



# EUROPEAN POLICY BRIEF



## GLOBAL RE-ORDERING: EVOLUTION THROUGH EUROPEAN NETWORKS

The EU and transnational regulation: Extending experimentalist governance?

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### INTRODUCTION

What is the relationship between innovative developments in EU internal governance and the Union's expanding role in transnational regulation?

As elaborated in previous work, rule making in the EU is increasingly characterized by a new architecture of experimentalist governance (Sabel & Zeitlin 2008, 2010). In this iterative, multi-level architecture, broad framework goals and metrics for gauging their achievement are established by joint action of the EU institutions and Member States. Lower-level units (such as national ministries or regulatory authorities and the civil society actors with whom they collaborate) are given substantial discretion to advance these goals in their own way. But as a condition for this autonomy, these units must report on their performance and participate in a peer review in which their results are compared with those of others employing different means to the same general ends. Where they are not making good progress against the agreed indicators, the local units are expected to show that they are taking appropriate corrective measures, informed by the experience of their peers. The goals, metrics, and decision-making procedures themselves are then periodically revised by a widening circle of actors in response to the problems and possibilities revealed by the review process, and the cycle repeats.

Although experimentalist governance architectures of this type are not universal across the EU, they have become pervasively institutionalized across a broad array of policy domains. These stretch from regulation of energy, telecommunications, finance, and competition through food and drug safety, data privacy, and environmental protection to justice, security, and anti-discrimination rights, to name only some of the best-documented cases. They take a variety of organizational forms, including networked agencies, councils of regulators, open methods of coordination, and operational cooperation among front-line officials, often in combination with one another. As these examples indicate, experimentalist governance is not confined to fields where the EU has weak

competences and produces mainly non-binding guidelines, action plans, scoreboards, and recommendations, but is also well-developed in domains where the Union has extensive legislative and regulatory powers. In many such cases, the EU's experimentalist decision-making architecture regularly results in the elaboration of revisable standards mandated by law and new principles which may eventually be given binding force. Often, too, these experimentalist architectures are underpinned by 'penalty defaults': mechanisms that induce reluctant parties to cooperate in framework rule-making and respect its outcomes, while stimulating them to propose plausible and superior alternatives, typically by threatening to reduce their control over their own fate.

At the same time, as a burgeoning literature underlines, the EU has become increasingly active in seeking to extend or 'export' its internal rules, norms, and standards through a variable mix of institutional channels and mechanisms. Some of these are unilateral or bilateral, such as the membership accession process, neighbourhood policy, market access requirements, partnership and free trade agreements, development aid, capacity-building assistance, and regulatory cooperation with third countries. Others are explicitly multilateral, often involving attempts to 'upload' the EU's preferred regulatory approach through international organizations and agreements, standard-setting bodies, transgovernmental networks, and other global institutions. Often, the EU's efforts to expand the geographic scope of its regulation entail varying forms and levels of participation by non-member states not only in the application of the rules themselves, but also in the Union's internal governance processes. This 'external governance' approach to extending EU regulation has become a prominent feature not only of academic analysis (e.g. Lavenex 2014; Falkner & Müller 2014; Lavenex & Schimmelfenning 2012; Laïdi 2008; Zielonka 2008), but also of the European Commission's own strategic thinking (European Commission, 2006, 2007; Damro 2012).

What is the relationship between these two sets of contemporaneous developments: the proliferation of experimentalist governance architectures within the EU, and the Union's efforts to extend its internal regulations and governance processes to third countries and the wider world? Are the EU's attempts to expand the geographic scope of its internal rules, norms, and standards to third countries and global institutions leading to a parallel outward and upward extension of its experimentalist governance processes? If so, through which institutional channels, pathways, and mechanisms? Do unilateral regulatory initiatives by the EU serve as a mechanism for overcoming collective action barriers to the construction of transnational experimentalist regimes? Or do such efforts to project EU regulation beyond the Union's borders, even when they appear successful, undermine crucial elements of its experimentalist governance architecture, by cutting out the feedback loop between local learning from contextualized rule adaptation on the one hand and central rule revision on the other?

These questions about the external dimension of EU experimentalist governance and its relationship to broader trends in transnational regulation are addressed by an edited volume that is one of the core outputs of GR:EEN's workpackage on trade and finance (Zeitlin 2015). Based on its introduction and conclusion, this policy brief lays out the book's main findings, focusing on the channels and pathways through which the EU can influence transnational regulation beyond its own borders. The domains addressed in this study include neighbourhood policy, food safety, GMOs, chemicals, forestry, competition, finance, data privacy, justice and security, crisis management, and disability rights. Although the book makes no claim to comprehensiveness, the cases covered encompass a broad spectrum of policy domains with different characteristics which might be expected to influence the applicability of experimentalist governance, from economic and social regulation to justice, security, and fundamental rights.

## EVIDENCE AND ANALYSIS

Taken together, the findings of this volume provide considerable evidence that the EU's efforts to extend its internal rules and governance processes are contributing positively to growing experimentalism in transnational regulation. As a broad generalization, the evidence presented in this book supports the view that the EU is most successful in promoting transnational

experimentalism by extending its rules, standards, and governance processes to third countries through ‘horizontal’ channels: unilateral, bilateral, and occasionally plurilateral. With some conspicuous exceptions, by contrast, the findings of this book suggest that the Union is typically less successful in uploading its internal experimentalist governance processes to international organizations and multilateral bodies through ‘vertical’ channels. At the same time, however, the evidence presented in this book also shows that the EU’s unilateral efforts to extend experimentalist governance horizontally often interact in complex, mutually supportive ways with multilateral institutions, which can serve as reflexive mechanisms for destabilizing characteristic blockages in the Union’s internal decision-making processes and relations with third countries, thereby contributing to the development of promising hybrid pathways towards transnational experimentalism.

#### *Extending experimentalist governance: horizontal channels*

In the majority of core policy domains analyzed in this book, including data privacy (Newman 2015), food safety (Weimer & Vos 2015), chemicals (Biedenkopf 2015), GMOs (Dąbrowska-Kłosińska 2015), forestry (Overdevest & Zeitlin 2015), and finance (Posner 2015), the EU has become a *de facto* global standard-setter, peer reviewer, and capacity-builder operating along experimentalist lines. To give only a single example, in food safety imported products must meet both EU substantive regulations (e.g. for maximum pesticide residues) and process standards (involving the use of Hazard Analysis of Critical Control Points [HACCP] plans to identify, control, monitor, and detect contamination risks). These build on, but often go beyond voluntary international standards developed through the *Codex Alimentarius* Commission and other bodies recognized by the WTO as providing *prima facie* evidence of conformity with global trade rules. The European Food and Veterinary Office (FVO) audits and assesses the equivalence to EU requirements of national food safety systems in third countries, through ongoing monitoring, country missions and site visits, and peer review reports. The European Commission, advised by the FVO, makes recommendations to third countries on changes needed to reach EU requirements, and provides training and technical assistance to developing countries in order to help them meet these demands. The FVO import control regime is carefully calibrated to the capacities of third country authorities and producers across different sectors and its provisions are regularly adjusted to take account of actual performance (assessed both through country missions and through notifications by Member States and third countries themselves to the EU Rapid Alert System for Food and Feed). The RASFF network for notifying and exchanging information on direct and indirect food risks to humans and preventing contaminated products from entering the food chain is widely considered to be the most effective in the world. RASFF in turn has served as a framework and template for the development of similar rapid alert and response systems in other countries and regions (including China, Africa, ASEAN, and Mercosur), as well as for an incipient extension to the global level in collaboration with the World Health Organization’s INFOSAN network, with which it currently cooperates on a case-by-case basis.

Even in policy domains where the EU does not currently play a comparable global role, the cases analyzed in this book provide substantial evidence that the Union nonetheless often serves as an active promoter of experimentalist governance arrangements and practices on a regional scale, as for example in justice and home affairs (Monar 2015), transboundary water protection (Lavenex 2015), crisis management (Ekengren 2015), and competition policy (Svetiev 2015). In many sectors, too, the Union fosters the extension of experimentalist governance practices both globally and regionally through the inclusion of third countries in its internal regulatory networks, as for example in food safety, chemicals, crisis management, competition, justice and security, and transboundary water management. In chemicals, for instance, third parties external to the EU, including private businesses, trade associations, NGOs, and international organizations, as well as public regulatory authorities, can contribute evidence on an equal footing to the authorization process and to reviews of potential substitutes for substances of very high concern conducted by the European Chemicals Agency (ECHA). More than half of all the stakeholder groups accredited by the ECHA have members headquartered outside the EU and its neighbourhood. Both public and private bodies from outside the EU participate, at least as observers, in many of the committees and networks that have been created to support implementation of its regulation on the Registration, Evaluation, and Authorization of Chemicals (REACH), including the expert group of

Competent Authorities that advises the Commission on the preparation of new legislation, monitors national policies and enforcement, and assists in the drafting of implementing measures (Biedenkopf 2015).

At the same time, however, the findings of this volume also show that unilateral extension of EU regulation to third countries can indeed undermine key elements of its experimentalist governance architecture. Thus, as a number of the contributors underline, third countries rarely participate directly in joint goal setting or review and revision of EU rules, standards, and governance procedures. No less significantly, third countries often lack the administrative capacity and resources to play an active part in EU regulatory networks and governance partnerships, though this may change over time as they develop the expertise necessary to participate on an equal footing with other Member States. Where third-country actors are excluded from participation in the elaboration and review of EU rules, standards, and governance procedures, or lack the administrative capacity, resources, and expertise to do so effectively, this can attenuate or cut altogether the critical learning feedback loop between local rule implementation and central rule revision, which is the defining feature of experimentalist governance. In the absence of reciprocal peer review, where one side is always the teacher and the other the pupil, the EU may forgo the benefits of external scrutiny, comparative benchmarking, and deliberative justification of its own internal regulations and governance arrangements.

In the worst cases, such asymmetries in power and capacity between the EU and third countries can lead to what Lavenex (2015) calls 'policy transfer in disguise', where the Union enlists external 'partners' in implementing its own objectives and standards by involving them in regulatory networks and bilateral cooperation arrangements with some experimentalist features, as for example in border management and control of irregular migration. Such asymmetries can also lead to what she calls 'experimentalism as an empty shell', as in the case of research policy, where the EU seeks to encourage science and technology cooperation and to extend the European Research Area to the Southern Mediterranean through a combination of bilateral committees and a multinational network, but where only one country (Israel) has so far joined a single EU research programme. Another case which combines elements of both 'policy transfer in disguise' and 'experimentalism as an empty shell' is that of the EU's involvement in extending experimentalism to African crisis management, where as Ekengren (2015) observes, the African Union remains heavily dependent on external resources and assistance, without any clear exit strategy on either side.

Despite these pitfalls, however, EU unilateral, bilateral, and regional initiatives do function in many cases as 'penalty default' mechanisms for overcoming collective action barriers to the emergence and development of transnational experimentalist regimes, by inducing third-country authorities and firms not simply to comply with EU rules and standards, but also to participate in its internal governance processes of regulatory equivalence assessment, capacity building, implementation monitoring, information sharing, supervisory cooperation, and mutual learning. In a number of these cases, too, these EU initiatives build explicitly on multilateral objectives and international standards, to which the Union has also contributed. In forestry, for example, where efforts to establish a binding international convention had repeatedly failed and regional dialogues had made limited progress, the EU explicitly launched its Forest Law Enforcement Governance and Trade (FLEGT) initiative as a means to advance the emerging multilateral consensus on combatting illegal logging by engaging developing countries in the joint construction of timber legality assurance and export licencing systems aimed at building up their internal governance capacities. The EU Timber Regulation (EUTR), which provides a powerful inducement for third countries to negotiate and implement FLEGT Voluntary Partnership Agreements (VPAs) by requiring all operators placing wood on the European market from whatever source to demonstrate due diligence that it was not harvested illegally, was only enacted after continuing efforts to achieve 'effective multilateral progress' in this domain had demonstrably failed to yield results. Both the VPAs and the EUTR, moreover, were explicitly designed for compatibility with WTO requirements that unilateral import restrictions for environmental protection purposes be non-discriminatory and proportional to their objectives, avoid unnecessary trade disruption, and allow third-country exporters to develop methods of compliance adapted to their own local circumstances (Overdevest & Zeitlin 2015).



### *Extending experimentalist governance: vertical channels*

If the cases analyzed in this book provide abundant evidence of the EU's positive contribution to extending experimentalist governance through horizontal channels, their findings indicate that the Union's influence in promoting transnational experimentalism by vertically uploading its internal processes of framework goal setting and revision to international organizations and multilateral bodies has been decidedly more modest.

In a number of cases, the EU has been a significant vector, if not the leading driver, of the incorporation of experimentalist architectures and practices into multilateral regulation. Thus, for example, in justice and home affairs fields such as the fight against corruption, organized crime, and money laundering (Monar 2015), the EU has successfully acted as a protagonist of the extension of experimentalist features developed within the AFSJ such as intensive peer review, diagnostic monitoring and evaluation of implementation, exchange of good practices, civil society participation in review processes, and recursive revision into the work of international bodies such as the Council of Europe's Group of States against Corruption (GRECO), the UN Conventions against Corruption and Transnational Organized Crime (UNCAC and UNTOC), and the Financial Action Task Force (FATF). In disability rights (de Búrca 2015), the EU made a modest but by no means negligible contribution to a number of the experimentalist features of the UN's pioneering Disability Convention. Most significantly, the EU successfully pushed for the inclusion in the CRPD of an open-ended definition of disability and denial of 'reasonable accommodation' as a key form of discrimination which signatories pledged to avoid. The EU also supported the incorporation of a social rather than medical model of disability, once the decision had been taken to base the Convention on substantive rights rather than anti-discrimination procedures. The EU likewise backed and facilitated both the inclusion of non-governmental stakeholders in the implementation of the Convention, and the participation in the drafting process itself of NGOs and persons with disabilities, who were in turn responsible for many of the Convention's most innovative features .

At the same time, however, the studies in this volume also show that the EU is not the only vector of the development of experimentalist architectures and practices within multilateral institutions. Thus for example, other countries, including the US, strongly backed the establishment of effective monitoring and recursive review mechanisms for the implementation of the UN Conventions against Corruption and Transnational Organized Crime, which can also be found in other UN conventions, even if the EU was clearly the leading advocate of the participation of civil society actors in the UNCAC. In disability rights, many of the key experimentalist features of the UN Convention, such as the provisions on national monitoring and implementation and for holding a substantive annual review conference of the parties, were driven by other countries and NGOs rather than the EU. Even the open-ended goal of 'reasonable accommodation', for which the Union was the leading protagonist in the drafting process, was only accepted because the EU could argue that it was not 'a purely or even mainly European notion which was being foisted on the rest of the international community', but was originally based on US and UN sources (de Búrca 2015).

In a number of cases, moreover, the studies in this volume show a two-way process of interaction between the EU and international organizations in the development of experimentalist practices, rather than a one-way chain of influence from the former to the latter. Thus the mutual evaluation and peer review processes deployed by the EU within the AFSJ and the Schengen borderless zone appear to have drawn on the prior development of similar mechanisms within FATF, while their subsequent deepening in the context of eastern enlargement to incorporate 'assessment of implementation capacity rather than only formal compliance with standards' may in turn have influenced more recent similarly directed revisions of the FATF peer review and evaluation methodology. In this sense, 'the EU may...be – at different stages – both an "importer" and an "exporter" of certain experimentalist elements' (Monar 2015). In crisis management (Ekengren 2015), the EU's guidelines for joint forces and interoperability standards for national military capabilities were strongly influenced by if not imported directly from NATO, even if NATO now also seems to be learning from the faster, more horizontal, and more interactive methods of goal-setting and capability planning subsequently developed within the Common Security and Defence Policy (CSDP).

When the EU does seek to upload its internal experimentalist models to international organizations and other multilateral bodies, the evidence presented in this volume indicates that it is rarely successful in doing so, because of opposition from both developed and developing countries to such a 'Eurocentric' approach, as well as suspicion of EU motives and methods (including 'speaking with one voice', often touted in the EU foreign policy literature as the key to enhancing the Union's external influence). A striking case in point is the failure of the EU's efforts to upload its internal anti-discrimination regime in the drafting of the UN Disability Convention. Once a consensus had emerged in favour of a binding international treaty, which the EU did not initially support, the European Commission sought to extend its internal model of mainstreaming equality for disabled persons through anti-discrimination law to the UN context, partly because officials genuinely considered it to be 'the most advanced in the world', and partly because they were concerned to avoid potential conflicts with existing Union legislation. The EU's efforts to 'speak with a single voice sometimes had the effect of weakening its influence in the proceedings', especially when opposition from other countries was very high, while the Union's close alliance with civil society organizations instead helped to strengthen the weight of its positions in the negotiations relative to those of other strong groupings of countries. The outcome was that the Convention followed neither the EU anti-discrimination approach nor a social development approach advocated by Mexico and other Latin American participants, but opted rather for 'a "holistic" and hybrid model premised on a combination of the equality model and a model of substantive rights tailored to persons with disabilities' (de Búrca 2015).

## POLICY IMPLICATIONS AND RECOMMENDATIONS

In multilateral settings, the findings of this volume suggest that the EU is likely to be most effective where it does not try to upload or export its own internal governance model transnationally, however experimentalist this may appear to be. Instead, the EU appears to have made the most significant contributions to promoting transnational experimentalism where it is prepared to work collaboratively with other countries (and in some cases also NGOs) to develop a new hybrid model, drawing on multiple national and international sources (as in the case of the UN Disability Convention or peer review in global financial regulation), and/or to build on two-way interactions with other countries and international organizations in transforming established multilateral regimes through the incorporation of recursive mechanisms for iterated goal setting and implementation review (as in the cases of FATF, UNCAC, UNTOC, and NATO).

By contrast, the evidence presented in this book abundantly demonstrates that the EU has been much more effective in promoting transnational experimentalism through horizontal rather than vertical channels. In many of the sectors analyzed in this book, the EU has emerged as a *de facto* standard setter, peer reviewer, and capacity builder for the development of transnational experimentalist regimes, either globally or regionally. Many of these regimes also involve a significant degree of contextual adaptation of EU rules to local circumstances and direct or indirect participation by third-country actors in EU regulatory governance networks. In many cases, too, EU market access requirements serve as penalty default mechanisms for overcoming collective action barriers to the emergence and development of transnational experimentalist regimes, by inducing third-country authorities and firms to participate in its internal governance processes.

Despite these positive contributions, however, unilateral extension of EU regulation to third countries is also subject to significant limitations from an experimentalist perspective. Third countries, as we have seen, rarely participate directly in joint goal setting, or review and revision of EU rules, standards, and governance procedures. Often, too, they lack the administrative capacity and resources to play an active part in EU regulatory networks and governance partnerships, at least initially. Such asymmetries of power and capacity in turn can cut the experimentalist feedback loop between local rule implementation and central rule revision, increasing the risks that EU rules may be poorly adapted to domestic circumstances in third countries, while depriving the Union of the benefits of external scrutiny and peer review of its own internal regulations and governance arrangements. In such cases, horizontal extension of EU regulation is likely to be regarded as unfair and illegitimate, as well as ineffective, by those to whom it is addressed.

Given the persistent obstacles to collective action in many multilateral settings, coupled with the pitfalls of unilateral regulatory extension, a promising way forward may be where the EU has some capacity for unilateral regulation (e.g. as a condition of market access), but is subject to other-regarding procedural requirements and deliberative constraints imposed by multilateral institutions like the WTO. WTO rules, as interpreted by its Appellate Body, permit national trade restrictions in order to protect the environment and public health and safety. But these rules also require member states wishing to impose import restrictions to avoid discrimination, ensure that the proposed measures are necessary and proportional for achieving their objective, and consult with trading partners to minimize the impact on affected parties. Such trade-restrictive measures should also take account of international standards – if only by justifying deviation from them – and be orientated towards multilateral cooperation where possible. These disciplines, when they permit such extensions at all, may thus provide a reflexive mechanism for transforming unilateral regulatory initiatives by large jurisdictions into a joint governance system with stakeholders from third countries (including from the developing world), if not a fully multilateral experimentalist regime. Among the cases analyzed in this volume, the EU's external initiatives in food safety, forest governance, chemicals regulation, and GMO segregation all provide clear evidence of the effectiveness of this mechanism in inducing the EU to take greater account of the external impact of its regulation on third parties and engage them in its internal governance processes.

But even in the absence of such multilateral procedural disciplines, the findings of this book suggest that reciprocal pressures from powerful trading partners like the US may serve as an alternative functional mechanism for pushing EU unilateral regulation towards joint governance through mutual regulatory equivalence assessment. The clearest example of this pathway among the cases analyzed in this book is that of food safety, where the recently adopted US Food Safety Modernization Act contains similar requirements to those of the EU food safety regime for HACCP-based risk detection and mitigation, coupled with regulatory equivalence assessment as a condition for expedited imports into the American market. Another nascent example is financial regulation, where both the EU and the US are requiring regulatory equivalence as a condition for foreign financial institutions to access their domestic markets, and where each jurisdiction is committed in principle to base its own domestic regulations on international standards developed through the sectoral bodies operating under the aegis of the Financial Stability Board (FSB). The EU has explicitly proposed that such regulatory equivalence assessment be conducted on a reciprocal basis with the US, and incorporated directly into the Transatlantic Trade and Investment Partnership (TTIP) agreement. The US Treasury has rejected this proposal, arguing that the Dodd-Frank Act represents a stricter approach to implementation of the Basel III Agreement than the EU Capital Requirements Directive IV, while the EU has refused to include any commitment to liberalization of financial services in the TTIP without it. But whether or not mutual equivalence assessment of financial regulation is formally included in the TTIP, transatlantic cooperation on the mutual adjustment and recognition of each other's regulatory standards can be expected to continue through existing channels such the Financial Markets Regulatory Dialogue (FMRD), and as in competition policy (Svetiev 2015) seems likely to evolve over time towards a *de facto* bilateral experimentalist regime, given the deep interdependence and reciprocal retaliatory capacity on both sides.

If successfully concluded, the TTIP agreement may be expected to provide an overarching institutional framework for such mutual regulatory equivalence assessment and cooperation. These mutual regulatory equivalence assessment procedures could also be extended to other countries through the web of bilateral and plurilateral trade agreements under negotiation by both the EU and the US. To mitigate the risks of a great power condominium, such regulatory equivalence assessment should be linked to international standards where possible, provided that the latter leave sufficient space for nations and regions to find their own contextually appropriate ways of reaching common objectives, and justifying departures from uniform rules through deliberative peer review, in which the outcomes achieved are systematically compared to those of other similarly placed jurisdictions.<sup>1</sup> Under these conditions, the generalization of such mutual regulatory

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<sup>1</sup> This does not currently appear to be the case in global financial regulation, where the post-crisis peer review procedures developed by the FSB exclude participation by representatives of the country being



equivalence assessment as a condition of market access in different sectors could serve as an effective penalty default underpinning participation in multilateral regimes based on joint goal setting and coordinated learning from decentralized implementation, thereby opening up a new hybrid pathway towards transnational experimentalism.

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## PROJECT IDENTITY

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