

POLICY BRIEF

Integrating Diversity in the European Union (InDivEU)

Is flexible implementation an effective and legitimate way to cope with heterogeneity in the European Union?

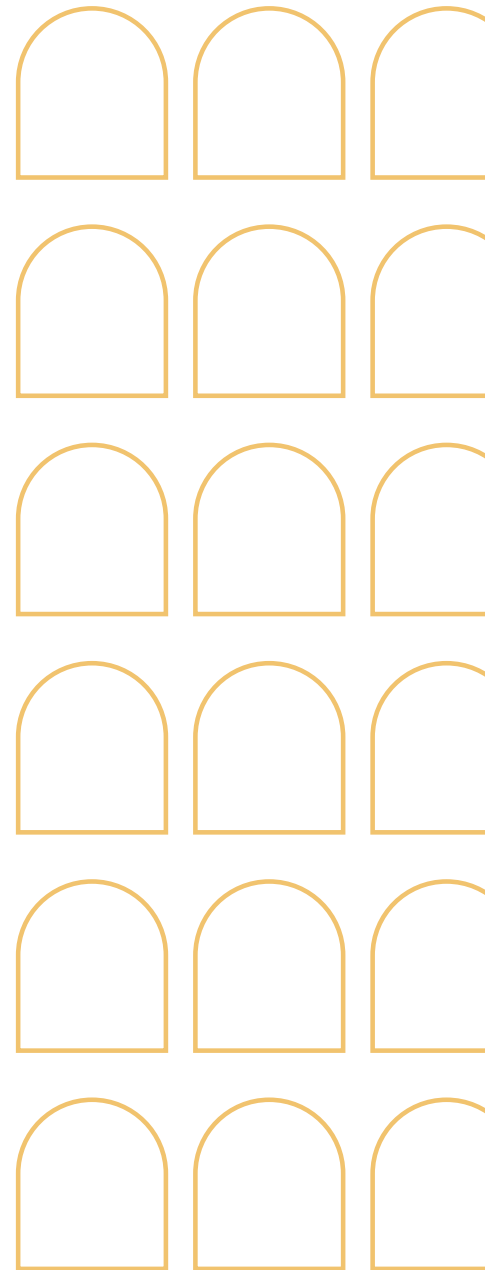
1. Background

As EU membership has become wider and more diverse, heterogeneity among member states has posed increasing challenges to EU policy-making. Partly these challenges relate to the decision-making process: greater heterogeneity makes it more difficult to reach agreement. Partly, the challenge is to balance EU-wide harmonization and member state autonomy in such a way that common objectives are met while simultaneously sufficiently adapting EU policies to differences in domestic conditions.

Several options exist to deal with this heterogeneity. One is differentiated integration, in which some member states are exempted from EU-level policy arrangements. Another way is flexible implementation of EU legislation, which includes all member states but gives them leeway to make further choices when implementing EU law and policies. By allowing such leeway, some objectives and policy instruments are harmonized at the EU-level, while leaving it to the member states to adapt these overall arrangements to differences in domestic conditions. This leads to variation in actual implementation among member states.

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WP7 of the InDivEU project has studied how flexible implementation in the EU works and whether it can be an effective and legitimate way to cope with heterogeneity among member states. Does flexible implementation lead to better-tailored, more effective and more legitimate EU policy arrangements or does it rather undermine the effectiveness and legitimacy of EU law and policies?

2. Approach

We have studied this question using a combination of methodological and theoretical approaches. These approaches build on insights and analytical techniques from the disciplines of law, political science and public administration.

First, we compiled a dataset on the room for flexible implementation in EU directives that were adopted in the period 2006-2015 (the Flexible Implementation in the European Union or FIEU dataset). This dataset was used to map how much and what types of flexibility the directives grant to member states in implementing EU law and what determines variation among directives in this respect.

Second, we did case studies in three policy domains in order to find out whether, how and why member states make use of the flexibility offered to them. These case studies focused on the Consumer Rights Directive (CRD; 2011/83/EU), the Energy Efficiency Directive (EED; 2012/27/EU) and the Sexual Abuse Directive (SAD; 2011/93/EU). Implementation was studied in four member states, Czechia, Germany, Ireland and the Netherlands, through a combination of document analysis and interviews with policy experts. This gave more insight into the choices made during implementation, the backgrounds to these choices and their consequences.

3. Findings

3.1 Flexibility in EU directives

The FIEU dataset shows a wide variety in the level and types of flexibility granted in directives, varying between 0% and 70% of all substantive provisions in a directive. The average level of flexibility differs considerably between policy areas. While directives in the fields of justice & home affairs and social policy offered most flexibility, directives in the fields of health and consumer protection and environment & energy contained

least flexibility. Further analyses showed that the level of flexibility in a directive is higher if (1) there was more conflict during decision-making on the directive in the Council, (2) there was a greater misfit between the legal orders of the member states and the directive and (3) the directive touched on core state powers.

A comparison between the use of flexibility and differentiated integration (i.e. the inclusion of opt-outs) in directives showed that both are used alongside each other: if a directive contains more opt-outs, it also tends to contain more flexibility. This suggests that flexible implementation and differentiated integration are used to address similar underlying challenges.

At the same time, flexibility provisions are included much more frequently in directives than opt-outs. While opt-outs are used to accommodate one or a few outliers among member states, flexible implementation is used to manage heterogeneity across all (or most) member states.

A comparative analysis found no effects of either flexible implementation or differentiated integration on compliance with a directive by member states.

3.2 The use of flexibility by member states

Among the three directives we studied, the EED and the SAD offered most flexibility to member states. All four member states in our case studies made wide use of this flexibility, which led to substantial differences in the ways these directives were implemented. The choices made during implementation reflected four main considerations:

- Member states mainly made use of flexibility in order to retain existing legal and policy arrangements. Flexibility was therefore used for *conservation* purposes.
- Member states used flexibility to integrate EU directives into broader domestic frameworks. This included alignment with principles underlying domestic legal systems. This served *alignment* purposes.
- Flexibility was used to maintain approaches that were seen as successful. Although this consideration overlaps with the conservation purpose, the rationale here was not simply to retain existing approaches, but to capitalize on proven successes. This served *effectiveness* purposes.

- Differences between member states sometimes reflected different levels of ambition that member states sought to pursue. These were the result of *political* choices.
- To the extent that guaranteeing equal rights or equal legal protection for EU citizens is an important purpose of a piece of EU legislation, differences in implementation between member states become less desirable.

The CRD offered much less flexibility to member states, and the member states made relatively little use of this (already limited) flexibility. To the extent that they did, the choices mostly reflected the conservation and alignment purposes outlined above.

As a general remark, all three cases showed that implementation of EU directives is a dynamic process that evolves over time. Sometimes, this is done by modifying the initial choices made in implementing the same directive. In other cases, implementation evolves in response to new EU directives that are adopted on the same topic at later points in time. As a consequence, patterns of (differentiated) implementation should not be seen as static but viewed in light of their development over time.

3.3 The effects of flexible implementation

Overall, the flexibility offered by the three directives seemed to allow for a better tailoring of EU policies to domestic conditions and contingencies by facilitating the continuation of well-working arrangements in member states. In addition, the flexibility also improved support for the directive among member state policy-makers.

At the same time, four caveats need to be noted:

- Although the potential for experimentation and trying out different approaches is a potential benefit of flexible implementation, this potential did not materialize in the cases we studied. Because flexibility was mainly used by member states to retain existing policy arrangement, little innovation took place and cross-border learning was limited.
- Flexible implementation works less well if the effects of implementation in one member state are contingent on implementation in another member state. In our case studies, we found only a few examples where this seemed to be the case. However, to the extent that there are mutual interdependencies in implementation between member states, this calls for greater coordination and harmonization.
- In some cases, flexibility led to unclarity about the (legal) requirements for correct implementation.
- Flexible implementation is a useful way of dealing with heterogeneity among member states. It allows for a more nuanced balance between EU-level cooperation and member state autonomy than differentiated integration, under which member states are either fully 'in' or 'out' of an EU-level policy arrangement.
- Flexible implementation and differentiated integration can also be used alongside each other, as ways to deal with different types of heterogeneity among member states.
- Although (and because) flexible implementation allows for a more fine-grained balance between cooperation and autonomy, it is less suitable to deal with highly symbolic political issues, in which a member state government wants to signal its commitment to national autonomy to its constituents.
- Offering flexibility in implementation increases acceptance by member states, at both the negotiation stage and the implementation stage of the legislative process.
- There is a trade-off between (the benefits of) flexibility and the level of ambition in an EU policy arrangement. As member states are offered more flexibility, the status quo within the member states is more likely to be preserved.

4. Conclusions and recommendations

Based on our analysis, we draw the following conclusions:

In addition, we can formulate three recommendations:

- Make the possibility to include flexibility provisions a more integral part of policy formation in the EU. This can be achieved by systematically assessing the potential advantages and disadvantages of flexible implementation under a given legal instrument. This assessment would come alongside (or be part of) other types of ex ante evaluations that are already carried out in the development of EU policy proposals. In so doing, implementation should not only be seen in terms of compliance and compliance risks, but also in terms of other potential benefits and drawbacks of flexible implementation.
- Be precise in the formulation of flexibility provisions. This would reduce uncertainty among member state governments, firms and civil society actors about what is required.
- Stimulate cross-border learning, in order to enhance the innovative potential of flexible implementation. This can be done by investing in cross-border learning and by providing incentives to consider and/or adopt new approaches that have shown to yield benefits in other 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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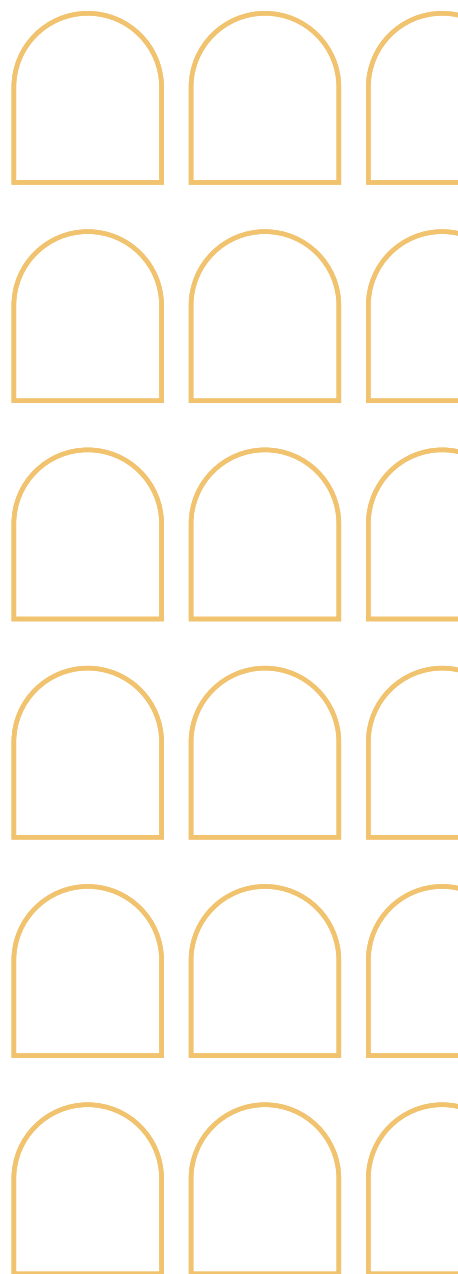
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