ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

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ACCOMMODATING DIVERSITY THROUGH LEGISLATIVE DIFFERENTIATION: AN UNTAPPED POTENTIAL AND AN OVERLOOKED REALITY?

TON VAN DEN BRINK* AND MICHAEL HÜBNER**

ABSTRACT: The "uniformity-based"-model of EU integration has lost considerable ground. It has become more and more considered as a model which takes too little account of national differences in economic, social, cultural and constitutional conditions and in political views. Differentiated integration (DI) raises issues, however. Equality of the Member States and the effectiveness of EU law and policy may be seriously impaired. This *Article* explores the potential of legislative differentiation as an alternative to more classic forms of DI. With legislative differentiation, we refer to the situation in which Member States are allowed to make substantive policy choices in the implementation of EU legislation and use such flexibility to customize EU legislation to their own domestic contexts. We explore this potential by assessing two case studies: The General Data Protection Regulation and the Child Sexual Abuse Directive. The analysis of these case studies shows that legislative differentiation is a multifaceted phenomenon that indeed has the potential to be an alternative to the classic forms of DI. Yet, in practice sub-optimal results have been found as well. Therefore, more consideration and a better incorporation of diversity in legislative processes is required to further enhance the potential of differentiated legislation.

* Professor of EU legislative studies, Utrecht University, a.vandenbrink1@uu.nl.

** PhD Candidate, Utrecht University, m.r.hubner@uu.nl. A special thanks to Juan Santos Vara and Ramses A. Wessel for organizing the EP-JMN Workshop "The EU after Brexit: New Options for Differentiated Integration?" at which a first draft of this *Article* was presented. We also would like to thank the participants of this workshop for their valuable comments on our *Article*.

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I. INTRODUCTION

The "uniformity-based"-model of EU integration has lost considerable ground in past years. Increasingly, it is seen as a model that is too rigid and that takes too little account of the economic, social, cultural and constitutional differences between the Member States as well as their political views. Meeting resistance at first, differentiated integration (DI) has now come to be accepted as a mechanism allowing the pursuit of collective interests without eliminating these national differences.[1] At first, DI was seen as an exception that applies – and should apply – only in specific, politically sensitive fields of EU law and policy, such as EMU and the Schengen cooperation.[2] At the legislative level, the Treaty options for enhanced cooperation reflect this exceptional nature.[3] The mechanism allows a group of Member States (at least nine) to advance integration by adopting EU legislation which is only applicable to this group. Yet, strict conditions, such as the requirement that a measure may only be adopted as a last resort, apply.[4] Consequently, only a limited number of enhanced cooperation based legislation has been adopted.[5] The turning point came in 2017 when the European Commission presented DI as one of the main scenarios or models for the future development of the EU, and indeed one of the most likely.[6] Obviously, the Commission White Paper appeared in the middle of the Brexit process which had fuelled the need to better balance unity and diversity in the EU. The exit of the UK from the EU has certainly not diminished this need, however.

At the same time, it has become clear that DI is not some sort of magic potion but raises its own problems and concerns. Whereas Member States' equality has been, since the Treaty of Lisbon, explicitly recognized as a general principle of EU law, DI may actually result in serious inequalities between the Member States and even the prospect of "A" and "B" memberships.[7] Equally, EU law and policy may become simply less effective when not all Member States participate.

[1] B de Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) CMLRev 227, 230-232.

[2] F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' (2015) Journal of European Public Policy 764, 765.

[3] See, in particular, art. 20 TEU and arts 326-334 TFEU.

[4] Art. 20(2) TEU; S Peers, 'Enhanced Cooperation: The Cinderella of Differentiated Integration' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 77.

[5] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* (Brill 2021) 7.

[6] European Commission COM(2017) 2025 of 1 March 2017 *White Paper on the Future of Europe and the Way forward: Reflections and Scenarios for the EU* ec.europa.eu.

[7] Art. 4(2) TEU.

Is there a way to address these downsides while still being able to benefit from what DI has to offer? In this *Article*, we assess the potential of ordinary EU legislation – by which we refer to legislation that has not been adopted within the framework of enhanced cooperation – to balance unity and diversity. Our aim is to examine whether such ordinary EU legislation may provide a good alternative to the established forms of DI. Not only the extent to which EU legislation allows for differentiation matters in this context, but also the way Member States implement such legislation as they see fit (within the legal borders of what EU law allows them to do). Perhaps rather counterintuitively, EU legislation more often than not creates such flexibility. Thus, EU legislation does not necessarily end diversity.

Schimmelfennig and Winzen adopted a definition of differentiated integration based on the legal effects in the Member States: the differential validity of formal EU rules across countries.[8] They explicitly exclude forms of what we call legislative differentiation, as these do not result in the differential validity of the EU rules. By contrast, legislative differentiation involves the *equal* validity of EU rules, but through the potential for differentiation offered by EU legislation and the national legislative strategies to exploit this an alternative mechanism to balance unity and diversity arises. Thus, we consider differentiated legislation as a form of DI, although it would not be included in most common definitions of that latter concept.[9]

But we first need to consider more carefully what legislative differentiation actually entails and how it diverges from other forms of DI. First, as indicated above and as we will further argue in this *Article*, flexibility offered by the EU legislature is actually a systematic aspect of EU legislation. It may appear in the form of minimum harmonization measures, but equally in other – perhaps less visible – forms, such as in open norms, in limitations of the scope of application of the legislative act at issue and in the form of explicit choices being offered. The outcome of legislative differentiation may lead to differences in implementation of uniform EU rules, which may be called "differentiated implementation".[10] Legislative differentiation is as such not a new phenomenon or concept. It has indeed provided a fruitful perspective for the study of EU sectoral legislation.[11] A more general approach, focused on its potential as an alternative for differentiated integration has, however, been missing thus far. Legislative differentiation aligns with a number of general principles of EU law, such as the subsidiarity and proportionality principles and also with the principle of national constitutional identity.[12] Obviously, these principles do not directly require the EU

[8] F Schimmelfennig and T Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (2014) JComMarSt 354, 356.

[9] See B Leruth, S Gänzle, and J Trondal, 'Exploring Differentiated Disintegration in a Post-Brexit European Union' (2019) JComMarSt 1012, for an overview of the research on differentiated integration.

[10] S Fink and E Ruffing, 'The Differentiated Implementation of European Participation Rules in Energy Infrastructure Planning. Why Does the German Participation Regime Exceed European Requirements' (2017) European Policy Analysis 274.

[11] *Ibid*.

[12] Arts 4(2), 5(3) and 5(4) TEU.

legislature to allow Member States to be able to make substantive policy choices. However, these principles protect Member States in different ways. The subsidiarity principle requires the EU legislature to refrain from regulating those issues that Member States can better regulate themselves. Also from the proportionality principle – which requires the EU legislature to not go beyond what is necessary – the need to protect Member States policy discretion may be distilled. Leaving room for Member States to make their own policy choices allows them to "customize" the law to national circumstances, which arguably leads to a more effective combined regulatory framework.[13] Moreover, legislative differentiation may – similar to DI – be functional in overcoming deadlocks in legislative negotiation processes and may resolve reservations Member States have.[14] Legislative differentiation applies equally to the Member States, meaning that the position of all Member States is the same. This provides it with an *a piori* advantage over other forms of DI. Indeed, unlike other forms of DI, legislative differentiation does not result in separating members and non-members.[15] All Member States acquire the same potential for adapting EU legislation according to their own preferences.[16] The aim of our *Article* is to assess how legislative differentiation may provide a balancing mechanism for unity and diversity in the EU and to what extent it may thus serve as an alternative to other forms of DI. To this end we will examine two case studies to assess how differentiated legislation works in practice. This involves first of all assessing the scope of flexibility these legislative acts offer the Member States (section 2) and second how this flexibility has been used in selected Member States (section 3). In section 4 we will explore in greater depth whether differentiated legislation may indeed provide a fruitful alternative to differentiated integration.

The selected case studies include the General Data Protection Regulation (GDPR) and the Child Sexual Abuse Directive (SAD).[17] The GDPR – adopted in the form of a Regulation – aims for a high level of uniformity, also in light of its internal market objectives, but still allows for differentiation at various points. The Child Sexual Abuse Directive is a minimum harmonization measure but includes, as we will see, other forms of differentiation as well.

[13] E Thomann, 'Customizing Europe: Transposition as Bottom-up Implementation' (2015) Journal of European Public Policy 1368; E Thomann and A Zhelyazkova, 'Moving Beyond (Non-)Compliance: The Customization of European Union Policies in 27 Countries' (2017) Journal of European Public Policy 1269.

[14] S Andersen and N Sitter, 'Differentiated Integration: What Is It and How Much Can the EU Accommodate?' (2006) Journal of European Integration 313, 321.

[15] To this extent, it differs from secondary law differentiation through the enhanced cooperation procedure, cf. DA Kroll and D Leuffen, 'Enhanced Cooperation in Practice: An Analysis of Differentiated Integration in EU Secondary Law' (2015) Journal of European Public Policy 353.

[16] T Duttle and others, 'Opting Out from European Union Legislation: The Differentiation of Secondary Law' (2017) Journal of European Public Policy 406.

[17] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (Sexual Abuse Directive).

Especially in light of its uncontested objectives, the Directive nevertheless equally reflects a strong desire to adopt a uniform approach to fight child abuse and child exploitation. This case-study approach has an explorative aim and seeks to demonstrate how legislative differentiation works and what its potential might be to shape diversity in the EU.

The two cases have been selected on the basis of the following criteria. They offer potential for differentiation, meaning that the legislation at the EU level includes a significant level of Member States' discretion: *i)* diverse legal acts: a regulation and a directive; *ii)* diverse policy fields: EU criminal law and internal market/data protection law; *iii)* diversity in terms of the legal situation at the national level: the directive impacts a well-established area of law at the national level (EU criminal law). For the GDPR, this is less the case: it builds on a prior EU directive but not so much on national law. This difference may equally impact how legislative differentiation works in practice.

The selected countries include Germany, Ireland and the Netherlands. These represent big, medium and small MS; common law and civil law systems; diverse political and cultural positions *vis-à-vis* the substantive topics that are regulated by the two legislative acts (*e.g.* Germany's position on data protection has been very different from the Irish). Admittedly, the country selection is limited in that it does not include Member States from the South and from the East. The current selection of countries meets, however, the overall purpose of this contribution, which is to explore legislative differentiation's potential to accommodate diversity in the EU.

The findings on the GDPR are based on ongoing Ph.D. research by the second author. The findings from the SAD case study are to a large extent based on research carried out in the framework of the Horizon 2020 funded research project Integrating Diversity in the European Union (InDivEU).[18]

II. Potential for legislative differentiation: Space offered by the EU legislature

II.1. Comparing the GDPR and the SAD

EU legislation itself is the obvious starting point for examining legislative differentiation. Indeed, the content of EU regulations and directives define the scope for differentiation and the type of national choices that can be made within the EU legislative framework. Our analysis includes two diverse legislative acts, the GDPR and the SAD. These acts differ not only in the type of legal act (Regulation *v* Directive), but equally in the type of policy fields they emanate from (internal market/data protection versus EU criminal law) and their respective stages of development. What the GDPR and the SAD have in common is that they both have replaced earlier legislation. In that respect, they both reflect a notion

[18] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' (EUI RSC Working Papers 35-2022).

of EU legislation as a continuous process, rather than as a process which is completed as soon as a legislative act is published in the Official Journal. Still, they differ in terms of what could be called "legislative maturity". Like a good wine, data protection legislation in the EU has been aging well. Building on previous international legislation, the EU in 1995 adopted the Data Protection Directive. Since then, legal experiences were gained, and technological developments occurred. Consequently, both of these factors influenced replacing the directive by a regulation, the GDPR, in 2018. In light of technological developments and the ever-increasing number of child abuse cases, the SAD seems more of an intermediate step. A revision of the Directive is being discussed now. Such legislative dynamics are important from the perspective of legislative differentiation: it may tell how experience and learning effects translate into more or less space for Member States to adapt EU legislation to their national situations and preferences, and, ultimately how the factor time impacts the balancing between unity and diversity.

II.2. Legislative contexts

A combination of factors fueled the adoption of the GDPR, including technological developments, higher exchanges of personal data and enforcement gaps.[19] Moreover, a new legal basis in the Treaty, art. 16 TFEU, allowed the EU legislature to take data protection out of the single market policy field and make it a genuine fundamental right.[20] Nevertheless, a double objective remained, the protection of natural persons in relation to the processing of personal data and the free movement of this personal data.[21] These objectives are to be achieved at the EU level, as the Regulation in principle fully regulates the matter. The Regulation covers provisions that determine whether personal data may be processed (arts 6 to 11, 44 to 49 and 85 to 89), and if so how personal data should be processed (arts 5 and 24 to 43). Furthermore, it sets out the rights of data subjects (arts 12 to 23 and 77 to 82) and the enforcement of these substantive rules on the national and EU level (arts 51 to 76).

The European Commission warranted action on EU level necessary, in particular the transfer of personal data across national borders at rapidly increasing rates and the need to reduce fragmentation formed a prominent argument to substantiate subsidiarity.[22] Generally, the European Parliament and the Council have been supportive of the objectives in the Regulation.[23] Yet, due to the Regulation's extensive nature there was much to do about details, seeing the 4000 amendments proposed by Members of the European

[19] CJ Hoofnagle, B van der Sloot and F Zuiderveen Borgesius, 'The European Union General Data Protection Regulation: What it Is and What it Means' (2019) Information & Communications Technology Law 65, 71.

[20] H Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU* (Springer 2016) 264.

[21] Art. 1 Regulation 2016/679 cit.

[22] Communication COM(2012) 11 final from the Commission of 25 January 2012 proposal for a regulation of the European parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) 6.

[23] *Ibid*. 4.

Parliament.[24] The issue was not so much whether there should be legislation, but rather what this legislation exactly regulates. In this regard, the type of legal instrument also played a role. A regulation would provide the same level of legally enforceable rights and obligations and provide consistent enforcement in all Member States.[25] At national level this was worrying, as a regulation would arguably leave no room for national legislation that takes into account national conditions or that provides more favourable conditions to personal data protection.[26]

In 2011, following the entry into force of the Treaty of Lisbon, the SAD was adopted to combat sexual abuse, sexual exploitation of children and child pornography. In line with the EU's limited legislative competence in the field, the Directive only establishes minimum rules concerning the definition of criminal offences and sanctions. The Directive equally contains provisions to strengthen prevention of these crimes and the protection of victims. These provisions cover investigation and prosecution of offences (arts 2 to 9 and 11 to 17), assistance to and protection of victims (arts 18 to 20), and prevention (arts 10 and 21 to 25). In terms of the political context of the Directive, it is important to observe that the general objectives of the Directive have been widely supported by the Member States.[27] Indeed, the predominant view has been that child abuse and exploitation are growing threats. Equally, the subsidiarity issue – whether the EU is better suited than the Member States to address these threats – has been answered positively as well. Apart from the obvious argument that the online element of abuse and exploitation by nature transcends national borders, the Commission has put forward other arguments as well to substantiate the subsidiarity of the proposal. It argued that existing national legislation and enforcement had been insufficiently strong and coherent to effectively address the threats. Such problems would be exacerbated by divergent approaches between the Member States.

The Commission has not been on its own in supporting the proposal.[28] Protection of children and preventing them from being harmed have been broadly shared and unequivocal objectives of the proposal. Still, significant importance is attached to accommodating diversity. This has less to do with the need to balance the objectives of the Directive with competing – national – interests, but rather with differences in national criminal law systems. As we will see, the height of maximum imprisonment sanctions for pre-existing crimes differs among Member States and national criminal laws equally differ on other elements – such as the age of sexual consent and views on consensual sexual activities.

[24] H Hijmans, 'The European Union as Guardian of Internet Privacy' cit. 492.

[25] Recital 13 Regulation 2016/679 cit.

[26] See reasoned opinions of Germany, Italy, Belgium, Sweden and France to be found in the website secure.ipex.eu.

[27] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit.

[28] See *e.g.* Opinion COM(2010) 94 final of the European Economic and Social Committee of 15 September 2010 on the 'Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA' 138.

II.3. Zooming in: Identifying discretion

By their very nature, the two legal acts already presuppose a differing degree of discretion. As a regulation, the GDPR should, in principle, not require action by the national legislatures whereas the SAD, as a Directive, must be transposed in the national legal systems. Yet, the GDPR in various provisions provides the Member States discretion to either complement, modify or further specify the provisions of the GDPR, and where certain issues fall outside of the scope of the Regulation the Member States may adopt legislation on their own.[29] In total, the GDPR has about 70 provisions that provide the Member States with some sort of discretion.[30] Similarly, the SAD contains much discretion as well, as 38 out of 86 substantive provisions include a form of discretion for Member States. A closer look at these provisions highlights a multifaceted picture of different types of discretion. These types are not mutually exclusive, as they may sometimes overlap, yet they illustrate the broad possibility of legislative differentiation.

a) Minimum harmonization

One of the most familiar and most recognizable forms of discretion is minimum harmonization. This form is profoundly visible in the Child Sexual Abuse Directive, where the first set of provisions of the Directive contain *offences* that Member States should include in their criminal codes. The Directive distinguishes four categories of offences: sexual abuse, sexual exploitation, child pornography and the solicitation of children online for sexual purposes. Within these, the legal basis of the Directive is art. 83 TFEU which enables the EU legislature only to adopt minimum harmonization measures. Thus, the maximum imprisonment sanctions which are specified by the Directive should in any case be included in national criminal codes, but Member States may choose to set a higher maximum.

Perhaps surprisingly, minimum harmonization is not exclusively reserved for directives. Also in the GDPR minimum harmonisation is visible, though, in contrast to the SAD it is not a structural element. The GDPR, overall, regulates issues exhaustively, as Member States are not allowed to transpose a regulation in national law. Yet, some provisions may still provide a minimum level of protection from which the Member States may go beyond. In this respect, the Regulation determines the grounds for processing of sensitive personal

[29] P Laue, 'Öffnungsklauseln in der DS-GVO–Öffnung wohin. - Geltungsbereich einzelstaatlicher (Sonder-) Regelungen' (2016) Zeitschrift für Datenschutz 463; P Voigt and A von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 222.

[30] See L Feiler, 'Öffnungsklauseln in der Datenschutz-Grundverordnung - Regelungsspielraum des österreichischen Gesetzgebers' (2016) jusIT 210; K Yuliyanova Chakarova, 'General Data Protection Regulation: Challenges Posed by the Opening Clauses and Conflict of Laws Issues' (Stanford Law School Working Paper 41-2019) 11; P Voigt and A von dem Bussche, *The EU General Data Protection Regulation (GDPR)* cit. 220; J Kühling and others, *Die Datenschutz-Grundverordnung und das Nationale Recht* (Verlagshaus Monsenstien und Vannerdat OHG Münster 2016) 14; J Chen, 'How the Best-Laid Plans Go Away: The (Unsolved) Issues of Applicable Law in the General Data Protection Regulation' (2016) International Data Privacy Law 310.

data but allows the Member States to maintain or introduce further conditions with regard to some specific forms of data (genetic data, biometric data and data concerning health).[31] Equally, the GDPR determines the powers a supervisory authority should have but allows the Member States to provide the supervisory authority with additional powers.[32]

b) Policy options

Various provisions in the GDPR provide the Member States with the option to make policy. This option may essentially entail that a certain national policy is maintained or newly adopted. An important policy option for the Member States is to decide that the processing of personal data is necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation, thereby providing a legal basis that allows the processing of this data.[33] In this way, national policies on social security, labour, healthcare or in law enforcement may be maintained. Similar, are the provisions that allow the Member States to restrict the rights of data subjects, where this is for example necessary to safeguard national security or an important financial interest of the Member State.[34]

In contrast, policy options are less visible in the SAD. Yet, they also exist, art. 25(2) of SAD provides the Member States with the option to block access to web pages containing or disseminating child pornography towards internet users. The Member States have the freedom to choose whether they block access and also how they do this.

c) Open norms

Especially in the field of prevention and protection of victims, the SAD offers a very different potential for legislative differentiation. In this context, freedom for national legislatures is offered by enabling them to elaborate and specify open-worded provisions from the Directive. This allows the Member States to "customize" provisions to fit their legislation and practices. The Directive includes various provisions that may be further fleshed out at the national level, but the degree to which these allow the Member States to make their own policy choices differs quite significantly. Limited freedom is offered by provisions such as art. 15(2) which ensures that for the most serious offences prosecution must be possible "for a sufficient period of time" after the victim has reached the age of majority. Equally limited freedom for the Member States flows from art. 11 SAD which requires the Member States to take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities. By contrast, other provisions are worded in much more general terms and, consequently, allow the Member States a much broader margin of discretion. Perhaps the key examples in this regard are the provisions that require the Member States to develop prevention activities such as education, awareness

[31] Art. 9(4) Regulation 2016/679 cit.
[32] *Ibid*. art. 58(6).
[33] *Ibid*. art. 6.
[34] *Ibid*. art. 23.

raising and training of officials (art. 23) and to provide "assistance and support" to victims as soon as there are reasonable grounds to suspect an offence (art. 18(2)).

Similarly, the GDPR contains, though limited, provisions with an open-ended nature. Art. 82 GDPR provides such freedom, where the provision prescribes that any person who has suffered damages as a result of an infringement of the GDPR shall have the right to receive compensation. Here, the Member States may substantiate the "right to receive compensation" in their national legal order.[35]

d) Adjusting the scope

Discretion may also enable the Member States to set the scope of EU legislation, *i.e*. decide to what situations this legislation applies.[36] Such discretion exists where the legislation specifies that a certain topic is not covered, but Member States are free to regulate the issue. In the GDPR, this is the case with personal data of deceased persons, to which the Regulation does not apply.[37] Member States may here provide for rules, for example by extending the scope of application. Moreover, the GDPR provides that for processing of personal data of children below the age of 16, in relation to information society services for children, consent is required from the holder of parental responsibility over the child.[38] The GDPR sets the minimum age of protection at 16 years, but Member States can decide to lower this threshold up to 13 years of age. In this way the Member States have the freedom to decide to what situations the level of protection applies.

Scope discretion is also used in the SAD, where the EU legislature left certain choices on the scope of application explicitly up to the Member States. For example, on consensual sexual activities between peers the Directive provides that it is "within the discretion of Member States to decide whether Article 3(2) and (4) apply".[39]

e) Other forms of discretion

Some provisions just give two or three options for the Member States to choose from. The policy discretion is in such case specified by the EU legislative measure itself. This is the case with a provision on certification bodies in the GDPR, which requires that "Member States shall ensure certification bodies are accredited by one or both of the following".[40] Similar is the provision that allows Member States to provide that the prohibition to process sensitive

[35] However, this freedom is curtailed by the case law of the CJEU on the right to compensation.

[36] A van den Brink, 'Refining the Division of Competences in the EU: National Discretion in EU Legislation' in S Garben and I Govaere (eds), *The Division of Competences Between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 251.

[37] Recital 27 Regulation 2016/679 cit.

[38] Art. 8(1) Regulation 2016/679 cit.

[39] Art. 8(1) Directive 2011/93/EU cit.

[40] Art. 43(1) Regulation 2016/679 cit.

data may not be lifted by the data subject's explicit consent.[41] In these situations, the Member States can only implement the specified options. Yet another form of national discretion is provided by the GDPR: "Where the legal system of the Member State does not provide for administrative fines, this article may be applied in such manner [...]".[42] This is a form of what could be called restricted or qualified policy discretion. The provision is worded as a generally applicable form of discretion but it may only be invoked by a limited number of Member States: only those which are unfamiliar with administrative fines.

III. Using the potential: Member States' implementation

In line with its general EU implementation policy,[43] the Dutch legislator opted for a "policy neutral" implementation of the GDPR. The GDPR's discretionary provisions have been used to adhere to existing national law and policy choices. Where this was not an option, implementation provisions were adopted which substantively remained as close as possible to pre-existing laws.[44] The German and Irish legislators have not explicitly expressed their implementation strategies, yet in practice a similar approach is visible in which national regulatory traditions were preserved.[45]

The minimum harmonization provisions regarding offenses under the SAD have been implemented differently. Member States such as Ireland have created – much – higher maximum imprisonment sanctions than the minimum levels prescribed by the Directive. The offense of causing a child to witness sexual activities – for which the Directive prescribes a maximum term of imprisonment of at least one year – is in Ireland subject to a maximum imprisonment of 10 years. Other Member States have remained closer to the minimum required by the Directive. In the Netherlands, for instance, the maximum imprisonment term for causing a child to witness sexual activities is two years (still a year more than the Directive's prescribed minimum).

Art. 25 of the Directive concerns measures against websites containing or disseminating child pornography. This – in light of the growing risks of online child abuse and exploitation – crucial provision has been implemented quite differently by the Member States. The first part of this provision requires Member States to take measures for the

[41] *Ibid*. art. 9(2)(a).

[42] *Ibid*. art. 83(9).

[43] See further section 4.

[44] See, in Dutch, *Tweede Kamer der Staten-Generaal, Kamerstuk 34851 nr. 3, Regels ter uitvoering van Verordening (EU) 2016/679 van het Europees Parlement en de Raad van 27 april 2016 betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens en tot intrekking van Richtlijn 95/46/EG (algemene verordening gegevensbescherming) (PbEU 2016, L 119) (Uitvoeringswet Algemene verordening gegevensbescherming)- Memorie van Toelichting*, 14 December 2017, 14.

[45] P Gola and D Heckmann, *Bundesdatenschutzgesetz* (beck-online 2019); C Gusy and J Eichenhofer, *BeckOK DatenschutzR* (beck-online 2021) para. 1. See the explanatory notes in the General Scheme of Data Protection Bill (May 2017).

fast removal of harmful content on website. The Dutch implementation of the provision is based on a combination of a notice-and-take-down system (on the basis of which intermediaries are required to take down unlawful content) and a criminal law based arrangement on the basis of which Public Prosecutors and Examining Judges may decide to remove harmful content if automated searches generate child pornography on the Internet.[46] In Germany, voluntary cooperation agreements are in place between service providers, the Internet hotlines (INHOPE) and the police.[47] In Ireland, no specific legal provisions on removal of harmful content apply, but "a self-regulatory framework for internet service providers (ISP)" applies.[48] This framework consists of a national reporting centre, Hotline.ie, where anyone may report illegal online content.[49]

Art. 25 equally includes the option to block websites.[50] The original proposal included a mandatory requirement.[51] Especially the Dutch government pushed for making the provision optional. On the basis of earlier research, the Dutch government had concluded that the list of websites to be blocked would be rather small and the costs of a blocking requirement would be relatively high, especially in light of the benefits it would provide.[52] Moreover, such an obligation would not help as child pornography disseminators exchange pornography less via the internet and more via P2P networks.[53] Unsurprisingly, this optional provision has not been implemented in the Netherlands, but also other Member States – including Member States such as Germany – decided to leave the option unimplemented. [54] By contrast, Ireland decided to indeed adopt blocking measures. Effectiveness arguments were considered here as well, but other factors equally informed the Irish decision on this point. Such factors included the inspiration drawn from a comparable system of blocking websites applicable in the United Kingdom and the public awareness dimension of blocking websites.[55]

[46] Wetboek van Strafvordering (Dutch criminal procedure code) (2012) art. 125o; Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit.

[47] Missing Children Europe, ECPAT and eNACSO, *A Survey on the Transposition of Directive 2011/93/EU on Combating Sexual Abuse and Sexual Exploitation of Children and Child Pornography* (2015) www.enacso.eu 118; In 2020, the German legislature adopted a provision which allows the police to distribute virtual child pornography in order to infiltrate and achieve success in investigations on illegal content (Section 184b(5)(2) StGB).

[48] Communication COM(2016) 872 final report from the Commission to the European Parliament and the Council of 16 December 2016 assessing the implementation of the measures referred to in Article 25 of Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography' (2016) 9.

[49] Irish Internet Hotline, *Who are we* www.hotline.ie.

[50] Art. 25(2) of the Directive 2011/93/EU cit.

[51] P Jeney, 'Combatting Child Sexual Abuse Online' (2015) European Parliament www.europarl.europa.eu 42.

[52] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit. 25, 26.

[53] K Parti and L Marin, 'Ensuring Freedoms and Protecting Rights in the Governance of the Internet: A Comparative Analysis of Blocking Measures and Internet Providers' Removal of Illegal Internet Content' (2013) Journal of Contemporary European Research 138, 152.

[54] Communication COM(2016) 872 final cit. 10.

[55] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit. 25, 26.

The GDPR essentially allows the Member States to regulate two substantive issues: *i)* whether personal data may be processed in the public interest (the legal basis), and *ii)* whether the data subject rights are restricted in particular situations in the public interest (restriction of the data subject rights). The discretion is in both cases widely used by the Member States in their respective sector-specific legislation and supplemented by general provisions in the national data protection act. These national provisions, for example, in Germany allow the naturalisation authority to process sensitive data to determine whether someone pursues or supports endeavours that are a threat to the security of the country, which may be a reason not to grant citizenship.[56] Moreover, credit institutions may process personal data of their customers for the determination and consideration of counterparty defaults risks.[57] The Irish law allows the authorities to process personal data to verify data supplied by an applicant of a student grant, but also to record a person's educational history in order to ascertain how best he or she may be assisted in availing his or her full educational potential.[58] Furthermore, the national anti-doping organisation may process personal data for the detection, prevention and elimination of doping in sport.[59] And in the Netherlands, the ship manager is obliged by law to process personal data concerning health in order to determine whether the ship crew of the ships managed by him meet the legal requirements of physical and mental fitness.[60] Thus, this resulted in not one single provision that is adopted in national law, but in a variety of provisions, illustrating the impact of the GDPR. Yet, it should be kept in mind that many of these national provisions already existed, but only required editorial changes.

In practice, the discretion does not only allow the Member States to maintain the possibility to process personal data for their respective public goals, but in Germany also to uphold a systematic distinction between processing by private and public bodies. Such a systematic approach already existed in the German law and was, were possible, again adopted.

Enforcement of the GDPR is extensively regulated by the Regulation itself. In particular, the choice on the main type of enforcement, by supervisory authorities, is set. Nevertheless, some discretion is left to the Member States and this is used to accommodate enforcement within the national constitutional model. With most of the discretion on enforcement it is not the question whether the Member States make use of it, as it contains a regulatory mandate, but how. This leads to differences in various aspects, such as the details of the respective appointment procedures and accountability mechanisms and also the relative height of the authorities' budgets. Fundamentally, some core characteristics can be preserved in the Member States. Again, Germany plays a prominent role, as

[56] *Staatsangehörigkeitsgesetz* (Nationality Act) para. 31.
[57] *Kreditwesengesetz* (Banking Act) para. 10(2).
[58] Student Support Act (2011) section 28; Education (Welfare) Act [2000] section 28.
[59] Sport Ireland Act (2015) section 42.
[60] *Wet Zeevarenden* (Seafarers Act) (2018) art. 3.

the discretion allows them to maintain a decentralized model of enforcement, with supervisory authorities in each federated State.

IV. Alternative to differentiated integration?

IV.1. Real decision-making authority or decisions on details?

The potential of EU legislation (and its national implementation) to provide a balancing mechanism between unity and diversity may have been clearly illustrated in the previous sections. This does not necessarily mean, however, that differentiated legislation would be a convincing alternative to the classic forms of DI. Critics could argue that DI is simply a different ball-game: the sphere of high-level politics – where decisions are adopted which impact the very status of a Member State. By contrast, legislative differentiation may be seen as allowing the Member States to merely flesh out EU legislation in further detail, whilst the real political choices would still be reserved to the EU level. The question is thus whether differentiated legislation includes real decision-making power for the Member States to accommodate national diversity or whether it is instead limited to the more technical specification of general norms.

Obviously, national decisions not to take part in specific EU legislative acts (enhanced cooperation) or even to remain outside of complete or large parts of policy areas are fundamentally different from using the potential EU legislation offers to make it fit national contexts better. The political weight of national decisions on classic forms of DI is demonstrated both at EU level (*e.g.* in the conditions that need to be fulfilled for enhanced cooperation) and at national levels. With regard to the latter, this may even include referenda, as demonstrated *i.e.* by the recent call from the Danish prime minister to hold a referendum on scrapping the Danish opt-out from the Common European Defense Policy.[61] In line with referenda decision-making, decisions on opting in our out of certain policies involve in principle a binary choice. In this sense, the options available to the Member States in case of legislative differentiation are more diverse (in as far as they relate to different forms) and measured (in as far as Member States may have discretion to decide on the intensity of protection). This concerns a first and important qualification of the argument that legislative differentiation involves no real decision-making authority.

The second requires a more careful consideration of the question *at which level* the desire to balance unity against diversity is the most prominent and *which balancing mechanisms* are exactly considered preferable. In this context, the British Balance of Competence review is instructive. This requires some explanation as this exercise has by now been mostly forgotten and tragically failed to fulfil its purpose. It was meant to create a solid basis for the decision-making on the UK membership of the EU, but it is common

[61] The Guardian, 'Denmark to hold Referendum on Scrapping EU Defence Opt-out' (6 March 2022) The Guardian www.theguardian.com.

knowledge that it has been completely neglected in the discussions before and after the Brexit referendum. Yet, the exercise has been a thorough and balanced overview of the EU's activities and how these impact the UK. Moreover, in providing this overview, it has much to say on the desire to balance unity and diversity in the EU more broadly. First, the outcomes of the Review suggest a strong preference for balancing unity and diversity at the level of individual legislation. The report on the Single Market, for instance, displays a strong preference to remain part (especially in light of the benefits for the UK) and at some points (*e.g.* services) to integrate further. Some legislation in the field of the Internal market is seen as problematic, such as the Toys Directive and rules on chemical content in products.[62] Even with regard to the Working Time Directive, which has been the subject of such strong contestation in the UK and which diverges substantially from pre-existing labour laws in the UK, the ultimate conclusion is not that the United Kingdom should not have been part of that Directive. Rather the costs involved and the need for greater flexibility were voiced.[63] What this shows is that flexibility is a particular priority at the level of concrete legislation, especially in areas in which a level playing field is an important concern. Rather than opt-outs, this need for flexibility focuses on the actual content of EU legislation. This observation is not just based on the British Balance of competences Review but may equally be drawn from the Member States' application of policy discretion left by the GDPR and the SAD, as explained in the previous section. Thus, legislative differentiation may perhaps cater even better for the need to balance unity and diversity, both in terms of the appropriate level to do so and in terms of ways to provide flexibility.

There is also a strong – third – argument to be made against the view that legislative differentiation would be located in the technocratic domain rather than in the domain of political decision-making. The selected EU legislative acts have demonstrated that political decision-making – in the sense of balancing public and private interests – is a systemic element of implementing EU legislation, even in the case of the densely regulated GDPR. The decision in which circumstances data may be processed in the public interest is one of the main provisions of the GDPR. The SAD equally includes substantial policy discretion for the Member States; the cost/benefit analyses in terms of whether to include a competence to block websites which contain harmful content demonstrate the political nature of such decisions. Equally, the implementation of the minimum harmonization provisions on the offenses displays Member States' criminal policies, especially since the minimum imprisonment terms have been set at rather low levels by the Directive.

Having argued that legislative differentiation indeed involves real decision-making authority rather than nitty-gritty technical details, we should not close our eyes to the downsides thereof. Timely implementation may be more challenging to achieve if

[62] Her Majesty's Government, 'Review of the Balance of Competences between the United Kingdom and the European Union: The Single Market' (2013) assets.publishing.service.gov.uk 42.

[63] Her Majesty's Government, 'Review of the Balance of Competences between the United Kingdom and the European Union: Social and Employment Policy' (2013) assets.publishing.service.gov.uk 61, 62.

political decisions are at stake. The case studies have also indicated that certain forms of policy discretion may ultimately be detrimental to the achievement of the very aims of EU legislation. The GDPR has reduced the scope for political decision-making by the Member States compared to the Data protection Directive for this very reason. The evaluation of the SAD reveals a similar picture: the open-worded obligation to adopt preventive measures allows indeed for wide policy discretion but prevention is now seen as one of the weakest points of the current Directive. These are important downsides. They may to some extent be addressed, *e.g.* by considering longer implementation deadlines or by delineating national discretion better. For another part, these issues are a perhaps more inherent aspect of legislative differentiation. It can therefore certainly not be considered a magic potion to balance unity and diversity in the EU.

IV.2. Political decision-making or fitting the directive into pre-existing structures?

Strikingly, a significant part of the discretion offered by the SAD Directive has been used to keep existing national laws as much as possible intact. This is not only true for the provisions on maximum imprisonment sanctions for child abuse and child exploitation offences. In particular with regard to adjacent provisions of substantive criminal law, *e.g.* art. 8 on consensual sexual activities, the dominant implementation strategy equally was to retain existing national laws as much as possible. This is equally true for provision on the age of sexual consent (the age below which it is prohibited to engage in sexual activities with a child). This concerns a key aspect of the Directive as it defines its scope of protection but it is left to the Member States to define. The selected Member States have largely decided to simply apply their pre-existing substantive criminal laws on this point. The Directive has thus not provided a reason to reconsider the age of sexual consent. Consequently, major differences exist between Member States such as Germany where the standard age limit is set at 14 years, and Ireland (17 years of age). Moreover, some Member States have opted for diversified levels of protection (*e.g.* Germany for the category between 14-18).

Retaining pre-existing legislation can even constitute a general and official EU implementation policy. In the Netherlands, the Guidelines for Legislation prescribe the government to only adopt new provisions when this is strictly necessary for the correct implementation of EU legislation.[64] Thus, the strategy for the implementation of the SAD was to first identify provisions of the Directive which could be considered to have already been implemented by pre-existing national laws. The second focus was on provisions which could be implemented by non-legislative measures. Only in third instance, the parts of the Directive were identified which would require the adoption of new legislative provisions.

[64] See, in Dutch, Ministry of General Affairs, *Aanwijzing 9.4 van de Aanwijzingen voor de regelgeving Tweede Kamer der Staten-Generaal* (2022).

The implementation of the GDPR equally reflected the strategy to leave existing legislative structures as much as possible intact. The decision not to implement the provision on blocking websites is an example, as are the ways in which Member States have used the discretion offered by the GDPR to make sector-specific arrangements. The German approach to uphold a systematic distinction between data processing by private and public bodies equally demonstrates Member States' preferences to maintain past legislative choices. At the same time, these examples from the implementation of the GDPR show that legislative conservatism is not the only factor at play. The Dutch government had indeed put forward substantive objectives against adopting an obligation to block websites containing harmful content. Attributing the non-implementation of the facultative provision to legislative conservatism would thus be simply wrong.

How to assess this tendency to leave pre-existing legislative frameworks as much as possible intact? At first sight, it seems to reflect a technocratic rationale and not so much the national political decision-making space that would allow for a careful balancing of interests involved to "customize" EU legislation to fit the national context. Indeed, the strategy to leave existing laws as much as possible intact is actually aimed exactly at avoiding such national political decision-making and to limit recourse to legislative capacity as much as possible. The risk thereof is that it gives too little consideration to changing circumstances and to the more recent balance of political interests encapsulated in the EU legislative act that needs to be implemented.

Other arguments speak in favour of this strategy though. Indeed, accommodating diversity may very well include approaches which have already found their way into national legislation. Such divergent national approaches may indeed have created important arguments for legislative differentiation in the first place, *e.g*. as part of impact assessments and/or subsidiarity calculus. In such a view, existing national laws are already the expression of a specific balancing of different interests.

Moreover, it could be questioned whether the overall aim of differentiated legislation should necessarily be to enable national legislatures to make their own specific political choices. A broader aim would be to keep existing heterogeneity in the European Union as much as possible intact. Protecting heterogeneity as a result of incremental and long-lasting evolvement of regulatory systems, such as in the field of criminal policy, may be a valid objective of differentiated legislation. If we would indeed accept that differentiated legislation should serve broader aims than merely providing for national political decision-making space, its protective scope would include national constitutional structures as well. The enforcement discretion offered by the GDPR has prevented the regulation from impacting on the federal structures in Germany. This discretion is thus not enabling national political decision-making, but it rather serves to prevent difficulties in aligning the requirements of correct implementation with basic constitutional structures. From this perspective, legislative differentiation acquires a new objective which fits the EU constitutional framework well, especially art. 4(2) TEU of which it indeed may be seen as an expression.

Another observation that we have drawn from the case-studies is that the strategy of retaining existing regulatory frameworks may prove to be only a temporary strategy. This was illustrated by the current "re-implementation" process of the SAD in the Netherlands. The time pressure involved in the initial implementation may be an additional factor why Member States would prioritize a strategy of not changing existing laws if not absolutely necessary. A later redesign of the regulatory system is not subject to such time pressure, thereby enabling more space to make fundamental political choices.

All in all, the argument that legislative differentiation would be mainly a vehicle for legislative conservatism – and would thereby hardly be relevant from the perspective of balancing unity and diversity in the EU – should be heavily qualified.

V. Conclusions

In this *Article* we explored the potential of legislative differentiation as an alternative to more classic forms of DI. We established principled advantages of legislative differentiation, most notably the absence of effects on the balance between the Member States. Unlike other forms of DI, differentiated legislation respects the principle of equality between the Member States. Obviously, the protection of individual Member States' interests is very different under differentiated legislation. When the ordinary legislative procedure applies – which is so in the vast majority of legislative procedures – Member States have no veto power on EU legislation. They thus lack the power to ensure the flexibility that they seek in order to be able to "customize" EU legislation to fit the national context. Especially when the national context differs from the (qualified) majority of other Member States, such flexibility is by no means guaranteed. Under the more classic forms of DI, individual Member States' power is stronger. Both for the Treaty-based forms of DI and for enhanced cooperation individual Member States' choice to join or not is key. Moreover, the other Member States need to accept DI, either as opt-outs that need to be agreed upon (and ratified) by all Member States, or in the form of the unanimity requirement needed for the Council to agree on proposals for enhanced cooperation.[65]

Differentiated legislation lacks such guarantees but this gives it also greater flexibility. It has the potential to be applied across all areas of EU legislative competence.[66] Flexibility is equally offered as the sequence of adopting legislation allows for adjusting the balance between unity and diversity. In both cases, subsequent legislation has been more geared towards establishing a more uniform EU approach.

Differentiated legislation is, moreover, a multifaceted phenomenon. The status of being "in" or "out" is a core element of other forms of DI. Differentiated legislation is different in that it allows a measured approach to balancing unity and diversity. In other

[65] Art. 329(2) last sentence TFEU.

[66] Obviously, in the absence of EU legislative competence, *e.g.* because the EU acts not by way of legislation, legislative differentiation lacks potential to accommodate diversity.

words, it may include more or less far-reaching forms of flexibility for the Member States, depending on the need to come to a uniform approach at the EU level on the one hand and the obstacles, political preferences and existing differences at the national level on the other. Some provisions thus allow only for technical and marginal policy choices at the national level. Other provisions create much more scope for political decision-making (in the sense of balancing public and other interests) at the national level.

Moreover, the multifaceted nature of differentiated legislation is not simply a matter of degree but also of form. The case studies have demonstrated a great variety of forms beyond the classic form of minimum harmonization. This creates more variety in the ways in which unity and diversity may be balanced, than the rather binary approach of other forms of DI.

This *Article* has also highlighted that differentiated legislation certainly not always works well. At first sight, the cases demonstrated an apparent need to accommodate diversity as the implementation of the legislative acts differs quite much between the Member States. Whether the balancing between unity and diversity is optimal is another issue. The fundamental transformation of the old Data protection Directive into the GDPR and equally the current discussion on the effectiveness of the preventive measures of the SAD demonstrate that diversity – both in terms of the EU legislature allowing for flexibility and the Member States using that flexibility to come to different legislative outcomes – may result in sub-optimal outcomes. However, it is equally important to observe that legislative differences should (no longer) be considered as inherently problematic. EU legislation has been presented in this article as what could be called a "diversity management mechanism",[67] which suggests that national diversity is indeed an inherent aspect of EU legislation. Moreover, the legislative dynamics at work in both cases ensure that balancing unity and diversity is not the product of a single decision but may be adjusted over time. This includes not just the EU legislature but the national level too.

Legislative differentiation fits well in the Commission's scenario according to which greater diversity could be a model for the future of the EU. The cases indeed demonstrated the potential thereto, although in practice sub-optimal results have been seen as well. In relation to more classic forms of DI, differentiated legislation can indeed create a meaningful alternative. Compared to enhanced cooperation, differentiated legislation has hitherto been quite invisible and, consequently, less structured. Enhanced cooperation requires an extensive decision-making process and must fulfil strict requirements. Differentiated legislation seems more "learning-by-doing". Making the motives for diversity explicit, as well as how these translate into space for national political decision-making could lead to a more structured approach and could further enhance the potential of differentiated legislation.

[67] M Avbelj, 'Differentiated Integration: Farewell to the EU-27?' (2013) German Law Journal 191, 209.