

# POLICY BRIEF

## Integrating Diversity in the European Union (InDivEU)

### Fundamental Rights as Constraints to and Triggers for Differentiated Integration<sup>1</sup>

#### Summary

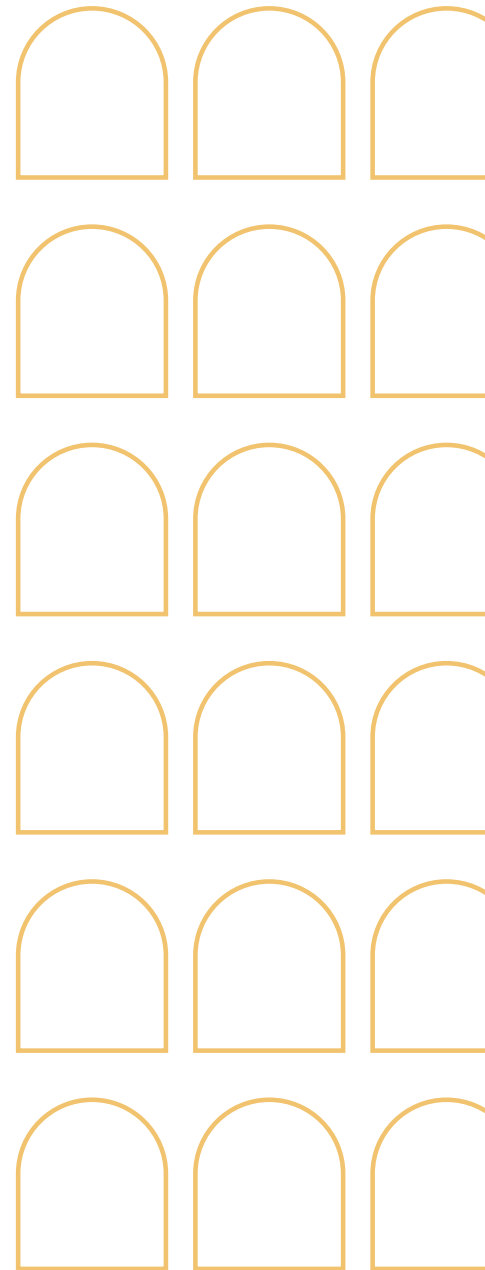
When looking for possible constraints on Differentiated Integration, the fundamental values of the European Union (EU) seem an obvious starting point. Both the Charter of Fundamental Rights and the values articulated in Art. 2 TEU are cross-cutting across EU states. However, while fundamental values have acted as centralising devices in other federal settings, in an EU context marked by extensive value disagreement, they may also act as pathways for differentiation. Insofar as national constitutional orders disagree on the scope of EU rights, attempts to ground EU law in fundamental values trigger inevitable interpretive conflicts across states. This paper will use the examples of asylum and the European Arrest Warrant to demonstrate this argument: while EU law may use fundamental values as a reason to harmonise EU law across states, such values may also be invoked to question the principle of mutual trust underlying the EU legal order, thereby causing rather than limiting differentiation.

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<sup>1</sup> This short policy brief is based on the findings of a larger article. E. Bertolini and M. Dawson, 'Fundamental Rights as Constraints to and Triggers for Differentiated Integration' (2021, forthcoming) *Swiss Political Science Review*.

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## Differentiated integration versus differentiation

Fundamental rights (FR) and the rule of law constitute the fundamental values of the EU. Unlike other policy areas such as monetary or border policy, fundamental values are not subject to *differentiated integration*, i.e. to the formal application of different rules across member states. As these values are enshrined in the Charter of Fundamental rights (CFR) and are protected by the EU's highest court, namely the Court of Justice of the European Union (CJEU), EU fundamental values are centralised.

Uniform integration does not, however, eliminate the possibilities for differentiation across member states. Differentiation refers to the existence of diverging practices across member states in how they apply EU values in their domestic legal orders. While central principles remain across Member States, the thresholds for fundamental rights protection differ across jurisdictions.

Differentiation of rights protection thus entails the following:

- *Within the FR field itself*, administrations and courts apply **different thresholds**. This means that while a Court in one member state may consider a national practice an example of “inhuman and degrading treatment”, a Court in another state may consider an

equivalent practice as acceptable (either because they interpret this legal standard differently or because they disagree about the underlying facts). Differentiation can thus arise from *disagreement* on how FR should be interpreted.

- Differentiation of standards also has effects on other EU policies, such as common asylum policy or cooperation in criminal matters. Differentiation can thus arise from derogation, where national orders defy EU policies e.g. in the asylum or criminal field, because following them would infringe the core of a FR protected under the national constitution.

	Differentiated integration	Differentiation
<b>Definition</b>	Different formal application of the rules (Treaties, secondary legislation)	Different practices across jurisdictions despite the existence of common rules
<b>Application to EU FR</b>	NO	YES
		Different thresholds leading to disagreement or to derogation

## Differentiation in practice: limits to mutual trust in the EU

Different thresholds of FR protection do not pose a problem when member states act in isolation. EU law recognizes the administrative autonomy of the member states, and the ability of national orders to apply national constitutional rights where outside of EU law's scope.<sup>2</sup> However, differentiation challenges the uniform application of EU law when national legal orders must interact. A common set of FR supposes the existence of mutual trust between legal orders, i.e. that national authorities recognize practices of other member states as equivalent in terms of rights protection.

However, divergent practices across member states trigger differentiation and thus bring limits to mutual trust:

- The existence of a *potential rebuttal of the principle of mutual trust*: the CJEU still favors

<sup>2</sup> Art. 51(1) EU Charter of Fundamental Rights

mutual trust and the uniform application of EU law, even where FR issues are affected. But it has opened the possibility for diverging national practices, albeit only in the case of inhumane and degrading treatment<sup>3</sup>. This possibility remains narrowly circumscribed in practice since the CJEU accepted differentiation only after the European Court of Human rights condemned EU member states for favoring the application of EU law over the protection of FR (thus breaching their obligations under the ECHR)<sup>4</sup>.

- FR protection is a process in flux: the intervention of the legislator and the CJEU create a centripetal effect that centralizes and harmonizes the protection of rights. But the subsequent interventions of national administrations and judiciaries, coupled with ECHR case law, create a *centrifugal* effect that increases the diversity of practice across the EU. The latter is especially clear in the field of common asylum policy, since several national courts have disregarded the strict conditions of the CJEU, refusing the transfer of asylum seekers to other Member States where inhuman conditions were likely to result. Some national courts prefer to rely on interpretations of the ECHR when issuing decisions with a FR component.

### Causes for differentiation in FR across the EU

If there is a high degree of differentiation in FR, what causes this differentiation? Three major causes can be identified:

- *Rule indeterminacy*: fundamental values remain abstract principles that must be adjusted to specific situations. While mutual trust presupposes an equivalence of FR protection across member states, the appraisal of standards is likely to diverge between administrations and courts on the one hand, and between different member states on the other. Even communications and frameworks developed by the legislator and the Commission may not fully remove legal disagreements.
- *Factual indeterminacy*: even if there is a certain agreement about the interpretation of

common rules, actors must cope with specific cases with their subjective assessments and cannot process data and evaluations of other member states to the greatest extent theoretically available. For example, the Higher Regional Court of Bremen assumed that the Latvian prison system suffered from systemic deficiencies even if Latvian authorities claimed the opposite<sup>5</sup>.

- *Cultural indeterminacy*: Legal actors might disagree on the prioritization of different norms, and this is likely to reflect the weight given to particular values within their respective legal systems. Even if the core or 'essence' of fundamental rights is common to all member states, the moral character associated to rights protection will likely trigger disagreements across states. Even if centripetal forces led by the CJEU lead to encompassing guidelines of interpretation, the specificity of cases (such as the perceived deservingness of litigants) and the different backgrounds of actors involved will play a centrifugal role.

#### Causes for differentiation in FR protection

Rule indeterminacy	Factual indeterminacy	Cultural indeterminacy
Different understanding of moral values associated to FR protection	Different/bounded knowledge of other national legal systems	Divergence about the hierarchization of moral standards

### Conclusion and recommendations: Unity in diversity

Thus, while FR and fundamental values are formally not subject to differentiated integration, their interpretation may lead to differentiation of practices across member states. This finding may not necessarily raise a need for immediate correction. While mutual trust is an overarching value of the EU, the administrative autonomy of member states is also a constitutional principle of the Union. The latter therefore recognizes the legitimate existence of different practices across member states, as long as the equivalence of rights protection remains unaffected.

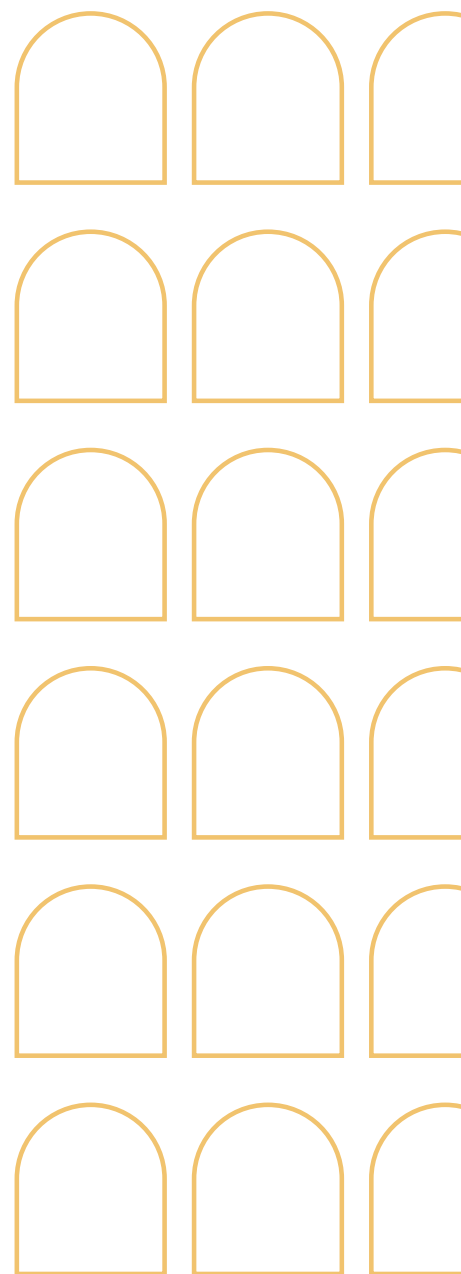
3 C-411/10, NS and others, 2011. See Xanthopoulou, E. (2018). Mutual trust and rights in EU criminal and asylum law: three phases of evolution and the uncharted territory beyond blind trust. *Common Market Law Review* 55(2):489–509  
 4 ECHR, *MSS v. Belgium and Greece*, 2011 and *Varga and Others v. Hungary*, 2015  
 5 Higher Regional Court Bremen (2016). Order of 3 August 2016 - 1 Ausl A 14/15

EU actors may nonetheless play an important role in limiting the effects of differentiation and enhancing mutual trust among national legal orders. The recommendations below thus stress the possible cooperative paths that could be (further) developed, addressing each of the causes of differentiation mentioned above.

1. In addressing *rule indeterminacy*, the CJEU shall keep its centripetal role as a harmonizing FR protector in the EU but should use the mechanism of the preliminary reference procedure to foster cooperation. In preliminary rulings, it may indicate to the referring judge supplementary sources of information about the protection of FR in other member states and should seek to provide more detailed guidance on how applicable EU law should be interpreted. Since national judges may not be aware of the specificities of other national legal orders in the EU, the Court shall use its considerable resources to guide national courts – which will issue the final decision – towards informed and consistent decisions.
2. In addressing *factual indeterminacy*, the European Commission, working with the Fundamental Rights Agency, shall monitor closely and regularly the differentiated application of FR protection across member states. It shall pinpoint the areas that trigger increased differentiation (e.g. European Arrest Warrant and the transfer of asylum seekers) and issue communications and research notes that contain updated information of the current state of play across member states. Updates occurring every 5 years would reduce the likelihood of differentiation. Centralised information on the factual operation of systems based on mutual trust (such as asylum conditions in EU member states) could considerably help national and European Courts in making consistent and evidence-based decisions on how mutual trust principles should be applied.
3. In addressing *cultural indeterminacy*, EU institutions can utilize the notion of an ‘essence’ of fundamental rights as established in the Charter to orient a meaningful division of labour between the national and EU levels regarding FR protection.<sup>6</sup> EU institutions must ensure that the core of fun-

damental rights common to all EU member states remains unaffected by diverging practices. They should however respect decisions that do not disregard that core yet display deference to national specificities, particularly when *in refusing to apply EU law, national Courts uphold a higher standard of fundamental rights protection*. The autonomy of Member states to protect core elements of the national constitutional order in respect to FR should be strengthened rather than weakened through the operation of Europe’s area of freedom, security and justice.

<sup>6</sup> M. Dawson, O. Lynskey & E. Muir, ‘What is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ (2019) *German Law Journal*, 20(6).



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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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