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United in Diversity?

EU Regulation Between Uniformity, Differentiation, and Experimentalism

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Integrating
Diversity in the
European Union

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Introduction: Alternative approaches to integrating diversity within the European Union

How can advances in European integration be reconciled with persistent diversity among Member States? One widely canvassed solution to this dilemma is differentiated integration (DI). Its underlying assumption is that deeper integration of markets and societies within the EU requires uniform, centrally determined rules, which some Member States may be unwilling or unable to accept, at least initially. Where other Member States wish nonetheless to push ahead, the result is DI: policies and rules that apply only to some Member States (internal DI), as well as in some cases to certain non-Member States (external DI). Most such internal DI, as recent research has shown, is temporary, resulting from transitional exemptions from EU rules in accession agreements or secondary legislation, which are eventually scheduled to expire (“multi-speed” integration). But other forms of internal DI are more durable, especially where they reflect “constitutional” reservations among some Member States to the integration of so-called “core state powers”, in fields such as foreign and defense, interior and justice, or monetary policies. Among the best known and most visible forms of such durable “multi-tier” integration are the Euro Area and the Schengen borderless zone.¹

Several scope conditions for such enduring DI have been identified in the recent literature.

Beyond heterogeneity of national preferences, variations in their intensity and political salience are crucial to understanding why some Member States choose to opt out from further integration in specific policy fields, while others forge ahead. So too is the degree of mutual interdependence, which must be sufficient to motivate closer integration among the vanguard, but not so high as to create externalities (whether negative or positive) that outweigh DI’s expected benefits. Another crucial scope condition is modularity: the key policy choice must be reducible to a binary option, which Member States can choose to embrace or reject. Enduring, multi-tier DI thus appears most likely under conditions of heterogeneous preferences, high but asymmetrical politicization, moderate interdependence, and high modularity.²

Yet DI is not the only available approach to accommodating diversity within the EU. A growing body of recent research has shown that in many key policy domains, EU governance is characterized not by top-down imposition of rigid uniform regulation (UR), but rather by an experimentalist architecture of provisional goal setting and revision, based on recursive learning from comparative review of implementation in different local contexts.³ In this iterative, multi-level architecture, framework goals, rules, and metrics for assess-

1 Frank Schimmelfennig and Thomas Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford: Oxford University Press, 2020).

2 Schimmelfennig & Winzen, *Ever Looser Union*; Frank Schimmelfennig, Dirk Leuffen, and Berthold Rittberger, “The EU as a System of Differentiated Integration: Interdependence, Politicization and Differentiation”, *Journal of European Public Policy* 22 (2015): 764-82.

3 See especially Charles F. Sabel and Jonathan Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, *European Law Journal* 14 (2008): 271–327; Sabel and Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford: Oxford University Press, 2010); Zeitlin (ed.), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (Oxford: Oxford University Press, 2015); Zeitlin, “EU Experimentalist Governance in Times of Crisis”, *West European Politics* 39 (2016): 1073-1094 Well-documented examples of such experimentalist governance architectures in the EU include: regulation of competition, energy, telecommunications, and finance; food, drug, chemicals, and maritime safety; environmental protection; employment promotion and social inclusion; justice and home affairs; data privacy, anti-discrimination, and fundamental rights. These architectures also play a growing part in EU external governance, where the revisable framework rules they generate are frequently extended to third-country actors.

ing their achievement are established jointly by the EU institutions and the Member States, typically following consultation with relevant stakeholders. “Lower-level” units (such as national administrations and regulatory authorities) are then given substantial discretion to pursue these goals in ways adapted to their local contexts. But in return for this autonomy, they must report regularly on their performance and participate in a peer review in which their results are compared to those of others following different means towards the same ends. Where Member States are not making good progress, they are expected to take corrective measures, based on a plausible plan for improvement informed by the experience of their peers. The goals, rules, metrics, and decision-making procedures are then periodically revised in response to the problems and possibilities revealed by the review process, and the cycle repeats. For a graphical representation of this architecture, see the Annex below.

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

Like DI, XG in this form also depends on several scope conditions. The first is strategic uncertainty, where policy makers cannot define their precise goals or how best to achieve them ex ante, but must instead discover both in the course of problem solving, because they are operating in a turbulent, rapidly changing environment. A

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

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

Comparative Research on EU Regulatory Governance

How far and under what conditions may XG represent an effective and legitimate means of responding to diversity of preferences and conditions among EU Member States, in comparison both to conventional UR and to DI? Based on new empirical research conducted within a Horizon 2020 project on [“Integrating Diversity with the EU \(InDivEU\)”](#), this Policy Brief addresses this question through a comparative analysis of EU regulatory governance in two major policy domains: electricity and banking.⁴ In each of these domains, the dilemma of how to accommodate national diversity in EU policy making has arisen prominently. Each is also characterized by high levels of strategic uncertainty, associated with rapidly changing markets and technologies (positive scope condition for XG). Each domain belongs to the internal market, where interdependence and the resulting demand for uniform rules is strong (negative scope condition for both DI and XG in its classic form); each is likewise politically salient and controversial, to varying degrees

across Member States (positive scope condition for DI). Comparison across these domains thus offers valuable analytical leverage in responding to the core research question about the relationship between XG, UR, and DI in integrating diversity within the EU.

Our research followed a process-tracing approach, combining a wide range of expert interviews with European and national policy actors with extensive review of official documents and literature to reconstruct the evolution of EU regulatory governance in each domain, and assess the changing balance between XG, UR, and DI within it. The detailed results of this research have been presented in previous InDivEU publications.⁵ In the remainder of this Policy Brief, we review the key empirical findings of our comparative analysis, and then go on to draw out some broader insights for the relationship between UR, DI, and XG in the EU more generally.

Key Empirical Findings

EU electricity and banking regulation clearly diverge on one key point. In electricity, EU-wide policies and rules for cross-border exchange and management of interconnected power grids apply

equally to all Member States, with no possibility for opt-outs. In banking, by contrast, supervision of eurozone credit institutions has been integrated into a single authority under the aegis of

4 Within the framework of this project, we also studied a third policy domain, regulation of genetically modified organisms (GMOs). Our findings on this domain will be presented in a subsequent Working Paper and Policy Brief.

5 Bernardo Rangoni, [Electricity Regulation in the European Union: Uniform, Differentiated or Experimentalist?](#), Amsterdam Centre for European Studies (ACES) SSRN Research Paper No. 2020/07; Rangoni, [EU Regulation of Electricity: Uniform, Differentiated and Experimentalist Approaches](#), ACES/InDivEU Policy Brief, September 2020; Jonathan Zeitlin, [“Uniformity, Differentiation, and Experimentalism in EU Financial Regulation: The Single Supervisory Mechanism in Action”](#), Amsterdam Centre for European Studies (ACES) SSRN Research Paper No. 2021/04; Zeitlin and Rangoni, “EU Regulation Between Uniformity, Differentiation, and Experimentalism: Electricity and Banking Compared”, unpublished InDivEU Working Paper, December 2021.

the European Central Bank (ECB), with far-reaching powers over bank licensing, capital holdings, governance, and internal processes, but nested within EU-wide financial regulation. Participation in this Single Supervisory Mechanism (SSM) is mandatory only for the Euro Area, though other EU Member States may also apply to opt in under a system of “close cooperation” with the ECB. This distinctive form of DI reflects asymmetries in national preferences and interdependence, path-dependently connected to the binary choice for euro membership, coupled with concerns to safeguard the integrity of the Single Market and limit externalities for non-participating Member States. Although energy policies are likewise historically linked to core state powers and remain highly sensitive politically, it has nonetheless proved possible to extend European integration of electricity regulation step-by-step, without dividing Member States into separate groups of “Ins” and “Outs”.

Beyond this crucial difference, however, the evolution of EU regulatory governance displays a similar trajectory across these two major sectors. In both electricity and banking, the integrated rules

themselves and the methodologies for their application have become progressively more uniform and detailed. At the same time, however, these increasingly uniform and detailed rules and methodologies always leave room for local adaptation and contextualization, whether through a margin of discretion (explicit or implicit) for national authorities, as in electricity, or through customization to firm specificities and direct participation in their application by national supervisors, who can flag misfits and propose changes in response to local conditions, as in banking. In both sectors, moreover, the common policies, rules, and methods are not centrally designed and hierarchically imposed by the EU institutions, as in conventional UR, but are instead developed collaboratively by polyarchic networks of European and national officials, with varying degrees of participation from other stakeholders. In both sectors, finally, these increasingly uniform policies, rules, and methods have been developed through experimentalist comparisons of different national and regional approaches, and are regularly updated and revised through joint review of their implementation in different local contexts.

Broader Policy Insights

The cases of EU electricity and banking regulation thus show that the conjunction of high interdependence with high uncertainty may result in the emergence of simplified XG architectures, combining synchronic uniformity with diachronic revisability. In such simplified XG architectures, framework rules and procedures may be progressively specified and discretion for lower-level actors at any given moment narrowed, but the rules and procedures themselves remain contestable in light of local application, while revisions over time based on learning from comparative

review of implementation experience provide a crucial source of improvement and adaptability for the governance system as a whole. Such architectures have previously been identified in sectors like chemicals, where there is at any given time a single harmonized list of authorized substances whose commercialization Member States are obliged to accept, but which is open to challenge and regularly revised through review processes involving a wide range of stakeholders within and beyond the EU alongside national and European regulators. Simplified XG architectures

of this type may also become increasingly prevalent in other sectors of EU regulation subject to rapid and unpredictable changes in markets and technology, where concerns to promote a level playing field and prevent regulatory arbitrage are similarly strong, such as competition or telecommunications.

The cases of electricity and banking regulation support the view that while conditions of high interdependence coupled with high uncertainty require rules and practices to be both uniform and revisable in order to be effective, these can be accepted as legitimate by diverse EU Member States, provided they are applied in contextually sensitive ways and regularly revised on the basis of local implementation experience, through deliberative review processes in which national officials themselves participate. In this sense, these cases further suggest that *far from uniformity and experimentalism being antithetical to one another, diachronic experimentalism may be a necessary condition for synchronic uniformity of regulation within a heterogeneous polity like the EU.*

What finally of the relationship between XG and DI? The SSM is obviously an instance of DI, whose creation would not have been possible without an opt-out for non-euro Member States, especially the UK. But if DI allowed the Banking Union to move forward initially, it does nothing to address the very substantial challenges of integrating diversity among participating Member States, for which the SSM's experimentalist organization and practices are instead essential. The European Banking Association (EBA), whose own peer review and supervisory convergence activities are conducted on experimentalist lines, likewise provides a parallel framework for learning from difference among national competent authorities across the Banking Union divide. The case of EU banking regulation thus suggests that *XG and DI may be complementary, but asymmetrically so, in that the latter depends on the former to accommodate diversity within and across separate groups of Member States, but not vice versa.*

Annex: The Classic Experimentalist Governance Architecture in the EU

Source: Jonathan Zeitlin (ed.), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (Oxford: Oxford University Press, 2015), 2.

