1. Introduction: balancing unity and diversity in EU legislation

Ton van den Brink and Virginia Passalacqua[1]

1 INTRODUCTION

In 2000, 8,000 young people adopted what soon after became the EU's motto: United in diversity. This motto was even codified in the EU Constitution, adopted in 2004. Even though none of the symbolic elements made it into the Treaty of Lisbon, it is still considered the EU's official motto.[2] It is taken to mean that "Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages." Unity is perhaps best captured by the continent's common currency and, arguably to a lesser extent, by the notion of EU citizenship. But as a union that is first and foremost built on the rule of law and the idea of integration through law, EU legislation represents an equally powerful force to symbolize unity in the EU. It is the notion that the same rules apply across the EU, enabling cross-border activities, ensuring an equal level of protection to citizens as well as quality of Member States, and creating a European "regulatory space" that is distinct from the outside world. As such, it brings about associations with uniformity, ever deeper levels of integration and full enforcement of the agreed rules by courts and administrative authorities.

In this sense, it may come as a surprise that we take the slightly adapted motto (Unity and Diversity, rather than Unified in Diversity) as the title of a book that deals with EU legislation. Does the adoption of EU legislation not

[1] While the present chapter is the result of a joint intellectual effort of the authors, Ton van den Brink has written sections 1, 3.1, 3.2, and 3.3, and Virginia Passalacqua sections 2, 3.3, 3.4 and 4.

[2] European Union, 'Principles, Countries, History: Symbols: EU Motto' Directorate-General for Communication (Brussels 20 January 2000) <https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en> accessed 14 July 2023.

exactly mark the transition from diversity to unity? Is the choice to adopt rules at the EU level not indicative of how diversity no longer works in a given area or regarding a specific issue? Another question might be why we focus on *legislation* rather than on other aspects of EU law, such as treaty law and case law. Or perhaps on newer aspects of EU law such as the administrative authorities, the networks they participate in, soft law measures, etc. Legislation is perhaps a bit too much of a classic element of EU law, one which perhaps does not raise key challenges from a legal perspective, or not anymore.

Our claim is first that EU legislation is a key aspect of EU law that deserves more – cross-sectoral, comparative – scholarly attention, especially in light of the fundamental transformation the EU's legislative function has undergone in recent times. Second, we consider that the adoption of EU legislation does not mark a definite choice between unity and diversity in favour of the former. Rather, the choice to adopt legislation at the EU level marks the beginning of a balancing act between EU unity on the one hand and diversity among the Member States on the other. It is both the choices of the EU legislature in designing legislation and the Member States' choices in dealing with such legislation that determine the final outcome of that balancing act. In this sense, we view unity and diversity not as a dichotomy, but rather as a gliding scale – or perhaps even a richer relation between the two would be imaginable.

EU legislation, and the EU legislature, have fundamentally transformed in the last decades, a transformation which has only limitedly been addressed and understood by existing scholarship. This transformation can be characterized as the EU legislative power reaching maturity. The Treaty of Lisbon has enhanced the role of the EU Parliament in the ordinary legislative procedure, and the latter is now the main procedure for law-making in the EU. However, the signs of the EU legislature reaching maturity are not merely institutional but also substantive in nature. Indeed, in fields ranging from environment to migration and agriculture, it becomes evident how EU legislation is more and more the result of complex balancing of conflicting public interests and of redistributive choices. And finally, this more political legislature witnesses at the same time, somewhat paradoxically, a growing importance of policies to promote the rationalizing and professionalizing of EU legislation, such as better lawmaking.

This transformation has added a new layer of complexity to a tension that has already long been a prominent feature of EU legislation: the tension between EU unity and national autonomy. This tension "between the whole and the parts, centrifugal and centripetal forces", characterizes all federal

systems, and the Union is no exception.[3] But the transformation of the EU legislature has altered the balance between the need to effectively address issues at the EU level and the desire to accommodate national policy preferences and legal diversity. This rebalancing is not based on a fundamental redesign of EU/Member State relations, but is rather shaped in pragmatic, piecemeal and gradual ways.[4] To understand this dynamic, traditional "top–down" analyses of EU law-making are of little use; but also the more promising "circular view" on EU legislation, despite being more adequate to reflect the spirit of the current better lawmaking strategy, may reveal only part of the picture. In this book, we advocate for a different understanding of the actual practice of EU legislation, which is much less structured and much more incremental than scholars' usual accounts, thus reflecting the different tensions, interests, and institutions that shape legislation. This requires looking beyond the constitutional structures of the EU and assessing legislative strategies and practices at the EU and national levels alike. Such legislative complexity equally requires assessing the interplay between legislative procedure and legislative content.

This volume thus seeks to unravel the precise nature of the legislative transformation in the EU, the conceptual questions it gives rise to, and the normative assessment it invites. In particular, it asks: How are unity and diversity accommodated, and balanced, in legislation in the EU? What are the effects thereof (including in terms of national implementing strategies that are adopted)? Which factors impact the choices that national and EU legislatures make in this regard? Which conceptual and normative issues arise as a result and how are these addressed?

These core questions require analysing legislation as a composite concept that explicitly encompasses both the supranational and the national legislative level, acquiring the status of "shared legislation". Importantly, such a conceptualization of legislation should not only include an institutional dimension (embodied by, e.g., the requirement that directives need to be transposed into national law), but also a substantial and political one. Indeed, implementing EU legislation entails substantive policy choices to be made at the national level; for instance, the Tobacco Products Directive gives the Member States the possibility to decide whether to introduce the obligation of plain packaging for tobacco products (see Chapter 11 by Vincent Delhomme) and the Mortgage Credit Directive leaves governments substantial leeway in choosing which type of sanctions to impose (see Chapter 7 by Jan Biemans). Thus, the legal

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[3] J Weiler, 'The Community system: The dual character of supranationalism' [1981] Yearbook of European Law (1) 268.

[4] Subscribing to the central claim of the book by F Bieber and R Bieber, Negotiating Unity and Diversity in the European Union (1st edn Palgrave, London 2021).

position of citizens and businesses in the EU is the result of a deeply combined, or shared, regulatory framework, which importantly differs according to the implementation choices adopted at the national level and that sometimes can even degenerate in harmful divergence between Member States (see Chapter 8 by Matteo Gargantini). To explore this substantive dimension, this volume assesses concrete legislative choices and strategies and analyses how other actors, most notably the Court of Justice (CJEU) in its interpretative role (see Chapter 9 by Małgorzata Kozak) but also private actors (see Chapter 10 by Willem Janssen), impact the substance of such shared regulatory frameworks.

This volume explores what legislative strategies have been adopted across various fields of EU law and policy to shape unity and diversity, and the practical and conceptual issues these bring along. For example, are the classic harmonization concepts still adequate to capture the EU's contemporary legislative practice (Chapter 2 by Sybe de Vries)? What is the role of the CJEU in balancing unity and diversity in EU legislation and in balancing the EU and national dimension of legislation (Chapter 12 by Dorin-Ciprian Grumaz)? What is the impact of newer legislative strategies and institutions, such as those provided for in the European Monetary Union field (Chapter 5 by Cristina Fasone)? With a broad set of academics from every corner of EU law that brings together insights from different sectors and different Member States, this volume widens and deepens our understanding of the current state of legislation in the EU. It offers critical reflections based on thorough analyses and it challenges common understandings and assumptions on EU legislation.

2 THE EU COMPOSITE LEGISLATIVE FRAMEWORK

Traditionally, EU legislation has received surprisingly little attention in EU scholarship. While single pieces of legislation, or subsequent legislative acts, are analysed in depth and at length, we lack studies that deal with EU legislation in a systematic way. Over the last decade, it has been rather alternative modes of governance, such as the open method of coordination[5] and the rule-making authority of EU agencies, that has attracted much attention.[6] EU law scholarship – traditionally more focused on the role of the EU Court of

[5] C Radaelli, 'The Open Method of Coordination: A new governance architecture for the European Union?' [2003] 1 Swedish Institute for European Policy Studies Report.

[6] See A Brenninkmeijer and M Scholten, 'Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order' [1st edn Palgrave, London 2020]; J Pollak and P Slominski, 'The Role of EU Agencies in the Eurozone and Migration Crisis. Impact and Future Challenges' [1st edn Springer Nature Switzerland AG, Cham 2020];

Justice – discovered these topics soon after public administration scholars and political scientists did. Other scholars have started to develop an interest in the role of, e.g., private actors in regulatory processes, such as standardization processes.[7]

Keleman has compellingly argued that alternative modes of governance are – still – in fact no more than peripherical phenomena in EU governance.[8] As the production of legislation thus remains the single most important task of the EU, one would expect this theme to enjoy abundant scholarly attention. Indeed, some aspects thereof have by now been extensively analysed. The full spectrum of better lawmaking policies (especially the legitimacy and effectiveness of impact assessments) has not been short of extensive research. In particular in political science and public administration scholarship, the procedural and institutional dimensions of EU legislation have been extensively studied. Also, legal scholars have adopted this research approach, post-Lisbon, especially with regard to the role of national parliaments. The implementation of EU legislation has equally, albeit to a much lesser extent, been examined from institutional perspectives. Although the view has been gaining traction that the EU legislative process should be characterized as a policy cycle (according to which implementation experiences feed into new legislative rounds at the EU level), the national and EU levels remain understood as fundamentally distinct. In any case, these types of research reveal little about the actual substance of legislation and its underlying legislative strategies. Conceptual work on EU harmonization – which indeed addresses the impact of EU legislation on national legal orders – seems no longer up to date. The introduction of the new approach in legislation sparked considerable academic interest for more than a decade,[9] but it dried out around the turn of the century. Perhaps the most

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E Chiti, 'European Agencies' Rule-making. Powers, Procedures, and Assessment' [2013] 19 (1) ELJ.

[7] See e.g. P Delimatsis, 'The Law, Economics and Politics of International Standardization' [2015] CUP; M Eilantonio and C Cauffman, 'The Legitimacy of Standardisation as a Regulatory Technique. A Cross-disciplinary and Multi-level Analysis', [2020] Edward Elgar; M de Cock Buning and L Senden, 'Private Regulation and Enforcement in the EU: Finding the Right Balance from a Citizen's Perspective', [2020] Hart Publishing.

[8] D Keleman, 'Eurolegalism: The Transformation of Law and Regulation in the European Union', [2011] Cambridge, MA: Harvard University Press.

[9] P Slot, 'Harmonisation' [1996] 21 (5) ELR; J Pelkmans, 'The new approach to technical harmonization and standardization' [1987] 25 JCMS, 249; N Burrows, 'Harmonization of technical standards: Reculer pour mieux sauter?' [1990] 53 MLR, 597; A McGee and S Weatherill, 'The evolution of the Single Market – Harmonization or liberalization' [1990] 53 CMLRev, 578. M Dougan, 'Minimum Harmonization and the Internal Market' [2000] 37 CMLRev, 853.

seminal work of that time has been the edited volume by Harlow and Craig: *Law Making in the European Union* (1998).[10] This extensive volume explored the democratic foundations of EU legislation; the role of key actors and their interaction; and the techniques of national implementation and the problems associated therewith. Substantive legislative and implementation strategies are being discussed as well, but only indirectly.

Thus, legislation in the EU – especially as a composite notion – has remained a widely underexplored phenomenon, despite its pivotal role in EU integration. By focusing on balancing unity and diversity, this book offers a novel approach that is able to shed light on the complexity of EU legislation as a composite process. As Eleftheriadis noted, "[t]here is no single set of constitutional principles that determines the application of EU law by the member states," but each state has its own national rules that determine the incorporation and enforcement of EU law into the national legal system; this crucially means that "the structure of EU law is very much like the structure of international law: dualist, not monist."[11] Understanding the EU as a composite constitutional system means overcoming the multilevel notion that locates the EU and the Member States on two parallel tracks, on two separate levels, or on two hierarchically ordered systems. The idea of different levels hardly describes the reality of the EU constitutional legal order, which is rather that of a "composite whole", where "[t]he one part cannot function without the other, and the various components keep on another in balance within the constitution of the totality which includes those of the component parts."[12]

Notably, the composite nature of EU law does not emerge only during its transposition and enforcement by the Member States. As van den Brink and Hübner noted, "EU legislation does not necessarily end diversity" but can instead be the starting ground for a less visible form of differentiated integration.[13] The single norms that compose EU law are often the result of difficult negotiations among the Member States' governments, which require a careful balance of different national interests. Although the EU constitutional system has lost much of its intergovernmental character, to leave space for supranational institutions and approaches, national interests have far from abandoned the scene and they often are the only lens through which we can

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[10] P Craig and C Harlow, 'Lawmaking in the European Union,' [1998] Kluwer Law International.

[11] P Eleftheriadis, 'The Structure of European Union Law' [2010] 12 CYELS, 121.

[12] Leonard F. M. Besselink, *A Composite European Constitution* (2007) Europa Law Publisher.

[13] T van Den Brink and M Hübner, 'Accommodating Diversity Through Legislative Differentiation: An Untapped Potential and an Overlooked Reality?' [2022] 7 (3) European Papers, 1193.

fully appreciate and understand the rationale that led to the adoption of certain EU provisions.

3 EU LEGISLATION: THE CONCEPTUAL FRAMEWORK

Understanding EU legislation as a composite notion means that we need to look at both the EU and the Member States to fully grasp its essence. This is why the tension between unity and diversity is the central theme of this book, as it allows us to analyse EU legislation as the forum where unity and diversity are constantly (re)negotiated.

Especially at the origin of the European project, "disunity" was feared by EU institutions and fiercely fought by the Court of Justice, which saw it as an existential threat.[14] But if we look at EU legislation with a more realistic view, we will see that it could never escape a certain degree of legislative freedom for the Member States.[15] Such legislative freedom can come in different forms, as a derogation provided by the treaties, as a form of harmonization, or as a type of differentiated integration. But while differentiated integration is often used to denote a situation where EU law does not apply to one or more Member States because of a formal exemption (also called opt-out),[16] this book is rather concerned with a different phenomenon, that is, when EU secondary legislation in principle applies equally to all the Member States, but in practice displays different legal effects. As de Witte notes, although this territorial differentiation in the application of EU legislation has become a defining feature of the EU, "such frequent renunciation to the uniform application of common norms is rare in unitary states and even in federal states".[17] In the next subsections, we will provide the definition of the key concepts that describe some

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[14] B de Witte, 'The law as a tool and constraint of differentiated integration' [2019] 47 EUI Working Papers RSCAS.

[15] T 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 (Modern Studies in European Law, Hart Publishing, Oxford 2017), 251–257.

[16] T Duttle, K Holzinger, T Malang, T Schäubli, F Schimmelfennig and T Winzen, 'Opting out from European Union legislation: the differentiation of secondary law' (2017) 24 (3) Journal of European Public Policy, 410. For a distinction between differentiated integration and other forms of flexibility, see A Miglio, *Integrazione Differenziata e Principi Strutturali dell'Ordinamento dell'Unione Europea* (Giappichelli 2020), 9.

[17] B de Witte, 'Variable geometry and differentiation as structural features of the EU legal order' in B De Witte, A Ott and E Vos (eds), *Between flexibility and disintegration: the trajectory of differentiation in EU law* (2017 Edward Elgar).

of the forms that such national differentiation can take; they will be a useful toolkit to understand the case studies developed in the chapters of this volume.

3.1 National Discretion

National discretion refers to the space for substantive policy choices for national legislatures that directly flows from EU legislation. The EU legislature may deploy different strategies to offer Member States discretion. Minimum harmonization instead of full harmonization may be the best known, but other strategies may be used as well, such as leaving the definition of key terms to the Member States, offering them the choice between two or more alternatives, or permitting derogations from common EU rules (e.g., on the grounds of other compelling interests such as national security). National discretion may be an explicit and conscious choice of the EU legislature, e.g., informed by subsidiarity and proportionality considerations. It may, however, also be simply the effect of the EU legislature not being able to come to a more concrete or more encompassing agreement on the topic concerned.

As national discretion refers to the *substantive* freedom of choice for Member States, the concept does not fully align with the dichotomy between regulations and directives, whereby the latter instrument would by definition include Member State discretion. The legislative practice, validated by the CJEU, demonstrates that directives should not necessarily offer the Member State discretion.[18] Conversely, regulations may not offer a complete regulatory system at the EU level but may still leave elements to be regulated at the national level.

National discretion in EU legislation should be clearly distinguished from the freedom for individuals to make choices within the framework of EU legislation. This has been, e.g., the issue addressed in cases such as *Gallaher* in which the question was whether the packaging requirement for tobacco products was intended as a minimum norm for tobacco producers (which could decide to dedicate a larger part of packages to warnings on dangers to health) or for Member States.[19] This issue draws our attention to the sometimes difficult task of identifying and delineating national discretion in EU legislation.

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[18] Case 38/77 *ENKA v Inspecteur der Invoerrechten* [1977], at 17 ECLI:EU:C:1977:190.

[19] Case C-11/92 *Gallaher* [1993] ECLI:EU:C:1993:262.

3.2 Harmonization

The concept of harmonization has been developed in the context of the internal market. Harmonization, or the approximation of laws, is a method of achieving the objectives of the internal market by legislating at the EU level. It involves legislation that combines the aim of removing the obstacles to the free movement of goods, services, workers, and/or capitals with the protection of other public interests. These other public interests could otherwise continue to provide obstacles to the functioning of the internal market, as the Member States could successfully invoke them to justify national legislation or measures that make free movement more difficult.

Harmonization is a synonym for *positive integration*. This latter concept is then contrasted with *negative integration*, which denotes the achievement of the internal market objectives through the invocation of directly effective treaty provisions to set aside incompatible national norms/practices. Negative integration, thus, does not require legislative intervention at the EU level. In Slot's famous article on harmonization, positive integration could still be qualified as "supplementary" to the apparently prevalent negative integration. Today, when the internal market involves such a plethora of policy objectives, this position seems increasingly difficult to maintain, both for normative[20] and for practical[21] reasons. Still, the interaction between positive and negative integration remains relevant (e.g., which obstacles may be removed on the basis of the treaty provisions, and for which obstacles legislation is necessary).

In the meantime, however, harmonization is no longer confined to the internal market, but has become a more general legislative strategy to achieve EU policy objectives and is applied in many areas of EU law. The link between those objectives and the internal market aims is much weaker or even wholly absent in those areas. Moreover, they may lack a similar dynamic between directly effective treaty norms and EU legislation altogether.

In legal doctrine, not all legislative action aimed at achieving internal market objectives has been qualified as "harmonization". The concept of harmonization, or approximation of laws, has been developed to be distinguished from the situation in which EU legislation would result in *unification*. Whereas harmonization would result in national regulatory frameworks converging, unification would indicate the replacement of national laws by a uniform law at the EU level. The dichotomy seemed particularly relevant in light of what

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[20] See the 'Utrecht school' on internal market research, presenting the internal market as an area in which the protection of a multitude of public interests comes together.

[21] The internal market is more and more shaped through legislation, see e.g. the new challenges of digital transformation and sustainability.

is now Article 114 TFEU allowing for approximation of laws only. The CJEU has, however, taken a flexible approach toward the use of this provision, allowing, e.g., the EU legislature to apply the provision for the adoption of regulations setting up agencies and regulating their powers. Such legislation has indeed little to do with bringing national laws closer together. The dichotomy between unification and harmonization is further impacted by the legislative practice. Even if a measure would lead to a uniform regulation at the EU level, it may still result in harmonizing effects. The regulation may, e.g., be limited to setting substantive standards only; it may still lead to harmonization if national enforcement would converge as a result of the regulation.

3.2.1 Minimum, maximum, partial and total harmonization

In legal doctrine, a typology of harmonization methods has been developed. The central element of that typology concerns the distinction between minimum and maximum harmonization. *Minimum harmonization* is the legislative strategy to merely set a floor in terms of the minimum standards the Member States (and thereby individuals) should comply with. The Member States have the freedom to introduce or maintain stricter standards, meaning that they can protect the public interest involved in a more intensive way. *Maximum harmonization* (also known as full or total harmonization), by contrast, is the EU legislative strategy whereby the substantive standards are fully designed at the EU level. Member States are prohibited from introducing stricter standards. Thus, both the "floor" and the "ceiling" are set by the EU. To avoid confusion, the qualification of a measure as maximum harmonization does not automatically mean the Member State loses all discretion. Maximum harmonization measures may, e.g., still include open norms, give Member States policy options, and/or leave enforcement discretion completely intact.

Maximum harmonization should not be confused with *exhaustive harmonization*. Unlike maximum harmonization – which refers to the intensity of regulation – exhaustive harmonization refers to the *scope* of harmonization. It indicates that all aspects of the topic have been regulated by the EU; in Slot's words, the issue of exhaustion concerns the question of whether EU law exhaustively occupies the field.[22] Thus, exhaustive harmonization says nothing about the intensity of the standards adopted (which may indeed be minimum and/or maximum harmonization). A disclaimer is due. The CJEU does not

[22] Slot (n 8), 382.

follow this terminology rigorously. In a case on the Shoes Directive, we find a consideration that reads as follows:

> a combined reading of Articles 1 and 4 of, and Annex I to, Directive 94/11 indicates that the directive does not set out minimum requirements as regards the labelling of the materials used in the main components of footwear, but rather exhaustive rules. Member States are *therefore* not entitled to adopt more stringent requirements (emphasis added).

Here we see the Court's analysis being based on what we qualified as maximum harmonization above.

Exhaustive harmonization is contrasted with the concept of *partial harmonization*, which denotes the EU legislature only regulating certain aspects of an issue (but see below for a different definition and use of the term).[23] This is, for instance, explicitly the case for the Tobacco Products Directive.[24] Article 1(b) of the directive states that the measure only seeks to approximate national standards in relation to "certain" aspects of the labelling and packaging of tobacco products.[25]

Thus the dichotomies shown in Figure 1.1 may be established.

Optional harmonization provides *producers* (rather than Member States) with an option to comply with the EU standards laid down in the optional harmonization instrument or to remain compliant with national standards. Thus, by adhering to the EU standards, producers or service providers operating internationally get access to the internal market, whereas local market players do not need to take over the EU rules when they are only active domestically.[26] This saves them from possibly having to change their production processes. In this context the term *partial harmonization* is sometimes used, which equally

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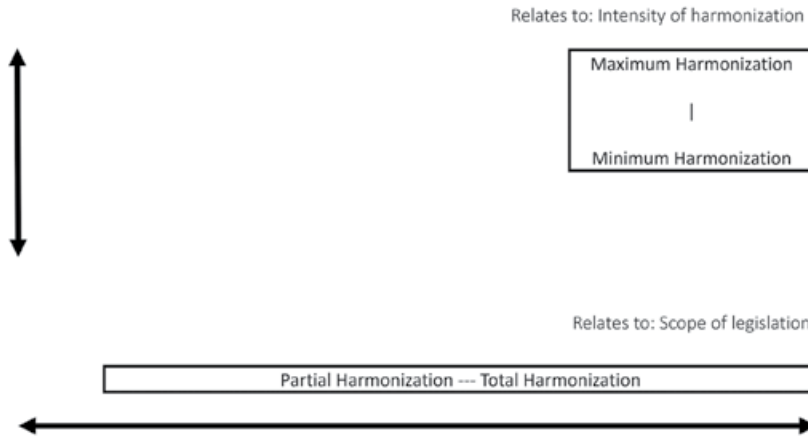
[23] Authors that use the term partial harmonization in this way include Vos and Hancher: E Vos, 'Differentiation, Harmonisation and Governance', in: B de Witte, D Hanf and E Vos (eds.), The Many Faces of Differentation in the EU, (Intersentia Publishing, Mortsel 2001), 149; L Hancher, 'The European Pharmaceutical Market: Problems of Partial Harmonization' [1990] 15 (9) ELR, 13.

[24] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

[25] Recitals 47, 48, 53, 55 equally point at the partial harmonization character of the Directive: J Weinzierl and J Weissenmayer, 'News from Minimum Harmonisation: How the Tobacco Advertising Cases Shape the Law of the Internal Market' (European Law Blog, 10 April 2016) <https://europeanlawblog.eu/2016/10/04/news-from-minimum-harmonisation-how-the-tobacco-advertising-cases-shape-the-law-of-the-internal-market/> accessed 14 July 2023.

[26] Slot (n 8), 38.



Source: Authors' own elaboration.

Figure 1.1 Different types of harmonization

distinguishes two regulatory regimes. In this case, however, compliance with the EU standards is mandatory for producers that are cross-border active. Needless to say, it is rather unhelpful to have the term partial harmonization being used to describe a completely different phenomenon. However, as partial harmonization is more common in its meaning as a contrast to exhaustive harmonization – and moreover better fitting the purposes of our book – we will use it in this sense.

3.3 Proceduralization

Proceduralization is a legislative strategy that has at least three meanings. First, and most importantly for the purposes of our volume, proceduralization refers to the EU legislative strategy to regulate national decision-making processes. Examples are to be found in the area of EU environmental law. The Environmental Impact Assessment Directive is a good example. Rather than setting substantive environmental standards, the directive requires that individual projects that are likely to have significant effects on the environment (such as a dam, motorway, airport or factory) are made subject to an environmental assessment prior to their approval or authorization. Important aspects of the Energy Efficiency Directive concern national decision-making on the energy efficiency of buildings, and the EU Emissions Trading System (EU ETS) is equally concerned with decision-making provisions. In the field of EMU, the legislation establishing the European Semester introduces a system of joint

decision-making on economic policies between EU and national institutions. In our book, we distinguish this type of legislation from other legislative strategies which are predicated on substantive norm-setting. Indeed, our claim is that the existing categories of minimum, total harmonization, etc, fit badly to these forms of proceduralization.

The second meaning of proceduralization is the EU legislature's (or CJEUs') strategy to include provisions that set procedural standards for EU (judicial) enforcement, thus introducing a partial and functional harmonization of the procedural laws of the Member States.[27] In these cases, in addition to setting substantive standards, the EU legislature also regulates aspects of national criminal, civil or administrative procedures. This rather new trend comes from the realization that setting substantive norms in itself may be insufficient to achieve EU policy objectives, thus we increasingly witness EU legislation that in part or fully deals with national remedies and procedural law issues. This can equally be viewed as a broader trend (e.g., manifested in the better lawmaking policies) or to better integrate enforcement in regulatory policies (see for instance the anti-discrimination directives that contain provisions on the shift of the burden of proof or on the legal standing of civil society organizations).[28] Especially in light of its intricate relation to the principle of national procedural autonomy, the harmonization of national procedural law entails a specific legislative strategy. We recommend referring to this form of proceduralization as "harmonization of national procedural law".

The third, and perhaps most restricted, meaning relates to the procedural requirement for Member States to notify technical regulations standards to the Commission prior to adopting them. The basis for this obligation lies in the Notification Directive (Directive 2015/1535). We suggest simply referring to "notification" when discussing this specific obligation.

3.4 General Principles, Open Norms, Open Textured Norms

General principles of law occupy a special place in the EU legal order. Together with the treaties and the Charter, they are considered part of the primary law of the Union. As such, the CJEU relies on general principles to interpret and review the legitimacy of EU legislation, norms, and acts. Remarkably, most of these general principles are the result of the CJEU's case law: the Court has first drawn on international and national common legal traditions to

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[27] M Eliantonio and D Muir, 'Conclusions on the "Proceduralisation" of EU Law Through the Backdoor' [2015] 8 (1) Review of European Administrative Law.

[28] E Muir, 'Pursuing Equality in the EU', in D Chalmers and A Arnull (eds) The Oxford Handbook of European Union Law (OUP, Oxford 2015).

identify widely shared principles of law, and then it has given them a distinct EU meaning. Prominent examples of such general principles are subsidiarity, proportionality, the autonomy of EU law, effectiveness, equality, etc. Notably, every legal order has its own general principles, including the legal order of the Member States; this means that sometimes national lawmakers and courts might interpret EU legislation in light of their own national principles, giving rise to possible conflicts (think of the case of *Taricco* on the definition of the principle of legality in criminal law) or to possible divergent interpretations.

A different concept is that of open norms, which are norms characterized by their open texture. These terms refer to legal provisions characterized by their vagueness and undetermined nature: they are susceptible to multiple interpretations and can mean different things in different contexts. We have examples of open norms both in national and EU law: think of legal formulas such as "standard of care", "adequate conditions", "due diligence", etc. The use of open norms can be very convenient for the EU legislature when it needs to leave some discretion to national implementing authorities, either because of a deliberate choice or a lack of agreement between the Member States during the negotiations. The adoption of open norms in EU legislation gives rise to elaboration discretion, i.e., the possibility (and sometimes even the obligation) for Member States to further flesh out EU legislation in national provisions.[29] Moreover, the use of open texture rules inevitably leads to increased discretion for judicial authorities when interpreting them, including the CJEU. The convenient reliance on open norms was well encapsulated by Neil Walker: "[f]ramework texts, even the relatively detailed codes of successive EU treaties, allow a degree of open texture. In so doing they lower the bar of prerequisite consensus and allow judicial adaptation of the text to changing conditions without new resort to the drawing board."[30]

4 STRUCTURE OF THE BOOK

This book tells the story of how the drives towards unity and those towards autonomy meet, collide, and balance each other within the legislation of the European Union. The beginning of the book is marked by the chapters that address the traditional principles and tools through which legislation in the Union has accommodated diversity, such as harmonization and derogations.

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[29] T 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 (Bloomsbury Publishing, London 2020).

[30] N Walker, 'The Philosophy of European Union Law' [2014] 29 University of Edinburgh School of Law Research Paper, 21.

De Vries in Chapter 2 lays out the historical evolution of the internal market integration and of the main harmonization techniques, assessing how their use has changed over time, especially vis-à-vis recent societal challenges, and observing that Article 114 has been an excellent basis to regulate non-economic interests, going well beyond the canonical abolition of free trade barriers. De Vries argues for a more pluralist narrative of EU legislative harmonization, while the predominantly market-based, neoliberal vision of the internal market of the 1990s has become outdated. In Chapter 3, Groussot and Petursson analyse how harmonization and the balance between unity and diversity have changed in recent years. The chapter asks whether the balancing of national and EU interests has taken new forms due to recent technological innovations and to the adoption of the Fundamental Rights Charter, with a special eye on the CJEU. Nicolosi in Chapter 4 analyses the topical issue of emergency legislation. His chapter offers an analysis of the "European Emergency Constitution", namely the set of provisions expressly dealing with emergencies or crises that often require urgent legislative responses; by the analysis of two case studies, namely the financial and economic crisis and the ongoing migratory pressure, Nicolosi identifies the legislative instruments used and how they balance different institutional interests and powers. Fasone, in Chapter 5, engages with the analysis of the balance between unity and diversity by looking at the implementation of EU legislation posing institutional obligations for Member States. She draws on the case of independent fiscal councils, whose setting-up reveals important challenges and tensions.

The following three chapters are more detailed case studies on three different EU norms, which they discuss with a more critical take towards diversity. Chapter 6, by Duivenvoorde, addresses the Unfair Commercial Practices Directive by focusing on two aspects that amplify discretion for the Member States: first, its uneasy relationship with the directive's heavy reliance on open norms; and second, the tension between maximum harmonization and the strong tradition of advertising self-regulation in some EU Member States. Chapter 7, by Biemans, deals with the Mortgage Credit Directive and argues that discretionary choices left to the Member States on how to implement a directive, e.g., regarding sanctions to be adopted or the meaning of open norms, can hamper harmonization. Chapter 8, by Gargantini, provides examples of and reasons for divergences in the field of capital markets law and of their actual consequences on harmonization. In addition, this chapter investigates to what extent the Capital Markets Union can deliver a truly integrated market within the current regulatory and supervisory architecture, and what improvements can be made.

The Court of Justice's adjudicatory role is at the centre of Chapter 9 by Kozak. Here she analyses the role of the Court in respect of private enforcement of competition law within the European Union. The chapter discusses

the balance between the CJEU acting in its capacity of judicial "harmonizer" and the principle of national procedural autonomy, one of the key sources of diversity in EU application. Janssen, in Chapter 10, provides an understanding of national legislative discretion as opposed to executive discretion within the context of EU public procurement law. He analyses how they are shaped at present and argues that the legislative proposals of the EU Green Deal will introduce great changes, including in the field of public procurement.

Chapters 11 and 12 deal with the regulation of tobacco products, but from two different angles. Delhomme in Chapter 11 argues, through the case studies of plain tobacco packaging and front-of-pack nutrition labelling, that regulating lifestyle risks at the EU level raises a number of challenges and questions. In particular, he focuses on the compatibility of flexible modes of harmonization and minimum harmonization, asking whether the two are compatible with the internal market treaty provisions. In Chapter 12, Grumaz instead brings our discussion to the international level: he analyses what role the Framework Convention on Tobacco Control recommendations, adopted by the International Health Organization, played in influencing the EU legislative process in adopting Directive 2014/40 EU. The chapter first assesses the preparatory work and the content of the directive, and second the reception by the Court of Justice on the external commitments under international law.

Phoa, in Chapter 13, examines the history of the Common Agricultural Policy to assess how much diversity it allows. The recent reform, on the one hand, grants Member States more leeway in its implementation because of the introduction of the national strategic plans. However, the cross-compliance requirements, such as the EU Green Deal, may curtail this flexibility.

The last chapter of the volume draws on the findings of the preceding chapters to derive some general conclusions and provide some suggestions for the future.