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Integrating Diversity in the European Union
(InDivEU)

WORKING PAPER

**Differentiated integration and
flexible implementation**

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Ronja Szczepanski, Hubert Smekal and
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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 begins from the assumption that managing heterogeneity and deep diversity is a continuous and growing challenge in the evolution of the EU and the dynamic of European integration.

The objective of InDivEU is to maximize the knowledge of Differentiated Integration (DI) on the basis of a theoretically robust conceptual foundations accompanied by an innovative and integrated analytical framework, and to provide Europe's policy makers with a knowledge hub on DI. InDivEU combines rigorous academic research with the capacity to translate research findings into policy design and advice.

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

For more information: <http://indiveu.eui.eu/>

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**Integrating
Diversity in the
European Union**

Abstract

This paper reports the findings of a comparative analysis of differentiated integration (DI) versus flexible implementation (FI). It finds overall support for our expectation that both DI and FI address international heterogeneity among EU member states and the complications in decision-making and compliance that derive from it. In addition, differentiation typically exempts individual member states in a particular situation (such as geographical location or treaty-based opt-outs) and reflects particularly high conflict in the legislative process. By contrast, our expectation that the EU uses DI in areas of core state powers, whereas FI is the instrument of choice in less politicized, market-related policy domains, receives mixed support. Finally, we observe no significant difference in the compliance effects of DI and FI. Neither instrument is sufficient to overcome the non-compliance threat emanating from imposing uniform legislation on a heterogeneous membership.

Keywords

Differentiated integration, European Union, flexible implementation, compliance.

1. Introduction

Over the past decades, various forms of differentiation have been proposed in response to the (growing) heterogeneity among member states in the European Union. These have come under different labels, such as ‘variable geometry’, ‘multi-speed Europe’ and ‘enhanced cooperation’, with partly different implications (Stubb 1996). Collectively, these approaches are known as ‘differentiated integration’ (DI) (Dyson and Sepos 2010; Leuffen et al. 2013, Schimmelfennig and Winzen 2020). What they have in common, is that they make a distinction between member states that do and member states that do not fall under some EU arrangement or measure. This can take the form of (temporary or indefinite) opt-outs from Treaty provisions or (provisions in) secondary legislation or of schemes that allow groups of member states to adopt intergovernmental arrangements that do not include all member states.

In terms of background and purpose, DI is foremost seen as a way to cope with heterogeneity among member states. This heterogeneity can manifest itself during decision-making, when a divergence of preferences makes it difficult to arrive at joint solutions. Allowing for differentiation may then be a way to appease member states that do not want to be tied to EU-level measures. This leads to what Schimmelfennig and Winzen (2014) call ‘constitutional differentiation’, which ‘is motivated by concerns about national sovereignty and identity’ (Ibid: 355). In addition, they discern forms of ‘instrumental differentiation.’ These are related to enlargement of the EU and meant either to protect old member states from competition by new ones or to allow new member states more time to adjust to EU requirements. Whereas constitutional differentiation is often permanent (or at least adopted for an indeterminate period of time), instrumental differentiation is typically temporary and transitional.

Alongside these forms of DI, EU law also allows for differentiation in the implementation (transposition and practical application) by member states. These forms of differentiated or flexible implementation (FI) have always been part of the EU legal and political systems. Directives, in particular, are instruments that are meant to ‘leave to the national authorities the choice of form and methods’, to quote Article 288 TFEU, although the extent of this leeway depends on the content and wording of the directive. Directives can offer various forms of flexibility, such as the possibility to adopt more stringent standards (minimum harmonization), the possibility to restrict or expand the scope of a directive or room to specify more general requirements from a directive (Van den Brink 2017).

FI arguably serves many of the same purposes as DI. By allowing member states room to make choices during implementation, differences between member states can be taken into account (Hartmann 2016; Thomann 2015; Zhelyazkova and Thomann 2021). Moreover, giving this flexibility may facilitate decision-making on EU-level measures when member states cannot agree on one set of uniform standards (Andersen and Sitter 2006: 321). As a result, both DI and FI allow for ways to tailor EU law and policies more closely to member state preferences. In the end, this should improve the ‘fit’ of EU law and policies with member state preferences and practices, and thereby compliance with EU law.

Although they serve similar purposes, DI and FI work differently. Whereas under DI member states are legally exempted or excluded from an EU-level arrangement altogether, under FI all member states are given room to manoeuvre under a common legal arrangement. Moreover, while DI relates to individual, specifically designated member states, FI applies to all member states. Finally, whereas DI leads to differentiation once the decision to adopt a differentiated EU arrangement is taken, FI only occurs when member states make actual use of the room given to them in EU law.¹

¹ To be precise, it is ‘actual’ differentiation that always refers to individual member states, whereas secondary law sometimes comes with ‘potential’ differentiation that, in most cases, accords all member states the right to seek or declare formal exemptions from specific legal obligations under certain conditions (Tuytschaever 1999). In that it applies to all member states and needs to be activated

It is therefore important to understand better how DI and FI relate to each other. Are they (full) alternatives that can substitute for each other in coping with heterogeneity in the EU or do they serve different functions within a broader range of arrangements that allow for differentiation? And either way, what effects do DI and FI have on the compliance by member states with EU law? This paper sets out to study the relationship between DI and FI by analysing (1) whether DI and FI go together in EU directives and (2) what is the effect of each on compliance with EU law.

It does so by comparing the use of both forms of differentiation in EU directives between 2006 and 2015 and by linking this use to data on compliance. The paper leverages two datasets compiled within the InDivEU project: the updated EUDIFF2 dataset on DI in EU secondary legislation and the Flexible Implementation in the EU (FIEU) dataset. For the analysis of compliance we match the EUDIFF2 and FIEU data with the Berlin Infringement Database (BID).²

We find overall support for our expectation that both DI and FI address international heterogeneity among EU member states and the legislative complications that derive from it. To some extent, however, they also address different concerns. The quantitative analysis shows that DI and FI are positively correlated. DI and FI tend to go together in EU legislation rather than being alternative or even mutually exclusive instruments. In addition, our detailed qualitative analysis of groups of directives representing distinct patterns of DI and FI reveals that differentiation typically exempts individual member states in a particular situation (such as geography or treaty-based opt-outs) and reflects high conflict in the legislative process. By contrast, our expectation that the EU uses DI in areas of core state powers, whereas FI is the instrument of choice in less politicized, market-related policy domains, only receives mixed support. Finally, we observe no significant difference in compliance between DI and FI.

2. Theoretical expectations

Our analysis is based on a number of theoretical expectations, which we develop in this section. We will start with the first research question (do DI and FI go together in EU directives?). As outlined in the introduction, DI and FI serve similar purposes. Both are ways to deal with heterogeneity and controversiality among the member states. Heterogeneity refers to differences between member states in conditions ‘on the ground’. As a result, certain standards and approaches may be more suitable for some member states than for others. Allowing for differentiation, either through DI or through FI, is a way to soften the impact of EU-level arrangements on ‘outlying’ member states (cf. Bellamy and Kröger 2017, Holzinger and Schimmelfennig 2012: 295, and Lord 2015 for DI; Hartmann 2016, Thomann 2015, and Zhelyazkova and Thomann 2021 for FI).

Controversiality relates to differences in preferences during the decision-making process. For one, this controversiality may have its origins in heterogeneous preferences about the desired level and scope of integration. Whereas some member states (or member state governments) support a comprehensive policy scope of European integration and deep supranational centralization, others seek to keep the EU out of certain policy domains (mainly in the area of core state powers; Genschel and Jachtenfuchs 2014) and under intergovernmental control. In addition, controversiality may have to do with heterogeneous member state capacities. Ambitious regulation, e.g. in environmental and social policy, or strict fiscal and financial rules imply costs and burdens that certain (especially poorer) member states reject.

These differences can lead to political stalemates, in which no agreement can be reached between (groups of) member states that prefer different outcomes. In such circumstances, both DI and FI

in the actual application of the law, potential differentiation is halfway between differentiated integration and flexible implementation. In this paper, we exclusively refer to actual differentiation, however.

² See <https://www.polsoz.fu-berlin.de/en/polwiss/forschung/international/europa/bid/index.html>, last access May 15, 2021.

are means to achieve compromise by differentiating between member states (see Holzinger and Schimmelfennig 2012: 293 and Jensen and Slapin 2012 for DI; Andersen and Sitter 2006: 321 and Dimitrova and Steunenbergh 2000: 218 for FI).

Since DI and FI respond to the same underlying concerns, it may be expected that both types of differentiation are used in similar situations. We can therefore formulate the following hypothesis:

H1: The use of DI and FI is positively correlated.

Despite these commonalities, DI and FI perform these functions differently. Two differences are of particular relevance in this regard: the balance between autonomy and cooperation under DI and FI, and the scope of the differentiation allowed by DI and FI.

The balance between autonomy and cooperation is struck differently under DI and FI. The main characteristic of DI is that it takes an 'all or nothing' approach to integration: a member state is either subject to some EU arrangement or it is not. FI, by contrast, allows for variation in implementation practices within a common arrangement that applies to all member states. Although in theory, in many cases much of the same result can be achieved through DI and FI, their political significance is different. DI is a highly visible way of exempting or excluding certain member states from an EU arrangement. As a result, it has as much a symbolic as a practical significance: by exempting a member state or by securing an opt-out, member state governments provide a clear and visible signal to their constituencies. Therefore, DI and calls for DI are often tied to identity and sovereignty concerns within member states. Through DI, member state governments can show to respond to these concerns.

This is much less the case for FI, as member states are still part of the same EU-level arrangement and the flexibility offered by FI provisions is often much less visible. FI is therefore less well-suited as a symbolic political gesture and less likely to address identity and sovereignty concerns to the extent that DI does. For that reason, we may expect FI to be used primarily in relation to capacity and cost problems. This leads to our second hypothesis:

H2: DI is primarily used to accommodate heterogeneity of preferences about the level and scope of integration, while FI is primarily used to accommodate capacity and cost problems.

In addition, DI and FI have a different scope: whereas DI usually excludes one or a few member states from the remit of an EU-level arrangement, FI applies to all member states. DI is therefore most likely to be used when one or a few member states have specific problems with a proposed EU measure. FI may also be used to accommodate a specific member state, but given its across-the-board nature this makes less sense. Hence, we may expect that:

H3: DI is used to accommodate individual outliers, while FI is used to address widespread concerns.

We now move to the second research question: what is the effect of DI and FI on compliance by member states with EU directives? In the literature on DI, which has focused strongly on the causes and conditions of differentiation rather than its effects, this question has not been studied systematically so far (with the partial exception of Zhelayzkova's 2014 study of compliance with opt-ins in Justice and Home Affairs).

It seems straightforward to expect that DI increases compliance. If we assume that those member states that either fundamentally disagree with the aims of a certain piece of legislation, or have the most severe capacity and cost problems in implementing it, are also the most likely candidates for non-compliance, then exempting these member states from the obligation to comply improves the compliance record for any given law or legal provision. Of course, this expectation only refers to the non-exempt group of member states.

The effects of FI on compliance have been studied as part of the literature on discretion in EU law. These studies have taken different operationalizations of (non-)compliance, such as delays in transposition (Kaeding 2008; Thomson et al 2007), numbers of infringement procedures (Thomson et al 2007), evaluation reports (Zhelyazkova 2013; Zhelyazkova et al. 2016; Zhelyazkova and Thomann 2021) and primary sources (Thomson 2007, who uses the data collected by Falkner et al. 2005). Most studies largely find a positive effect of FI on compliance: if a (provision in a) directive offers more discretion, member states are more likely to comply (Thomson 2007; Thomson et al. 2007; Zhelyazkova 2013; Zhelyazkova et al. 2016; Zhelyazkova and Thomann 2021; for an overview, see Treib 2014: 21). This makes sense, because the range of compliant member state practices is wider if EU law offers more flexibility and because flexible provisions are less likely to cause opposition from outlying member states.

At the same time, several studies provide nuance to these overall positive findings. Kaeding (2008: 135) found that greater discretion was associated with delays in transposition, although these delays tended to be relatively short (less than six months). This finding is echoed by Thomson et al (2007), who found more delays but fewer infringements when a directive offered more discretion. Zhelyazkova and Thomann (2021) found different effects on compliance, depending on the use that member states made of their discretion: whereas changes to the content of EU norms improved compliance, adding national rules to the EU rules had a negative effect on compliance.

Overall, then, two opposing arguments can be made about the (relative) effects of DI and FI on compliance. On the one hand, since both DI and FI reduce heterogeneity and controversiality issues among member states, both may be expected to have a positive effect on compliance. This leads to the following hypothesis:

H4a: There is no significant difference in noncompliance between DI and FI.

On the other hand, DI and FI differ in the extent to which they exempt potential non-compliers. Whereas DI exempts them completely, FI only offers them more flexibility in implementation. Moreover, whereas DI creates high legal certainty – states are either obliged to comply or not – it might be less clear whether states remain within the boundaries of permitted flexibility in FI. For these reasons, DI may be more effective in increasing compliance with directives, albeit it only among the non-exempted member states. This leads to an alternative hypothesis:

H4b: FI provisions produce more noncompliance than DI provisions.

3. Correlation between differentiated and flexible integration in directives

This section quantitatively explores the correlation between DI and FI. The analysis is based on original data from two datasets: DI was recorded within the Differentiated Integration in the EU dataset (EUDIFF2, Duttler et al. 2017), FI then within the Flexible Implementation in the EU dataset (FIEU, Princen et al. 2019; Zbiral et al. 2020). After merging the two datasets, our ‘master’ dataset contains values for 164 directives adopted between 2006 and 2015. The selection of directives in this time period followed the selection made for the EUDIFF2 dataset and included legislative acts (directives) as defined by the primary law, excluding those that ‘merely amend, supplement, extend or suspend existing legislative acts or fix volumes, levies, duties, subsidies, refunds or prices [...] on a regular (usually annual) basis’ and implementing or delegated acts (Art. 290 and 291 TFEU) (Duttler et al. 2017). The so-called codified directives were excluded as well, because they only technically combine the original act and its amendments (vertical consolidation) or more acts from related subjects (horizontal codification).³

³ See https://ec.europa.eu/dgs/legal_service/codifica_en.htm.

Scholars have proposed several approaches to measuring discretion in EU legislation. The approach taken in the FIEU dataset is based on a combination of these previous endeavours. The starting point is the work by Franchino (2007; see also 2001; 2004) on discretion in the EU, which in turn is based on the approach developed by Epstein and O'Halloran (1999) in the context of the US federal government. The basic idea behind this approach is to determine whether individual provisions in a legislative act grant discretion or not. The overall discretion can then be calculated either as the total number of provisions granting discretion (absolute value) or as the number of provisions granting discretion divided by the total number of provisions in the legislative act (a relative ratio of discretion, used e.g. by Steunenbergh and Toshkov (2009) and Hartmann (2016)). Yet discretion may be limited by imposing certain constraints on the exercise of discretion, for instance by requiring prior authorisation, by attaching substantive conditions or by imposing a reporting requirement. In order to obtain a balanced view of the level of discretion, it may be useful to record these constraints and account for them in the calculation of discretion (see Franchino 2007).

In the FIEU dataset, the same basic approach was adopted by manually coding whether individual provisions granted discretion. We applied the key coding rule that discretion was accounted for only if it was granted explicitly. The 164 directives in total contained 13,806 substantive provisions, of which 3345 (24 percent) granted explicit discretion to the member states. FI thus commonly appears across the universe of sampled directives, although its presence obviously varies across the sample, the longer directives on average generally contain more provisions with FI.

Due to large differences in absolute values, the relative ratio of discretion may better express the level of FI. Additionally, in order to provide as precise values of FI as possible, four types of constraints were recorded but only insofar as they were linked to a provision granting discretion.⁴ Provisions granting discretion were “discounted” by the number of constraints contained in the directive and the weighted ratio of discretion was calculated, (theoretically) spreading from 0 (no discretion granted in the directive) to 100 (all provisions in the directive are discretionary without constraints). The values of weighted ratio of discretion are more evenly distributed across the sample than the absolute values of FI, but considerable distinctions persist among the directives.

In the FIEU dataset, we additionally refined the approaches taken by researchers cited above by distinguishing between different types of discretion. Conceptually, the types of discretion that are discerned are a combination of the typologies used by Hartmann (2016) in her coding of EU directives and Van den Brink (2017) in his analysis of discretion in EU law.

Based on these two typologies, the FIEU dataset includes five types of discretion:

- Elaboration discretion: permission for member states to further specify a provision.
- Reference to national legal norms: the use of pre-existing national legal norms for the definition of concepts or the scope of a directive.
- Minimum harmonisation: permission for member states to adopt more stringent standards.
- Scope discretion: permission for member states to expand or restrict the categories of cases to which a provision applies.
- Discretion in application on case-by-case basis: permission for member states to deviate from a provision in an individual case.
- Elaboration discretion represents the most frequent type (about 40 percent), followed by reference to national law provisions (about 25 percent), the remaining types are represented similarly with a share above 10 percent (see Table 1).

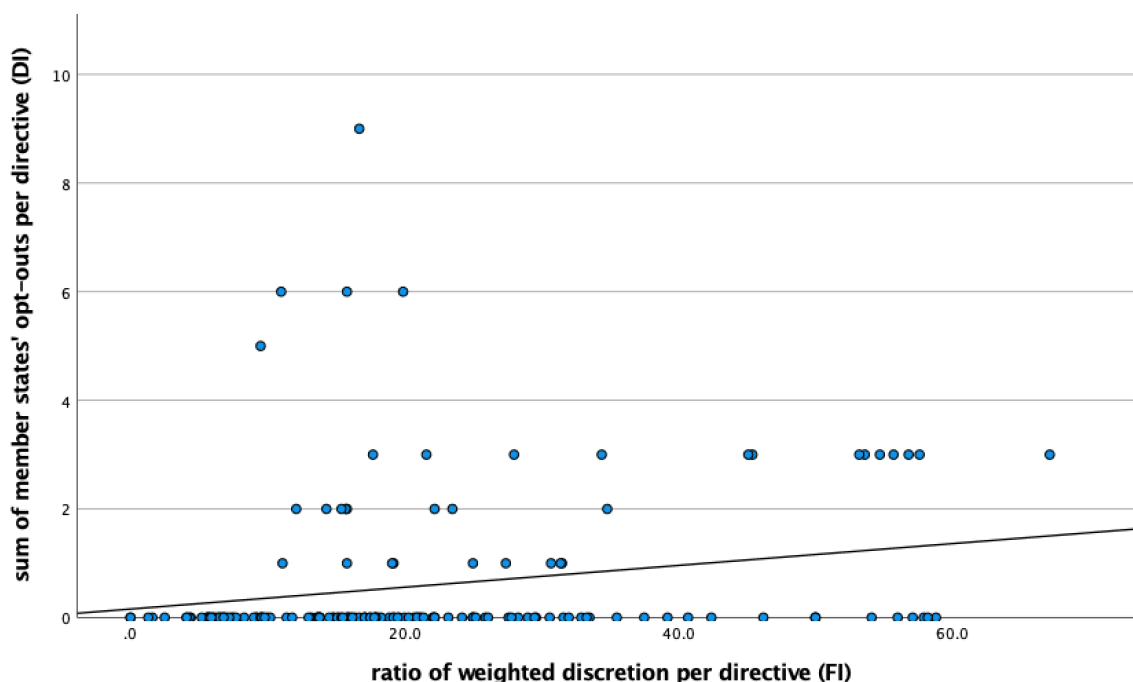
⁴ The following types of constraints were distinguished: substantive, reporting, requirement of EU action, time limit. Types of constraints are not used in this paper.

The instances of DI in directives are less contentious to identify. A provision granting actual DI to a member state is coded as such if it provides an opt-out and the member state does not take part in this directive or part of that legal act. The most appropriate value for expressing the level of DI is a sum of member states' opt-outs in the directive in question. It is thus an absolute value and because each member state may have more than one opt-out in one legal act, there is theoretically no upper limit on the number of DI.

DI occurs much less frequently in the sample than FI, actually only 35 directives contain at least one provision granting an opt-out to a member state, meaning that 80 percent of directives are free of any DI. Moreover even within the subsample of DI-positive directives, only a handful of member states was granted an opt-out in each legislative act, limiting the total number of DI instances in the sample to 96.

Exploration of correlation between DI and FI is logically affected by their uneven frequency and low number of occurrences of the latter in the sample. The positions of all directives are presented on a scatterplot in Figure 1. No clear pattern emerges, cases with highest number of out-optos oscillate around the average values of ratio of weighted discretion (FI), then there is however a rather cohesive group of seven directives with three opt-outs for member states that at the same time grant high level (between 55-65) of discretion. Directives providing no DI are evenly distributed across the whole scale of FI.

Figure 1: Scatterplot of values of DI and FI (ratio of weighted discretion) per directive



Pearson correlation reveals a statistically significant positive relationship between FI and DI, thus confirming our H1 (Table 1). The effect is of low to medium size but it seems to be driven mainly by the mentioned cohesive group of seven directives.

Table 1: Correlation between DI and FI (ratio of weighted discretion)

	Ratio of weighted discretion
Pearson correlation	0.214**
Statistical significance (2-tailed)	0.006
N	164

When we look into correlations between DI and different types of discretion,⁵ statistical significance disappears with the exception of reference to national law (Table 2). That development may be explained by the specific character of certain directives: if DI is really driven by sovereignty or identity concerns (see assumptions in H2), reference to national law probably serves similar purposes in the realm of FI.

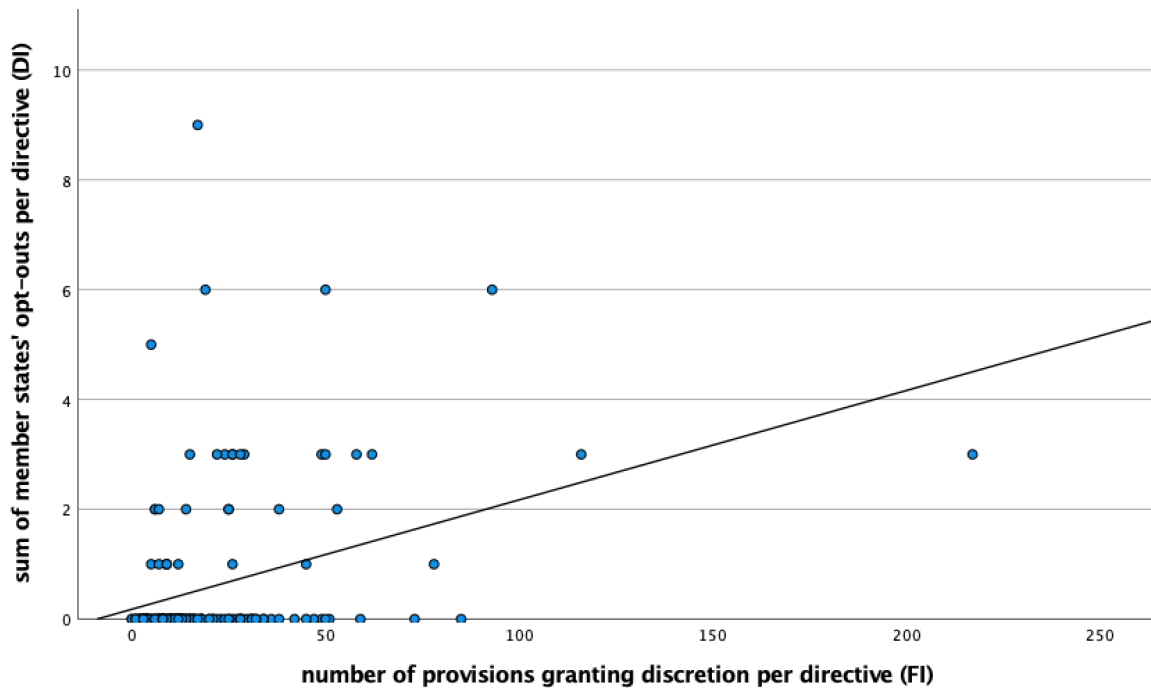
Table 2: Correlations between DI and FI according to the type of discretion (ratio of discretion)

	Reference to national law discretion	Minimum discretion	Scope discretion	Elaboration discretion	Discretion in application
Pearson correlation	0.200*	0.091	-0.047	0.101	0.128
Statistical significance (2-tailed)	0.010	0.245	0.548	0.200	0.103

Because DI was recorded in absolute values (sum of opt-outs for member states per directive), for the sake of completeness and robustness, we also display the correlation with the absolute values of FI, i.e., the number of provisions granting discretion in each directive (Figure 2). The mutual relationship between both types of differentiated integration is strengthened, namely because the top three directives as to the number of discretionary provisions evince rather high number of opt-outs. On the other hand, the top DI directives belong to legislative acts with only around average number of discretionary provisions.

⁵ Because constraints were coded to the whole directive and not linked to types of discretion, the FI is represented by a ratio of discretion (ratio of number of provisions granting discretion to total number of provisions).

Figure 2: Scatterplot of values of DI and FI (number of provisions granting discretion) per directive



The Pearson coefficient of correlation corroborates an increasing positive effect after entering absolute values of FI (Table 3). This time even the correlations between DI and individual types of discretion are strong and statistically significant (Table 4). The only exception is scope discretion, which seems to contradict H2. One of the possible explanations might be that the member states see these two as alternatives and unlike in case of reference to national laws (see above), they either pursue the opt-out option (which is basically a scope measure) or push for scope FI from at least part of the directive.

Table 3: Correlation between DI and FI (number of provisions granting discretion)

	Number of provisions granting discretion
Pearson correlation	0.347**
Statistical significance (2-tailed)	<0.001
N	164

Table 4: Correlations between DI and FI according to the type of discretion (number of provisions granting discretion)

	Reference to national law discretion	Minimum discretion	Scope discretion	Elaboration discretion	Discretion in application
Pearson correlation	0.336**	0.298**	0.131	0.291**	0.304**
Statistical significance (2-tailed)	<0.001	<0.001	0.095	<0.001	<0.001

The quantitative analysis of the relationship between FI and DI confirms the hypothesized positive correlation between both types of measures aimed at accommodating diversity in the EU legal order. The correlation was statistically significant regardless of whether we used relative or absolute values of FI. Our exploration of the sample seems to validate the assumption that complex legislative acts with a high number of discretionary provisions are likely to include legal differentiation as well. Lastly, if we distinguish between different types of discretion, the reference to national law records the strongest correlation with DI, while the scope discretion the lowest. In the next step, we move from quantitative to qualitative exploration of selected directives from the dataset to gain a better understanding of the relationship between DI and FI.

4. Qualitative exploration of directives with co-occurrence of DI and FI

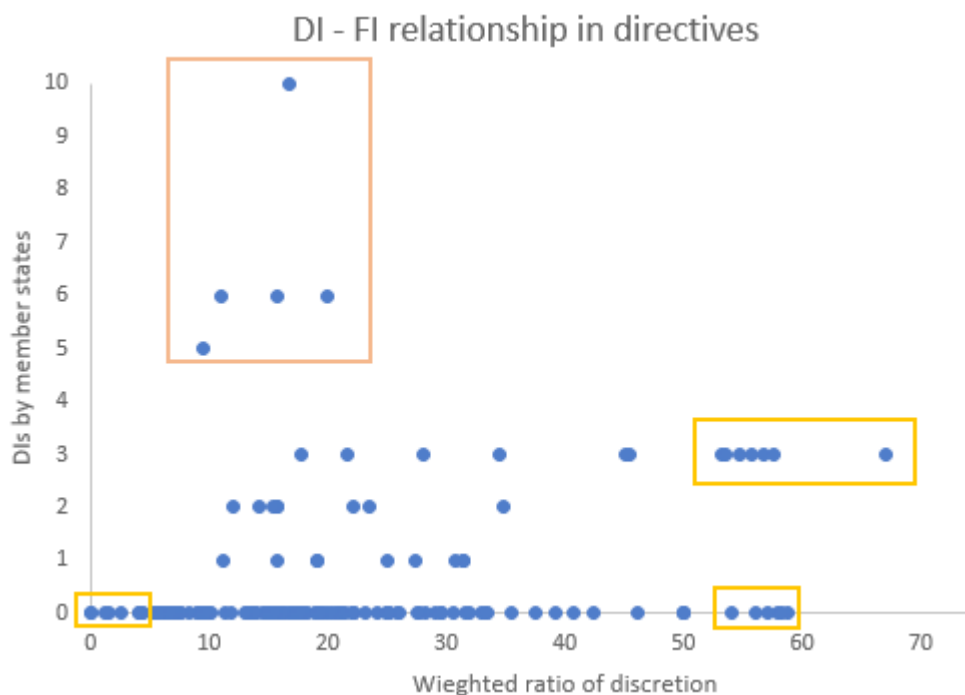
When plotting directives according to their levels of DI and FI (see Figure 3), we observe that the upper-right area of many opt-outs and the high weighted ratio of discretion remains empty. The five directives with the highest number of opt-outs score relatively low in terms of flexibility of implementation granted to member states. On the other hand, some directives with moderate DI scores record very high levels of discretion for member states. The qualitative exploration seeks to uncover similarities and differences among groups of directives clustered according to their DI and FI scores. It looks both at the content of directives and their various characteristics, and at the nature of opt-outs.

As we discuss more closely in Section 3, out of 164 directives in the sample, just 35 directives include some instance of a member state opting out from a directive or its provisions, and in only five of these directives, more than four states obtained an opt-out. None of these five directives rich in opt-outs belongs to a group of directives with high flexibility in implementation for member states. In order to get a grasp of what kind of directives belong to each group, we study directives with different values in DI and FI. First, we look at the directives with the highest number of member states opting out, which at the same time fall into the category of directives with a mid-score weighted ratio of discretion (see Figure 6).⁶ Second, we study directives that score moderately on DI (three member states opting out) and leave very high levels of flexibility in implementation for member states. Finally, we look at the highly populated group of directives with no opt-outs and contrast directives with very low levels of implementation flexibility for member states with those of high levels. We expect DI

⁶ The case selection is based on the EUDIFF and FIEU datasets. We plot the total number of member states opting-out and the weighted ratio of discretion of individual directives (explained above). Such combination enables dealing with situations when e.g. one member state obtains opt-outs from many provisions in one directive or when a very long directive contains comparatively more discretionary provisions than a much shorter directive, but only because of its length. If we computed simply the number of opt-outs and a number of discretionary provisions, these important distinctions would be lost. Therefore, we base our case selection on the number of member states opting out and on the weighted ratio of discretion. They better capture the nature of a directive in terms of degree of member states' agreement on its provisions.

to be primarily used to accommodate heterogeneity of preferences about the level and scope of integration (H2) by individual outliers (H3). On the other hand, we expect FI to be primarily used to accommodate capacity and cost problems (H2) and to address widespread concerns (H3).

Figure 3: Number of member states opting-out from directives in relation to directives' flexibility in implementation for member states



4.1 High DI and mid FI directives

All five directives with the highest number of opting-out member states score moderately in terms of flexibility of implementation. The values of the weighted ratio of discretion of these directives range between 9.5 (129th out of 164 directives)⁷ and 19.9 (68th out of 164 directives).⁸ This group of five directives is highly diverse in all the measures we obtained by merging the updated EUDIFF2 and FIEU datasets. The subsample includes both short and long directives, a directive that took less than a year to adopt and a directive where negotiations lasted almost four years. The directives also differ widely in terms of complexity – one touches only on three subject matters, while the other on eight; one directive has only 27 recitals in the preamble while the longest has 142 recitals. The range of the number of national implementing acts goes from 84 to 559. Not many median values in measures of this subgroup depart much from the median values of the whole sample of 164 directives. We only observe higher numbers of documents in the Council Register and more national implementing acts, which suggests that these directives were adopted in situations of higher conflict among member states in the Council and in cases of a high misfit between the directive and existing legal state in the member states. The directives in this subgroup also tend to be longer. Two directives from the

⁷ Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning.

⁸ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

subgroup belong to the policy field internal market⁹ and two to environment and energy¹⁰ that are at the same time the most frequently appearing policy fields in the whole sample of all directives. The remaining directive was adopted in the field of health and consumer protection.¹¹

By far the most states opted out from some provisions of Directive 2012/19/EU on waste electrical and electronic equipment (WEEE). The proposal was adopted by the Commission in December 2008 and signed by the Presidents of the European Parliament and the Council almost after four years in July 2012. The Council listed the proposal as a B item, i.e. a proposal on which member states disagree, and it stayed as a B item for a total of four meetings. European Parliament committees tabled a total of 84 amendments (76 adopted), and the whole complex negotiations made it to the second reading. The directive focuses on the prevention of WEEE and its re-use, recycling and other ways of recovering waste from electrical and electronic equipment. Given substantial disparities among member states regarding the producer responsibility and consequently the financial burden on economic operators, the directive seeks to lay down minimum standards for the treatment of WEEE.¹² Ten countries, all of them from the Eastern enlargement group, negotiated a possibility of opting out regarding a collection rate of electrical and electronic equipment “because of their lack of the necessary infrastructure and their low level of EEE consumption”.¹³

The group of three directives from whose provisions six member states opted out consists of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Directive 2009/73/EC concerning common rules for the internal market in natural gas, and Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products. The Solvency II directive requires insurance companies to hold enough financial resources and sets out management and supervisory rules.¹⁴ It seeks to eliminate the most serious differences between the national laws and provide a legal framework for insurance and reinsurance undertakings to conduct insurance business throughout the internal market.¹⁵ The directive is very long (385 provisions), with 142 recitals in the preamble. The proposal caused a disagreement in the Council as it was twice listed as a B item. European Parliament committees tabled 144 amendment proposals and the proposal passed after more than two years in the first reading. The directive contains a total of 93 provisions enabling member states flexibility in implementation; it uses a comparatively high proportion of references to national laws, minimum harmonization and provides for discretion in application. The United Kingdom, Ireland and Luxembourg secured opt-

9 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II); Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products.

10 Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

11 Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning.

12 Directive 2012/19/EU, Recital 6.

13 Directive 2012/19/EU, Art. 7 para. 3 (“By way of derogation from paragraph 1, Bulgaria, the Czech Republic, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia and Slovakia may, because of their lack of the necessary infrastructure and their low level of EEE consumption, decide to:

(a) achieve, from 14 August 2016, a collection rate that is lower than 45 % but higher than 40 % of the average weight of EEE placed on the market in the three preceding years; and
(b) postpone the achievement of the collection rate referred to in the second subparagraph of paragraph 1 until a date of their own choice which shall not be later than 14 August 2021.”).

14 See Summary of the directive at <https://eur-lex.europa.eu/legal-content/en/LSU/?uri=CELEX:32009L0138>.

15 Directive 2009/138/EC, Recital 2.

outs from a provision on an assistance activity in road vehicle accidents.¹⁶ Four countries – Denmark, Germany, Ireland, and Spain – exempted individually listed institutions that pursue non-life insurance activities from the application of the Directive.¹⁷ Finally, the United Kingdom obtained a specific exemption that non-life and life insurance undertakings may continue their business in the legal form in which they were constituted in the 1970s.¹⁸

The directive concerning common rules for the internal market in natural gas aimed to “introduce common rules for the transmission, distribution, supply and storage of natural gas with the objectives of providing market access and enabling fair and non-discriminatory competition.”¹⁹ The directive sought to deal with the situation when non-discriminatory network access to gas and effective regulatory supervision did not exist in each member state.²⁰ Especially so-called unbundling, i.e. the separation of interests in energy production and distribution, represented a big challenge, not least also for the Nord Stream 2 project (Jeutner 2019). The proposal proved to be highly controversial, appearing four times as a B item on the Council’s agenda. It took almost two years and two readings to adopt the directive. As regards discretion for member states, the directive’s provisions most frequently leave it to state administrations to elaborate on details in implementation and quite often resort to minimum harmonization. Several countries secured possibilities of derogations from important articles on the authorization procedure for natural gas facilities, unbundling, market opening and reciprocity, and direct lines.²¹ Cyprus received such an opt-out for the time it qualifies as an isolated market and “Estonia, Latvia and/or Finland until any of those Member States is directly connected to the interconnected system of any Member State other than Estonia, Latvia, Lithuania and Finland”.²² Finally, the key unbundling provision (Art. 9) shall not apply to Cyprus, Luxembourg and/or Malta. The six countries consist mainly of smaller states on the fringe of the EU,²³ including two islands, with low connectedness to the EU gas market.²⁴

The title of Council Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products is quite descriptive of its main aim. In addition to securing the EU oil supply by requiring governments to keep a minimum level of crude oil and/or petroleum stocks, the directive sets out procedures for releasing the stocks in case of a serious shortage.²⁵ The objective of the Directive is “to maintain a high level of security of oil supply in the Community through reliable and transparent mechanisms based on solidarity amongst Member States while complying with the internal market and competition rules.”²⁶ The directive scores rather low in weighted ratio of discretion, partially due to high levels of constraints on discretion. It provides especially discretion for member states to elaborate on details and for minimum harmonization. Again, member states held diverse positions during the negotiation process as the proposal appeared twice as a B item in the Council. Anyway, the legislative process lasted less than a year under the

16 Directive 2009/138/EC, Art. 6.

17 Directive 2009/138/EC, Art. 8.

18 Directive 2009/138/EC, Art. 305.

19 See Summary of the directive at <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32009L0073>.

20 Directive 2009/73/EC, Recital 4.

21 Directive 2009/73/EC, Arts. 4, 9, 37, and 38.

22 Directive 2009/73/EC, Art. 49(1).

23 With the exception of Luxembourg.

24 Some authors find the derogation regime of “energy islands” exceedingly wide, cf. de Hauteclocque and Ahner 2012.

25 See Summary of the directive at <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32009L0119>.

26 Directive 2009/119/EC, Recital 33.

consultation procedure.²⁷ The member states that were not members of the International Energy Agency by 31 December 2012 and covered their inland consumption of petroleum products fully by imports received two extra years to comply with key Art. 3(1). Until then, these states should maintain oil stocks corresponding to 81 days of average daily net imports instead of at least 90 days as Art. 3(1) Requires. The countries covered by this provisional derogation include Cyprus, Estonia, Latvia, Lithuania, Malta and Slovenia, i.e. small new member states at the EU's periphery.

Five landlocked member states do not need to implement²⁸ Directive 2014/89/EU establishing a framework for maritime spatial planning. This directive sets a common approach to the sustainable planning of maritime areas through the introduction of a common timeframe and minimum common requirements.²⁹ It has both the lowest number of DI instances and the lowest implementation flexibility for member states among the subgroup's directives. The legislative process took 16 months and did not produce any complications – as the only proposal in the subgroup, it has not been listed as a B item in the Council, and it passed in the first reading. The DI arises here out of purely functional reasons – landlocked countries do not need to have maritime spatial planning.

To sum up, the group of directives with high levels of DI and mid-levels of FI is characterized by complications during the legislative process. Four out of five directives appeared as B items on the Council agenda, indicating that member states held diverging positions on the directive's proposals. The outlier – the Directive establishing a framework for maritime spatial planning – had five member states opting out not because of the conflicting preferences but because of functional necessity, as five landlocked countries do not need to implement European norms on maritime planning. Thus, we can conclude that high DI instances and mid-FI have arisen as a means for resolving a conflict arising from heterogeneity of preferences among member states. Inter-institutional conflicts loomed large in the legislative process as well because two out of five directives made it to the second reading.

We observe similarities in the composition of member states derogating from the directives in the sample. New member states emerged as opting-out member states in three directives.³⁰ In two of these three cases, the group consists of small countries on the EU's territorial periphery. Similarly to the case of the landlocked country, the functional logic for DI prevailed – those two largely overlapping groups of countries were not well connected to the EU gas market and/or relied on imported petroleum products. In the case of the Directive on waste electrical and electronic equipment, ten new member states received differentiated treatment because of their low level of development in this field. On the contrary, only old member states opted out from some provisions of the Solvency II directive and their opt-outs concerned issues that were comparatively much more specific. Hence, the results align with the expectations of H3, as DI instances serve here predominantly as a tool to accommodate groups of outliers sharing some specific characteristics. As regards the purpose of the DI instances, the data do not fully support H2, which expected opt-outs as a reaction to heterogeneity of preferences about the level and scope of integration. However, the opt-outs do not stem here from sovereignty concerns but rather from practical necessity. The specific situation of landlocked countries or countries not well connected to the EU energy market better aligns with expectations we had about FI, which we predicted to be used as a way to accommodate capacity and cost problems.

27 The remaining four directives from this subgroup passed in the co-decision procedure.

28 Directive 2014/89/EU, Art. 15(4).

29 See Summary of the directive at <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32014L0089>.

30 In two cases, the groups of opting-out states consisted exclusively of new member states and in one case four new member states were joined by Finland and Luxembourg.

4.2 Mid DI and high FI directives

The second subgroup includes five directives³¹ that score high in implementation flexibility for member states and from whose provisions a moderate number (three, in our case) of member states opted out. All these directives closely relate to the politically very sensitive Justice and interior policy field.³² Four of them cover issues of residence and work of third-country nationals in the EU, and one deals with the European arrest warrant procedure. Consequently, the structure of individual opt-outs remains uncharacteristically uniform – all opt-outs were employed by the same set of three countries: Denmark, Ireland, and the United Kingdom. Given the homogenous structure of the opt-outs, we will not describe individual directives but characterize this subgroup of directives as a whole.

The directives in this group belong to shorter ones; all of them consist of less than a hundred codable provisions. Despite being shorter than the mean or median directive in the whole sample of 164 directives, the directives in the subgroup have comparatively more recitals in the preamble. A longer list of recitals may indicate policy complexity of legal acts touching upon many important issues (Franchino 2007; Thomson and Torenvlied 2011; Toshkov 2008; Migliorati 2020), but also controversy (Kaeding 2008) or salience of the legal act (Häge 2007). The median directive out of these five also took a longer time on average to negotiate than the median directive of the whole sample. Moreover, a high number of documents in the Council Registry hints towards conflicts during political negotiations among member states. Indeed, all five directives made it multiple times on the Council agenda as B items. On the contrary, the European Parliament remained largely inactive, as its committees tabled an unusually low number of amendment proposals. Finally, a large number of implementing acts shows that member states needed to adjust their domestic legal orders significantly in order to implement the requirements of these directives. While the five directives grant considerable discretion to member states, they have not included many constraints.

The nature of opt-outs remains the same across the whole subgroup. All five directives insert two recitals at the end of the preamble, one concerning the United Kingdom and Ireland, and one Denmark. These recitals uniformly state that due to Protocols annexed to the Treaties, these countries “are not taking part in the adoption of this Directive and are not bound by it or subject to its application”.³³ These results correspond to the expectations of H2 because DI was primarily used to accommodate heterogeneity of preferences about the level and scope of integration. They also demonstrate the ‘trickle-down’ effect of treaty-based to legislative differentiations. In conformity with H3, the DI instances were used to accommodate country-specific preferences of a group of outliers who had secured earlier treaty-based opt-outs due to their sovereignty concerns. The rest of the member states used high FI to address widespread concerns connected to the European integration in a sensitive area of justice and home affairs.

31 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

32 Although Directive on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers falls under the internal market policy field, it closely relates to Justice and interior as it concerns third-country nationals.

33 See recitals 33 and 34 of Directive 2011/98, recitals 54 and 55 of Directive 2014/36, recitals 58 and 59 of Directive 2013/48, recitals 28 and 29 of Directive 2009/50, and recitals 38 and 39 of Directive 2009/52.

4.3 Zero DI – high FI, and zero DI – zero and very low FI

The sample of 164 directives includes 129 directives with the full participation of all member states. This subgroup with no instances of DI differs widely in terms of flexible implementation, as the weighted ratio of discretion ranges from zero to 59. We analyse two groups of directives here – those with high levels of discretion for member states and those with zero or very low levels of such discretion.

The subgroup of directives with high levels of discretion for member states exclusively concerns the fields of transport³⁴ and internal market.³⁵ This subgroup is characterized by directives with comparatively lower levels of salience and political conflict than in the case of the two previous subgroups with non-zero DI. They have much fewer recitals in their preambles and tend to be shorter. It took a shorter time to pass them, the Council stored fewer documents in the Council Registry, and the European Parliament committees tabled fewer amendment proposals. Only one directive out of five appeared as a B item on the Council agenda, and all passed in the first reading, which indicates a low level of inter-state and inter-institutional conflict. Member states, on average, need much fewer implementing acts than in the previous two subgroups. Compared to the subset of directives with moderate DI and high FI, they have a similar weighted ratio of discretion, but their discretionary provisions tend to be more constrained.

The subgroup with no opt-outs and zero or very low levels of discretion for member states consists of four directives in the policy field of health and consumer protection³⁶ and one directive in environment and energy.³⁷ Three of these five directives are so-called recasts which means that the directives incorporate previous legal acts and amend them, resulting in a single legal act. The subgroup scores even slightly lower than the subgroup with zero DI and high FI in terms of political salience and conflict, with fewer documents in the Council Registry, fewer amendment proposals tabled by the European Parliament committees and fewer national implementing acts. The directives in this subgroup also tend to be short and with a high ratio of constraints when its provisions offer discretion for member states.³⁸

4.4 Summary

Our sample of 164 directives lacks cases of co-occurring directives with both high DI and high FI scores. Therefore we explore groups of directives with high levels of DI but only moderate levels of FI, and directives with moderate DI but high FI. While the first group of directives (with high DI and

34 Directive 2009/100/EC of the European Parliament and of the Council of 16 September 2009 on reciprocal recognition of navigability licences for inland waterway vessels; Directive 2009/40/EC of the European Parliament and of the Council of 6 May 2009 on roadworthiness tests for motor vehicles and their trailers (Recast); and Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences.

35 Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent; and Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

36 Council Directive 2013/51/Euratom of 22 October 2013 laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption; Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses (recast); Directive 2008/92/EC of the European Parliament and of the Council of 22 October 2008 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (recast); and Directive 2009/35/EC of the European Parliament and of the Council of 23 April 2009 on the colouring matters which may be added to medicinal products (recast).

37 Directive 2006/40/EC of the European Parliament and of the Council of 17 May 2006 relating to emissions from air conditioning systems in motor vehicles and amending Council Directive 70/156/EEC.

38 Two directives offer no discretion and the highest score in the weighted discretion ratio in this subgroup stands at 2.5.

moderate FI) covers various policy fields and different groups of opting-out member states emerge, the second group (moderate DI and high FI) is much more homogenous. It consists exclusively of directives related to the policy field of justice and interior, and the same group of three states constantly opted out – Denmark, Ireland and the United Kingdom.

The membership of the first group (high DI and moderate FI) is much more diverse, yet we can observe that DI predominantly concerned new member states in three out of five cases. In contrast to the pre-structured treaty opt-outs of Denmark, Ireland and the United Kingdom in the second group (moderate DI and high FI) in the field of justice and home affairs, DI in the first group follows a more functional logic. It concerns e.g. landlocked countries, countries not well connected to EU energy networks and new member states not well-equipped to deal with EU electric waste legislation. Accordingly, these findings are in line with our expectations that DI will follow a rationale related to specific characteristics of the opting-out countries (H3). However, our expectation that member states opt out due to their different preferences about the level and scope of integration (H2) materialized only partially. It clearly worked in relation to opt-outs of Denmark, Ireland and the United Kingdom in justice and home affairs. Nevertheless, in the case of landlocked countries and new member states lacking in dealing with electric waste or not well-connected to the EU energy networks, the opt-outs are used to deal with structurally different conditions rather than from sovereignty concerns.

Both groups of directives share some characteristics, such as heightened political conflict, documented by categorization as B items on the Council agenda and more documents in the Council Registry. Member states also needed, on average, many more domestic implementing acts than in the case of a median directive in the sample. These characteristics stand out, especially when compared to directives with no opt-outs, which show much lower levels of conflict, regardless of their level of implementing flexibility for member states. It takes a shorter time to adopt such directives, and they are shorter. Importantly, they do not appear as B items on the Council agenda and fewer documents appear in the Council Registry. Similarly, European Parliament committees table fewer amendment proposals and states adopt much fewer national implementing acts. These findings go hand in hand with expectations of H1 and its underlying logic. Both DI and FI serve as ways to deal with heterogeneity and controversiality. Both groups of directives which score highly either on DI or FI and at the same time moderately on the other measure (FI or DI) stand out in terms of political conflict in the Council and in the need for domestic legal adjustment. This is documented by frequent appearance of such directives as B items on the Council agenda and a higher number of documents in the Council Registry, and by a high number of implementing measures, which signifies necessity for greater domestic legal adaptation to new EU legislation.

5. Flexible implementation, Differentiated Integration and Compliance

While in the previous section we investigated the relationship between flexible implementation and differentiation, this section investigates how flexible implementation and differentiated integration are related to non-compliance, respectively. According to our baseline expectation, we expect that flexible implementation and differentiated integration relate to non-compliance in the same way. However, we also allow for a higher rate of non-compliance in the case of FI given that DI fully exempts potential rule violators from compliance.

In order to understand how flexible implementation, namely granting member states discretion, impacts a member states likelihood to non-comply with a directive, we use a logistic regression model. As we are interested in whether non-compliance occurs and not in the question of how much non-compliance occurs, this model is the appropriate choice. In the first two models, we investigate whether flexible implementation reduces non-compliance on an overall level. Thus, the unit of analysis is the directive, and the dependent variable is a binary indicator if at least one reasoned opinion was sent to one of the member states. The independent variable consists of an indicator, how much discretion a member state has in implementing the directive into national law. We further use a binary

indicator coding whether a legal act contains a differentiation. We then calculate a second model for the impact of differentiated integration on non-compliance. Comparing the coefficients between and the significance of the two models will allow us to investigate whether differentiated integration and flexible implementation impact non-compliance in the same way – either reducing or increasing the probability of non-compliance. In a second step, we also investigate whether the relationship between discretion and non-compliance changes when the legal act contains differentiation. Therefore, to investigate this question, we enter DI and FI into the same model to compare their impact. Because comparing continuous (discretion) and binary variables (differentiation) is problematic, we transform the discretion variable into a binary indicator – whether a directive grants discretion or not. However, as the number of legal acts granting no discretion at all is limited, we additionally calculate a model that contains the continuous predictor of discretion as well as the binary predictor. Here, we compare the average marginal effects of each predictor.

Hypothesis 4a, stating that flexible implementation and differentiated integration do not differ significantly in their effect on non-compliance, is confirmed by our bivariate regressions. Yet, the relationship is not as expected: the coefficients are positive, indicating that DI and FI tend to increase the probability of non-compliance rather than decreasing it (Table 5 and Figure 4). These findings challenge previous theoretical accounts arguing that granting flexibility to member states - either in terms of special legislative provisions for individual member states (DI) or general discretion for all member states how to implement a legal act (FI) – would reduce non-compliance. Because the coefficients are not statistically significant, we would not be confident in stating that DI and FI are counterproductive in tackling non-compliance. But we can certainly say that neither DI nor FI reliably fulfils the promise of reducing the EU's compliance problems through granting legal flexibility.

Figure 4: The impact of flexible implementation and differentiated integration on the probability of non-compliance

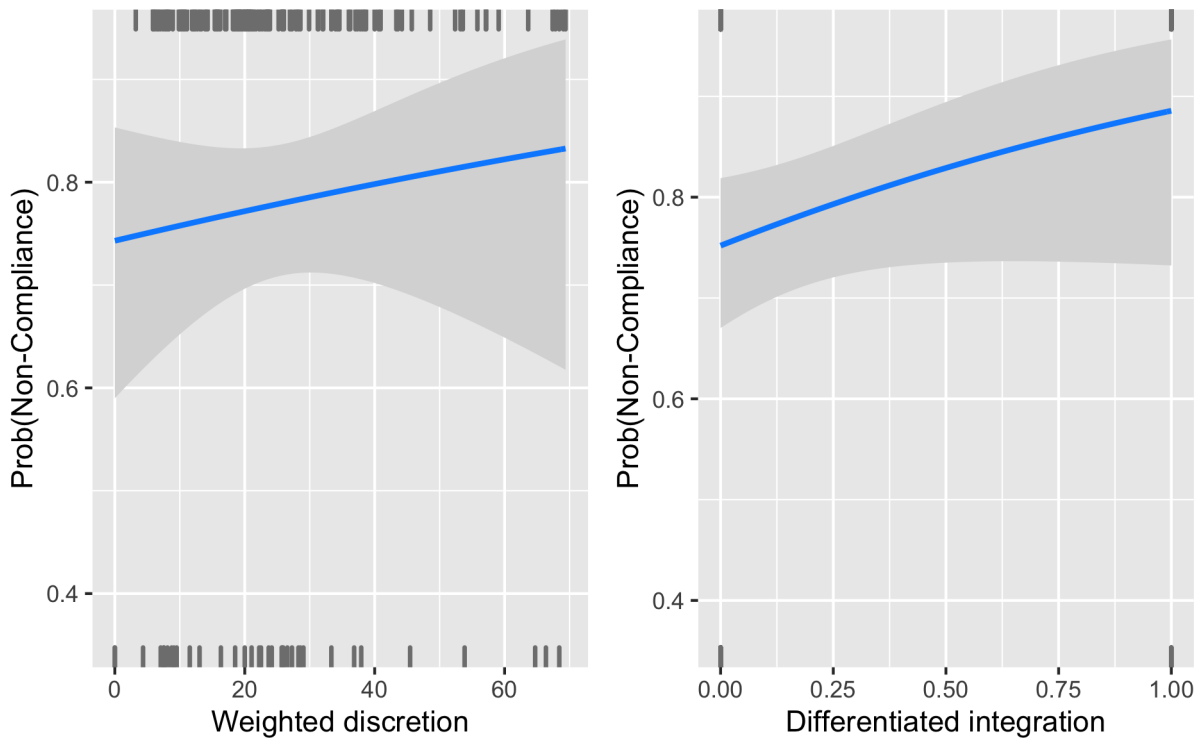


Table 5: Logistic regression models, testing the impact of flexible implementation and differentiated integration separately

	Non-Compliance	
	(1)	(2)
FI	0.008 (0.012)	
DI		0.939 (0.569)
Constant	1.062** (0.356)	1.109*** (0.204)
N	163	164
Log Likelihood	-85.850	-84.704
AIC	175.699	173.407

*p < .05; **p < .01; ***p < .001

In order to investigate to what extent DI and FI impact compliance behaviour, we included both instruments as binary indicators into the same logistic regression model. Table 6 shows that even if both variables are included in the model none of them gains significance. Furthermore, the counterintuitive positive relationship between FI and DI, on the one hand, and non-compliance, on the other, remains. Comparing effect sizes in the first model is difficult as the standard errors are enormous. These large standard errors can be explained by the fact that only a few directives grant no discretion to member states regarding the implementation of the legal act.

Therefore, we calculated a second model, using the continuous version of FI. Even though effect sizes are not directly comparable anymore, the general relationships stay the same. Moreover, the effect sizes of one unit changes of each variable on the probability of non-compliance can be examined in the Average Marginal effects plot (Figure 8): differentiation increases the probability of non-compliance by 15 percent but not significantly so. In contrast, discretion only has a minor impact on the existence of non-compliance with a positive but tiny effect size nearly equal to zero. Therefore, we can assume – but not completely affirm due to non-significance – that differentiation has stronger effects on non-compliance compared to flexible implementation.

Table 6: Logistic model on the combined impact of flexible implementation and differentiation on non-compliance

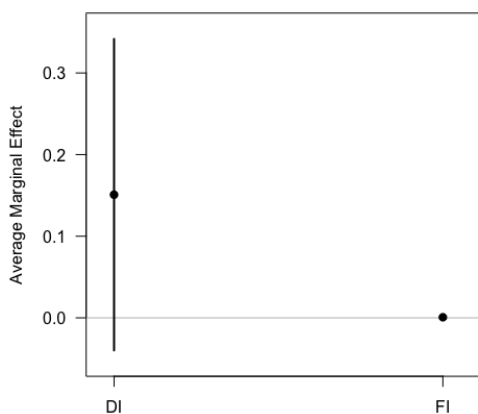
	Non-Compliance	
	(1)	(2)
DI	0.874 (0.571)	0.897 (0.585)
FI (bin)	16.740 (1,029.121)	
FI (cont)		0.004 (0.014)
Constant	-15.566 (1,029.121)	1.030*** (0.331)
N	164	164
Log Likelihood	-81.867	-84.658
AIC	169.735	175.316

*p < .1; **p < .05; ***p < .01

Table 7: Average marginal effects for a logistic regression model containing both the continuous discretion and the differentiation variable as predictors.

	Differentiated integration	Flexible implementation
Average Marginal Effects	0.1509	0.000703

Figure 5: Average marginal effect plot for the impact of differentiated integration and flexible implementation on non-compliance



6. Conclusions

Both differentiated integration and flexible implementation address the difficulties that the EU faces in designing uniform legislation for a diverse membership. DI and FI further pursue the twin goals of facilitating agreement on, and of reducing non-compliance with, EU law. However, DI and FI differ in their means. Whereas DI seeks to accommodate individual outliers among the member states by exempting or excluding them from legal acts, or parts thereof, FI grants all member states flexibility in implementing uniform policy objectives. Because of their commonalities, we hypothesize that the use of DI and FI in EU directives is positively correlated, and that they have similar effects on non-compliance. Because of their differences, however, we expect DI to be used predominantly to manage country-specific outlier characteristics and politicized legislation, which is typical for integration in the domain of core state powers related to state sovereignty and national identity. By contrast, FI is the method of choice for managing general reservations among the EU membership regarding the costs and capacity requirements of EU directives.

The results of our analysis corroborate these expectations by and large. Across the board of the directives in our dataset, we find that differentiated integration and flexible implementation are positively correlated, indeed. Directives that include forms of differentiated integration offer increased discretion in implementation, too. This result suggests that DI and FI respond to similar conditions of heterogeneity and controversiality overall and that there is no clear division of labour between both instruments.

At the same time, we observe groups of directives that differ in the precise pattern of DI and FI. In general, DI is significantly rarer than FI. In particular, we observe one group of directives that combines high DI with medium FI, whereas another group combines medium DI with high FI. The largest group of directives with high discretion has either no or low levels of differentiated integration. This pattern exhibits some of the expected features. For one, directives with high DI often result from conflictual legislative processes, whereas those with low DI (but high FI) show considerably less indications of legislative conflict. In addition, DI addresses country-specific circumstances. These render some directives – such as maritime issues for landlocked countries or legal acts in areas of treaty opt-outs – simply irrelevant or inapplicable to individual member states.

Moreover, we observe that directives in the domain of core state powers (such as in Justice and Home Affairs) exhibit forms of differentiated integration, whereas high FI without DI occurs in market and infrastructure-related areas that are typically less politicized. This is not an exclusive relationship, however. We actually find the highest concentration of DI in our selection of directives in areas that are unrelated to state sovereignty and national identity – and where the conflict is about costs and capacities rather than the level and scope of integration. In general, the distinction between individual outliers and widespread concerns seems to structure the choice between DI and FI more systematically than the distinction between policy domains.

Finally, when it comes to their effects on non-compliance, we do not find any systematic difference between DI and FI. Neither differentiated integration nor flexible implementation improves compliance with EU directives significantly. If anything, the relationship between these instruments of legal flexibility is positively correlated with non-compliance, even though the association lacks statistical significance at conventional levels. Our analysis further suggests that DI contributes more to non-compliance than FI. It seems, however, that these findings are best interpreted as indicating that DI and FI are spurious or at best moderating conditions of compliance. Differentiated integration, flexible implementation and non-compliance are influenced by the heterogeneity of member state preferences and capacities and the controversiality of policy issues. Whereas DI and FI are used to overcome non-cooperation on such issues, their impact is not sufficient to reduce non-compliance significantly. Our results therefore do not provide strong grounds for recommending the use of one instrument rather than the other as a means to strengthen compliance with EU directives.

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Annex 1: List of directives included in Section 4 (Qualitative exploration of directives with co-occurrence of DI and FI)

Group of directives with high DI and mid FI

- Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE)
- Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
- Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products
- Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning

Group of directives with high FI and mid DI

- Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State
- Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment
- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

Group of directives with high FI and zero DI

- Directive 2009/100/EC of the European Parliament and of the Council of 16 September 2009 on reciprocal recognition of navigability licences for inland waterway vessels
- Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent

- Directive 2009/40/EC of the European Parliament and of the Council of 6 May 2009 on roadworthiness tests for motor vehicles and their trailers (Recast)
- Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences
- Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies

Group of directives with zero FI and zero DI

- Council Directive 2013/51/Euratom of 22 October 2013 laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption
- Directive 2006/40/EC of the European Parliament and of the Council of 17 May 2006 relating to emissions from air conditioning systems in motor vehicles and amending Council Directive 70/156/EEC
- Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses (recast)
- Directive 2008/92/EC of the European Parliament and of the Council of 22 October 2008 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (recast)
- Directive 2009/35/EC of the European Parliament and of the Council of 23 April 2009 on the colouring matters which may be added to medicinal products (recast)

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