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Robert Schuman Centre for Advanced Studies
Integrating Diversity in the European Union (InDivEU)

WORKING PAPER

**Mapping the Legal Scope for Flexible
Implementation in EU Directives**

Robert Zbírál, Sebastiaan Princen, Hubert Smekal

European University Institute
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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 analyses the extent to which EU directives allow for variation in the way that member states implement them. Such room for 'flexible implementation' may be used to overcome conflict during decision-making or to accommodate diversity in conditions within member states. The analysis is based on an original dataset of 164 directives adopted between 2006 and 2015, which are coded for the discretion they offer to member states. In addition to the overall level of discretion in directives, the paper also zooms in on five specific types of discretion. Based on these data, patterns of discretion across policy areas and different types of directives are explored.

Keywords

Differentiated integration, European Union, flexible implementation, directives

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1. Flexible implementation in EU law

In recent decades, differentiation has become one of the key issues in debates on the future of the European Union. With a growing and more diverse membership, differentiation in EU law and policies has been put forward as a way to cope with the increasing diversity among member states. In these debates, most attention has gone to forms of differentiated integration (DI). DI occurs when parts of EU law do not apply to all member states (Dyson and Sepos 2010: 4; Leuffen et al., 2013: 17). This may relate to a policy area (such as EMU or Schengen) or to a single legal instrument and may take shape through opt-outs for specific member states (Adler-Nissen 2011; Winzen 2016) or the participation of only part of the member states in forms of 'enhanced cooperation' (Kroll and Leuffen 2015). All these forms of DI are tied to the adoption of EU law: in the establishment of a (set of) EU legal instrument(s), some member states are excluded from its scope.

In addition to DI, differentiation may also take place in the implementation of EU law. EU law often leaves room for member states to make their own choices, for instance by granting a choice among options, by requiring further specification of EU legal norms or by allowing for the adoption of more stringent standards. This is clearest in the case of directives. As directives need to be transposed into member state law, they are particularly well-suited for legislation that requires further specification and fine-tuning at the member state level. Directives unify legislation across Europe, but leave the different Member States some discretion in choosing means and instruments, hence mediating between unity and diversity (Haverland et al. 2011: 265-266). This leads to forms of flexible implementation (FI), in which EU law is implemented differently in different member states, within the limits set by EU law.

In the EU legal and political system, DI and FI serve largely the same instrumental and principled purposes. To begin with, both DI and FI are used to smoothen the decision-making process and overcome stalemates among member states. In this vein, DI has been presented as an answer to the difficulties of coming to decisions in a widening and more heterogeneous EU: by allowing opt-outs for member states that are opposed to a common arrangement, the other (willing) member states can move ahead (Holzinger and Schimmelfennig 2012: 293; Jensen and Slapin 2012). Likewise, FI helps to smoothen the decision-making process by allowing member states leeway to further shape the requirements flowing from EU legislation during implementation. This, then, also serves to overcome opposition in decision-making (Andersen and Sitter 2006: 321). In this line of thought, DI and FI are not used for their intrinsic value but as ad hoc solutions to the political stalemate. This we may call the instrumental use of DI and FI.

In addition, DI and FI may be valued in their own rights, as arrangements that lead to better outcomes than uniform arrangements would. Thus, Bellamy and Kröger (2017) and Fossum (2015) have argued that DI can be justified from the point of view of democracy. Since (and to the extent that) citizens of different member states have different preferences regarding a policy, allowing for opt-outs and enhanced cooperation among smaller groups of member states leads to outcomes that are more closely aligned with citizen preferences throughout the EU. Taking a slightly different angle, DI has also been defended as a way to match the territorial scope of costs and benefits of a given policy (Holzinger and Schimmelfennig 2012: 295; Lord 2015). Along the same lines, FI can be seen as a way to tailor EU-wide policies and legislation to specific domestic contexts (Thomann 2015). By allowing member states the room to make their own choices, implementation practices can be better adapted to cultural, economic, legal, natural and social conditions in a member state. Because this line of argument sees DI and FI as (potentially) having intrinsic benefits, we may call this the principled use of DI and FI.

At the same time, DI has also been criticised on several scores. Some have argued that DI results in a fragmentation of EU law. This may lead to less effective policies if member states are allowed to 'cherry-pick' and free ride on the efforts of others. Differences between member states may also create barriers to free movement in the internal market. In addition, DI may lead to legal uncertainty and run up against the desire to establish a common set of rights for citizens. Finally, from a more systemic and political point of view, DI has been argued to lead to unwanted divisions within the EU, between core and peripheral member states (and their citizens) (Avbelj 2013; Eriksen 2018).

Largely for these same reasons, the European Commission and European Parliament have also tended to be sceptical about FI (European Commission 2017; European Parliament 2014). This has been reinforced by the fear that allowing for flexibility in implementation will offer room for shirking on the part of member states that are unwilling to comply with EU law. The stress has therefore often been on the uniformity of implementation across the EU.

In terms of its background and purpose, FI can therefore be seen as an alternative for or complement to DI, which raises many of the same issues. Both can be used as ways to accommodate diversity within the EU. At the same time, the way they do this differs. Whereas under DI, some member states are excluded from a part of EU law, under FI all member states are subject to the same legal norms but have room to make choices within the limits set by those norms. As a result, DI and FI strike a different balance between EU-wide harmonisation on the one hand and member state freedom to manoeuvre on the other.

Although forms of FI are part and parcel of the EU legal and administrative system, they have received relatively little attention in the literature. Most of the literature on the implementation of EU law has focused on compliance with EU law as its main concern, to the point where 'implementation' and 'compliance' are seen as 'two sides of the same coin' (Treib 2014: 5). This approach overlooks the fact that usually, there is more than one way to comply with a given piece of EU law. Law always leaves room for multiple interpretations, either by design (for the reasons outlined above) or simply because it is impossible to create 'perfectly precise rules' that specify the proper response for all contingencies (Stone 2012). As a result, rather than one specific form of compliant implementation, in many cases EU law allows for multiple implementation practices that all comply with EU law (Thomann and Sager 2017).

The range of compliant implementation practices, and thereby the scope for legitimate differentiation in implementation among member states, is defined by EU law. Depending on the way EU legislation is set up and specific provisions are formulated, this zone may be narrower for some legal instruments and wider for other ones (Van den Brink 2017a). It is therefore crucial to gain a better understanding of the extent to which EU law allows for flexible implementation and how variation between legal acts in this regard can be explained. This paper does so, in two ways. First, we map the scope for flexible implementation in EU directives adopted from 2006 to 2015. In this way, an overview can be obtained of the levels of flexibility in EU directives. Second, we seek to explain why levels of flexibility vary across EU directives, thereby contributing to a better understanding of how flexibility is used in EU law.

Our paper contributes to the current state of knowledge on the implementation of EU law in a number of ways. First, we move beyond the focus on compliance as a point-specific outcome in the implementation of EU law. Although our dataset does not itself include data on implementation (or compliance), by systematically mapping the scope for FI it offers a systematic basis for exploring forms of FI. In this way, it contributes to nascent literature that seeks to move 'beyond compliance' in the implementation of EU law (Heidbreder 2017; Schmidt 2008; Thomann and Sager 2017; Thomann and Zhelyaskova 2017).

Second, we shed more light on the extent and determinants of discretion in EU law. Over the past twenty years, a number of authors have studied discretion in EU legislation (Dörrenbächer and Mastenbroek 2017; Franchino 2007; Hartmann 2016; Steunenbergh and Toshkov 2009; Van Eerd et al. 2019). With the exception of Franchino's, these studies have been based on relatively small numbers of cases. Our dataset, which includes 164 directives, allows for a comprehensive overview of (patterns of) discretion in EU legislation between 2006 and 2015.

Third, our paper contributes to studies of implementation of EU law that look at variation in member state implementation. In these studies, variation is usually explained as a matter of fact and/or depicted as an unfortunate imperfection in policy-making (see e.g. Ferranti et al. 2010; Fink and Ruffing 2017; Versluis 2007). Our paper adds to these approaches by looking at the legally defined room for FI. This adds an understanding of the legal framework within which variation in domestic implementation occurs.

This paper proceeds as follows. In the next section, we discuss existing studies of discretion in EU law and formulate a number of theoretical expectations. Subsequently, we explain in detail how our dataset was constructed and which methodological choices we made. We then present the empirical results of our dataset, both in a descriptive and an explanatory way. Finally, we draw conclusions based on our analysis.

2. Explaining discretion in EU law

In the existing literature, the scope for flexible implementation has been studied under the heading of 'discretion'. Several studies have looked at discretion in EU legislation, either as a phenomenon that requires explanation (as a dependent variable) or as a characteristic of EU law that may explain other phenomena (as an explanatory variable). In both types of study, 'discretion' is understood as the room for choices that member states (or other implementing actors) have in transposing, applying and enforcing EU law. Many of these studies are placed in the broader literature on delegation, which is interested in the conditions under which certain tasks, powers and/or responsibilities are delegated by EU law-makers (in practice mostly: the Council and the European Parliament) to other actors (mainly: the European Commission and the member states).

In one of the first and most ambitious such endeavours, Franchino built on the US literature on delegation by the Congress to study patterns of delegation in the EU. Based on an analysis of 158 EU legislative acts, he found that more discretion was given to member states when legislation had to be adopted in the Council by unanimity and if a policy area required specialised and technical knowledge (Franchino 2004). Under qualified majority voting, greater conflict on the content of a policy within the Council led to less discretion for member states, arguably because member states in the majority wanted to prevent laxity in implementation by those opposed to the policy (Franchino 2007: 168-171). Greater involvement of the EP also led to less discretion, out of the Parliament's desire to control member state implementation (Franchino 2007: 293-294).

Three of these factors are linked to the decision-making process. Discretion is a way to overcome stalemate during decision-making. By granting more discretion to member states, opponents of a proposal can be appeased. This becomes particularly pressing when one member state can block a decision under unanimity voting. The EP has a preference for more limited discretion for member states because it has few other ways of controlling member state implementation, so its involvement tends to reduce discretion. The fourth variable (specialised and technical knowledge) points to more substantive considerations relating to the requirements for the implementation of the policy itself.

Later studies have typically focused on smaller numbers of cases in order to unveil the dynamics around delegation, discretion and transposition. Hartmann (2016) found that disagreements in the Council are often settled by building discretion into EU legislation. This emphasises the instrumental use of flexible implementation. She found that discretion does not affect the timeliness and correctness of transposition on its own, but only in combination with other factors.

Others have also analysed discretion in light of the processes that follow the adoption of EU legislation. For instance, Dörrenbächer and Mastenbroek (2017) focused on the extent to which discretion in EU legislation was 'passed on' to domestic implementers during transposition. The literature on 'customisation' of EU law has analysed the ways in which member states make use of the discretion in EU legislation to tailor EU law to domestic contexts. Based on both quantitative analyses (Thomann and Zhelyaskova 2017) and case studies (Thomann 2015; 2019), this literature has mapped the patterns that result from these forms of customised transposition.

Some studies have looked at the consequences of the level of discretion in EU legislation. In their study of transposition, Thomson et al. (2007) found that infringement procedures were more likely to be initiated against a member state if that member state disagreed with a directive *and* the level of discretion in the directive was low. Higher levels of discretion therefore contribute to greater (substantive) compliance on the part of member states. However, higher levels of discretion also led to more delays in transposition. The latter finding was confirmed by Steunenbergh and Toshkov (2009), who found that more discretion in EU directives leads to longer transposition times. Van Eerd et al. (2019) studied the incentives for domestic implementers to feed their implementation experiences back to the EU level. Although they expected this type of 'reloading' to take place less often if discretion was high, they found that it occurred both under high and low discretion, but for different reasons.

A different approach is taken by Hurka and Steinebach (2020), who look at the choice between directives and regulations, based on the assumption that directives offer more discretion than regulations (an assumption we will return to in more detail below). Their analysis yields three factors that determine the choice of instrument. First, choices are shaped by the legacy of prior decisions, by sticking to the type of instrument that was used for an issue before. Second, the use of co-decision in a policy area leads to greater use of directives in that area. Third and finally, they observe a drop in the (relative as well as absolute) use of directives over time, which they attribute to the rise in Euroscepticism over time (presumably in order to limit the increased risk of non-compliance stemming from Euroscepticism).

3. Methods and data

The analysis in this paper is based on an original dataset of 164 directives adopted in the period 2006-2015, which were coded for discretion and associated constraints on the level of individual provisions. This is the Flexible Implementation in the European Union (FIEU) dataset. In this section, we will explain (1) what approach we took to coding discretion, (2) how discretion was operationalised, (3) how the choice for and selection of directives was made and (4) how coding was done. Further details can be found in the codebook for the FIEU dataset (Princen et al. 2019).

3.1 Coding discretion in EU legislation

The approach taken in the FIEU dataset is based on a combination of earlier approaches. 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 as the number of provisions granting discretion divided by the total number of provisions in the legislative act (the 'delegation ratio').

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, Franchino also codes these constraints under twelve different types. His 'constraints ratio' is calculated by counting how many different types of constraints are used in a legislative act, as a proportion of the total number of constraint types (12, in Franchino's case).

Franchino arrives at an overall measure of discretion by weighing the delegation ratio with the constraints ratio. However, the delegation ratio can also be used on its own, as was done by Thomson et al. (2007). A similar approach is taken by Steunenbergh and Toshkov (2009) and Hartmann (2016), who take as their measure of discretion the number of provisions that allow for choice or discretion as a proportion of all provisions in a legislative act.

In the FIEU dataset, we adopted the same basic approach by coding whether individual provisions granted discretion. In addition, we coded for constraints but only insofar as they were linked to a provision granting discretion.

3.2 Operationalizing discretion and constraints

In the FIEU dataset, we refined the basic approach by distinguishing between different types of discretion. Whereas Franchino used a dichotomous approach, in which a provision was coded as either granting or not granting discretion, the FIEU dataset specifies which type of discretion is involved. This also means that one and the same provision can simultaneously grant multiple 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 (2017b) 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.

Annex I gives some examples of each of these categories as they are included in the dataset. A key coding rule for the dataset is that discretion was only coded if it was granted explicitly. This means that a provision is not coded if it merely includes 'vague' concepts but does not explicitly provide for discretion. The reasons for this is that whether or not, and to what extent, seemingly vague concepts provide discretion is often a matter for debate, even among legal experts. They therefore do not offer a good basis for reliable coding across large numbers of directives (as was also borne out during testcoding for the dataset).

The types of constraints in the FIEU dataset are based on Franchino (2007: 92-96 for descriptions and pp. 111ff. for examples). However, whereas Franchino discerned twelve categories of constraints (based on the fourteen categories in Epstein and O'Halloran 1999), in the FIEU dataset some have been merged and others deleted for reasons of simplification. This resulted in five types of constraints:

- The imposition of time limits on the exercise of discretion (which means that member states may only exercise discretion for a limited period of time);
- The imposition of spending limits in relation to the exercise of discretion;
- The need for EU actors to approve or the possibility for them to overturn the exercise of discretion;
- The requirement to report, consult or hold public hearings when exercising discretion;
- The imposition of substantive standards and/or procedures on the exercise of discretion.

3.3 Selection of directives

For the FIEU dataset, we decided to code EU directives adopted in the ten years from 2006 to 2015. The choice for directives (to the exclusion of regulations) was made because directives are likely to contain higher levels of discretion for member states than regulations. Although the actual level of discretion in a directive or regulation depends on the (wording of) provisions in the specific legislative act, regulations are typically meant for (and used in) situations in which closer and more uniform harmonisation between member states is sought.

This (theoretical) assumption is also borne out empirically. In their reanalysis of Franchino's data, Hurka and Steineback (2020: 9) found that directives offer (much) more discretion to member states than regulations. Insofar as regulations offer discretion, they primarily grant it to the European Commission, not member states. We further tested this by coding a sample of 59 randomly selected regulations in the period 2006-2015 and comparing them to the directives in our dataset. This comparison confirmed Hurka and Steinebach's findings: whereas on average 26% of provisions in directives granted discretion, in regulations this was 8.1%. Given the time- and resource-intensive nature of coding, the choice to code only directives therefore seemed justified as a way to focus on the legal instruments that offer most information on variation in (types of) discretion.

The time period 2006-2015 was chosen to obtain a sufficient number of directives, while also allowing for follow-up studies into transposition and application by member states (which are done as a different part of the same project). The selection of directives in this time period followed the selection made for the EUDIFF2 dataset, which codes secondary legislation for instances of DI (Duttle et al. 2017). According to the codebook for the EUDIFF2 dataset (EUDIFF 2017: 7), an EU legal act qualifies as a legislative act if it is (1) legally binding, (2) generally applicable to and in the EU member states and (3) initiated by the European Commission and adopted by the EU legislature under a legislative procedure as laid down in the TFEU. This also includes framework decisions within the Third Pillar prior to 2009. Legislative acts are not coded in the EUDIFF2 dataset

if they 'merely amend, supplement, extend or suspend existing legislative acts or fix volumes, levies, duties, subsidies, refunds or prices [...] on a regular (usually annual) basis'. This excludes directives (and regulations) that lay down technical standards or set quotas, tariffs or reference prices, as well as other forms of EU executive rule-making that are adopted as delegated acts (Article 290 TFEU) or implementing acts (Article 291 TFEU).

Compared to EUDIFF2, two further choices were made in selecting directives. First, we coded legal acts as they were adopted, not, as in EUDIFF2, separately for each year that they were in force. Due to this decision and exclusion of amending acts in the EUDIFF2 dataset, amendments to the original legal acts are not coded.

Second, so-called codified directives were excluded from the FIEU dataset. Although these acts pass in the standard legislative process, they only technically combine the original act and its amendments (vertical consolidation) or more acts from related subjects (horizontal codification).¹ In none of these cases new provisions are added, therefore the level of discretion to the Member States remains unchanged and is covered by previous acts. On the contrary, recast directives form part of our dataset, because apart from codifying existing legislation they also involve substantive amendments to the original legal acts.²

This left 164 directives adopted between 2006 and 2015, which were all coded. In total, these directives contained 13,806 provisions.

3.4 Coding procedures

Within each directive, the preamble and annexes were not coded. Moreover, general provisions on revisions, transposition (deadlines) and the like, which appear at the end of a legislative act, were not coded, unless they contained substantive provisions. In a number of rounds of testcoding by the authors of this paper, the initial codebook was tested and further refined (Princen et al. 2019) which formed the basis for the coding of legislative acts. Subsequently, five coders based at Masaryk University were trained. They underwent three rounds of testcoding, each followed by a feedback session.

The whole sample of 164 directives was divided into batches of ten directives. In order to achieve maximum reliability, each batch of ten directives was coded independently by two coders. One of the authors of the paper participated in the coding process as well, therefore three teams of two coders were created for each batch. The results between coders in each pair were compared, and coders subsequently asked to resolve their differences. The final coding outcome of each batch was then checked by one of the authors. After each round of coding, the pairs were reshuffled. Therefore one of the authors has always been paired with another coder in order to resolve potential discrepancies in coding results and thus increase consistency. A shared document with both the most typical and tough cases was created and used by all coders in order to achieve consistency across all coding situations.

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

2 See: https://ec.europa.eu/dgs/legal_service/recasting_en.htm.

4. Empirical results

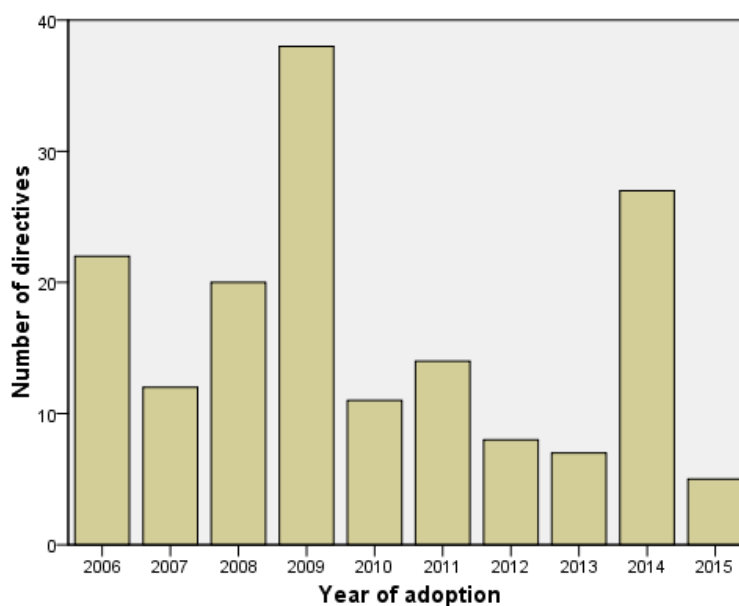
This section explores the universe of EU directives and discretion contained therein using descriptive statistics. First, it gives a short overview of directives included in the sample and then, it focuses on the central issue of interest – the discretion the directives provide to the EU member states. We map how directives differ in the extent of discretion and how discretion develops over time. We compare the extent of discretion provided in individual EU policies and according to the legislative procedure used for the adoption of directives. Thanks to our more in-depth coding, we also determine which type of discretion prevails and how it manifests itself in various policy fields. Finally, we take a look at constraints, which limit member states' discretion. Again, we study how often constraints are used, of which type and how the patterns differ in various EU policies.

4.1 Examination of directives

The sample includes all 164 directives conforming to the abovementioned criteria, adopted in the ten-year period from 2006 till 2015. The graphs in this section are based on this sample of 164 directives, with a hand-coded total of 13,806 provisions. The directives considerably differ as regards their length. The shortest directive has only nine provisions (Directive 2014/112/EU implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport),³ while the longest contains 569 provisions (Directive 2006/112/EC on the common system of value added tax).⁴ The distribution of the length of directives is quite right-skewed, as the mean stands at 84 provisions per a directive, while the median at 60 provisions.

We can see a generally decreasing trend in the number of adopted directives, with the years of elections to the European Parliament (2009 and 2014) clearly standing out (see Figure 1). The heightened legislative activity towards the end of the European Parliament's term coincides with MEPs trying to "clear the table" and all actors involved eager to close outstanding negotiations.

Figure 1. Number of directives in 2006–2015



³ Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF).

⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Figure 2. Number of directives by policy field

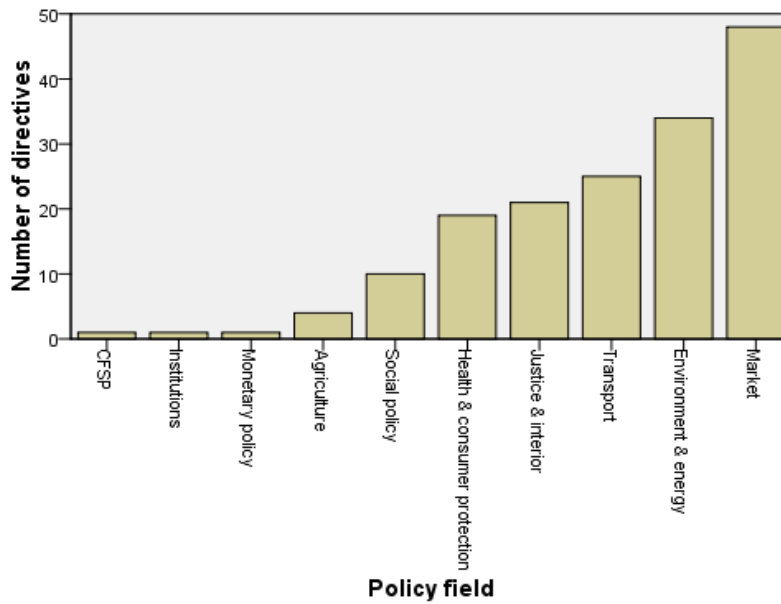
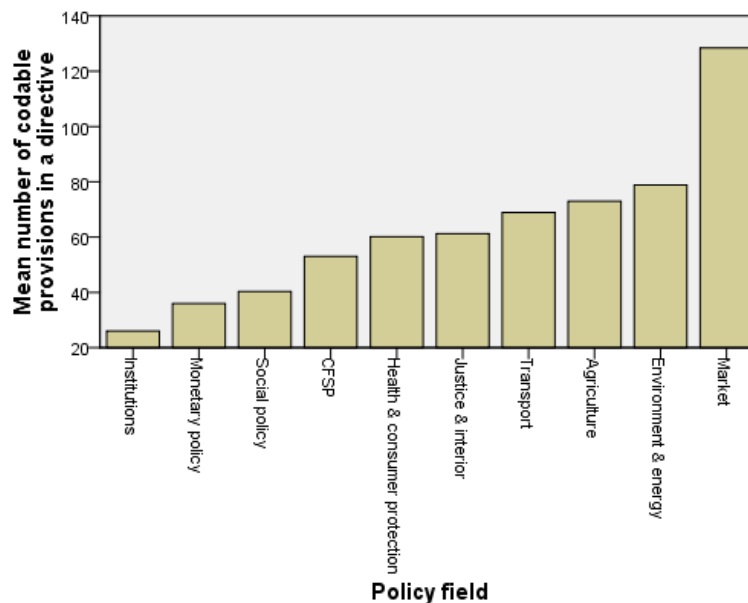


Figure 2 shows that most of the directives concern the wide policy field covering the internal market. Similarly, environment and energy, transport, justice and interior, and health and consumer protection attract great legislative attention. Social policy, agriculture, common foreign and security policy (CFSP), institutions, and monetary policy are comparatively much less covered by directives. This does not mean that policy fields such as agriculture, monetary policy or the CFSP are not regulated at the EU level, only that directives are used relatively little. However, the EU law-maker may use other instruments, such as e.g. regulations, in these areas.

Figure 3. Mean number of provisions in directives by a policy field



Not only do directives most often regulate the internal market, but they also tend to be the longest, as is borne out by Figure 3. The same can be said of other fields frequently regulated by directives such as environment and energy, transport, justice and interior, and health and consumer protection. Interestingly, directives do not cover agriculture very often, but when they do, they include many provisions. Policy fields with only one directive in our sample (institutions, monetary policy and CFSP) belong among the shortest.

Figure 4. Number of directives and mean number of provisions by legislative procedure

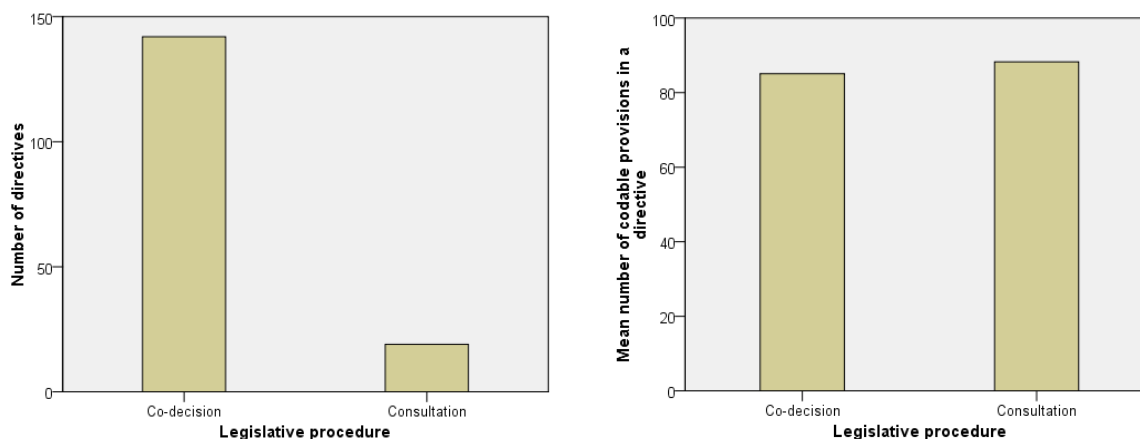


Figure 4 shows the overall number of and the average number of provisions in directives adopted by different types of legislative procedure. Between the years 2006 and 2015, the EU law-maker typically adopted directives using the co-decision procedure (called the ordinary legislative procedure after the Lisbon Treaty coming into effect on 1 December 2009). The special legislative procedures were used much less (consultation on nineteen and other procedures on three occasions)⁵ to adopt directives in the period of interest. However, the average length (as indicated by the mean number of provisions) hardly differed between the co-decision and consultation procedure.

4.2 Examination of discretion in directives

The EU law-maker makes use of giving discretion to member states to a varying degree. We try to find patterns in the data in order to make sense of the EU legislative practice: we identify situations when the EU law-maker tends to regulate the issue strictly and when it leaves some room for states to adopt rules best suited to the local conditions. We also examine which types of discretion and when the EU law-maker uses.

As a measure of discretion granted by a directive, we use the *ratio of discretion*, which captures the share of instances of discretion in the total number of provisions in a directive.⁶ For example, if all provisions in a directive included one instance of discretion, then the ratio of discretion would be 1 (i.e., 100%);⁷ if none, then the ratio would stand at 0 (and 0%).

The ratio of discretion in individual directives serves as a basic unit of analysis in the following graphs and tables. For example, when examining the ratio of discretion in directives by individual policy fields, the result is based on ratios of discretion in individual directives, not on the total share of instances of discretion in the total number of provisions in a given policy field.

⁵ Because other procedures than co-decision and consultation occurred only three times, we do not include it in the figures.

⁶ The ratio of discretion = number of instances of discretion / total number of provisions in a directive.

⁷ The ratio of discretion can theoretically even surpass 100%, because one provision – an article, or a paragraph if the article is further divided – can include more instances of discretion. However, in practice, it happens only seldom that a provision contains more than one instance of discretion.

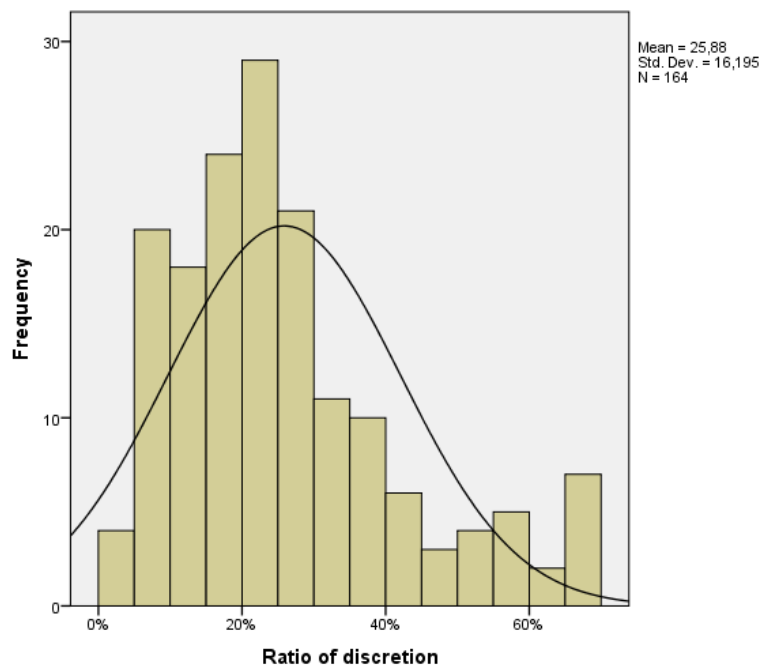
This is because a directive is our unit of interest. Moreover, we can thus neutralise outlier cases of very long directives with few instances of discretion in a policy field otherwise dominated by short directives with a high ratio of discretion. We are interested in how much discretion the directives in various policy fields offer, rather than how much discretion a policy field offers. Nevertheless, we checked both ways of computing, and the results do not differ much.

Table 1 and Figure 5 show large variation among directives as regards the extent of discretion they provide in their provisions. On the one hand, some directives do not contain any provisions that allow member states room for flexible implementation; on the other hand, one directive contains almost 70% of provisions granting states an opportunity for tailor-made domestic implementation. On average, directives contain around one-quarter of provisions providing discretion.

Table 1. Analysis of the ratio of discretion in directives (summary statistics)

	Ratio of discretion
Mean	25.9
Median	22.2
Std. Deviation	16.2
Range	69.4
Minimum	0.0
Maximum	69.4

Figure 5. Histogram of frequencies of the ratio of discretion



Directives with the lowest share of discretion in the sample include Directive 2009/35/EC on the colouring matters which may be added to medicinal products⁸ and Directive 2008/92/EC concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (recast).⁹ Both directives are concise, recast and cover procedural issues. The question arises why to adopt these legal acts as directives if they provide no discretion and a regulation might have served as a more appropriate legislative instrument. The former directive complemented and expanded on a few other older directives (see Hurka and Steinebach 2020). The latter directive was replaced by Regulation 2016/1952¹⁰ with similar content and objectives.

In contrast, Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies¹¹ and Directive 2006/126/EC on driving licences¹² provide the most leeway to member states in transposition (the ratios of discretion: 69.0 and 69.4). Both directives are relatively short, consisting of only 42 and 49 provisions, respectively. The former directive explicitly states that it introduces minimum standards,¹³ which implies ample space for states to go beyond the minimum requirements set by the directive. Many provisions call on states to elaborate on specific issues and, moreover, states may, for example, exempt from the directive certain types of companies, and key concepts are defined through references to national legal orders. Elaboration discretion appears the most often in this directive, calling on states to expand on specific issues delineated in the text. The latter directive points to the fact that there are over 110 different models of driving licences valid in the member states. It invokes safety grounds to lay down at least the minimum requirements for the issue of a driving licence.¹⁴ The directive leaves ample space for the EU member states to fill details into general provisions contained in the Directive and similarly often sets only minimum requirements which admit stricter national legislation.

Interestingly, as Figure 6 shows, there seems to be only a weak relationship between the number of provisions in a directive (i.e., its length) and the extent of discretion it provides (i.e., the ratio of discretion). Every dot represents one directive in our sample, plotted on the axes depicting its number of provisions and the ration of discretion. Brief directives can both offer member states a lot of room for their own elaboration, or none at all. Very long directives, which are scarce in our dataset, always provide some discretion but do not belong to the group of directives with the highest ratio of discretion.

There is no clear trend in the level of discretion over time (see Figure 7). It is difficult to assess if the Lisbon Treaty coming into effect in December 2009 brought a change in the approach of the EU law-maker towards the use of discretion in directives. The year 2009 coincides not only with the major treaty revision and the election to the European Parliament but also with the era of the “Great Recession”. The increased discretion for states in directives in the period 2011–2013 thus might have had various causes. After the peak in the ratio of discretion in 2013 (37%) came a steep drop to the lowest value of the ratio of discretion in the sample (21% in 2014).

Rather as a fun fact, the word “harmonisation” in the title of the directive serves as a very good predictor of rather long directives with low levels of discretion. There are ten such directives in our sample, all of them have the ratio of discretion lower than 11%, and all except one contain over 130 provisions.

8 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).

9 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) (Text with EEA relevance).

10 Regulation (EU) 2016/1952 of the European Parliament and of the Council of 26 October 2016 on European statistics on natural gas and electricity prices and repealing Directive 2008/92/EC.

11 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.

12 Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast).

13 Recital 4 of the preamble to the Directive 2007/36/EC.

14 Recitals 3 and 8 of the preamble to the Directive 2006/126/EC.

Figure 6. Length of directives and the ratio of discretion in individual directives

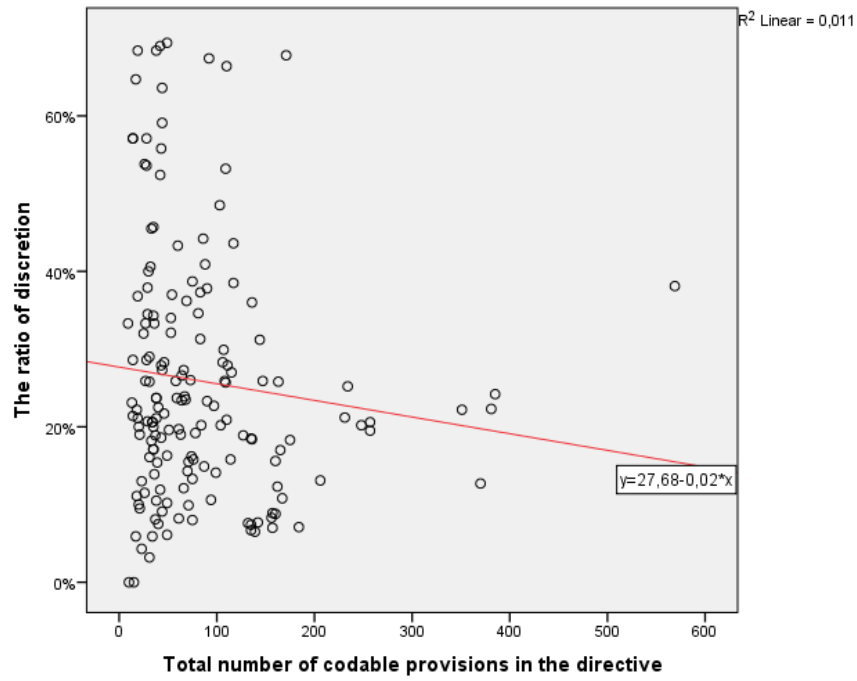
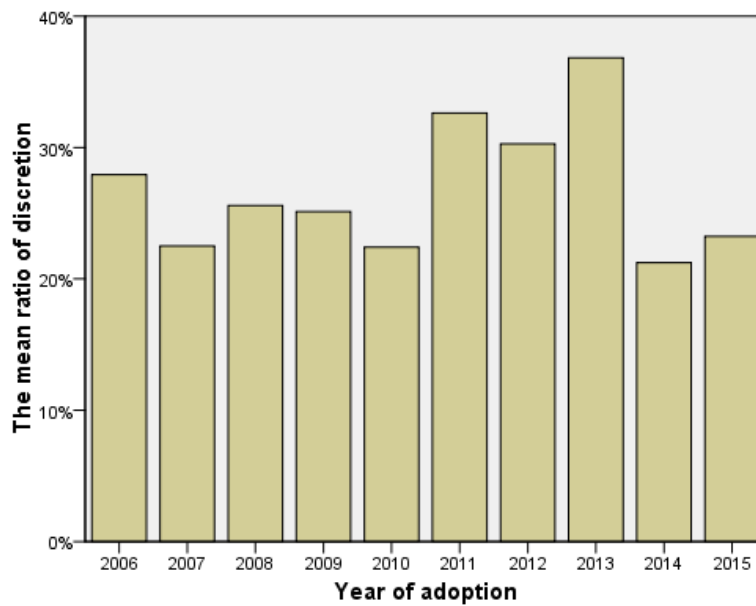


Figure 7. Development in the mean ratio of discretion of over time



More variation starts to appear when we look at the average discretion in directives according to different policy fields. Figure 8 shows the figures for the six policy fields with ten or more directives in our dataset. Directives in the fields of justice and interior, and social policy provide states with the most room for the state's flexibility in implementation (the mean ratio discretion 39% and 36% respectively), while health and consumer protection (14%) offers the least. So far, we have not found any theory that would allow us to formulate predictions on expected amounts of discretion in different policy fields. The fact that a policy field is considered a sensitive one may result in more discretion (states prefer to keep the opportunity to adjust) but also to less discretion (states negotiate until all discrepancies are resolved and no discretion is needed) in the relevant directives. We need more information on the process of negotiations of the directives and their character to answer these conundrums. Still, some preliminary observations can be made. The directives in the policy fields which offer the least discretion – health and consumer protection, and environment and energy – tend to deal with very detailed technical issues and often bear the term "harmonisation" explicitly in their names. On the other hand, the policy fields of both justice and interior, and social policy count among very sensitive policies in which preferences of the member states and also their legislation widely differ.

Figure 8. The mean ratio of discretion by policy fields

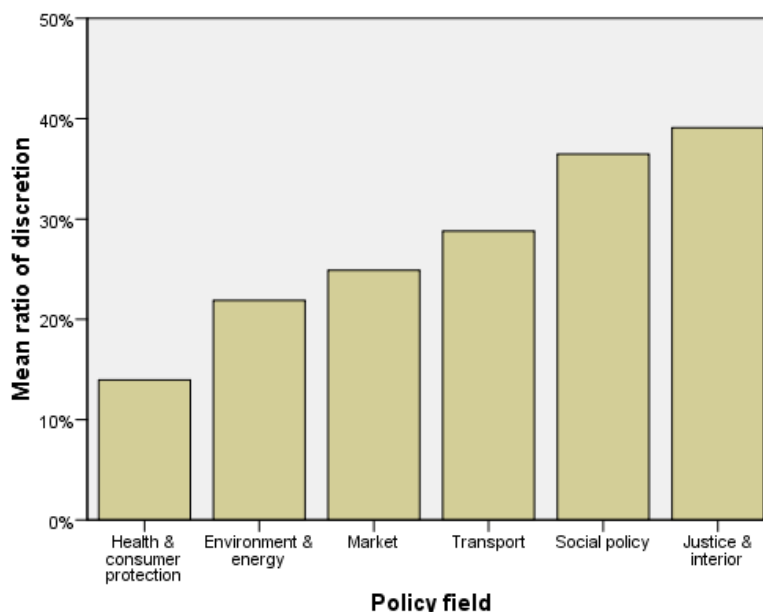


Figure 9 provides us with a more fine-grained look at how the EU law-maker approaches the discretion for the EU member states in various policy fields. Again, every dot in the plot represents one directive, which enables us to observe the spread of the ratio of discretion in various policy fields. We can thus differentiate, e.g., between scenarios when in one policy field all the directives have a similar ratio of discretion, while in the second policy field some directives have zero ratios of discretion, while others offer states high levels of discretion. We observe in Figure 9 that the policies with the highest mean ratio of discretion include directive with quite highly spread ratios of discretion among individual directives. Those policies with a lower mean ratio of discretion tend to have a larger number of directives with lower levels of discretion, which outweigh those few directives with a very high ratio of discretion.

Figure 9. The ratio of discretion in individual directives by policy fields

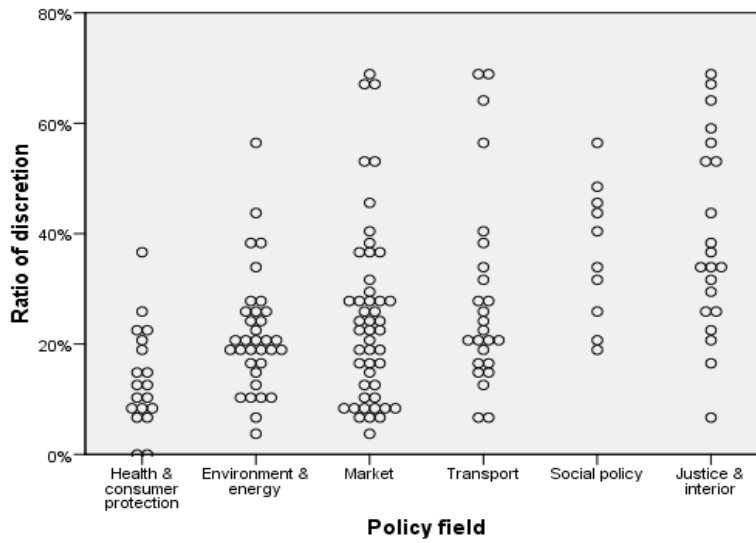


Figure 10. The mean ratio of discretion by legislative procedures

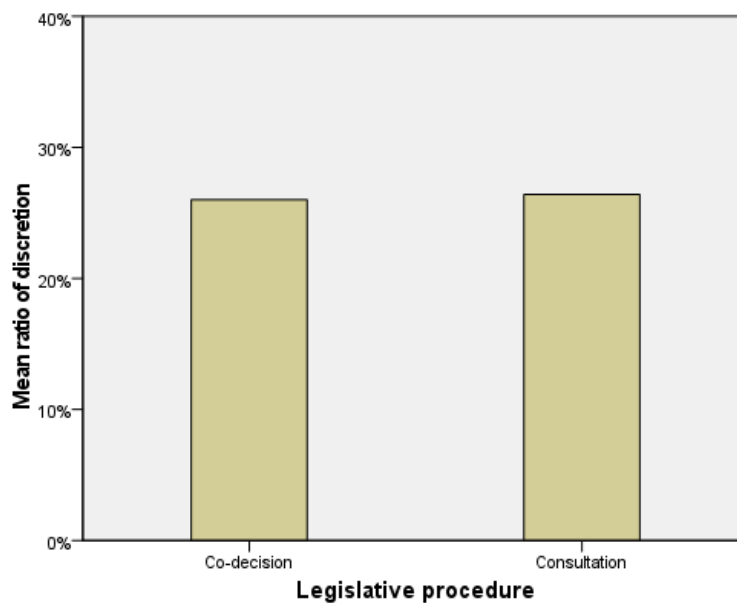
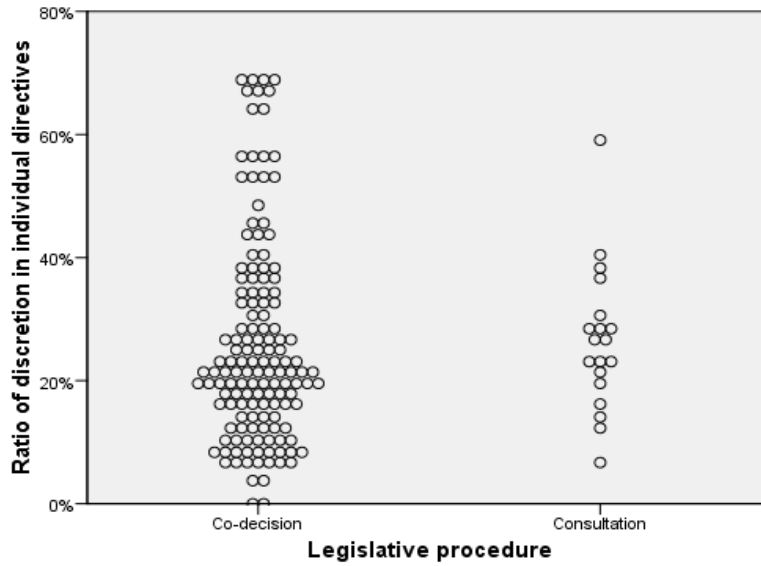


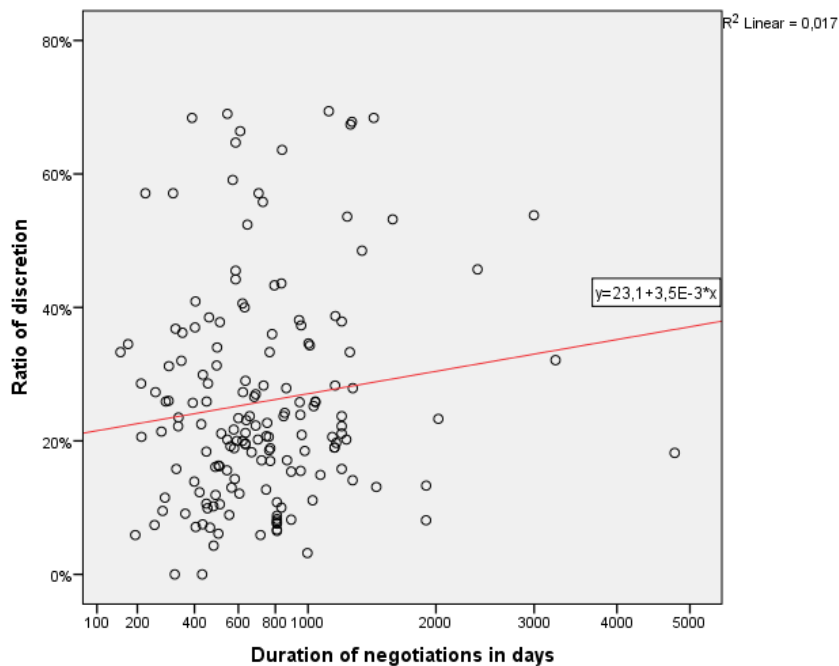
Figure 10 demonstrates that there is virtually no difference between the ratio of discretion in directives adopted by co-decision (26.0%) and consultation procedure (26.4%). This result goes against previous findings and theoretical expectations. According to Franchino (2007: 293-294), greater involvement of the European Parliament leads to less discretion, out of the Parliament’s desire to control member state implementation. One needs to bear in mind that the co-decision procedure has become clearly dominant among the EU legislative procedures and is being used by far the most frequently. Figure 11 incorporates this fact showing the ratio of discretion in individual directives according to the legislative procedure. Again, each dot represents one directive.

Figure 11. The ratio of discretion in individual directives by legislative procedures



We do not see any clear relationship between the ratio of discretion and the length of the decision-making process, measured as the number of days between the adoption of the proposal of the directive by the Commission and by the Council. Figure 12 shows that the ratios of discretion in individual directives are widely dispersed in the scatterplot, not following any observable pattern. The regression line goes up, which corresponds to the intuition that controversial issues require more time to resolve and may lead to granting more discretion to states to enable final adoption of the proposal.

Figure 12. The ratio of discretion in individual directives and the length of the decision-making process¹⁵



¹⁵ The scale of the x-axis (Duration of negotiations in days) is adjusted.

4.3 Types of discretion

The ability to distinguish between different types of discretion counts among the strengths of our project. We described the types of discretion in section 3.2 and just recall here that we coded five types of discretion: elaboration discretion, reference to national law, minimum discretion, scope discretion and discretion in the application on a case-by-case basis. Figure 13 demonstrates that the EU law-maker makes the most frequent use of elaboration discretion, leaving it to member states to further specify a provision, followed by references to national law, which typically provide definitions of a term (see Annex I for an example). Elaboration discretion was used on 1,295 occasions in our sample which corresponds to almost 40% of all uses of discretion. References to national law come second with 773 occurrences (23%), while the remaining three types of discretion (minimum discretion, scope discretion and discretion in application on case-by-case basis) appear with similar frequencies (from 11% to 14%).

Figure 13. Proportion and frequency of individual types of discretion

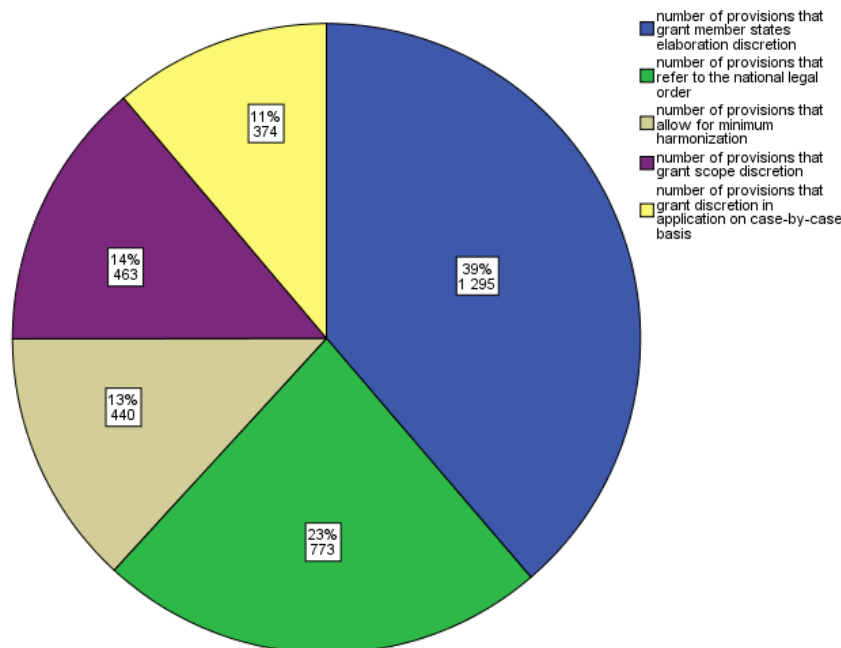


Table 2 provides more details on individual types of discretion.

Table 2. Types of discretion in directives (summary statistics)

	Elaboration discretion	National reference	Minimum harmonization	Scope discretion	Discretion in application
Mean	7.9	4.7	2.7	2.8	2.3
Median	5	3	2	1	1
Std. Deviat.	12.1	5.9	3.8	4.92	3.7
Range	126	33	25	43	23
Minimum	0	0	0	0	0
Maximum	126	33	25	43	23

Figure 14 and Table 3 build on the same data, using a different mode of visualization. They compare the relative use of different types of discretion across individual EU policy fields. Figure 13 showed that elaboration discretion represents the most common type of discretion (39% of all instances of discretion), followed by a reference to national law (23%). However, individual policy fields differ in the frequency of use of the various types of discretion. While elaboration discretion dominates the field of environment and energy (49% of all types of discretion), both in social policy and justice and interior, references to national law occur more often than elaboration discretion. Both count among the more sensitive policy fields, so the EU law-maker relies on domestic definitions of legal concepts. On the contrary, the fields of environment and energy and transport use comparatively fewer references to national law (12% and 16%, respectively). The remaining three types of discretion (minimum discretion, scope discretion and discretion in the application on a case-by-case basis) appear much less often than the previously mentioned two types of discretion. Only in the transport and environment and energy policy fields do minimum harmonization and scope discretion minimum occur roughly as often as references to national law.

Figure 14. Proportion of the use of individual types of discretion by policy fields

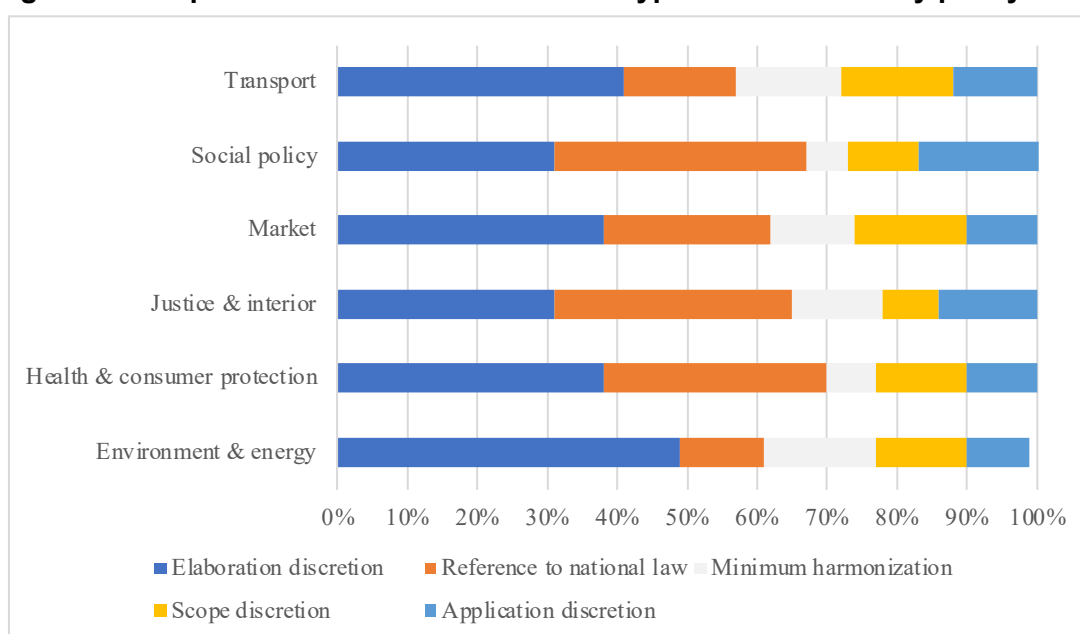


Table 3. Proportion of the use of individual types of discretion by policy fields (in %)

	Elaboration discretion	Reference to national law	Minimum harmonization	Scope discretion	Application discretion
Environment & energy	49%	12%	16%	13%	9%
Health & cons. protection	38	32	7	13	10
Justice & interior	31	34	13	8	14
Market	38	24	12	16	10
Social policy	31	36	6	10	18
Transport	41	16	15	16	12

4.4 Constraints

Directives allow for flexible implementation, yet at the same time, the exercise of discretion by the member states is not always free of constraints. As explained above, we utilize an approach that includes only constraints that are directly linked to discretion. To put it differently, discretion provided by each provision of a directive might be either without explicit limits (member states receive a “free hand”) or accompanied by various additional conditions that may potentially greatly reduce the actual level of discretion.

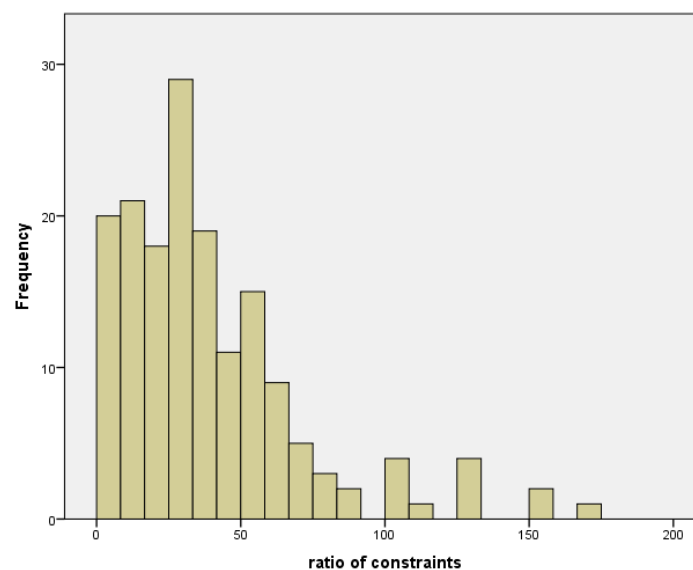
The dataset lists 3,345 instances of discretion and 1,189 instances of constraints, indicating that approximately one out of three provisions is somehow limited. It is important to keep in mind that, first, our coding strategy enables each provision to contain more than one case of discretion or constraint,¹⁶ and second, the structure of the dataset separates concrete cases of discretion from constraints and stores the information on both apart. The results are thus further presented as the ratio between the total number of cases of constraints and the total number of cases of discretion (ratio of constraints).

The overall results reveal a wide range in the extent to which the member states are constrained in exercising discretion. The distribution is right-skewed, and there are thirteen directives without any constraints. On the other side of the spectrum, a few directives evince an extremely high ratio of constraints that even exceeds 100%. This outlying group consists of directives with small numbers of discretionary provisions that are associated with multiple constraints.

Table 4. Ratio of constraints (summary statistics)

	Ratio of constraints
Mean	38.4
Median	33.3
Std. Deviation	32.0
Range	166.7
Minimum	0.0
Maximum	166.7

Figure 15. Histogram of frequencies of the ratio of constraints



¹⁶ See for example Art. 111 paragraph 2 Directive 2006/48: “... Member States may, however, exempt the exposures incurred to such clients from the 20 % limit if they provide for specific monitoring of such exposures by other measures or procedures. They shall inform the Commission and the European Banking Committee of the content of such measures or procedures.” (Discretion is limited by both substantive and reporting constraints).

Noticeable differences can be seen between ratios of constraints across the selected policy fields (see Figure 16). At first sight, there seems to be a reverse relationship – sectors in which the directives provide the most discretion (social policy, justice & interior) are also those in which the discretion of the member states is the least constrained (and vice versa). The negative relationship between the ratio of discretion and the ratio of constraints remains even if we switch the presentation to individual directives (see Figure 17), the correlation is moreover statistically significant with a moderate effect (-0,16 at 95 % level, Pearson correlation). This finding suggests that the EU law-maker applies something we might call an “overall degree of discretion” in the directives. Discretionary provisions in directives that offer only limited overall discretion are more likely to be further constrained, while discretionary provisions in directives with a high level of overall discretion are on average imposing less additional limits on the member states.

Figure 16. The mean ratio of constraints by policy fields

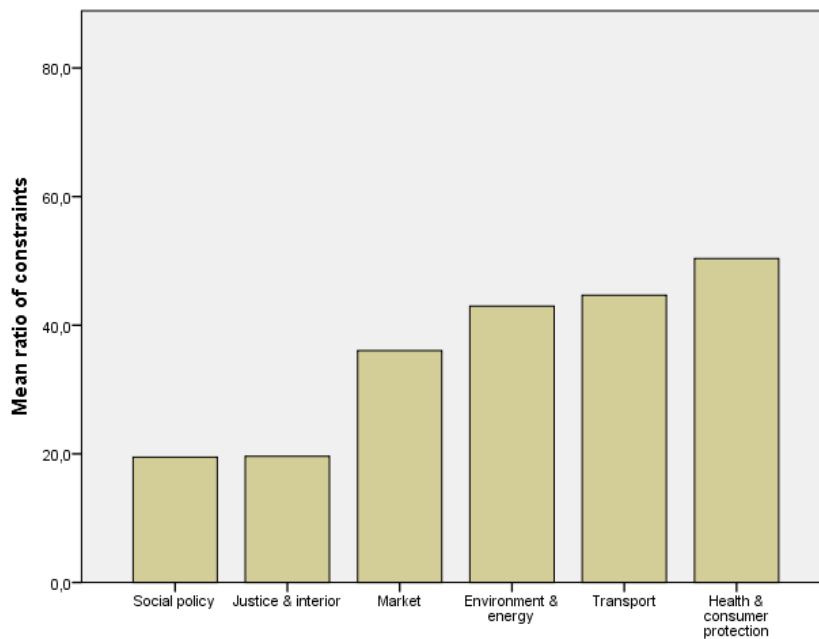


Figure 17. Relationship between the ratio of discretion and the ratio of constraints in individual directives

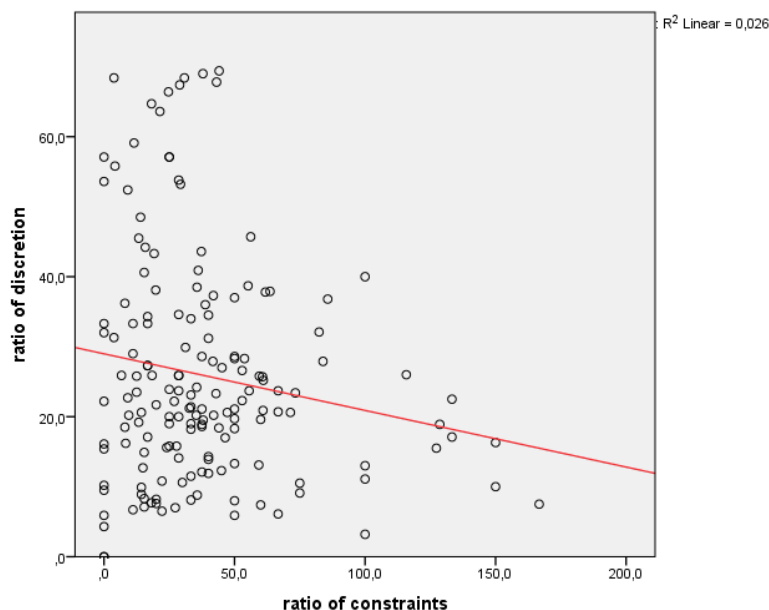
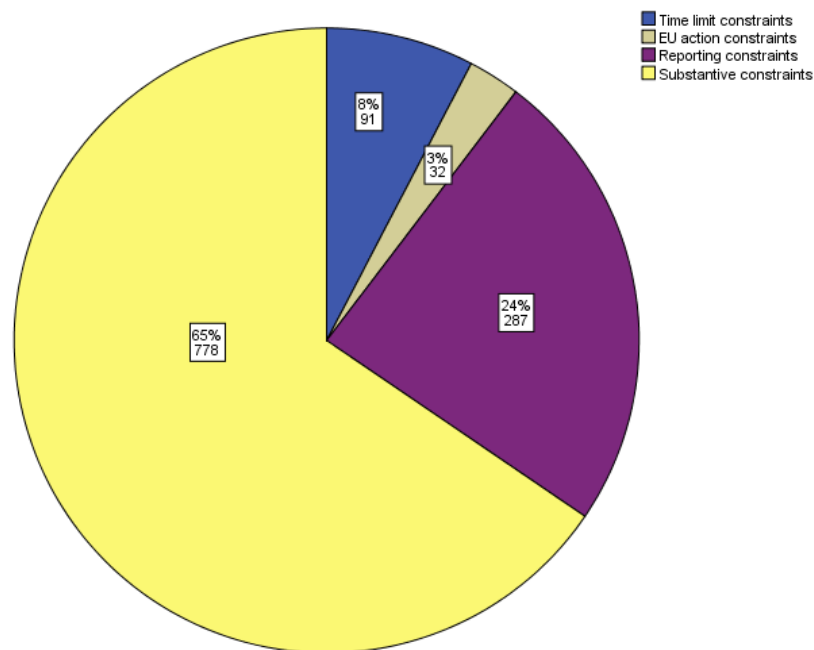


Figure 18 shows the occurrence of various types of constraints. Substantive constraints are by far the most represented category (65%). This outcome is hardly surprising as this type encompasses the “standard” types of limitation set on the member states discretion, i.e. how exactly they may execute the choices provided by the directive. The second most common category is the requirement to report or consult when exercising discretion. In practice, it usually means sending information to the Commission about what discretionary option offered by the directive the member state chose. Other types of constraints are used only rarely. Frequent application of time limits, namely by determining deadlines to which the member states could exercise discretion, would greatly increase the legal uncertainty. The nature of directives as instruments targeted to member states is illustrated by the very low number of constraints that actually conditions the exercise of discretion on the action (typically consent) of EU institutions. If there is a threat of some “controversial” behaviour on the part of the transposing member states, it is deemed sufficient to impose a reporting requirement that does not affect if (or when) the national measure becomes effective (as in case of the requirement of ex ante consent of EU institutions). Finally, spending constraints were not found in the sample at all. This finding nicely reflects the logic of directives which are instruments for harmonization of national legal orders, not acts that shall interfere with national budgetary matters.

Figure 18. Categories of constraints (totals)



The last Table 5 explores how different types of constraints are used in each policy field. The variation among the policy sectors is comparably low, with directives regulating the internal market containing slightly more substantive constraints and requiring less reporting. The only clear outlier is the category of justice and interior with a predominance of substantive constraints, the other types being much less represented or even missing altogether. Results of the dataset thus again confirm the specific position of this former intergovernmental (third) pillar where the member states remain sensitive to the loss of their sovereignty.

Table 5. Proportion of categories of constraints by policy fields (in %)

	Time limit	EU action	Reporting	Substantive
Market	7%	1%	20%	71%
Health & consumer protection	9	2	31	59
Social policy	13	7	19	61
Environment & energy	8	2	33	57
Transport	11	10	30	50
Justice & interior	2	0	14	85

5. Conclusions

Based on the analysis presented above, we can now formulate a number of key conclusions regarding the occurrence of discretion in our dataset. Our data show a huge variation in discretion, from 0% to almost 70% relative to the total number of provisions in a directive, and an average across all directives of close to 26%. In our analysis, we have linked this variation to a range of other characteristics of the directives, which sometimes did and sometimes did not yield meaningful associations.

To begin with a number of negative results, first, we do not find a link with the length of directives. Overall, the data show a weak inverse relationship (a bit less discretion as directives become longer), but this relationship is both very weak and driven by a relatively small number of (very) long directives. The substantive meaning of this finding is open to interpretation, but as a first cut, it seems to imply there is no clear relationship with the complexity of the topic under regulation (upon the assumption that a longer directive indicates greater regulatory complexity).

Second, there is no link with time. Although the average level of discretion varies between years, this variation does not add up to any clear trend. It rather seems to be driven by the specifics of the directives that happened to be adopted in a given year. This runs contrary to Hurka and Steinebach's (2020) finding that the rise of Euroscepticism over time has led to a decrease in discretion for member states, as measured through the relative use of directives over time. At the same time, the comparison of our analysis with that of Hurka and Steinebach should be treated with caution. To start with, our dataset covers a relatively short period (of ten years), which may not be enough to identify long-term trends in Euroscepticism. Moreover, the direct association of time with Euroscepticism is questionable, since many more trends have evolved over time and Euroscepticism itself has not developed unidirectionally over the years.

Third, we find hardly any difference in discretion between directives adopted under the consultation procedure and those adopted under co-decision. Moreover, directives adopted under co-decision also show both higher and lower extreme scores than those adopted under the consultation procedure. This runs counter to previous studies, which find links between the decision-making procedure and the level of discretion given to member states (Franchino 2007: 293-294; Hurka and Steinebach 2020). It should be noted, however, that the relevance of the decision-making procedure as an explanatory variable has become smaller over time, as the ordinary legislative procedure (formerly: co-decision) has increasingly become the standard procedure for adopting directives. This is borne out by our dataset, in which 142 out of 164 directives were adopted using co-decision (or after the Lisbon Treaty: the ordinary legislative procedure). Differences in discretion between directives will therefore need to be accounted for by other variables.

Fourth, we only find a weak positive association between the level of discretion and the length of the decision-making process. As the decision-making process takes longer, the resulting directive tends to include slightly more discretion. To the extent that substantive meaning can be given to this variable, the length of the decision-making process may be a proxy for the level of conflict and/or the complexity of issues regulated in the directive.

Turning to the positive results, we do find clear differences in average discretion between policy fields. Limiting ourselves to policy fields with at least ten directives in our dataset, we find that average discretion is highest in the fields of 'Justice and interior' and 'Social policy'. These are both relatively sensitive areas, in which member states have been reluctant to accept strict harmonization at the EU-level. This may explain why directives in these areas are only acceptable to the member states if they contain sufficient discretion.

By contrast, discretion is lowest in the fields of 'Health & consumer protection' and 'Environment & energy'. In our analysis, we linked this to the fact that directives in these fields often cover relatively technical issues, which are explicitly meant to be harmonized through EU legislation.

Interestingly, the pattern we find between policy fields is the exact inverse of that found for the relative use of directives in different policy fields. According to the data presented by Hurka and Steinebach (2020: 11), the relative use of directives is lowest in the field of 'civil liberties, justice and home affairs' and a bit less than average for 'employment and social affairs'. On the other extreme, it is high for 'environment, public health and food safety' and 'internal market and consumer protection'.

As Hurka and Steinebach show that directives tend to give (much) more discretion to member states than regulations, this is a paradoxical finding. Apparently, fields in which directives are used most extensively are also the fields in which those directives provide relatively little discretion to member states. Perhaps this pattern shows that directives have a specific function in fields in which they are used relatively rarely. In those policy fields, it may be that directives are predominantly used for issues that require (for political and/or substantive reasons) more discretion for member states, which also shows in the relatively high level of discretion in those directives. This may be different in policy fields that 'routinely' use directives as the instrument of choice. At this point, however, these are merely tentative explanations, based on an interpretation of our descriptive data. It would require a further analysis of instrument choice in different policy fields to arrive at firmer conclusions about this pattern.

In addition to the overall level of discretion, we also looked at the use of specific types of discretion and the use of constraints in EU directives. As to the various types of discretion, our data show a clear predominance of the use of elaboration discretion. This is followed by references to national law, which are mainly used for the definition of concepts. The other three types of discretion we discerned (minimum harmonization, scope discretion and discretion in application on a case-by-case basis, are used less often and in roughly equal measure. With regard to minimum harmonization, it should be noted, however, that directives sometimes include a single provision granting the right to set more stringent standards for the entire directive and/or that the TFEU includes a general minimum harmonization clause for an entire policy field (such as consumer protection in Article 169(4) TFEU and environmental protection in Article 193 TFEU).

When it comes to constraints, there is an overwhelming predominance in the use of substantive constraints, which make up almost two-thirds of all constraints we coded. In addition, reporting requirements make up almost a quarter of all constraints. The three other types of constraints (time limits, spending limits, and approval or clearance at the EU-level) are used much less often and together account for only 11% of all constraints.

The data show a negative association between the use of constraints and the level of discretion in directives, both overall and when compared between policy fields. Directives (and policy fields) in which member states are given more discretion tend to include fewer constraints on the provisions granting discretion. Stated differently, as directives include less discretion, they also tend to include more constraints on the provisions granting that discretion. It seems, therefore, that directives operate on the basis of what we can call an 'overall degree of discretion': when EU legislators are reluctant to give discretion to member states, the discretion that remains is also curtailed by adding constraints. Conversely, if a directive grants wide discretion, that discretion tends to be less constrained.

All in all, the FIEU dataset offers a better understanding of patterns of discretion across EU directives. It allows for a comprehensive overview of levels and types of discretion, as well as constraints on that discretion. In addition, the data on discretion can be linked to various background variables, which yields more insight into the way discretion is (or is not) linked to characteristics of the directives and the decision-making process through which they were adopted.

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Annex I: Examples of types of discretion

- Elaboration discretion:

E.g.: 'A driver attestation shall be issued for a period to be determined by the issuing Member State' (Article 5(7) Regulation 1072/2009 on road haulage).

- Reference to national legal norms:

E.g.: "speeding' means exceeding speed limits in force in the Member State of offence for the road or type of vehicle concerned;" (Article 3 (d) (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences).

- Minimum harmonization:

E.g.: 'Member States may adopt or maintain additional pre-contractual information requirements for contracts to which this Article applies.' (Article 5(4) Directive 2011/83/EU on consumer rights).

- Scope discretion:

E.g.: 'Member States may decide to apply this Directive in procedures for deciding on applications for any kind of protection falling outside of the scope of Directive 2011/95/EU.' (Article 3(3) Directive 2013/32/EU on common procedures for granting and withdrawing international protection)

- Discretion in application on case-by-case basis:

E.g.: 'In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.' (Article 3(5) Directive 2013/48 on the right of access to a lawyer in criminal proceedings)

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