

Differentiation through flexibility in implementation: Strategic and substantive uses of discretion in EU directives

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Abstract

This article analyses the extent to which European Union (EU) directives allow for variation in domestic implementation. Such flexibility in implementation may be used to deal with heterogeneity among member states. Based on an original dataset of 164 directives adopted between 2006 and 2015, we find that the use of flexibility is associated more with efforts to accommodate differences between national policies (substantive use of discretion) than with attempts to facilitate the decision-making process in and between EU legislative institutions (strategic use of discretion). Although flexibility may be used to address some of the same concerns that drive differentiated integration (DI), the situations in which each is most likely to be used are distinct because they approach the divergences between member states differently.

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Differentiated integration, discretion, EU directives, European Union, flexibility

Flexibility in European Union (EU) law

In recent decades, differentiation has become one of the key issues in debates on the future of the EU. 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 heterogeneity among member states. In these debates, most attention has gone to forms of differentiated integration (DI). DI occurs when only a part of all member states participate in an EU-level policy arrangement (Dyson and Sepos, 2010: 4; Leuffen et al., 2013: 17; see also the discussion by Schimmelfennig et al., 2023, in the introduction to this special issue). This may relate to a specific integration project (such as the Eurozone 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 allowing member states to decide on the scope of application of a specific provision or on the adoption of more stringent standards. This is clearest in the case of directives that unify legislation across the EU 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 flexibility, which allows member states to implement EU law differently. If this flexibility leads to differences in implementation practices between member states, it results in patterns of what has been called ‘differentiated implementation’ (cf. Fink and Ruffing, 2017).

DI and flexibility may serve largely the same purposes: by differentiating between member states, they can be used to accommodate heterogeneity within the EU and to ensure a closer fit between member state preferences and EU policies (see also Schimmelfennig et al., 2023). In addition, they give rise to many of the same concerns, as both DI and flexibility may lead to fragmentation and allow for shirking and cherry-picking by member states. Although DI and flexibility both enable differentiation among member states, their approach is distinct. Whereas under DI some member states are excluded from a part of EU law altogether, under flexibility all member states are subject to the same legal norms but have discretion to make choices within the limits set by those norms. As a result, DI and flexibility strike different balances between EU-wide harmonisation on the one hand and member state freedom to manoeuvre on the other.

It is therefore important to understand better under what conditions EU directives offer flexibility in implementation. Directives do this by including provisions that offer discretion (which we define as the explicit authorisation to make choices in transposing,

applying and enforcing EU law) to member states. Depending on the way EU legislation is set up and specific provisions are formulated, the level of discretion is narrower for some legal instruments and wider for other ones (Van den Brink, 2017a). The central question our article seeks to answer is: what determines the level of discretion offered to member states in EU directives? Based on a novel dataset, it maps the level of discretion in 164 EU directives adopted from 2006 to 2015. In addition, it seeks to explain why levels of discretion vary across EU directives, thereby contributing to a better understanding of flexibility, that is, the room EU law offers for forms of differentiated implementation.

In doing so, we make a number of contributions. To begin with, our analysis takes a first step towards assessing the potential of differentiated implementation as a form of differentiation by systematically investigating the discretion member states have in implementing EU policies. This forms a stepping stone towards further analyses of the ways in which that room is used by member states in practice and the consequences this use has for the effectiveness and legitimacy of EU policies.

Empirically, our article introduces a novel dataset that maps discretion in 164 EU directives adopted between 2006 and 2015. Although it has a similar approach to pre-existing work, it presents an important advance. Whereas the last and, so far, only large N dataset on discretion (Franchino, 2007) covered the period until 1997, our dataset presents data comprising a more recent time period. In the meantime, the EU had undergone a number of important changes, such as the Eastern enlargement which nearly doubled EU membership, a number of treaty revisions, the extension of EU action into new policy areas and the increased use of the ordinary legislative procedure with the European Parliament (EP) as a co-decision maker and qualified majority voting in the Council of the EU (henceforth Council). As a result, the debate on differentiation and uniformity in EU law and policies took on a new shape in this period, which calls for a renewed effort to map discretion in EU legislation.

Finally, our article contributes to a nascent body of literature that seeks to move ‘beyond compliance’ in studying the implementation of EU law (Heidbreder, 2017; Schmidt, 2008; Thomann and Sager, 2017; Thomann and Zhelyazkova, 2017). This literature challenges the focus on compliance that dominates most research on the implementation of EU law 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 rather than one specific form of compliant implementation in many cases EU law defines a zone of compliant implementation practices within which member states could make different choices. This examination contributes to our understanding of the extent to which EU law allows for such differences in implementation and how variation between EU directives in this regard can be explained.

The findings from our statistical analysis show that the level of discretion in directives was affected most by factors related to the substance of directives, namely the extent to which a directive requires changes in domestic legislation and touches upon core state powers, and to a lesser extent the complexity of a directive. In contrast, factors related to the decision-making process proved statistically insignificant.

The results of the analysis also suggest that while flexibility may be used to address some of the same concerns that drive DI, the situations in which each is most likely to be used are different.

Explaining discretion in EU law

The strategic and substantive use of differentiation

Above, it was pointed out that DI and flexibility may serve similar purposes in accommodating heterogeneity among member states. In the literature, two distinct rationales have been identified in this regard, which focus on different types of heterogeneity. To begin with, DI and flexibility can be used to overcome stalemates in the decision-making process. By allowing for opt-outs or more leeway in implementation, DI and flexibility are used to make a legislative proposal acceptable to member states that would otherwise have opposed it (for DI, see Holzinger and Schimmelfennig, 2012: 293; Jensen and Slapin, 2012; for flexibility, see Andersen and Sitter, 2006: 321). We call this the ‘strategic’ use of differentiation, as differentiation is not used to address differences in conditions ‘on the ground’ but as an ad hoc solution to a political stalemate.

Alternatively, differentiation can be used to cope with the heterogeneity of conditions within member states. In this case, differentiation is meant to tailor EU policies to the specific needs and contexts of member states. Hence, DI has been defended as a way to account for different national underlying conditions (Bellamy and Kröger, 2017; Fossum, 2015) and to match the territorial scope of costs and benefits of a given policy (Holzinger and Schimmelfennig, 2012: 295; Lord, 2015). Along the same lines, flexibility can be seen as a way to tailor EU-wide policies and legislation to specific domestic contexts (Hartmann, 2016; Thomann, 2015; Zhelyazkova and Thomann, 2022). We call this the ‘substantive’ use of differentiation.

Rationales for flexibility do not translate directly into explanations for the use of discretion in directives. However, the two rationales point to distinct types of factors that may drive the use of discretion: factors relating to the decision-making process (the strategic use) and factors relating to the substance of a directive (the substantive use). We use this distinction to organise our discussion of determinants of discretion.

Explaining the strategic use of discretion

Regarding the effect of the decision-making process on the use of discretion, a central assumption is that flexibility is introduced in order to facilitate decision making. By allowing more leeway in implementation, reluctant member states may accept a legislative proposal that they would otherwise have rejected (Eichener, 1997: 605–606). The need to include a certain level of discretion for this purpose is closely related to the level of conflict or disagreement between member states. Offering flexibility in implementation is then used to overcome these disagreements and resolve the potential stalemate that results from them (Dimitrova and Steunenberg, 2000: 218; Thomson et al., 2007: 707). Hartmann (2016: 387–388) and Thomson (2011: 277) found empirical

support for this assumption. Similarly, Franchino (2004) showed that more discretion was given to member states when legislation had to be adopted in the Council by unanimity. This is in line with the notion that offering flexibility in implementation is used to facilitate decision making when it is more difficult to reach a consensus.

At the same time, different mechanisms may be at work when the Council does not decide by unanimity and therefore does not need to accommodate each member state's concerns. Franchino's (2007: 168–171) analysis indicated that under qualified majority voting, greater conflict on the content of a policy within the Council led to less discretion for member states. He explained this by arguing that member states in the majority want to prevent laxity in implementation by those opposed to the policy, an argument that is echoed by Migliorati (2021). Moreover, Franchino's findings indicate that greater involvement of the EP leads to less discretion for member states, out of the EP's desire to control member state implementation (Franchino, 2007: 293–294).

These contradicting arguments can be understood by focusing on their underlying logics. As Thomson et al. (2007: 707) pointed out, the dynamics differ depending on whether decision makers and implementers are the same or not. Policy conflict is likely to lead to lower levels of discretion for implementers when decision makers and implementers are clearly separated. In that case, supporters of the adopted policy have an incentive to reduce the leeway given to implementers in order to prevent their opponents from undercutting the policy's objectives in the implementation stage. This applies to the EP in its relationship with the Council. Since the EP cannot control member states' implementation in direct ways, it can only limit member states' discretion from the outset through the strict formulation of directives.

By contrast, if decision makers and implementers are the same, decision makers give discretion to themselves rather than to others, which makes granting flexibility in implementation a viable way to overcome conflicts. This logic applies to the Council when member states vote on proposals that they will later implement themselves (Thomson et al., 2007: 707). Moreover, despite qualified majority voting becoming the standard in Council decision making, a strong consensus norm prevails in the Council (Naurin, 2010: 38–39). Therefore, when a conflict among member states arises in the Council, a consensual solution, including granting flexibility in implementation, prevails over creating winners and losers of majority voting, if possible.

H1: The higher the level of conflict within the Council during the decision-making process, the more discretion a directive will grant to member states.

H2: The more involved the EP is in the decision-making process, the less discretion a directive will grant to member states.

Explaining the substantive use of discretion

Existing studies have less to say about determinants related to the substance of directives. The underlying notion here is that flexibility in implementation allows member states to

adapt EU-wide standards to domestic contexts and conditions. This is what Thomann (2015, 2019) has labelled ‘customisation’, which ‘occurs when compliant countries use their leeway to adapt EU rules to domestic particularities’ (Thomann, 2015: 1370). Starting from this argument, we may expect discretion for member states to be greatest if specific contexts and conditions vary significantly between them. On the one extreme are directives that impose relatively straightforward requirements, which can be implemented without having to consider many other aspects of member states’ legal systems or domestic contexts. On the other extreme are directives that require specific fine-tuning on the part of member states, because their provisions affect or are affected by a wide range of legal and other contextual factors in the member states. We assume that member states generally want to keep adaptation costs low. Hence, they will prefer greater discretion in directives that require significant changes to domestic law.

From this general argument, we derive two hypotheses. First, the need for flexibility in implementation is arguably greatest for directives that show greater complexity. It is particularly in these cases that member states need to make further choices in order to account for domestic specificities in the implementation and to align it with related policies and legal instruments. In addition, a directive will require more domestic adaptation when it differs significantly from existing domestic law. This argument is traditionally called ‘goodness of fit’ or (if negatively phrased) ‘misfit’ (Falkner et al., 2005; Héritier, 1995; Thomson et al., 2020; critically Mastebroek and Kaeding, 2006). In cases of high misfit between existing national laws and a proposed EU directive, member states will support more discretion in the directive’s provisions in order to ease efforts related to the need to change many domestic laws. This strategy is viable especially if the legal systems of a considerable number of member states suffer from legal misfit (Hartmann, 2016).

H3: The greater the complexity of a directive, the more discretion it will grant to member states.

H4: The greater the misfit between national legal orders and a directive, the more discretion a directive will grant to member states.

It is also reasonable to assume that the level of discretion granted to member states by directives may differ among various policy fields. The current literature provides little basis for formulating hypotheses on the relationship between discretion and policy fields. The only theoretical argument that can be made is linked to ‘core state powers’. As Genschel and Jachtenfuchs (2014) have argued, in policy fields that encroach on the sovereignty of member states, governments are wary of deepening EU powers, but integration still proceeds by the regulation of national capacities. DI has traditionally been used to protect sovereignty concerns in these sectors (see also Rittberger et al., 2013). The same logic may also apply to flexibility, as it allows member states to cushion the impact on national sovereignty of EU standards that have been adopted in these areas.

H5: If a directive affects core state powers, it will grant more discretion to member states.

Methods and data

The analysis is based on an original dataset – Flexible Implementation in the European Union (FIEU) – of 164 directives adopted in the period 2006–2015, which were coded for discretion and associated constraints on the level of individual provisions.¹ In this section, we explain our approach to measuring discretion and the selection of directives. In addition, we describe the operationalisation of the explanatory and control variables included in our multivariate model.

Measuring discretion in EU legislation

The approach taken in the FIEU dataset builds on the work by Franchino (2007, see also 2001, 2004) on discretion in the EU (see also Gastinger and Heldt, 2022 for recent application of the approach on discretion granted to the Commission), which in turn is based on the framework 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 to the member states or not. Since discretion may be limited by imposing certain constraints on the exercise of discretion (e.g. by requiring prior authorisation or by attaching substantive conditions), we also accounted for these constraints insofar as they were linked to a provision granting discretion.² We only coded discretion if it was granted explicitly.³

We calculated the level of discretion in a directive by discounting the number of constraints against the number of provisions granting discretion and dividing this number by the total number of provisions in the legislative act. In discounting for constraints, we divide the number of constraints by half, since a constraint will reduce the level of discretion but (normally) not completely take it away. This, of course, depends on the specific constraint (and discretion) but across the entire dataset; our procedure allows for balanced weighting of the ratio of discretion by the constraints imposed on that discretion.⁴ The weighted discretion ratio is then calculated as follows:

$$\text{Weighted discretion ratio} = \frac{((n \text{ of provisions granting discretion}) - (0.5 * n \text{ of constraints}))}{\text{total } n \text{ of provisions}} * 100$$

Selection of directives and coding procedures

For the FIEU dataset, we coded EU directives adopted between 2006 and 2015. The choice for directives (and against regulations) was made because they are legal acts whose explicit purpose is to allow for flexibility (see Art. 288 TFEU). Due to their nature, directives are likely to contain higher levels of discretion for member states than regulations. This assumption was confirmed by test coding 59 randomly selected regulations adopted in the timespan 2006–2015 and comparing them to the directives in our dataset. Whereas on average, 26% of provisions in directives granted discretion, in regulations, this was only 8.1% (see also Hurka and Steinebach, 2021: 286). In light

of the time-intensive nature of coding, focusing on directives was therefore likely to yield a more useful variation on the dependent variable than focusing on regulations or a sample of both types. Future research, however, could extend the analysis to regulations to see if the results hold.

The selection of directives in the period 2006–2015 followed the method used by the EUDIFF2 dataset, which codes secondary legislation for instances of DI (Duttle et al., 2017). This includes legislative acts that are generally applicable in and to the EU member states and were adopted under a legislative procedure as laid down in the TFEU (EUDIFF, 2017: 7). It excludes legislative acts that amend existing legislation as well as delegated and implementing acts.

Directives were coded in their original version (year of adoption). So-called codified directives were excluded from the FIEU dataset. These directives only technically combine the original act and its amendments (vertical consolidation) or more acts from related subjects (horizontal codification).⁵ By contrast, recasted directives form part of our dataset because, apart from codifying existing legislation, they also involve substantive amendments to the original legal acts.⁶

This left 164 directives adopted between 2006 and 2015, which were all coded. Within each directive, the preamble and annexes were excluded from coding. 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 total, these directives contained 13,806 codable provisions. The coding was done by six trained coders. Each directive was coded independently by two coders, and differences in coding were resolved through a conciliation procedure under the supervision of one of the article's authors. See the Online appendix for the codebook and further details on the coding procedure.

Operationalisation of explanatory variables

The hypotheses in our article are linked to a range of explanatory variables. We discuss our operationalisation of these variables in turn. The descriptive statistics are provided in the Online appendix.

Policy conflict within the Council: Previous research on the determinants of discretion has relied on distinguishing among voting rules in the Council and their consequences in order to capture varying levels of conflict. However, in our dataset, almost 90% of directives were adopted through qualified majority voting. As a result, there is not sufficient variation in voting rules procedures to use this measure in a meaningful way.

We, therefore, look if and how many times a directive proposal appeared as a B item on the Council agenda. B items comprise politically sensitive points which have not been resolved in previous Council meetings, in Coreper or at working party level.⁷ Hence, the more times a directive proposal made it to the B section of the Council agenda, the more conflict we presume within the Council.

EP involvement: Traditionally, the type of legislative procedure (co-decision or consultation) has served as a proxy for EP involvement in studies of discretion in EU legislation. However, with the increasing dominance of co-decision (i.e. the ordinary legislative procedure after the Lisbon Treaty), this measure can no longer meaningfully

differentiate between directives.⁸ To measure the involvement of the EP in the decision-making process, we therefore include the number of amendments proposed by parliamentary committees. These amendments also often reflect the informal trilogue deals the EP makes with the Council, yet they still indicate the level of EP involvement because the compromise obviously has to mirror its interests (Yordanova, 2013).

Complexity: We account for the complexity of directives through two distinct measures. First, the number of subject matters describes how many policy fields the legal act relates to and captures the multidimensionality of the directive. To this end, the variable contained in Eur-Lex (keywords) was extracted from the CEPS EurLex dataset collection (Laurer and Borret, 2020). As a second measure, we use the number of documents relating to a legislative proposal contained in the Council Register. This variable could also be affected by multidimensionality, yet it mirrors other aspects such as legal complexity, requirement of numerous amendments or clarification of delegations' positions.

Misfit with national legal orders: For this variable, we counted the number of national implementing measures as listed in the Eur-Lex database (similar to Steunenberg and Toshkov, 2009). Although the variable captures values recorded after the discretion is granted in the original directive, we believe it provides a valid conceptualisation of misfit and does not suffer from post-treatment bias. The higher the misfit, the higher the number of domestic legal acts that will likely require adaptation and subsequent notification. As to the post-treatment bias, the level of discretion in a directive may impact the content of domestic measures (e.g. how a duty is structured), but it is not likely to directly influence whether a certain domestic act is affected by the directive or not. Likewise, the ratio of discretion in the directive is unlikely to be correlated with more (or less) willingness to notify implementing measures. Finally, as the states notify (pre-existing) implementing measures even if they do not comply with obligations on implementation (Zhelyazkova and Yordanova, 2015), we may assume that they generally notify all implementing measures truthfully. Recalling that discretion is granted to all member states, the variable is operationalised as the sum of national implementing acts for each directive across all member states. Because of the right-skewed distribution and the presence of outliers, values were logged in the analysis.⁹

Core state powers: This dummy variable equals one if the primary subject matter of a directive (extracted from Eur-Lex) belongs to a core state power. Due to the focus on directives, only a limited number of policy fields qualify in the category. We decided to include directives related to justice and home affairs, foreign policy (both involve intervention in states' sovereignty) and social policy (the most important budget expenditure for states) (Genschel and Jachtenfuchs, 2014).

Controls: Two control variables were added to the model. First, we included the number of recitals contained in the preamble of the directive. Several scholars have used this measure as a proxy for different phenomena, such as the scope of a legal act and the number of issues it touches upon (Franchino, 2007; Migliorati, 2021; Thomson and Torenvlied, 2011; Toshkov, 2008), the level of controversy surrounding the legal act (Kaeding, 2008) and the salience of the proposal in EU legal order (Häge, 2007). Because of these diverging applications of the indicator, its substantive

interpretation remains unclear, but generally the mentioned conceptualisations suggest a positive relationship with our dependent variable.

Second, we added the level of Europeanisation (or centralisation) of the primary issue area (subject matter) that the directive regulates. To create this variable, we combine the scales developed by two studies (Nanou et al., 2017; Schakel et al., 2015). Schakel et al. (2015) placed policy fields along a 5-point Likert scale (1 = all policy decisions on the national level, 5 = all policy decisions on the EU level) based on an examination of formal competences in the EU Treaties. Nanou et al. (2017) measured the expansion of EU policy making through an expert survey, on a scale ranging from 1 to 10. For both scales, we used the results for 2010, which is in the middle of our dataset's time-frame. We recalculated the scores and averaged them on a scale from 1 to 5 (including halves). As the description of the scale indicates, increasing Europeanisation is defined as the increasing scope of EU intervention in a given policy field. This is usually linked with more discretion granted by EU legal acts to supranational institutions (Migliorati, 2021). Following the same logic, less Europeanisation of the policy field will likely result in more discretion for member states.

Results

Descriptive statistics on discretion in the directives

The length of the directives in our dataset differs considerably, spanning from 9 to 569 provisions. The distribution of the length of directives is right-skewed, as the mean stands at 84 provisions per directive and the median at 60 provisions.

Out of a total of 13,806 provisions in our dataset, 3345 provisions provide discretion to member states. The 164 directives show wide variation in the overall discretion they grant (Figure 1). Two directives contain no discretion at all, while the highest weighted discretion ratio stands at 67.1. The median of the weighted ratio of discretion is 17.6 and the distribution of values is slightly right-skewed with a mean of 21.3.

The dataset shows that average levels of discretion vary markedly between policy fields. Figure 2 presents the mean values of the weighted discretion ratio by policy field. It includes the policy fields for which our dataset contains at least 10 directives, subsuming all other directives under the 'others' category. As Figure 2 shows, directives in the fields of justice and home affairs and social policy offer most discretion, lending initial support to our hypothesis that discretion will be used most in sensitive areas that touch upon core state powers. Environment and energy as well as health and consumer protection stand out as the policy fields in which directives offer least discretion. We will further discuss these differences in the multivariate analysis.

Explaining discretion in directives

We run a multiple linear regression model to analyse the extent to which variables associated with the strategic use of flexibility (proposal as a B point on the Council agenda and the number of amendments tabled by EP committees) and the substantive use of

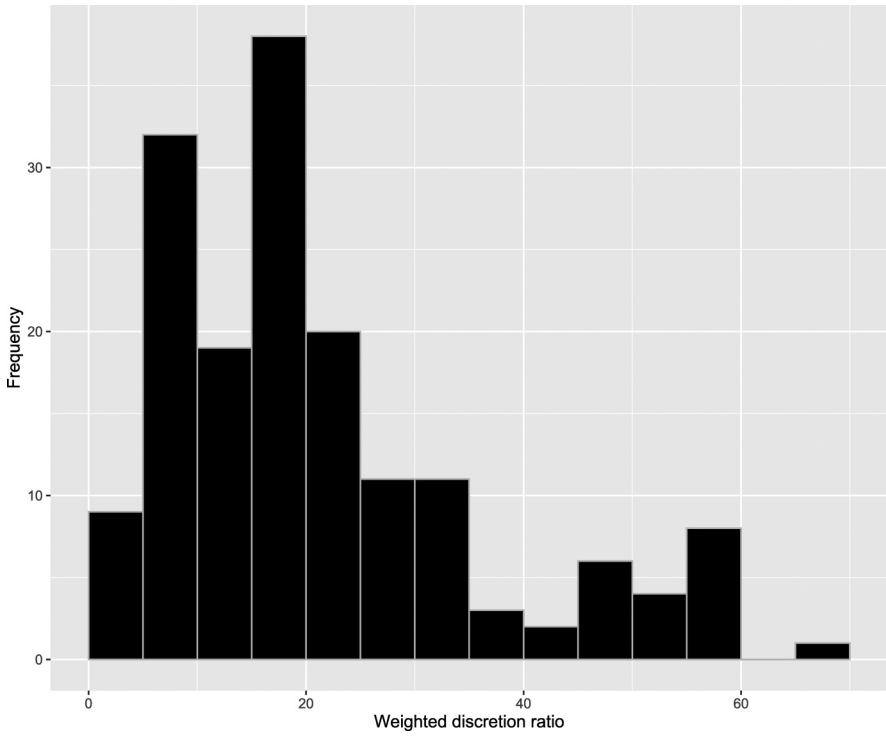


Figure 1. Distribution of the weighted discretion ratio.

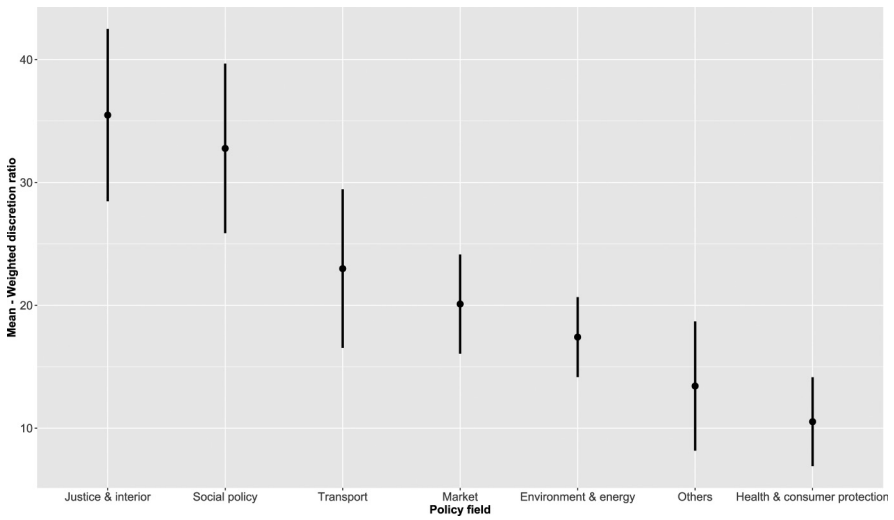


Figure 2. Mean weighted discretion ratio by policy field, with 95% confidence intervals.

flexibility (the number of policy dimensions a directive relates to, the number of documents in the Council Register, the number of national implementing measures based on the directive, and if the directive affects core state powers) are associated with the ratio of weighted discretion in EU directives. Although our dependent variable is a fraction with a bounded minimum of 0 and maximum of 100, we used an OLS regression. This is justified because our dependent variable (the weighted discretion ratio) is sufficiently normally distributed and includes few observations at or near the boundaries. To test the robustness of the OLS results, we redid the analysis using a fractional model and a tobit model. Both of these alternative models yielded the same results as the OLS model. Because the OLS model is easier to interpret, we only show those results here. The results of the fractional and tobit models are included in the Online appendix.

The results of the multivariate model reported in Table 1 reveal that neither of the two indicators relating to the decision-making process is significantly associated with the weighted discretion ratio whereas the hypothesised drivers for the substantive use of discretion perform quite strongly. Directives that show a high misfit with domestic legal orders and thus require a high number of national implementing measures generally

Table 1. Multiple linear regression of weighted discretion ratio in directives.

	Weighted discretion ratio	
	Unstandardised coefficients	Standardised coefficients
Relating to the decision-making process		
Number of times as a B item	-.747 (.870)	-0.077
Number of amendments tabled by EP committees	-.029 (.019)	-0.135
Relating to substance		
Number of policy dimensions	.060 (.729)	0.006
Number of documents in the Council Register	.097** (.047)	0.194**
Number of national implementing measures (logged)	4.277*** (1.618)	0.256***
Core state powers affected	12.047*** (3.037)	0.326***
Controls		
Number of recitals in the preamble	-.112* (.064)	-0.166*
Europeanisation of the policy field	-.589 (1.646)	0.028
Constant	-2.104 (10.109)	
R ²		.257
Adjusted R ²		.219
N		164

Note: Standard errors are shown in parentheses

* $p < .1$, ** $p < .05$, *** $p < 0.01$.

EP: European Parliament.

grant more discretion to the member states. Directives that affect core state powers are also significantly more discretionary than directives outside core state powers. The standardised coefficients reveal large effect size of both factors. Likewise, the number of documents in the Council Register, one of the two indicators of complexity, is positively associated with the level of discretion (with medium effect size). Only the number of policy dimensions that the directive relates to does not show the hypothesised effect. If we look at controls, the number of recitals is associated with the level of discretion (at the 10% confidence level) while the level of Europeanisation of policy fields shows no significant correlation with discretion at all.

In line with our hypotheses, Table 1 contains a dummy variable for core state powers but not for individual policy fields. Since Figure 2 showed that there are substantial differences in terms of mean levels of discretion between policy fields, we also constructed a model with dummies for policy fields. The results for this alternative model are included in the Online appendix and indeed show that there are strongly significant differences between policy fields. However, the inclusion of the policy field dummies does not change the results found for the other explanatory variables, except that the significance level of the number of documents in the Council Register drops to 10%. This confirms the overall findings from Table 1.

Conclusion and discussion

In this article, we analyse the determinants of discretion in EU directives and their potential use for differentiated implementation in the EU. In our theoretical section, we formulated a number of hypotheses, which we tested empirically on a dataset of 164 directives adopted between 2006 and 2015. Table 2 summarises our hypotheses and findings.

The analysis shows that the level of discretion in directives was affected most by factors related to the substance of directives, while factors related to the decision-making process proved insignificant. Clearly, these two categories are at least partially related, in the sense that characteristics of the directive play an important role in decision making and in the debates that take place within the Council and between the Council and the EP. Yet, factors that directly reflect the level of conflict within the Council and EP involvement are not significantly associated with the level of discretion that is finally incorporated in a directive. This suggests that the source of most discretion lies in the substantive use of flexibility.

Table 2. Hypotheses and findings.

H	Hypotheses	Empirical findings
H1	More conflict in the Council, more discretion	Not supported by findings
H2	Active involvement of the EP, less discretion	Not supported by findings
H3	Greater complexity, more discretion	Partly supported by findings
H4	Greater misfit, more discretion	Supported by findings
H5	Core state powers affected, more discretion	Supported by findings

EP: European Parliament.

Our findings on conflict in the Council are not in line with the argument in the literature about the use of discretion as a way to overcome conflict if those that decide on a policy are also the implementers of that policy (Thomson et al., 2007). If a proposal for a directive occurs in the Council as a B item more often, the resulting conflict is not addressed by including more discretion for member states, according to our results. Our findings on the EP also differ from Franchino's (2007) argument about the EP's preference for less discretion. The changes in the EU institutional framework in the last two decades may explain these differences. In the past, the comparatively weak EP might have vigilantly tried to curb discretion to the member states in the limited number of directives it co-decided on. However, nowadays, the EP's equal standing with the Council in negotiating most directives might increase the EP's self-confidence and abandon the position that any discretion granted to member states should be viewed as a danger to the integration process.

Among the variables related to substance, the data were in line with our hypotheses regarding core state powers. Directives related to policy fields that affect sovereignty or are otherwise 'sensitive' to the member states contain more discretion. This is a similar concern as Schimmelfennig and Winzen (2014) identified for 'constitutional' DI, in which member states seek opt-outs for sovereignty reasons.

This suggests that flexibility and DI at least partly respond to similar underlying concerns. Nevertheless, they are likely to occur in different situations. As DI fully excludes some member states, it can be used to appease one or a few opposing member states, allowing the others to pursue their goals. DI is thus used to advance the integration process despite principled opposition from some member states (see also Schimmelfennig et al., 2023). This can only occur if there is a relatively large group of member states that share a preference for further integration, with a smaller group opposing it. By contrast, discretion in directives allows for flexibility in implementation across all member states. Such an approach is useful if all member states agree on further integration but want to delimit the EU and member states' roles in the policy. Flexibility is then not necessarily introduced to avoid opposition by some member states, but may also reflect more widely held preferences among member states about the proper form of EU policies.

Our analysis also shows that directives contained more discretion when a larger number of national implementing measures was used, which we argue indicates a larger misfit with pre-existing member states' legislation and policies. This finding reflects the more general notion in the literature on EU implementation that discretion is used in particular when domestic contexts vary a lot (cf. Hartmann, 2016; Thomann, 2019). It also ties in with the argument that DI and flexibility are likely to respond to different types of heterogeneity. DI makes the most sense as a way to accommodate one or a few 'outlying' member states vis-a-vis a (relatively) homogeneous majority of other member states. Flexibility is predominantly used in two other situations: when all member states agree on the need to retain substantial room for member states' choices or when member states show a wide variety of different preferences and capacities, without clear majority and minority positions – similar to experimental governance (see Zeitlin and Rangoni, 2023).

This difference between DI and flexibility offers a solution to one of the potential trade-offs of efficient DI described in the introduction to this special issue (Schimmelfennig et al., 2023). As was argued there, for DI ‘maximizing the homogeneity of member states runs the danger of creating groups that are too small to meet the policy goals, produce economies of scale, and pool resources.’ (Schimmelfennig et al., 2023). Flexibility operates differently in this respect, as it includes all member states but offers a room for choices in implementation. Although this may overcome the dilemma of too small groups, flexibility introduces a new dilemma. Offering too much flexibility may rob joint policy arrangements of the harmonising effect that they are supposed to have. If a directive includes too much flexibility, the practical result may be almost the same as it would have been without any EU-level policy. The trade-off then is between (higher) flexibility and (lower) harmonisation.

As pointed out above, discretion enables differentiated implementation and thus extends the scope for compliant implementation practices for the member states. While the assumption that more flexibility in directives would guarantee higher compliance with EU law seems sensible, the results revealing a negative association between DI and compliance (see Szczepanski and Börzel, 2023) challenge the logic. Further research is therefore needed to investigate the relationship between flexibility and compliance.

Finally, we found partial support for the notion that increased complexity is associated with greater discretion. While we did not find a significant correlation between multidimensionality and the level of discretion, the number of documents in the Council Register was significantly and positively associated with the level of discretion. As expected, both measures conceptualise different aspects of the notoriously disputed concept of ‘complexity’. The latter variable may reflect some sort of legal intricacy of the proposal or even disagreement among delegations on the level of Council working groups, and both these factors might contribute to higher discretion. More fine-grained data are required to investigate the relationships in greater detail.

All in all, our analysis shows that discretion is mainly used for substantive purposes. In comparison with DI, flexibility partly reflects similar underlying heterogeneity concerns but seems to be embraced in different specific situations. Having said that, DI and flexibility do not present an either/or-choice but can also be used in combination. This leads to four ideal typical possibilities: (a) one in which an EU policy includes all member states and offers no flexibility (neither DI nor flexibility); (b) one in which some member states are excluded but the others are not given any flexibility in implementation (DI but not flexibility); (c) one in which all member states participate in a policy but they are given wide flexibility (flexibility but not DI); and (d) one in which some member states do not participate and those that do are given significant flexibility (both DI and flexibility). This allows for multiple ways to achieve differentiation between member states, with different consequences in terms of efficiency and legitimacy. The relative occurrence of each of these combinations and their consequences are a matter for further research. This article has sought to fill in one part of that puzzle by showing that flexibility is used to address some of the same issues that underlie differentiation in the EU more generally.


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Supplemental material

Supplemental material for this article is available online.

Notes

1. Available at <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/I7BZGU> (accessed 10 August 2022).
2. The dataset discerns five types of constraint: time limits (on the exercise of discretion), spending limits, obligations to obtain approval by EU actors, reporting or consulting obligations and obligations to follow substantive standards and/or procedures set by the directive's provisions. Together, these 5 types correspond to the 12 that Franchino (2007) used. In the analysis, we only use the total numbers of constraints.
3. In the dataset, each instance of discretion was coded under one of five types of discretion, based on the categorisations suggested by Van den Brink (2017b) and Hartmann (2016: 429ff.). These categories include elaboration discretion, reference to national legal norms, minimum harmonisation, scope discretion and discretion in application on a case-by-case basis. Because the article focuses only on the overall discretion granted to member states, these types of discretion are disregarded in the analysis.
4. In order to check whether this choice affected our results, we performed robustness checks to see if varying the parameter used for weighting would affect the findings. Overall, our weighted discretion ratio and the unweighted discretion ratio show a strong correlation of .971. Redoing the analysis without weighting and with the weight set at 0.3 and 0.7, respectively, did not affect the findings of our model (see the Online appendix).
5. Available at: https://ec.europa.eu/dgs/legal_service/codifica_en.htm (accessed 10 August 2022).
6. Available at: https://ec.europa.eu/dgs/legal_service/recasting_en.htm (accessed 10 August 2022).

7. Available at: <https://www.consilium.europa.eu/en/council-eu/decision-making/> (accessed 10 August 2022).
8. Only 19 out of 164 directives in our dataset were adopted under the consultation procedure.
9. There are large variations in how many implementing acts member states notify to the Commission. Although some states on average notify more implementing measures than others, they do so consistently across the dataset. As a result, the variation between member states does not affect the pattern of differences in the total number of notified implementing measures across directives.

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