Aligning rulesets: understanding cooperation in the European Union

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ABSTRACT

The story of European Integration has often been told as that of an ‘ever closer union’. This narrative has rightly attracted criticism over the years. However, it is worth exploring through which practices this ‘ever closer union’ is pursued, because these practices go to the heart of what the European Union is. Existing concepts used to interpret cooperation in the European Union, like harmonization, are unfulfilling, as they are used in different ways depending on the field in which they are applied. Currently, common ground and conceptual clarity are lacking. In an attempt to provide the kind of simplicity that facilitates cross-disciplinary analysis, we introduce the concept of aligning rulesets, a five-level framework for studying international cooperation (differentiating between (1) full alignment, (2) methods-based alignment, (3) ends-based alignment, (4) principles-based alignment and (5) no alignment). After introducing our framework, we demonstrate its applicability in the domains of statistical measurement, the responsibility for asylum applications, and the COVID-19 vaccine purchasing policy.

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Introduction

In recent years, the narrative of the European Union (EU) as that of an ‘ever closer union’, has attracted a lot of criticism (Pichler 2020; Von Bogdandy 2016; Moravcsik 2005). Deepening European integration is far from self-evident, nor is it irreversible. Similar things can be said about its widening, with Brexit as an obvious case in point. Despite this, the member states of the European Union are currently much closer than they were in 1952, when the European Coal and Steel Community was founded.

Nowadays, member states’ systems of governance are compatible enough to allow for exchanges of labour, capital, services and goods to take place at little transaction costs. Moreover, there are cases in which the member states of the European Union have proven themselves capable of acting as a bloc in policy or in international political
dealings, for example in the early phases of purchasing vaccines against COVID-19, as illustrated below. Through this research note, we want to further our understanding of the practices of European Integration by studying various possible outcomes of cooperation within the European Union.

Some ways in which the states of the European Union have tried to bring their systems of governance closer together have been studied extensively, often in the context of the common market, and often with harmonisation as a central concept. Stephen Weatherill understands the nature and purpose of harmonisation as ‘de-regulating’ the common market – in the sense that the EU legislature decides to replace rulesets of the member states with a common EU ruleset – and at the same time as ‘re-regulating’ the market – because ‘the EU rule becomes the (common) basis for the internal market’s regulation of the sector in question’ (Weatherill 2017).

While the study of harmonisation has led to valuable insights, it has also led to confusion. Scholars in different academic fields tend to talk past each other, as terminologies regarding harmonisation, coordination or cooperation vary per discipline and topical area of expertise (for some approaches to harmonisation, see: Barnard and Deakin 2002; Barry 2003; Craig and De Búrca 2011; Desrosières 2000; Fertikh et al. 2018; Kinderman 2020). In legal scholarship, for instance, the term harmonisation has been used far and wide (e.g. Huber 2011; Halson and Campbell 2013; Caruana 2019; Mitsilegas 2019), seemingly building on a shared understanding of the concept of harmonisation. However, a solid conceptualisation has rarely taken place. Legal scholar Eva Lohse observes the confusion about harmonization and rightly calls it a ‘Babylonian confusion of terms’ (Lohse 2012).

Lohse herself tries to clarify the concept by defining harmonisation as ‘a conscious process that has the aim to lead to the insertion of a concept into the national legal orders, which triggers a process of adaptation to form a European concept as uniform as required to serve the objectives of the European Union’ (Lohse 2012: 313). This very broad definition of harmonisation does indeed unite much of the literature on the concept, but it fails to differentiate between various degrees of harmonization. Although we appreciate Lohse’s approach, we aim to add to scholarship by building an approach that can differentiate between various degrees of adaptation to a common norm or rule.

We argue that the field of European Studies is in need of a conceptual frame that provides more clarity than the concept of harmonisation. In this research note, we thus aim to provide a heuristic framework that allows for a more specific analysis of ways in which member states of the European Union have tried to integrate their policies. We coin the term international alignment of rulesets and propose using it as a way to capture not only harmonisation, but also modes of integration that do not fit well with the concept of harmonisation – showing a range of ways in which alignment can take place. Ultimately, we believe that the concept of alignment of rulesets, as developed below, offers a vocabulary that enables scholars to analyse how processes of alignment play out in various domains (and to various degrees) which offers the benefit of making those various degrees of alignment comparable.

An additional benefit of developing the concept of ‘international alignment of rulesets’ over using the concept of harmonisation is that it helps us to avoid the scholarly confusion that ‘harmonisation’ may bring about (for example, legal harmonisation could refer to practices vastly different than, for example, the harmonisation of environmental standards), but it also helps us to avoid the political connotations accompanying
the use of harmonisation. Harmonisation is often associated with a loss of national sovereignty, an increase of technical regulations, and the rule of experts and technocracy (Barry 2003). We argue that the international alignment of rulesets is a broader and more neutral concept than harmonisation, and can therefore help researchers to find common ground for cross-disciplinary comparisons.

This research note starts by developing our concepts of rulesets and international alignment of rulesets. Next, we apply our framework to three exemplary cases of alignment of rulesets in the EU. We have chosen to illustrate our framework in three cases about the European Union, because the EU is a well-known example of international alignment of rulesets for scholars of international relations around the world, and thus well-positioned to demonstrate what our framework can contribute to the academic debate.

**Conceptualizing the international alignment of rulesets**

A ruleset is defined in this research note as a body of formal or informal rules and norms governing conduct. The content of any given ruleset varies per domain and place, and from time to time. For instance, the ruleset governing access to international protection (asylum) is different from rulesets governing other types of migration; the ruleset on the asylum procedure in the Netherlands differs from that in France; and they are both currently different than they were in 1950. Law often plays a large part in these rulesets, but we understand rulesets to go beyond written legal texts. They also include unwritten standards and practices, upheld by state or non-state authorities.

In this research note, we coin the term international alignment of rulesets and define it as a set of practices aimed at the approximation of rulesets to facilitate interactions between multiple actors in different countries. In general, the alignment of rulesets is important because international flows of money, people and responsibilities depend on compatibility. This is perhaps most obvious in cases that concern the European internal market. If every country in Europe uses the same rules for labour, sanitation, environment etc., companies are not dependent on adjustments (and costs) to trade, interact or even set up production facilities in the national market of another member state than their own. International alignment of rulesets thus reduces transaction costs for doing business in Europe. However, we argue that the alignment of rulesets goes beyond the internal market and occurs in many policy fields outside of the purely economic realm, as is illustrated by the exemplary cases of this research note.

The alignment of rulesets can take many different forms. In theory, the potential ways in which alignment can manifest itself are endless. To make the many forms of cooperation in which alignment may be identified accessible, we have distinguished five potential types of outcomes of alignment dynamics.

**List: five potential outcomes of alignment dynamics**

1. Full alignment, or standardization: states adopt the same (identical) rulesets to minimize the risk of hiccups.
2. Methods-based alignment: states agree on certain methods but keep control over the specific implementation of the methods.
(3) Ends-based alignment: states agree on the ends of their rulesets but keep control over form and method, i.e. how to get there.
(4) Principles-based alignment: in the case of the principle of mutual trust, states give each other the space to choose their own ends and methods, trusting that the other party will adhere to an equivalent (albeit not necessarily equal) level of adherence to (EU/EC) law.
(5) No alignment: when negotiations about alignment break down, the result may very well be no alignment.

The outcome of alignment dynamics differs from situation to situation. Although aligning rulesets can be advantageous, there are limits to the extent to which states are willing to approximate their rulesets. Adapting rulesets in order to further align them on the European level may, for instance, be perceived as breaking down national conventions and encroaching on national sovereignty. Although rare, the alignment of rulesets can also be reversed. This may be caused by backlashes to the political regime for engaging in alignment, or by influential groups within societies deeming the upholding of internationally aligned rulesets unfavourable.

We stress that the concept of international alignment of rulesets is not an overarching theory that seeks to provide a new master narrative on international relations. It is rather a heuristic tool to help researchers in different academic fields understand, describe and compare a particular aspect of EU politics. In addition, it is important to acknowledge that the alignment of rulesets always takes place in specific historical, political and legal contexts. Without understanding the context, the concept of aligning rulesets would be inoperative. In the next paragraph, we will look more closely at some of the contexts in which alignment has taken place.

Three examples of ruleset alignment

As much of the history of European integration has already been documented and analysed, we have chosen to select exemplary cases that illustrate cooperation in areas of the European project that have received less attention. Such illustrations will help us to show how widely applicable our framework is, and how it can open up new paths of inquiry. Here, we focus on ‘additional’ or ‘voluntary’ cooperation, defined as any form of cooperation between states that exists without institutional or legal mechanisms that oblige them to cooperate. Thus, for cases to fall under this definition, the decision to opt in or opt out of cooperation should not be bound by the European treaties or other legal or institutional conditions. The decision to align rulesets is ‘free’ in the sense that there are no legal repercussions for not engaging in alignment for the organisations engaging in the process. Due to the voluntary nature, ‘no alignment’ is always an option, thus allowing for the full range of potential alignment outcomes.

Following these criteria, we have found three cases located at the periphery of the common market. Although the core of the common market is bound by treaties and laws governing alignment, alignment taking place on its periphery is of a more voluntary nature. The functioning of the common market does not hinge on the objects of our (peripheral) exemplary cases; however, alignment in these fields does contribute to functioning of the market, as will be exemplified for each case.
We study the international alignment of rulesets in the domains of statistical measurement, the responsibility for asylum applications, and the COVID-19 vaccine purchasing policy. Looking at such a diverse range of cases allows us to begin to grasp the variations in alignment dynamics.

**Illustration 1: statistical measurement**

The interwovenness of European economies and economic policy that emerged as a consequence of the introduction of the common market, makes comparable European macro-economic statistics highly desirable. Indeed, common statistical systems allow European institutions to monitor the economic policy of its members, and provide European institutions with information to base common policy on (Wagenführ 1966). It, therefore, contributes to the efficient functioning of the internal market, without being essential to its existence.

Despite the benefits of common statistical systems, there has been little, if any, legal basis for the role of the Statistical Office of the European Communities (Eurostat), nor for the production of uniform statistics for European purposes at national offices until 1997 (De Michelis and Chantraine 2003). To this day, many countries use dissimilar statistics in various important macro-economic fields, such as unemployment (Salais 2006). Where ‘European statistics’ have arisen, this has not been the result of laws and treaties. Rather, from the 1950s until the mid-1990s the alignment of statistical rulesets emerged voluntarily, based on the cooperation in small working groups of experts from national statistical authorities, European institutions and other international organisations like the Organisation for European Economic Co-operation (OEEC/OECD) or statistical organizations related to the United Nations (Wagenführ 1963; Sverdrup 2006; Ward 2004). The alignment under the banner of post Second World War international organizations such as the European Community was a continuation of the voluntary international statistical cooperation in the pre-war period through existing expert communities within the League of Nations and the International Statistical Institute (Nixon 1960; Wagenführ 1963; Clavin 2013).

The type of alignment that emerged in the field of European statistics should be considered within the general context of international statistical cooperation as well as the particular circumstances of European integration. It is crucial to understand that international statistical organizations (ISO’s) have neither the resources nor the personnel to conduct extensive statistical inquiries and, as a consequence, they rely heavily on national statistical offices. Yet, national statistical offices have their own constraints. They are connected to particular national contexts and demands, such as national nomenclatures, definitions and methods, all inhibiting comparability. If national statistical institutes have to produce different data for each ISO and their national governments, this would create much ‘double work’ putting stress on the often limited resources of national statistical offices.

Since the merger treaty of 1965, Eurostat works in service of the different directorates general of the Commission to provide them with the information they require. Because there are limited funds to do their own inquiries, Eurostat relies on collecting information from national statistical offices. Yet, in many cases, the work of statistical offices differs in definitions, nomenclatures and methodology. As a result, this renders comparison or
integration of such numbers impossible. However, because of its reliance on national offices, Eurostat cannot force them to conduct inquiries based on similar methodologies. Although Eurostat and its predecessors have initially tried to fully align statistics in, for example, the field of household budgets, such endeavours were abandoned after the mid-1960s. This was because the specific inquiries were at odds with national agenda's, were financially unrealistic and only of limited interest to the direction of the community as a whole (Von Lammers 2013). Instead of full alignment, Eurostat chose to avoid standardised frameworks, and started promoting what they label as ‘harmonized frameworks’.

‘Harmonized frameworks’ imply that Eurostat requests national statistical offices to structure their data in such a way that the data for European inquiries can be easily accessed from national statistical representations (Statistischen Amt der Europäischen Gemeinschaften 1965).

For example, in the case of National Accounts, Eurostat and the member states of the European Statistical System provide detailed guidelines for collection and calculation of national accounts. The member states can adjust these guidelines to fit their national economic structures. The first framework was designed between 1963 and 1970. Ever since it has seen continuous adaption through experimentation and consultation with national statistical offices (Statistical Office of the European Communities 1970; Statistical Office of the European Communities 2010). Through this constant process, the macro-economic statistical frameworks are continuously adapted to novel insights, new technologies or national capabilities (European Statistical System).

In terms of aligning rulesets, we can best characterize the type of alignment that occurs within the field of international statistics as a combination of ends-based and methods-based alignment. However, there are significant differences depending on the specific field of statistics. Contrary to the field of household budgets in which attempts at full alignment have been unsuccessful, the common frameworks that follow more ends-based and methods-based alignment have been able to stand the test of time. The illustration of frameworks or systems for national accounts as National statistical organizations thus remain free to choose, adapt and influence their methods of achieving particular statistical figures, so long as they adhere to the agreed upon standards for inter alia objectivity and transparency. Cooperation between the experts from national statistical offices, however, have also resulted in so-called common standard/harmonised statistical systems, as is the case with national incomes or trade and transport statistics.

**Illustration 2: the Dublin system on responsibility distribution for asylum applications**

As a side effect of the freedom of movement, third country nationals were able to travel freely throughout Europe. Thus, they could choose the member state in which to apply for asylum (‘asylum shopping’: Birchard 1997; Moore 2013) and the risk existed that no member state would deem itself responsible (‘remaining in orbit’: Morgades-Gil 2020).

On the one hand, the member states wanted to prevent this in order to avoid third country nationals without a European residence permit making use of the freedom of movement and to avoid refugees remaining without international protection (see also: Davis 2020). On the other hand, they wished to maintain ‘the joint objective of an area
without internal frontiers in which the free movement of persons shall, in particular, be ensured’ (Preamble to the Dublin Convention 1997). Based on these considerations, the Dublin system determining the Member State responsible for an asylum application was the outcome of the alignment dynamics.

At the basis of this system lies the Dublin Convention, which first saw the light of day in 1990. It was an agreement concluded between the member states (outside the scope of the then EC legal system) entering into force in 1997 (Dublin Convention 1997; Hurwitz 1999). In 2003, the Dublin system officially became part of EU law, when the Convention was replaced by an EU Regulation (Dublin II Regulation 2003). In 2013 it was reformed when the Dublin III Regulation entered into force (Dublin III Regulation 2013).

The existence of the Dublin system is an example of voluntary cooperation; it is a form of (increased) cooperation between the member states without them being obliged to cooperate by EC (and later EU) law. Although the Dublin system is not crucial to the existence of the internal market, it ensures that the free market and freedom of movement are not disrupted by member states closing their borders to avoid responsibility for asylum applications. Thus, it contributes to the functioning of the common market.

In the Dublin Regulation, the member states have aligned the criteria determining responsibility (e.g. art. 3(2) Dublin III Regulation). These criteria were transposed to a Regulation and are therefore directly applicable in all member states (art. 288 TFEU 2012). However, the member states keep control over the factual application of those criteria in individual cases. Moreover, the Dublin system provides for a derogation option based on humanitarian and compassionate grounds (Consideration 16 of the Preamble to the Dublin III Regulation). Member states may thus deviate from the responsibility criteria up to a certain extent, as long as they achieve the intended end, namely maintaining free movement while restricting asylum shopping – and stay within the limits of the rights of individual asylum seekers. Indeed, the member states agree on the ends of their rulesets but keep control over how to get there.

In addition, the criteria of the Dublin system are to be applied based on the principle of mutual trust (CJEU N.S. 2011). Mutual trust between the member states requires them to trust one another in complying with EU law and recognizing decisions made in their civil and criminal justice systems, asylum law and family law, without having to fully align their national legal systems as a whole. While sometimes contested and controversial, the principle of mutual trust between the EU member states still stands as a tool of cooperation in the context of the Dublin system (see: Thym 2018). Mutual trust is to be considered as a form of principles-based alignment, also in the Dublin system of determining the member state responsible for an asylum application made in Europe.

In sum, the Dublin system entails alignment dynamics resulting in what we interpret as ends-based alignment and principles-based alignment. When the member states decided in 1990 to align their criteria on the determination of the member states responsible for an asylum application made in Europe, there was no legal obligation for them to do so. Thus, while the alignment dynamics could also have led to the outcome of no alignment, the EU member states decided to voluntarily cooperate. In aligning their rulesets, however, we have observed that they wished to grant one another room for manoeuvre in order to maintain their administrative sovereignty. It is well worth investigating if the combination of ends-based alignment and principles-based alignment is a consequence of such a wish to align rulesets on the EU level while maintaining national sovereignty.
Illustration 3: the COVID-19 vaccine purchasing policy

COVID-19 vaccinations are in full swing in Europe, albeit not without struggle. The purchasing of several vaccines against the coronavirus was set in motion at the European level in the summer of 2020, but due to delivery problems the planning was already disrupted in early 2021 (European Commission 2020; Schifffers 2021). The fact that the purchasing policy was set out at the EU level instead of each member state setting out an individual purchasing policy is noteworthy, especially from the perspective of the international alignment of rulesets (Commission 2020a). Aside from combatting ‘vaccine nationalism’, the assumed benefit of a common European vaccine purchasing policy was that it would prevent pharmaceutical companies to set the 27 member states against each other and hide behind 27 different opaque agreements with each member state (Deutche and Wheaton 2021). The goal, in other words, was to let the common market work in the member states’ favour.

Neither the Treaties, nor any other instrument of EU law obliged the Member States or the EU to cooperate. However, it seems that there was a general agreement between the EU and its member states on the need to cooperate when purchasing COVID-19 vaccines, despite the reluctance of some of the member states (Spekschoor and Zwart 2021). This can partially be attributed to the all-embracing and socially disruptive crisis that the pandemic has brought about, causing the member states to close their borders and thus disrupting the freedom of movement. The idea of these member states was that this disruption of the internal market would most likely not be necessary if the member states all vaccinate their inhabitants at the same pace. Thus, the concerted purchasing of COVID-19 vaccines contributes to the common market’s recovery in times of economic and pandemic upheaval.

The foregoing makes the European COVID-19 vaccine purchasing policy an example of voluntary cooperation: the Treaties do not oblige these actors to align their purchasing of vaccines. As the rulesets on the COVID-19 vaccine purchasing policy (to be distinguished from the vaccination policy itself) was set out at the EU level by the Commission, it was identical for all the member states at that moment in time. In conclusion, we observe that the COVID-19 vaccine purchasing policy is an example of full alignment.

In a relatively short time span, the member states had come to an agreement to cooperate. This was the case even though the outcome of no alignment was on the table. Indeed, there was no obligation for the member state to cooperate, let alone to let the European Commission take the lead in the purchasing policy of COVID-19 vaccines. Due to the nature of the crisis that required a quick response, the other potential outcomes of the alignment dynamics – which are less invasive on the member states’ sovereignty than the outcome of full alignment – seemed to be considered less opportune by the member states and the Commission.

Conclusion

In this research note, we have presented an exploration of the concept of the international alignment of rulesets, which we coin as a set of practices aimed at the approximation of rulesets to facilitate interactions between multiple actors in different countries. We have identified five possible outcomes of alignment dynamics: full, methods-based,
ends-based, principles-based, or no alignment. While we acknowledge that this framework is not exhaustive, we believe that our conceptualisation of the alignment of rulesets offers a new and valuable way of studying European integration, as exemplified in the illustrations in the domains of statistical measurement, the responsibility for asylum applications, and the COVID-19 vaccine purchasing policy.

In our three cases, we have seen how our alignment framework can be applied to actual cases of European politics. The exemplary cases lie at the periphery of the common market, to ensure that we would study illustrations in which all five possible outcomes of alignment dynamics – including the outcome of ‘no alignment’ – were still an option. In the three cases, the framework has offered a vocabulary to discuss the different levels of alignment dynamics and practices with. We found that the combination of various outcomes of alignment dynamics is a possibility. For instance, the exemplary case on the Dublin system showed an outcome of ends-based alignment in combination with principles-based alignment.

Although it has to be acknowledged that three examples are insufficient to build definite conclusions about how alignment dynamics work on, the exemplary cases studied in our research note suggest that alignment dynamics typical for European politics may involve member states cooperating ad hoc towards a common goal, employing and combining the various outcomes of alignment dynamics.

The concept of ruleset alignment adds a conceptual instrument to the toolbox of scholars studying modes of international cooperation. Here, it has been applied in a relatively small way, by examining three European cases at the periphery of the internal market. However, the potential of the concept is far greater. The entire history of the EC/EU can potentially be read as a history of aligning frameworks, which could lead to future comparative research about the ways in which alignment dynamics vary per domain. Further research on Alignment and European Integration could explore potential factors explaining alignment dynamics. Examples of avenues for further research could be assessments of the role played by institutional entrepreneurs, pushing for the right type of alignment at the right time; or the way in which previous experiences (or general political-psychological associations) with alignment shaped national attitudes towards processes of alignment.

Other avenues for future research could employ the concept of aligning rulesets outside the EU context. We believe that the alignment of rulesets could be used to study any case of prolonged interaction between states, for example in the African Union or in UN subsidiaries (like the International Labour Organisation or the World Health Organisation) in a similar manner as regarding the EU. In twenty-first century international relations, without a clear hegemon and with increasingly complicated politics, understanding the international alignment of rulesets may be more important than ever.

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