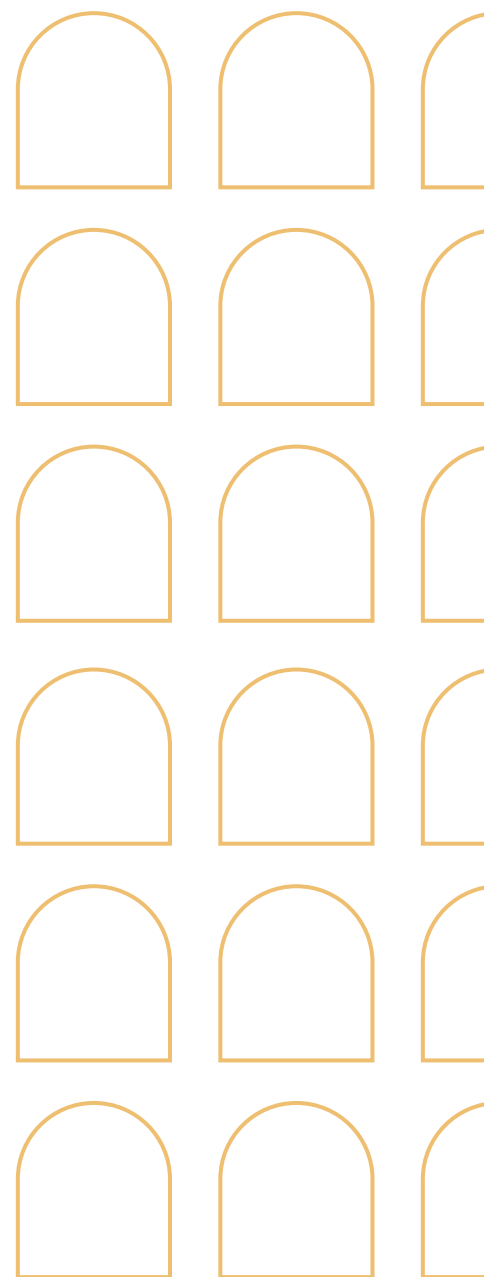
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