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EU constitutional standards of democracy in differentiated integration

Deirdre Curtin and Maria Patrin

European University Institute
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The objective of InDivEU is to maximize the knowledge of Differentiated Integration (DI) on the basis of a theoretically robust conceptual foundations accompanied by an innovative and integrated analytical framework, and to provide Europe's policy makers with a knowledge hub on DI. InDivEU combines rigorous academic research with the capacity to translate research findings into policy design and advice.
InDivEU comprises a consortium of 14 partner institutions coordinated by the Robert Schuman Centre at the European University Institute, where the project is hosted by the European Governance and Politics Programme (EGPP). The scientific coordinators of InDivEU are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).
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EUI EUROPEAN GOVERNANCE AND POLITICS PROGRAMME

Integrating Diversity in the European Union

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Abstract

Differentiated integration has becomes a pervasive feature of the EU legal and political reality. It happens when legal rules are not uniformly valid across the EU Member States. This report explores to what extent regimes of differentiated integration are compatible with EU constitutional standards of democracy. Increasing recourse to differentiated integration in the EU builds upon the premise that differentiation can strengthen the democratic underpinning of the Union by allowing different views and preferences to coexist, while pursuing further integration. Yet, differentiation can also create asymmetries between Member States, which are not subject to the same rights and obligations, thus challenging key assumptions about equality. The report provides an analytical framework to assess different forms of differentiation, deriving four main constitutional standards of democracy from the EU Treaties - representation, political accountability, legal accountability and transparency. It then applies these standards to concrete case-studies in the two mostly differentiated EU policy areas: the Economic and Monetary Union (EMU) and the Area of Freedom, Security and Justice (AFSJ).

Keywords

Differentiated Integration; Democracy, Accountability; Areas of Freedom, Security and Justice; Economic and Monetary Union

Contents

Introduction*

This report investigates differentiated integration (DI) in relation to European Union (EU) constitutional democratic standards, with the aim to assess how differentiation performs in terms of democracy and accountability and whether it strengthens or undermines them. To do so, it extrapolates some key EU constitutional standards of democracy and applies them to different forms of differentiation. Accountability, as both legal and political accountability, is hereby considered within an overarching broader framework as a standard of democracy.

We define DI in accordance with the InDivEU project proposal as comprising "all EU legal rules whose territorial validity does not coincide with the membership of the EU"[1]. Internal differentiation refers to a situation in which at least one member state is exempt or excluded from EU rules or policies. External differentiation arises when EU rules and policies are valid in at least one non member-state. In our report we will mainly deal with the impact of internal differentiation on democratic standards, however we will also at times touch upon external differentiation, as the two are often closely connected.

This paper is organised in three main parts. The first part provides a conceptual framework from which to derive our standards of democracy. It clarifies what we mean by "constitutional standards" and what sources we use to define them. In this endeavour we shall not lose sight of the main objective of the InDivEU project, which is to ultimately "establish criteria for legitimate, legally feasible and constitutionally acceptable DI"[2]. In line with this overall goal our analysis will mostly focus on operational legal standards of democracy and accountability as well as on the concrete democracy and accountability issues that are specific to DI. The main source of standards is EU constitutional law, namely the EU Treaties, complemented with the relevant jurisprudence of the Court of Justice of the European Union (CJEU). However, the definition of democracy standards requires us to indicate in a preliminary fashion how we understand the key concepts of democracy and accountability in constitutional terms. In other words, we need to understand how to address differentiation from a "democratic perspective".[3] Thus, before we investigate EU constitutional law in this context, we first provide a brief theoretical background of the object of our research. This part of the analysis will also draw upon the findings of WP1 on the philosophical foundations of DI.

The second and third parts of the report will apply the derived constitutional standards to concrete differentiation areas. Part two will present DI in Economic and Monetary Union (EMU), focusing in particular on its institutional implications. Part three will assess the impact of differentiation on democracy by looking at some specific case-studies in the area of Freedom Security and Justice (AFSJ). This choice is not random but is linked to the fact that EMU and AFSJ are two EU policy areas with high levels of differentiation; in fact they probably are the most differentiated EU policy areas overall. They reveal highly heterogenous patterns of differentiation and combine several differentiation instruments. Moreover, in both areas European integration has produced high interdependences, with externalities often affecting non-participating countries[4]. Through the analysis of the case-studies we will assess how different forms of differentiation perform in terms of democracy standards. This in turn will hopefully lead to an assessment as to what kind of differentiation may be best suited to enhance, or at least not to further harm, the already very controversial EU democracy and accountability record.

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1 'Integrating Diversity in the European Union (InDivEU)' (2019), project proposal, 9.

2 ibid 7.

3 John Erik Fossum, 'Democracy and Differentiation in Europe' (2015) 22 Journal of European Public Policy 799, 801.

4 Thu Nguyen, 'Differentiated Integration and Accountability in the European Union – An Analytical Framework' [2020] EUIDEA; Marta Migliorati, 'Postfunctional Differentiation, Functional Reintegration: The Danish Case in Justice and Home Affairs' [2021] Journal of European Public Policy 1.

Following De Witte's classification of DI tools (InDivEU WP2 task 2.1)[5], we will consider three main forms of DI: 1) Treaty-based opt-outs, mainly referring to the derogations granted to some Member States in specific policy areas (mainly EMU and AFSJ); 2) enhanced cooperation, as the procedure that allows for differentiation in secondary legislation when not all Member States agree to it; and 3) separate international agreements, when differentiated regimes take place outside of the Treaty framework, yet they keep a tight connection with EU law. Our paper will in turn assess how each of these instruments affect democracy standards in the policy areas examined.

Finally, this report will not address issues specifically related to the rule of law. This is not because they are not relevant to democracy, but rather because they are so explicitly relevant that they are treated in a separate part of this project, under WP2, task 2.2.

EU constitutional standards of democracy

Democracy and differentiation in the EU: a janus-faced relationship

Habermas defines the essence of democratic self-government as requiring that the addressees of mandatory laws are at the same time their authors. "In a democracy, citizens are subject only to those laws which they have given themselves in accordance with a democratic procedure"[6]. The two consequences derived by Habermas are that all citizens must be represented in the decision-making process and that this representation must be informed by deliberative will-formation. Yet, representation is meaningless in the absence of a way to justify decisions to those who are represented. In this light accountability is representation's other side of the coin as it provides the possibility to verify the relationship between those making the laws and those affected by them, and to hold decision-makers responsible for their decisions[7]. Accordingly, our analysis will be based on an understanding of democracy that includes both representation and accountability, with accountability subsumed under the broader concept of democratic governance[8].

Even this basic concept of democracy is however problematic in the EU. Weiler argues that precisely the principles of accountability and of representation, as the two primordial norms of democracy, are compromised in the Union. There is no meaningful way to hold decision-makers politically accountable in the EU: "Even the basic condition of Representative Democracy that at election time the citizens '…can throw the scoundrels out' – that is, replace the Government – does not operate in Europe"[9]. And there is no effective opportunity for Union's wide representation: "Likewise, at the most primitive level of democracy, there is simply no moment in the civic calendar of Europe where the citizen can influence directly the outcome of any policy choice facing the Community and Union in the way that citizens can when choosing between parties which offer sharply distinct programmes."[10]. This asymmetry is the very heart of the well-known EU democratic deficit[11].

In fact, many authors have argued that the principle of democracy cannot simply be transposed from the national to the EU level, the main problem being the absence of a collective political unity, a "European people"[12], a Union-wide "We"[13], a "demos"[14]. For this reason, democracy at the Union

5 Bruno De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (2019) RSCAS 2019/47 EUI Working Papers 5 ff.
6 Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012) 14.
7 Fossum (n 3) 801.
8 Erik Oddvar Eriksen and John Erik Fossum, *Rethinking Democracy and the European Union* (Routledge 2012); Jürgen Habermas, Ciaran Cronin and Pablo De Greiff, *The Inclusion of the Other: Studies in Political Theory* (MIT Press 1998).
9 Joseph HH Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 Journal of European Integration 825, 829.
10 ibid.
11 Andreas Follesdal and Simon Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS: Journal of Common Market Studies 533.
12 Jürgen Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (2012) 23 European Journal of International Law.
13 Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European constitutional law* (Second revised edition, Hart ; CH Beck 2011) 49.
14 Richard Bellamy and Sandra Kröger, 'A Demoicratic Justification of Differentiated Integration in a Heterogeneous EU' (2017) 39 Journal of European integration 625, 625.

level rests on "a dual structure of legitimacy", composed of the citizens of the Union and the peoples of Europe as nationals from their Member States[15]. This understanding is reflected in the concept of representation as laid down by Art. 10 (2) of the Treaty on the European Union (TEU), whereby citizens are directly represented by the European Parliament (EP), but also indirectly through their Member States in the Council and the European Council (that are in turn accountable to their parliaments and citizens). For the same reason, Art. 1 TEU refers to the "peoples" of Europe. Diversity is thus built into the very first article of the TEU. What is specific to the way the principle of democracy operates in the Union is that democracy, intended as political equality of all citizens, and diversity, e.g. the diversity of the peoples of the Member States, must be placed on the same level[16]. Diversity interacts with democracy at the very foundation of the integration project. Preserving and integrating diversity thus becomes a democratic imperative of EU integration as a whole, and the very rationale for resorting to DI.

Based on these premises, one can ask whether the concept and objectives of DI are to be considered as a) an instrument of democracy or rather as b) a threat to the democratic process.

a) Differentiation strengthens the democratic underpinning of the Union in that it allows different views and positions to coexist, and it accommodates divergent preferences and capacities of EU citizens and Member States. As pointed out by Bellamy and Kroeger, the main driver of DI is heterogeneity[17]. In a culturally and socially heterogenous political system such as the EU, integrating divergent preferences is the only way to respect the equality of EU citizens. This conception of differentiation is rooted in theories of dem*oi*cracy, which place the main source of democratic legitimacy at the national level.[18] As the EU is not a *demos* but it is composed of many *demoi*, "DI gives a sovereign right to decide how much integration the EU *demoi* want"[19]. It is also supported by empirical findings. The empirical study carried out by Schimmelfennig and Schramm on the 2015 Danish Justice and Home Affairs opt-out referendum concludes that decisions regarding opt-outs can increase the democratic legitimacy of the EU and strengthen citizens' ownership of European integration[20].

On a more practical side, DI is often welcomed as a good pragmatic solution[21]. It allows to overcome stalemates and vetoes and to pursue further integration even without all EU members being on board. According to Lord, DI allows to reconcile "the right of some not to participate in unwanted integration with the right of others not to be frustrated from wanted integration"[22]. Looking at the impact on decision-making, De Witte observes that "the main advantage of differentiated integration is that it respects the diversity among States, whilst allowing the European integration to proceed without being held up by national vetoes"[23]. Similarly, Scharpf as early as 2006 argued that differentiation constitutes the potential solution to the lack of EU democratic legitimacy in politically salient policy areas. Where high levels of heterogeneity and divergent preferences prevent effective European action, differentiated regimes may help overcome cleavages, shifting the discussion to the political level, and increase the capacity for action by the Union. "Since democratic accountability can take effect only where there is political choice, the democratic legitimacy of the multi-level European

15 Habermas (n 6); Oliver Garner, *Constitutional Disintegration and Disruption : Withdrawal and Opt-Outs from the European Union* (European University Institute 2020).
16 Bogdandy (n 13) 52.
17 Richard Bellamy and Sandra Kröger, 'Differentiated Integration as a Fair Scheme of Cooperation' (2019) RSCAS 2019/27 EUI Working Papers 1.
18 Bellamy and Kröger (n 14); Fossum (n 3).
19 Frank Schimmelfennig, 'Differentiated Integration before and after the Crisis' in Olaf Cramme and Sara Binzer Hobolt (eds), *Democratic politics in a European Union under stress* (Oxford University Press 2015) 132.
20 Dominik Schraff and Frank Schimmelfennig, 'Does Differentiated Integration Strengthen the Democratic Legitimacy of the EU?: Evidence from the 2015 Danish Opt-out Referendum' (2020) RSCAS, 2020/11 EUI Working Papers.
21 Bellamy and Kröger (n 17); Daniel Thym, 'Competing Models for Understanding Differentiated Integration' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between flexibility and disintegration : the trajectory of differentiation in EU law* (Edward Elgar Publishing 2017).
22 Christopher Lord, 'Utopia or Dystopia? Towards a Normative Analysis of Differentiated Integration' (2015) 22 Journal of European Public Policy 783, 784.
23 Bruno De Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) 55 Common Market Law Review 227, 228.

polity would indeed be strengthened by acceptance of DI."[24]

b) On the other hand, DI can create divisions instead of (or along with) opportunities for integration. As reported by Bellamy and Kroeger "DI itself is an expression of new divisions in the EU"[25]. It creates asymmetries between Member States and it thus challenges key assumptions about democracy, such as that "those who are equally affected by shared institutions should have an equal say on how they are run and modified"[26]. Depending on whether Member States are part of the eurozone or of the Schengen area, they will be more or less affected by policies and institutions. Also, some will have better opportunities than others to decide how institutions are run and policies adopted. This creates a permanent asymmetry in the way common standards of democracy can be applied to the EU.

This asymmetry can exacerbate issues related to the balance between winners and losers and the equality of EU citizens. According to Fossum, "DI is a deeply political process and a way of relating to conflicts. There are winners and losers"[27]. For instance, one key issue is how to ensure that the self-determination of excluded states is not diminished by the differentiated regime[28]. Especially in the presence of externalities, outer members have a right to be associated to the decisions that will affect them. If this does not happen the democratic legitimacy of the decisions is undermined, as non-participating member states and their citizens are affected by decisions that they did not contribute to make. As we will see, a typical example is EMU, where eurozone decisions often have significant impact on the economy of the EU as a whole and therefore on non-eurozone Member States[29].

Furthermore, differentiated regimes can weaken the Union's democratic accountability in several ways. Opt-outs can reinforce the self-perception of being different in non-participating Member States, strengthening their national belonging, with negative drawbacks on the perceived legitimacy of the EU[30]. In addition, the fragmentation in the geographical application of EU law makes it hard to determine who is responsible for what, especially in a multi-level system such as the EU. Since differentiation can happen in a variety of manners (opt-outs, enhanced cooperation, inter-se treaties), tracking accountability mechanisms becomes complicated, leading to an overload of accountability fora on the one hand[31], and to blurred accountability lines at both Member States and EU level on the other[32].

In the following analysis we will see that both accounts of differentiation (whether as a democratic-enhancing or as a democratic-constraining element) play out in differentiated regimes. First, however, we will need to sketch out an analytical framework that will allow us to assess the democratic credentials of DI.

Democratic standards in the EU Treaties: An analytical framework

In this section we will look more concretely at how the principle of democracy is enshrined within the EU Treaties, in order to derive key standards of democracy that will be used to assess legal regimes of DI.

24 Fritz Wilhelm Scharpf, 'Problem Solving Effectiveness and Democratic Accountability in the EU' (2006) Working Paper 107 IHS Wien 25; See also on politicization and DI: Daniel Thym, 'Legal Solution vs. Discursive Othering: The (Dis)Integrative Effects of Supranational Differentiation' (2018) Working Paper n°7 DCU Brexit Institute 20.

25 Bellamy and Kröger (n 17) 2.

26 Andreas Follesdal, 'Democratic Standards in an Asymmetric Union' in Olaf Cramme and Sara Binzer Hobolt (eds), *Democratic politics in a European Union under stress* (Oxford University Press 2015) 210.

27 Fossum (n 3) 2.

28 Bellamy and Kröger (n 17) 9.

29 See what Bellamy and Kroeger call procedural fairness in their InDivEU paper. Bellamy and Kröger (n 17); See further Fossum (n 3) 804 observing that "at present, given that a number of issues pertain to all member states, and as it is difficult to single out what are euro-zone specific concerns from general EU concerns, there appears to be a discrepancy btw the problem structure and the decision-making structure"; Nguyen (n 4).

30 Thym (n 24) 22.

31 Damian Chalmers and Mariana Chaves, 'EU Law-Making and the State of European Democratic Agency' in Olaf Cramme and Sara Binzer Hobolt (eds), *Democratic politics in a European Union under stress* (Oxford University Press 2015).

32 Fossum (n 3).

Art. 2 TEU lists democracy among the values upon which the Union is founded. The principle of democracy finds more concrete expression in *Title II* of the TEU, which is explicitly devoted to "provisions on democratic principles"[33]. *Title II* opens with Art. 9 TEU, that sets out the principle of equality of EU citizens, which is at the very core of the democratic foundation of the Union: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies." From the principle of citizens' equality are derived subsequent provisions establishing: that the Union is founded on representative democracy (Art. 10.1 TEU – *principle of representation*); that citizens are directly represented at the Union level in the European Parliament and that Member States governments in the Council and in the European Council are accountable to their national parliaments or to their citizens (Art. 10.2 – *principle of accountability*); that every citizen must be given the possibility to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen. (Art. 10.3 TEU – *principles of participation and transparency*).

Accordingly, our standards of democracy for DI will be rooted in a democratic model in which citizens must be represented by, participate in and be able to control the decisions made by institutions and decision-makers on their behalf on an equal footing. On this basis, we can dissect four main overarching standards of democracy as composing our analytical framework to address DI (see Table 1 for a summary): the principle of representation, the principle of accountability in the two forms of political and legal accountability, and the principles of transparency and participation. The latter, however, finds only limited and indirect application to DI and will thus only be addressed in conjunction with the twin principle of transparency (which is a precondition for citizens' participation in the democratic life of the Union).

In the next sections we will describe these standards as defined by the Treaties and by the CJEU jurisprudence and we will provide some indicators in order to assess how they relate to differentiation. This shall allow us to apply them to concrete examples of DI in part 2 and part 3 of the report. It must be noted that there are necessarily several overlaps between the standards: accountability and representation are two sides of the same coin, as citizens elect their representatives and hold them to account; similarly, transparency enhances accountability (and indeed is an essential preliminary to it), or the other way around since the absence of transparency hampers effective accountability. Thus, when building indicators around these concepts, we shall keep in mind that we are applying artificial categories and that the reality is far more complex and interconnected. Ultimately, our aim is not to put democracy into boxes (a futile exercise) but rather to devise a pragmatic analytical framework that can be used to assess differentiation patterns in the light of democratic standards.

Table 1. Constitutional standards of democracy in differentiated integration

Standard	Definition	Treaty provisions	Indicators for assessment
Representation	Citizens and Member States are equally represented in EU decision-making	▪ Art. 10.1 TEU ▪ Art. 4 TEU ▪ Art. 9 TEU	▪ Equality between Member States in the Council ▪ Rights of non-participating MSs ▪ EU institutional capacity to equally represent citizens of participating and non participating countries
Political accountability	Citizens can control EU institutions and EU decision-making	▪ Art. 14 TEU ▪ Art. 13.2 TEU ▪ Art. 17.8 TEU ▪ Art 12 TEU	▪ Accountability to EP ▪ Accountability to NPs ▪ Interinstitutional accountability
Legal accountability	Citizens can contest EU decisions	▪ Art. 19 TEU	▪ CJEU jurisdiction ▪ Legal (un)certainty

33 On the principle of democracy and on democratic principles more broadly see Bogdandy (n 13); Simona Piattoni, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* (Oxford University Press 2015).

Transparency	Citizens can be informed and understand EU decision-making	▪ Art. 1 TEU ▪ Art. 10 TEU ▪ Art. 11 TEU ▪ Art. 15 TEU	▪ Complexity of legal framework ▪ Publicity of deliberations ▪ Access to information

Source: made by the authors

Representation

Art. 10.1 TEU declares that "the functioning of the Union shall be founded on representative democracy". At a primordial level, as Von Bogdandy puts it, the principle of democracy finds its most important expression in representative institutions[34]. In accordance with the "dual structure of legitimacy" of the Union, elections provide two lines of democratic legitimacy, institutionally represented by the Council (as representation of Member States nationals) and by the Parliament (as representation of EU citizens). For this reason, Parliament and Council are the *co*-legislators: no EU law can be passed without a source of democratic legitimacy stemming from voters. It follows that the first standard of democracy of our analysis requires that representation of citizens is ensured in the European Parliament and that representation of Member States takes place in the Council and in the European Council. It furthermore needs to consider the role of the European Commission in representing the general interest of the EU (and thus also of all EU citizens and Member States nationals).

On the same line, the principle of representation builds upon a dual notion of equality as equality of citizens and of Member States. Art 9 TEU recalls that "in all its activities, the Union shall observe the principle of the equality of its citizens"; Art. 4 TEU establishes that "the Union shall respect the equality of Member States before the Treaties as well as their national identities". This latter provision informs the scope and limits of differentiated arrangements. On the one hand the respect for the national identities of Member States can be seen as a sort of "identity clause" allowing for some flexibility in the way Union's law applies[35]. At the outset differentiation is rooted in this pluralistic understanding of national peculiarities[36]. On the other hand, the principle of equality of Member States constraints the range of admissible forms of differentiation. For instance, there can only be one type of EU membership: all EU countries are members *à part entière*, there cannot be second-order or associated members[37]. Moreover, the obligation to respect the equality of the Member States translates in the principle of sincere cooperation, which indeed is formulated immediately thereafter in the TEU's Art. 4.3: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties". Sincere cooperation sets out the limits of and conditions for differentiation regimes within EU law, which will have to ensure respectful relations between participating and non-participating member states and avoid discriminatory effects[38].

The equality of citizens and of Member States will therefore provide a key element for assessing whether and in how far DI is compatible with EU democratic standards. Differentiation creates asymmetries between Member States and within institutions that can affect equality. In this regard, the main indicators of the level of representation in DI are the relations between EU citizens and institutions (whether EU institutions equally represent citizens) and the relations between participating and non-participating countries in differentiated regimes (whether the rights of non-participating member states are upheld).

34 Bogdandy (n 13) 50.

35 Lucia Serena Rossi, 'The Principle of Equality Among Member States of the European Union' in Lucia Serena Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer International Publishing : Imprint: Springer 2017) 28.

36 Giacinto della Cananea, 'Differentiated Integration in Europe After Brexit: A Legal Analysis' (2019) 2019 4 European Papers - A Journal on Law and Integration 447, 452.

37 Pauline Corre-Dumoulin, 'L'égalité Entre États Membres de l'Union Européenne et La Différenciation: De La Compatibilité Affirmée à l'inconcialiabilité Exacerbée' in Laurence Potvin-Solis (ed), *Le statut d'Etat membre de l'Union européenne : quatorzièmes journées Jean Monnet* (Bruylant 2018) 536.

38 Indeed the principle of equality between Member States was first interpreted by the Court as a principle for non-discrimination, such as in Case C-13/63 Italian Republic v Commission of the European Economic Community EU:C:1963:20. See Rossi (n 35) 24.

Political accountability

According to Art. 14 TEU the European Parliament "shall exercise functions of political control and consultation as laid down in the Treaties". The second standard relates to the democratic control of citizens on decision-makers, what we can categorize as accountability. Employing Bovens' widely accepted definition, accountability can be described as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his conduct, the forum can pose questions and pass judgment, and the actor may face consequences"[39]. In essence accountability provides a democratic means for citizens to control governments and prevents dangerous concentration of executive power through internal checks and balance. As pointed out by Bovens, Curtin and t'Hart, there are as many accountability fora as there are mechanisms[40]. We limit our analysis in this paper to the two mechanisms most relevant for DI, political accountability and judicial accountability (see below the third standard).

At the most essential level, democratic control is exercised through political accountability of executives to parliament and, eventually, to the voters. Van Gerven observes that the term accountability in a representative democracy can mean at the same time that: "the executive branch of government must render account *to* parliament in respect of action undertaken or proposed for the future"; and that "the executive can be held politically responsible *by* parliament for action that was undertaken in the past"[41]. The jurisprudence of the Court has historically protected the prerogatives of the European Parliament as the democratic institution *par excellence.* Parliamentary involvement in the decision-making process is the means through which citizens' participation is realized. As noted by the Court in the *Isoglucose* case, "it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly"[42]. Political accountability therefore also takes the form pf inter-institutional accountability, whereby for instance the European Commission is accountable in front of the European Parliament.

The main challenge of DI in relation to political accountability is that those who take decisions are not necessarily aligned with those affected by them[43]. In Fossum's words: "Incongruence occurs when citizens are affected by decisions that are beyond their control and where they cannot hold the decision-makers to account"[44]. The dual representation channel of the EU exacerbates potential asymmetries deriving from differentiation, as citizens can hold EU executives to account at both the EU and at the national level. Key indicators of political accountability are whether differentiation disrupts the accountability relations towards both the European Parliament and the national parliaments and whether one or both of these fora provide for adequate accountability structures as regards citizens of participating and non-participating Member States. In addition, indicators also assess the accountability relations between institutions, in particular as regards non-majoritarian institutions.

Legal accountability

Courts are considered accountability forums (in the Bovens sense) as they watch over the misconduct of executive actors (e.g. the Court can remove Commissioners in case of serious professional breach or misconduct). But more importantly they are a place of public accountability and democratic control as they provide citizens, institutions and Member States with the opportunity to contest legal acts and measures[45]. The equal rights of citizens (as both nationals and EU citizens) are thus safeguarded by national and EU Courts, who will determine whether their rights have been violated by EU or national

39 Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447, 450.
40 Mark Bovens, Deirdre Curtin and Paul 't Hart, *The Real World of EU Accountability : What Deficit?* (Oxford University Press 2010).
41 Walter van Gerven, 'Two Twin-Principles of EU Law: Democracy and Accountabiliy, Consistency and Convergence' in Ulf Bernitz and others (eds), *General principles of EC law in a process of development : reports from a conference in Stockholm, 23-24 March 2007* (Kluwer Law International 2008) 32.
42 *SA Roquette Farères v Council (Isoglucose)* Court of Justice Case C-138/79, ECLI:EU:C:1980:249 para 33.
43 Nguyen (n 4) 4.
44 Fossum (n 3) 801.
45 Bovens, Curtin and Hart (n 40) 42 ff.

law.

DI often implies differentiated jurisdiction by EU Courts. This is for instance the case with some opt-outs and with differentiation taking place outside of the Treaty framework. Such variable geometries in the Court's competences are problematic from a democratic perspective[46]. Given its transversal jurisdiction, the Court is able to secure the uniform application of EU constitutional concepts such as effective judicial protection and other individual fundamental rights. As follows from the Opinions 1/91 and 2/13, the indivisibility of the Court's jurisdiction over the interpretation and application of EU law in its various segments may appear as a significant constraint upon differentiated integration[47]. In addition, DI can affect the position of non-participating Member States, such as when *erga omnes* effects of the Court's jurisprudence in differentiated settings breach their rights.[48]

In this context, the question can be asked whether there are substantial limits to DI, such as in the domain of fundamental rights.[49] Indeed, the British and Polish special Protocol on the European Charter of Fundamental Rights (Charter)[50] has given rise to several concerns, although the Court has recognized that it does not amount to a real opt-out, and it 'does not call into question the applicability of the Charter in the United Kingdom or in Poland'[51].

Finally, differentiation can affect the coherence of the EU legal order, with consequences for legal accountability. DI creates a multi-layered legal order and produces overlaps between EU and international norms. It can result in complex and unclear participation patterns leading to legal uncertainty. Indicators for legal accountability in our analysis will mainly revolve around the scope of the CJEU jurisdiction in DI and whether legal certainty is upheld or not by differentiated regimes.

Transparency

Art 1 TEU requires that decisions in the Union shall be taken "as openly as possible and as closely as possible to the citizen". Art 10 TEU reiterates *verbatim* the same concept, and Art.11 TEU explicitly uses the term transparency twice (Art, 11.2 and 11.3)[52].

Transparency is a horizontal value. It makes it possible for citizens to scrutinize the way decisions are made and by whom and it is therefore above all needed for effective accountability practices[53]. In addition, it is an essential instrument to ensure participation of citizens in decision-making. According to Art. 15 TFEU, "in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible." As plainly explained by Lenaerts: "the principle of transparency enables European citizens to participate closely in the EU decision-making process. By being well informed on the decisions adopted by the EU legislator and by the EU administration, European citizens may engage in a discussion as to whether they agree or disagree with those decisions. At the same time, transparency enhances the legitimacy of the EU institutions, given that their actions (or their failures to act) are open to public scrutiny"[54]. As a matter of fact, as noted above, in our report the principle

46 For some general observations about the Court's jurisdiction in DI see Alberto Miglio, *Integrazione Differenziata e Principi Strutturali Dell'ordinamento Dell'Unione Europea* (G Giappichelli 2020) 207 ff.

47 *Opinion 1/91* [1991] ECLI:EU:C:1991:490 (Court of Justice); *Opinion 2/13* [2014] ECLI:EU:C:2014:2454 (Court of Justice).

48 Robert Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* (Brill Nijhoff 2021) 269 ff.

49 Emanuela Pistoia, *Limiti All'integrazione Differenziata Dell'Unione Europea* (Cacucci 2018) 33 ff, who identifies the Charter as an EU hard core not subject to differentiation.

50 Consolidated version of the Treaty on the Functioning of the European Union - Protocol (No 16) on certain provisions relating to Denmark 2010.

51 *N S v Secretary of State for the Home Department* [2011] Court of Justice C-411/10, ECLI:EU:C:2011:865 para 23.

52 Art 11.2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. Art. 11.3: the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

53 Sacha Prechal and Madeleine De Leeuw, 'Transparency: A General Principle' in Ulf Bernitz and others (eds), *General principles of EC law in a process of development : reports from a conference in Stockholm, 23-24 March 2007* (Kluwer Law International 2008); Stefania Ninatti, *Giudicare La Democrazia? : Processo Politico e Ideale Democratico Nella Giurisprudenza Della Corte Di Giustizia Europea* (Giuffrè 2004) 174.

54 Koen Lenaerts, 'The Principle of Democracy in the Case-Law of the European Court of Justice' (2013) 62 The International and Comparative Law Quarterly 271, 300. The principle of participation will here mainly be addressed through the prism of transparency.

of transparency will offer the prism to also address participation patterns in DI[55].

The importance of transparency for democratic legislative decision-making was repeatedly noted by the General Court and by the CJEU. As explained in *Access Info Europe* '[o]penness in that respect contributes to strengthening democracy by enabling citizens to scrutinize all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights"[56] The Court has been particularly strict when it comes to transparency practices, pushing the institutions towards greater publicity in all stages of decision-making. It reduced the range of reasons for refusing to grant access to documents and allowed for access to key inter-institutional documents, such as the trilogue files[57]. Spurred by the Court's jurisprudence, EU institutions have developed a set of rules on publicity and access to documents, that shall allow for increased transparency, especially when it comes to legislative work. However, many commentators have noted that there is still much room for improvement[58].

Transparency is moreover a prerequisite of legal accountability. The duty to provide reasons of Art. 296 TFEU is an essential element of legal protection, without which individuals and undertakings would be deprived of information essential to contest decisions they do not deem to be fair[59]. Along similar lines Treaty rules on access to documents (Art 15 TFEU) provide the means to scrutinize decision-making and to hold institutions accountable[60].

DI poses a number of challenges to transparency as a standard of democracy. It complicates the decision-making and makes it difficult to situate the *locus* of decision-making (and thus who is responsible for it)[61]. As noted, lack of transparency leads to political and legal accountability flaws. It also affects the way citizens actively take part to decision-making. By creating several layers of governance, normal citizens will struggle to gather the knowledge and information needed to effectively contribute to decision-making. In addition, when differentiation takes place outside of the EU law framework, EU transparency obligations may fall through.

Indicators for transparency rely on the overall clarity and complexity of the legal framework resulting from differentiation, on the publicity of the institutions' work and on access to information and documents.

Democratic standards and differentiated integration in EMU

Economic and Monetary Union (EMU) is an exemplary area for the study of DI. It is "the field where differentiated integration is most relevant and complex"[62], and is profoundly embedded in the policy and institutional framework. At the outset, EMU's differentiation has grounded theories of a "core" Europe, whereby a group of countries would establish forms of closer cooperation in a variety of fields, the nucleus of this group being mostly identified with a stable eurozone avantgarde[63]. Yet,

55 Participation is manifestly also a standard of democracy. Article 11 establishes that "the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action." It also spells out the two main channels that give effect to this participation: interest representation and the citizens' initiative. However, the impact of differentiation on participation patterns is at best indirect and cannot be assessed within the analytical framework proposed. Participation-related issues in DI will thus be addressed within the fourth standard of transparency.

56 *Access Info Europe v Council* [2011] General Court Case T-233/09, ECLI:EU:T:2011:105.

57 *Case T-540/15, De Capitani v Parliament* [2018] ECLI:EU:T:2018:167; *Case C-60/15 P, Saint-Gobain Glass Deutschland v Commission* [2017] ECLI:EU:C:2017:540.

58 Deirdre Curtin and Päivi Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU. Report for the Petitions Committee' (European Parliament 2016); Herwig Hofmann and Päivi Leino-Sandberg, 'An Agenda for Transparency in the EU' (*European Law Blog*, 23 October 2019).

59 Bogdandy (n 13) 51.

60 *Kingdom of Sweden v Commission* [2007] Court of Justice Case C-64/05 P, ECLI:EU:C:2007:802.

61 Hofmann and Leino-Sandberg (n 58).

62 Christoph Herrmann, 'Differentiated Integration in the Field of Economic and Monetary Policy and the Use of "(Semi)Extra" Union Legal Instruments – The Case for 'Inter-Se Treaty Amendments'' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between flexibility and disintegration : the trajectory of differentiation in EU law* (Edward Elgar Publishing 2017) 241.

63 Jean-Claude Piris, *The Future of Europe : Towards a Two-Speed EU?* (Cambridge University Press 2012); Sergio Fabbrini, *Europe's Future : Decoupling and Reforming* (Cambridge University Press 2019).

these visions postulate a uniform legal framework for differentiation centred upon the eurozone, whereas DI in EMU was never coherent and has grown increasingly complex and disconnected, especially following the euro-crisis.

Enshrined in EU primary law since the Treaty of Maastricht, that contained provisions for the creation of a single currency, differentiation in EMU is mainly built upon, but is not limited to, euro-membership. The main dividing line in fact runs between EU member states which have joined the euro and are thus part of the European Monetary Union and those which did not. So far, 19 EU member states are in the eurozone. Although, in principle, all Member States should share the objective to adopt the euro, in practice there are many differences within the non-euro member states. Denmark has a permanent exemption clause from EMU (Protocol n 16)[64]. Accordingly, Denmark is under no obligation to introduce the euro. The UK prior to Brexit also enjoyed a similar permanent opt-out from the single currency. On the other side of the spectrum are six of the Member States that joined the Union more recently: Poland, the Czech Republic, Hungary, Rumania, Bulgaria and Croatia have the status of "Member States with a derogation", meaning that they are supposed to join the euro but do not yet fulfil the criteria of convergence. In-between is Sweden, officially a Member State with derogation, which however decided not to join the eurozone following a popular referendum against it. Sweden is simply staying outside of the eurozone, intentionally not complying with the euro convergence criteria[65]. As noted by Beukers and Van der Sluis, "it is clear that the non-euro area Member States have hardly ever been in the same position, either with regard to their legal obligations or with regard to their political intention to join the euro. Indeed, it seems that the group of outs is best defined in the negative: they are Member States who are not a member of the euro area"[66].

Following the euro-crisis the membership landscape of EMU has become even more complex and multi-layered. Several differentiation instruments have been used in coordination, sometimes operating within the EU law framework, sometimes outside of it. In addition, post crisis reform measures apply not only to eurozone members but have associated many non-eurozone countries in a variety of different geometries[67]. The two-pack and part of the six-pack legislation, strengthening budgetary and macro-economic surveillance, was adopted under a special closer cooperation regime under Article 136(1) TFEU. Some provisions apply to the EU-27, some apply to the eurozone only and some others partially apply to non-euro area countries too. The European Stability Mechanism (ESM) (and its temporary predecessor, the European Financial Stability Facility (EFSF)), was created outside of the EU Treaties framework by the euro area Member States only. It established a permanent emergency fund to support eurozone members in distress.[68] The Fiscal Compact, also an international Treaty, required Member States to enshrine into national law the 'golden rule' of a structural deficit not exceeding 0.5% of the GDP. It was signed by 25 Member States (with the exclusion of the UK, Croatia and the Czech Republic). Finally, the Single Resolution Mechanism (SRM) of the Banking Union is an EU Agency deciding on the resolution of failing banks and sees the mandatory participation of eurozone members but it also associates non-eurozone members[69]. It manages the Single Resolution Fund (SRF), which was however created via an intergovernmental agreement signed by 26 Member States, with the exception of Sweden and the UK[70].

64 Treaty on the Functioning of the European Union - Protocol (No 16) on certain provisions relating to Denmark 2016; The opt-out is in principle temporary but in practice there is no timeline for Denmark to ever join the euro. See further Bruno De Witte, 'EMU as Constitutional Law' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic & Monetary Union* (Oxford University Press 2020) 280.

65 For further information on the status of non-euro Member States see Cornelia Manger-Nestler, 'The Architecture of EMU' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic & Monetary Union* (Oxford University Press 2020) 191 ff.

66 Thomas Beukers and Marijn Van der Sluis, 'Differentiated Integration from the Perspective of Non-Euro Area Member States' in Thomas Beukers, Bruno de Witte and Claire Kilpatrick (eds), *Constitutional change through Euro-crisis law* (Cambridge University Press 2017) 144.

67 Stefaan Van den Bogaert and Vestert Borger, 'Differentiated Integration in EMU' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between flexibility and disintegration : the trajectory of differentiation in EU law* (Edward Elgar Publishing 2017) 210 ff.

68 A special article was introduced in the Treaties through the simplified revision procedure (Art 136(3) TFEU) allowing the Eurozone member states to establish a 'stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole'.

69 For more information on the application of EMU-related post-crisis reform see further Beukers and Van der Sluis (n 66) 152 ff.

70 Council of the European Union, Website, available at http://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2014031 (last consulted 24/04/20). See further Federico Fabbrini, 'On Banks, Courts and International Law:

Such varied arrangements are the reflection of the fact that differentiation in EMU struggles to strike a fair balance between euro-area and non-euro area members (or between the ins' and the outs' as it is commonly referred to). Decisions regarding the euro-area also affect non-eurozone members, as the euro-crisis plainly demonstrated. In addition, as in principle all EU Member States should at some point join the euro, it follows that euro-area decisions have a potential future impact on them (or at least on those Member States who actually plan to adopt the single currency). In addition, there seems to be a mismatch between the formal legal rules on the eurozone and the political reality[71]. It is by now clear that adopting the euro is no actual obligation neither for the opt-out Member States nor for the Member States with derogations. The disconnect between rules and reality creates a *de-facto* permanent differentiation paradigm[72]. It also points to the first democratic idiosyncrasy. One could argue that the EU is trumping its Treaties by allowing for permanent exclusion to the euro. More pragmatically, as pointed out by Dashwood regarding the Swedish case, 'no Member State of the Union can be compelled to join the single currency if its people do not wish this'[73]. Yet, it makes a difference from a democratic perspective whether the relationship between ins' and outs' is to be designed upon future inclusion or as a permanent feature of the legal system[74].

This section of the paper will address the challenges that EMU differentiation poses in terms of democracy and accountability. Because of the complexity of the legal framework, our analysis will be limited to only some examples of DI and will focus on the institutional aspects[75]. Our objective is thereby to apply our standards of democracy to a meaningful sample of differentiation, without pretending to be exhaustive. We will consider in turn how the EU institutions have organized differentiation (I), and how it is implemented both within the Treaty framework in the Six- and Two-Pack (II), and outside of it within the ESM (III).

Setting the scene. EU institutions facing differentiation

The EU institutions have responded to eurozone differentiation by adapting their working methods yet remaining solidly anchored to the single EU institutional framework. In fact, the eurozone institutional framework is built upon a mixture of differentiated and non-differentiated institutions. Whereas the European Commission (Commission), the European Parliament (EP) and the CJEU operate on a non-differentiated basis, the Council, the European Council and the ECB have set up differentiated platforms for eurozone decision-making. The legally distinctive features concern the voting rights of Member States within the Council and the composition of the decision-making bodies of the European Central Bank (ECB). As for the former, Member States which are not part of the eurozone cannot vote on euro-related measures. In the latter, the ECB Governing Council gathers central banks of the euro area only and its executive board is composed of nationals of euro-countries[76]. In addition, national parliaments, by definition operating on the basis of national mandates, contribute to differentiated decision-making, albeit not with a regular involvement. Next, we will examine EMU differentiation paradigms at the three main EU institutional levels of the Council, the parliaments and the Commission[77].

The Intergovernmental Agreement on the Single Resolution Fund in Context' (2014) 21 Maastricht Journal of European and Comparative Law 444.

71 Paul Craig and Menelaos Markakis, 'The Euro Area, Its Regulation and Impact on Non-Euro Member States' in Panos Koutrakos and Jukka Snell (eds), *Research handbook on the law of the EU's internal market* (Edward Elgar Publishing 2017) 300.

72 Diane Fromage, 'Moving beyond "Institutional Unity" within the EU? Euro Area versus Non-Euro Area Representation in the EU Institutions' in Diane Fromage and Bruno De Witte (eds), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection* (Maastricht Law Working Papers Series) 61.

73 Alan Dashwood, 'Guest Editorial. Living with the Eurozone'' (2016) 53 Common Market Law Review 5.

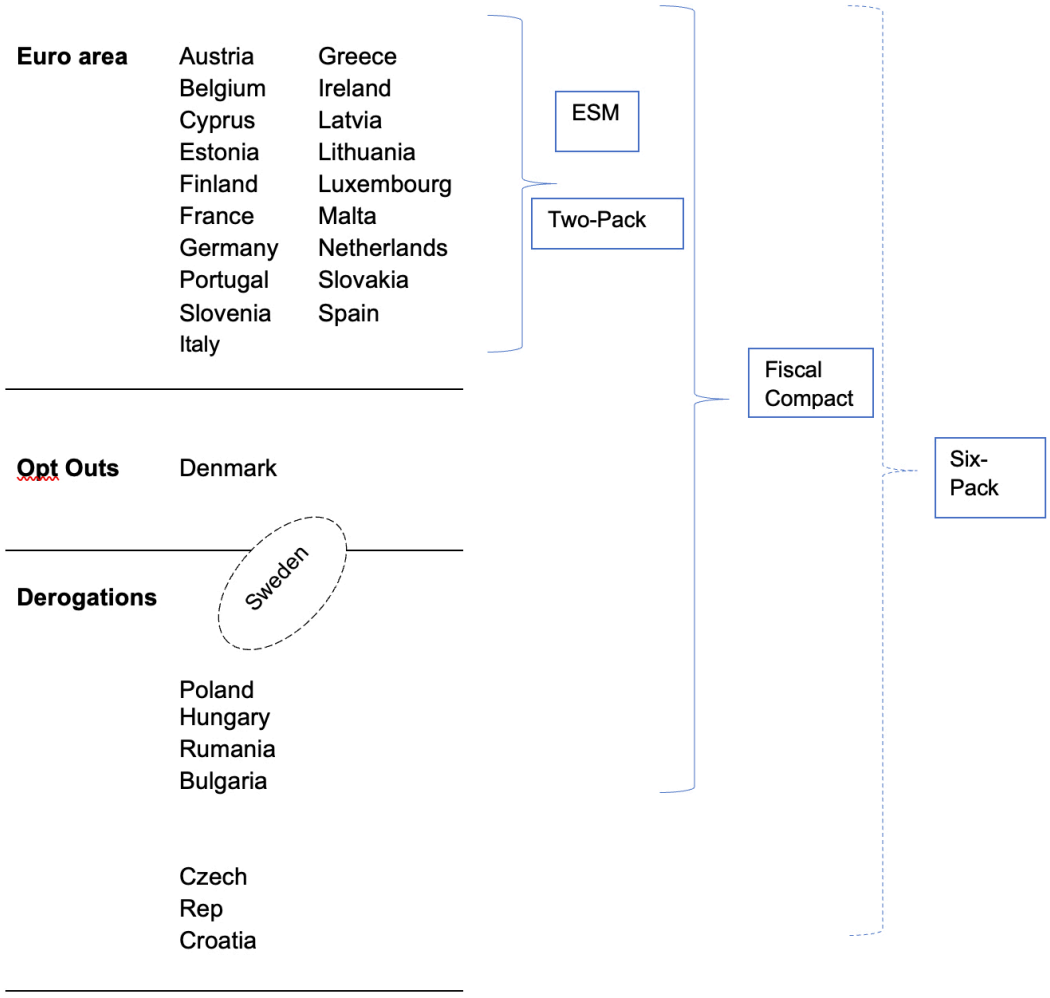
74 See for instance the debate on institutional reform that would create permanent euro-area institutional settings (e.g. a parliament for the eurozone). Thorough institutional reform could legally be possible assuming that the euro is not necessarily a common destiny. Most of these issues will be treated in the following analysis.

75 See for a broader approach Van den Bogaert and Borger (n 67), who distinguish between several forms of differentiation (membership, participation, instruments, law).

76 Böttner (n 48) 30. The scope of this paper does not allow us to delve into the role of the ECB, which is however highly relevant for DI especially as far as the Banking Union is concerned. See further on this the work of D. Fromage.

77 We will not examine the CJEU and the ECB, although especially the latter is highly relevant for differentiation. Indeed, the analysis of the role of the ECB in EMU and in the Banking Union would require a more in depth analysis, certainly too long to fit the scope of this report.

Figure 1. Differentiation in the eurozone and EMU



Source: made by the authors

Ecofin, Eurogroup, European Council and Euro-Summit

We will start our analysis from the institutions that are mostly impacted by EMU differentiation: the Council and the European Council and their euro-area sub-formations: the Eurogroup and the Euro-Summit.

The Eurogroup is an informal meeting of finance ministers of the euro countries, which was set-up in the late 1990s to coordinate matters related to the single currency. Despite its informal status, since the Lisbon Treaty it is recognised in Art. 137 TFEU and governed by the arrangements of the Protocol 14 on the Eurogroup[78]. The Protocol, which has only two articles, states that Eurogroup meetings are informal and that they "shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency" (Art. 1). The European Commission takes part to Eurogroup's meetings and the ECB is invited to participate (Art. 1).

In practice, following the euro-crisis, the Eurogroup has gained enormous importance in EMU decision-making. It was instrumental in negotiating financial assistance packages with Member States in distress during the financial crisis[79] and played a key role during the most recent COVID-19 crisis in the early stages of the discussions about a recovery instrument[80]. In fact, the Eurogroup now deals

78 Consolidated version of the Treaty on the Functioning of the European Union - Protocol (No 16) on certain provisions relating to Denmark.

79 Pierre Schlosser, *Europe's New Fiscal Union* (Palgrave Macmillan 2019).

80 Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58

with all major euro-related economic and financial matters, ranging from macroeconomic planning to the banking union[81]. Post-crisis reform has even entrusted the Eurogroup with own supervision tasks, separate from ECOFIN: this is the case for instance of the macro-economic imbalance surveillance and the Two-Pack, whereby the Eurogroup is called on to examine the Commission's reports and evaluate national budgetary plans in a tight relationship with the Commission[82]. The body is also responsible for the preparation of the Euro Summits, e.g. the meeting of the Heads of State of the euro-area countries. The Euro Summit is the transposition of the Eurogroup at the level of the European Council, which started meeting in a differentiated format as of 2008.

Since then, the Eurogroup and the Euro Summit have become the most important EU fora for European financial and economic matters. This development has tilted the balance of EU decision-making in favour of euro-area members. The UK has in fact reiterated on several occasions its concerns for the impact euro-area decisions may have on non euro-area members. The pre-Brexit New Settlement for the UK even mentioned the need to protect the interests of non-euro area Member States in this context.[83] Arguably, the increasing power of the Eurogroup relegates the Economic and Financial Affairs Council (ECOFIN) to a second-order platform. Yet it is ECOFIN which adopts all formal decisions. The Eurogroup, as an informal body, is deprived of any formal decision-making power.

The relation between ECOFIN and the Eurogroup reveals the dilemma of implementing DI in the EU. On the one hand, providing a decision-making forum for the Member States who participate in the euro is normal and even needed from a practical point of view. Yet, because of high externalities, non Euro-area Member States are likely to be substantially affected by eurozone decisions, and should be associated to discussions. This dilemma has been usually addressed by allowing non-euro area Member States to take part to the meetings of the Eurogroup whenever matters of common interest are tackled[84]. When this happens, it is referred to the Eurogroup meeting in 'inclusive format'. Increasingly, the Eurogroup is resorting to this format[85]. However, inclusive meetings have ended up further strengthening the Eurogroup and weakening the ECOFIN. It is by now common practice for the Eurogroup to hold hybrid meetings, gathering the Eurogroup Ministers only first and opening up to all EU Finance Ministers to discuss matters of common interest in a second moment. As the Eurogroup usually meets before the ECOFIN, this produces a convoluted meeting agenda, whereby Ministers meet first in the framework of the Eurogroup and shortly thereafter again in the ECOFIN, resulting in a duplication of decision-making forums (See Table 2). The sequence matters as actual decisions are likely to be made in the former, informal, setting, rather than in the latter formal one. This is a usual process in EU decision-making, whereby preparatory bodies, such as the Coreper, often reach agreements that are then officially adopted by the Council. However, in the Coreper all Member States are represented, yet at a lower hierarchical, and perhaps less politicised, level. In the Eurogroup, conversely, sit the same ECOFIN Ministers headed by a politically vocal President. Such an institutional architecture duplicates tasks and shifts decision making on economic and financial matters away from its dedicated legal platform to an informal, yet political and euro-centric, body.

This trend clearly emerged during the Covid-19 crisis, where the Eurogroup became the centre of the discussion on the EU response to the crisis. It is telling that the European Council in March 2020 mandated the Eurogroup to present proposals on how to tackle the crisis. According to the European Council Joint Statement, "These proposals should take into account the unprecedented nature of the COVID-19 shock affecting all our countries and our response will be stepped up, as necessary,

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81 Paul Craig, 'The Eurogroup, Power and Accountability' (2017) 23 European Law Journal 234, 235 ff.

82 Miglio (n 46) 159–160, who notices how the Eurogroup has acquired even more markedly quasi-formal powers in the Banking Union, an area which is not covered by the present report, but which assigns to the Eurogroup a more significant role than the Council.

83 Letter by President Donald Tusk to the Members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union, 2 February 2016.

84 Resolution of the European Council of 13 December 1997 on economic policy coordination in stage 3 of EMU and on Treaty Articles 109 and 109b of the EC Treaty 1997 [OJ C 35].

85 Alberto de Gregorio Merino, 'The Institutional Architecture of Economic Union' in Federico Fabbrini and Marco Ventoruzzo (eds), *Research handbook on EU economic law* (Edward Elgar Publishing 2019) 32.

with further action in an inclusive way, in light of developments, in order to deliver a comprehensive response."[86] Strikingly, the task to find a 'comprehensive' and 'inclusive' solution is entrusted to the main differentiated body par excellence[87].

The timeline of Table 2 retraces the decision-making process between the Eurogroup and the ECOFIN at the height of the Covid crisis through the example of one specific meeting (of May 2020). As one can see, the Eurogroup in inclusive format focused mainly on the economic response of the EU to the crisis, while the ECOFIN treated also of broader issues.

Table 2. Eurogroup/ECOFIN meetings May 2020

15 May 2020		19 May 2020
Eurogroup	**Eurogroup inclusive format (EU 27)**	**ECOFIN**
Agenda: • Euro area: economic outlook and challenges	Agenda: • Economic response to the COVID-19 crisis • State aid framework	Agenda: • Economic response to COVID-19 pandemic • Anti-money laundering and terrorist financing • European Semester 2020 • Economic dialogue with Western Balkans and Turkey

Source: Meeting Calendar and Agendas, Council of the European Union[88]

These developments have several consequences in terms of democracy and accountability and affect all the four standards of representation, political accountability, legal accountability and transparency.

First, as pointed out by Nguyen, differentiation in the Eurozone highlights a typical problem of representation incongruence, as "the Eurogroup and Euro summit exclude the government representatives of those member states that may be indirectly affected by the decisions".[89] Although the inclusive format allows the Eurogroup to associate non-euro area countries to the decision-making, there remains a big imbalance between ins' and outs'. In fact, it would be wrong to think that the Eurogroup in inclusive format is identical to ECOFIN. First, it is an informal body with its own procedures and practices which are focused on the eurozone. Second, the Eurogroup's President holds extensive powers and speaks on behalf of the Eurogroup mainly. He certainly also detains a big leverage in negotiations and bargaining that could put off countries that are not in the eurozone. Finally, the 1997 European Council Resolution establishing the Eurogroup reminded that "the defining position of the ECOFIN Council at the centre of the economic coordination and decision-making process affirms the unity and cohesion of the Community"[90]. The Eurogroup does not hold this position. Probably for non-eurozone member states it is better to be at least associated to the Eurogroup work than excluded from the main forum of informal – and yet most effective – decision-making. However, the shift from ECOFIN to the Eurogroup does not safeguard the rights of non participating member states in the same way[91].

86 Joint statement of the Members of the European Council, Brussels, 26 March 2020, https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf

87 On the potential reasons as to why this happened see further De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (n 80), also pointing to the overlap between the Eurogroup and the ESM functions.

88 https://www.consilium.europa.eu/en/meetings/calendar/?daterange=past

89 Nguyen (n 4) 13.

90 Resolution of the European Council of 13 December 1997 on economic policy coordination in stage 3 of EMU and on Treaty Articles 109 and 109b of the EC Treaty (n 84).

91 See for instance Fromage (n 72) 71, noting that the habits to hold inclusive meetings defies the very purpose for which the Eurogroup was created and does not find any support in the Treaties.

Second, the gap between the official informal mandate of the Eurogroup as a discussion forum and its actual decision-making powers raises several issues of political accountability[92]. The Eurogroup is not subject to the accountability and transparency requirements of the Council (see also further below on transparency). For this reason, all decisions are formally adopted by the Council. This, however, shifts the *locus* of decision-making behind the public scene and makes control very difficult. The duplication of fora noted above adds to this disconnect, since it blurs the picture of who is deciding and when, rendering "the demarcation of clear lines of accountability more difficult"[93]. As observed by De Gregorio Merino, there is an intrinsic ambiguity where "bodies in principle conceived for a subset of Member States […] effectively deal with EU instruments called to be adopted by all 27 Member States"[94]. It follows that the main decision-making body for the most important differentiated policy in the EU is only very indirectly politically accountable (via the European Council and the Council it is ultimately accountable to national electorates and national Parliaments). There is no direct accountability line to the European Parliament, although the President of the Eurogroup often attends European Parliament's meetings.

Third, the legal accountability of the Eurogroup is a contested issue. The CJEU has held on several occasions that the Eurogroup is not an EU body according to the Treaties and is deprived of decision-making powers. With the two 2016 judgments of *Mallis* and *Ledra Advertising* it ruled that Eurogroup's acts cannot be challenged neither in an action for annulment (*Mallis*) nor in an action for damages (*Ledra*)[95]. Nevertheless, in *Ledra* it envisaged the possibility of triggering the non-contractual liability of the Union for the violation of the Charter of Fundamental Rights[96]. The most recent judgment in the Eurogroup's accountability *saga* is the *Chrysostomides* case, dealing with Eurogroup's responsibilities in the framework of EU financial assistance measures adopted in Cyprus during the 2012-2013 banking crisis. Several Cypriot investors were affected by the decision to restructure the major Cypriot banks, decision in which the Eurogroup arguably played a key - even if informal – role. Not even in that case, however did the Court recognize the non-contractual liability of the Union and ruled that the action was not admissible. It reiterated that the Eurogroup was created as an intergovernmental body outside the EU institutional framework and that its formalisation in Art. 136 TFEU "did not alter its intergovernmental nature in the slightest"[97]. As a consequence, its acts could not be reviewed by the CJEU. Interestingly, the general Court had adopted a different approach on the case. It had hold that the Eurogroup could be considered as an entity recognised by the Treaties and contributing to achieving the Treaties' objectives. In the opinion of the General Court "any contrary solution would clash with the principle of the Union based on the rule of law, in so far as it would allow the establishment, within the legal system of the European Union itself, of entities whose acts and conduct could not result in the European Union incurring liability"[98]. That interpretation would have opened to the review of the Eurogroup decisions at least as regards actions for damages, whereas actions for annulments would have remained not admissible.

The implication of the Court's jurisprudence is that the Eurogroup cannot be held liable because it does not adopt acts but is only an informal forum for discussions. This stance, however, is "predicated on a formalistic view of the Eurogroup and its place within the EU institutional architecture, which bears little relation to reality"[99]. As argued by several scholars, the clash between the Eurogroup's effective powers and its informality leaves a void in judicial protection[100]. The problem arises when this

92 For an in depth study of the Eurogroup's accountability see the 2019 report of Transparency International on the matter. Benjamin Braun and Marina Hübner, 'Vanishing Act: The Eurogroup's Accountability' (Transparency International EU 2019).

93 Craig (n 81) 240.

94 de Gregorio Merino (n 85) 31.

95 *Mallis and Others v Commission and ECB* [2016] Court of Justice Joined Cases C-105/15 P to C-109/15 P, ECLI:EU:C:2016:702; *Ledra Advertising Ltd and Others v Commission and ECB* [2016] Court of Justice Joined Cases C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701; For an analysis of the legal accountability of the Eurogroup in these two cases see further Craig (n 81).

96 René Repasi, 'Judicial Protection against Austerity Measures in the Euro Area: Ledra and Mallis' (2017) 54 Common Market Law Review.

97 *Council v K Chrysostomides & Co and Others* [2020] ECLI:EU:C:2020:1028 para 87.

98 ibid para 110.

99 Craig (n 81) 244.

100 Craig (n 81); Isabel Staudinger, 'The Court of Justice's Self-Restraint of Reviewing Financial Assistance Conditionality in the Chrysostomides Case' (2021) 2021 6 European Papers - A Journal on Law and Integration 177.

informal forum for discussion effectively makes decisions that translate into legal acts which affect individuals but which cannot be challenged. This was for instance the case for austerity measures adopted during the euro-crisis. They were de-facto imposed by the EU but only as a condition for financial support under the threat of sovereign default. Revasi observed that "political commitments to payment conditions set by the external creditors produce effects similar to legal obligations. In avoiding sovereign default, national legislatures implement such political commitments as if they were prescribed by law"[101]. Yet, the "supranational *raison d'être"* of these national measures cannot be reviewed. In this sense the fact that the Eurogroup is an informal body with no decision-making powers can lead to a gap in judicial protection, when its actions constraint and determine the adoption of national decisions and acts, but the CJEU has no jurisdiction on them. This is particularly relevant for the citizens of the euro-area Member States, who cannot challenge the results of the Eurogroup's work, despite the Eurogroup holding significant power to determine what measures will be imposed upon them. It is a problem for non euro-area Member States too, who may be indirectly affected by those measures. And, in recent times, the Eurogroup's centrality to the management of the pandemics on behalf of the EU-27 may require further legal control on its activities. The problem is that until the Eurogroup remains an informal body, it will be difficult for the CJEU to establish its jurisdiction[102].

Fourth, as noted above, the Eurogroup fares very low in terms of transparency. As a 2019 report of Transparency International colourfully puts it: "for an institution whose decisions have had an impact on the lives of millions of Europeans, there is much about the Eurogroup that is mysterious"[103]. As an informal body, the Eurogroup is not bound by rules on publicity. Its meetings are confidential and it does not adopt conclusions. Generally, the Eurogroup's President summarises the main results of the meetings in a public letter to its participants. The Eurogroup's working methods justifies this confidentiality as a pragmatic tool for effective decision-making: "the informal character of the Eurogroup provides for both the flexibility of a pragmatic approach to the agenda-setting and the confidentiality for in-depth political discussions"[104]. This has probably constituted a big advantage for the Eurogroup, as it has provided an informal, flexible and confidential platform for discussion, far away from the spotlights of the European Council. This may be one of the main reasons for the preference for the Eurogroup's inclusive format over the ECOFIN, especially during the Covid-19 crisis. Yet, the same Transparency International report points out that transparency is especially important in an intergovernmental body such as the Eurogroup, which is not politically accountable at the Union level: information on how decisions are reached make it possible to hold the Ministers to account[105]. Even more so when the Eurogroup is mandated to lead negotiations on packages such as the European Recovery Plan. Crucially, moreover, transparency allows non eurozone Member States to keep the Eurogroup's activities under control, allowing to anticipate potential effects on them and prepare for them.

Following several calls to upgrade the Eurogroup's transparency, as well as a strategic inquiry by the European Ombudsman, the body has engaged in a reform path that is gradually improving its transparency practices. The so called "Eurogroup Transparency Initiative" was on the agenda of its April 2021 meeting and the body's work programme reiterates its commitment to enhancing the transparency and legitimacy of its decisions[106]. As a matter of fact, the Eurogroup has set up an online register, where it publishes some of the documents submitted to the Eurogroup and to the Eurogroup Working Group as well as their agendas. It also makes its work programmes and Working Methods public[107]. Although this represents a significant improvement in terms of transparency and

101 Repasi (n 96) 1123.
102 ibid 1135.
103 Braun and Hübner (n 92) 4.
104 Working Methods of the Eurogroup 2008 (ECFIN/CEFCPE(2008)REP/50842 rev 1).
105 Braun and Hübner (n 92) 29.
106 Eurogroup Work programme until June 2021, Brussels, 5 October 2020, available at https://www.consilium.europa.eu/media/45984/eurougroup-wp-until2021.pdf
107 Council of the European Union, Secreteriat General, Eurogroup transparency review 2021 Background document for the Eurogroup discussion, 31 March 2021, available at https://www.consilium.europa.eu/media/49193/20210416-eg-transparency-review.pdf

accessibility to information, it is very much up to the Eurogroup itself to decide what to publish and when as there is no comprehensive framework regulating this transparency regime.

European Parliament and National Parliaments

As a matter of fact, there is no differentiation in the EP. MEPs are democratically elected in the Member States, but they are protected by a free mandate, whereby no distinction is made as to their constituency of origin. According to Art. 10(2) TEU "citizens are directly represented at Union level in the European Parliament". It has been argued that this asymmetry undermines the democratic accountability of the EP, because non-Eurozone MEPs can vote on euro-relates measures, but eurozone citizens cannot exercise any democratic control upon them[108]. This accountability gap is further strengthened by the limited powers of the EP in EU economic governance. As noted by De Witte, legislation is used sporadically in the EMU domain, where soft-law recommendations and operational decisions are predominant[109]. Limited recourse to legislative decision-making diminishes the involvement and the oversight of the EP. With the euro-crisis, in addition, many measures were adopted outside of the EU Treaty framework leading to a further marginalization of the EP[110]. In this context national parliaments can act as an additional layer of - and a replacement for – democratic accountability in EMU. As the powers of the EP in EMU are limited, control is to be exercised by the national parliaments, who hold their respective governments to account. Where the EP oversight alone cannot take into account the differentiated nature of the euro-zone, national parliaments can step in to ensure such a differentiated control (naturally the national parliaments of the eurozone will be more interested to participate in euro-related policies than the non-eurozone ones).

Several proposals to integrate DI in the EP functioning have attempted to reinforce the accountability lines towards both the European parliament and the national parliaments. They range from only cosmetic changes to the accountability relations between the EU institutions to a revolutionary transformation of the EP in a new parliamentary assembly.

For instance, the Commission proposed an 'agreement' on the democratic accountability for the euro area in view of the European Parliament elections of June 2019. Acknowledging that the Treaties currently do not provide a framework for the democratic accountability of the euro area, the Commission observed that: "the European Parliament and national parliaments need to be equipped with sufficient powers of oversight, following the principle of accountability at the level where decisions are taken"[111]. However, its concrete proposal amounted to little more than a formalisation of the regular dialogue that Commissioners already have with the EP.

Bolder versions of differentiation include proposals to set up a new parliamentary chamber for the Eurozone on the model of the Bundesrat[112]. Even more radically, a number of prominent French academics, including Thomas Piketty, have proposed the establishment of a new *Parliamentary Assembly of the Euro area* in the framework of a far-reaching, parallel, reform Treaty on the democratization of the governance of the euro area (T-Dem)[113]. The new Assembly, that would be composed for 4/5ths by the representatives of national parliaments and for the remaining 1/5th by the representatives of the European Parliament, would have much more far-reaching powers than currently enjoyed by the European Parliament in this area. It would take part to the preparation of the Eurogroup and of the Euro summit meetings; it would have legislative capacity; and it would have the final say on the vote of the Euro area budget. The T-Dem proposal would radically transform the way the European Parliament works. However, it risks making things worse rather than better. The reform

108 Nguyen (n 4) 6.

109 De Witte, 'EMU as Constitutional Law' (n 64) 282–283.

110 Thomas Beukers, 'The Eurozone Crisis and the Legitimacy of Differentiated Integration' [2013] EUI Working paper 2013/36 14 ff <http://cadmus.eui.eu//handle/1814/29057> accessed 18 March 2020.

111 European Commission, Reflection Paper on the Deepening of the Economic and Monetary Union 2017 [COM(2017) 291] 27.

112 For this and other proposals on how to reform the EP to allow for EMU differentiation see Deirdre Curtin and Cristina Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between flexibility and disintegration: the trajectory of differentiation in EU law* (Edward Elgar Publishing 2017) 127 ff.

113 Stéphanie Hennette-Vauchez and others, *How to Democratize Europe* (Harvard University Press 2019).

would weaken the legitimacy basis of the European Parliament, duplicate the roles of the institutions and enhance confusion[114]. In addition, such an Assembly would not respect the free mandate of the MEPs, which is also a key element of European democracy. The very identity of the EP, it is argued, rests precisely with its European mandate which is built upon the principle of equality of the European citizens[115]. Finally, it is unclear how differentiated rights for MEPs would be compatible with the introduction of transnational lists, whereby a share of MEPs would not be elected on a national contingent, but on Europe-wide lists, providing for a genuine European mandate, independent from the distinction between Eurozone and non-Eurozone countries.

Half-way through proposals have considered the possibility to create a euro area sub-committee within the EP ECON Committee[116] or to shift the accountability balance towards a collective involvement of national parliaments[117]. These proposals, that we will now examine in turn, were prompted by the belief that any form of differentiation should respect the European free mandate of MEPs, avoid differentiated representation and the creation of second-order MEPs.

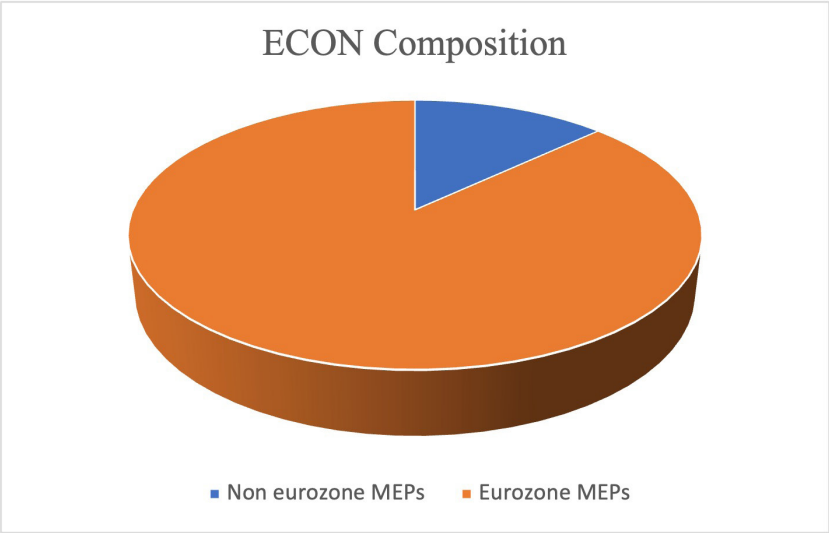
The European Parliament itself has historically opposed forms of asymmetric participation[118]. However, in May 2014 the ECON Committee put forward the idea to set up a sub-committee on EMU, as a sort of preparatory body for the EMU-related work of ECON. Only the work of such a sub-committee would be differentiated, while membership would be open to all MEPs. Nevertheless, political groups could achieve a sustainable 'differentiation', by entrusting the MEPs of the eurozone key positions within the committee[119]. Such a proposal was never implemented in practice. In fact, it has been argued that an ECON subcommittee would simply duplicate the shortcomings in democratic accountability that affect ECON itself[120]. Perhaps more plainly, there may be no need for such a sub-committee, nor to enshrine any other 'hard' form of differentiation within the EP institutional setting, since ECON already achieves quite a big deal of such differentiation in practice, by the internal organization of its work. If we take a look at the current composition of the committee, we find that only nine out of sixty MEPs come from non-eurozone countries (see graph 1). Eurozone MEPs hold all the major positions but a vice-chairmanship (which is filled by a Czech MEP). One may argue that this composition strikes a fair balance between the representation of the eurozone and the interests of non-eurozone countries to be associated to EMU decision-making (which by the way, often apply also to them, at least as far as economic policy is concerned). Such an operational solution maintains the European rationale of the EP mandate, by limiting institutional change to political practice. However, it may also be possible in principle to formalize such arrangements, by establishing a minimum quota of eurozone MEPs that must be represented in ECON. Such a rule could be added to the EP Rules of Procedure. Currently, Rule 209 on composition of committees only requires that the committees should reflect the balance between the political groups[121].

Arguably, the European Parliament may continue to work on a non-differentiated basis, if national parliaments exert an effective control on Heads of State and Government and Ministers on EMU matters. The accountability of the Eurozone governments to their parliaments would thus make up for the absence of hard differentiation in the European Parliament. However, communications channels between the national and the European level are weak. National parliaments are often not well and timely informed, and do not have the time to deal with EU decision-making[122]. Furthermore, the ordinary legislative procedure and the use of QMV in the Council generally require amendments to be negotiated during the legislative process, with small windows for national parliamentary scrutiny over

114 De Witte, 'An Undivided Union?' (n 23) 246.
115 Curtin and Fasone (n 112) 130.
116 Curtin and Fasone (n 112).
117 Diane Fromage, 'A Parliamentary Assembly for the Eurozone?' (2018) WP 2018/134 Ademu Working Paper.
118 European Parliament, Report on differentiated integration [2018/2093(INI)].
119 Curtin and Fasone (n 112) 134.
120 Fromage (n 72) 67.
121 Rules of Procedure of the European Parliament 2021.
122 Deirdre Curtin, 'Democratic Accountability of Executive Power' in Federico Fabbrini, EMH Hirsch Ballin and Han Somsen (eds), *What form of government for the European Union and the Eurozone?* (Hart Publishing 2015) 182 ff; Adam Jan Cygan, *Accountability, Parliamentarism and Transparency in the EU : The Role of National Parliaments* (Edward Elgar Pub Ltd 2013) 24, 90.

proposed changes[123]. The second strand of reform proposals mentioned above therefore stresses the importance of more effectively involving national parliaments in EMU decision-making[124]

Figure 2. ECON composition



Source: data of the European Parliament

An attempt in such a direction was made by the Treaty on Stability, Coordination and Governance (TSCG or better known as the Fiscal Compat) that established the Inter-parliamentary Conference on Stability, Economic Coordination and Governance in the European Union (Art. 13). The Conference provides a platform for discussion and exchange of information and best practices between the national parliaments and the European Parliament on economic governance and fiscal policy. It meets since 2015 twice a year. It was noted that the Conference is unlikely to become anything beyond a talk shop. Indeed, the size of national delegations vary greatly, decisions are always consensual and all Member States participate, not only the eurozone's[125]. Nevertheless, the Conference represents an interesting institutional experiment. In 2020 it was held in the framework of the *European Parliamentary Week*, also including the *European Semester Conference*, devoted specifically to the implementation of the European Semester cycles. The European Semester is the cycle of economic, fiscal, and social policy coordination within the EU, during which the member states align their budgetary and economic policies with the EU rules. It constitutes a good hook for the involvement of national parliaments as it touches upon their key prerogatives, especially for the eurozone, by exerting control over national allocation of budget, historically in the hands of NPs[126]. This may become even more the case in connection with the Recovery Plan, which links the national recovery and resilience plans to the European Semester[127]. In sum, such an inter-parliamentary platform collectively gathering MPs and MEPs may at least provide the right forum to discuss European matters of highly national relevance (and, arguably, competence), attract increasing interest from national political debates and allow for more effective flows of information between the two decision-making levels.

123 Cygan (n 122) 113.

124 Fromage (n 117); R Daniel Kelemen, 'Towards a New Constitutional Architecture in the EU?' in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What form of government for the European Union and the Eurozone?* (Hart Publishing 2015); Juergen Neyer, 'Empowering the Sovereign. National Parliaments in European Union Monetary and Financial Policy' in Simona Piattoni (ed), *The European Union: democratic principles and institutional architectures in times of crisis* (Oxford University Press 2015).

125 Fromage (n 117) 3.

126 Damian Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 European Law Journal 667.

127 Regulation 2021/241 of the European Parliament and of the Council of 12 Feb. 2021 establishing the Recovery and Resilience Facility [O.J. 2021 L 57/17].

The European Commission

The European Commission is the supranational institution par excellence. It represents the interest of the Union, is accountable to the European Parliament and does not act on a representative basis, although it is composed by one Commissioner per Member State. Differentiation, be it in the form of opt-outs or enhanced cooperation, does not affect the Commission's decision-making, as the Commission fulfils its functions in a uniform institutional setting. For example, the Commission will put forward proposals in the framework of enhanced cooperation in line with its right of initiative, independently of whether they concern only a subset of Member States. A large use of DI therefore raises the question of up to which point shall the Commission be used by some Member States only, if the institution represents the interest of the EU 27. This issue will be tackled more extensively in the next sections (see further on the ESM). Suffice here to note that this is more of a theoretical discussion, as only an extensive use of DI may put the Commission under stress in this respect. After all, the interest of the Union may pass through differentiation, especially if it paves the way to deeper integration. As a matter of fact, the Commission has not opposed DI throughout. On the contrary, one of former Commission President Juncker's favourite scenarios for the future of Europe was "those who want more do more", and foresaw several "coalitions of the willing" in specific policy areas[128]. This quest for differentiation has lost some of its appeal under the leadership of President Von der Leyen, who supported a unitary approach to the response to the Covid-19 crisis.

The Commission has also been particularly keen on reforming the eurozone in order to increase its democratic accountability and has acknowledged that the institutional framework as it is does not guarantee such accountability. In its Reflection Paper on deepening EMU, it observed that "the institutional architecture of the EMU is a mixed system which is cumbersome and requires greater transparency and accountability. It balances, albeit imperfectly, Union institutions and ways of working with an increasing number of intergovernmental bodies and practices, many of which have emerged since the crisis. This "in-between" governance partly reflects the lack of trust among Member States, as well as towards the EU institutions. This results in multiple and complex "checks and balances"'[129].

Art. 136 TFEU procedure: the Two- and Six- Pack

Art 136(1) TFEU establishes a special procedure for the adoption of euro-area specific legislation on economic governance, allowing the Council to

> "adopt measures specific to those Member States whose currency is the euro:
>
> (a) to strengthen the coordination and surveillance of their budgetary discipline;
>
> (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance".

Art 136(2) TFEU further specifies that for those measures "only members of the Council representing Member States whose currency is the euro shall take part in the vote". The provisions recall the rules on enhanced cooperation, except that no authorization is required by the Council acting in its normal composition. This is because the Art 136(1) procedure is open only to the eurozone members and requires the participation of all of them. Effectively the procedure inverts the rationale of the enhanced cooperation. Instead of creating ad hoc geometries which exclude unwilling Member States, it allows an already well-defined group of Member States to adopt legislation in a particular policy field. This is predicated upon the fact that Eurozone membership defines the group and it is as such open to all member states to join, provided they fulfil certain criteria. For this reason T. Beukers has spoken of a "Eurozone-specific enabling clause"[130].

128 European Commission, 'White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025' COM(2017)2025 of 1 March 2017.

129 European Commission Reflection Paper on the Deepening of the Economic and Monetary Union (n 111) 17.

130 Beukers (n 110) 3.

Art. 136(1) TFEU has enabled the adoption of several pieces of legislation during the euro-crisis. Two of the Six-Pack regulations on budgetary surveillance and excessive macroeconomic imbalances have been based on Article 136(1) TFEU. Two further Regulations of the Six-Pack have a mixed legal basis, whereby provisions on sanctions apply only to the euro-area. The last two have a different legal basis. As regards the Two-Pack, both regulations are based on Art. 136(1) TFEU and apply to the eurozone only (see Table 3 for a recap).

Table 3. Application of Art. 136 TFEU to the Six-Pack and Two-Pack

Legislation	Geographical scope	Content	Legal basis (Art. 136 TFEU)
Six-Pack			
Regulation 1173/2011	Euro-area	Effective enforcement of euro-area budgetary surveillance	Art 136
Regulation 1174/2011	Euro-area	Enforcement measures to correct excessive macroeconomic imbalances in the euro area	Art 136
Regulation 1175/2011	Euro-area/ EU 27	Strengthening the surveillance of budgetary positions and the surveillance and coordination of economic policies	Art 136 only for fines
Regulation 1177/2011	Euro-area/ EU 27	Speeding up and clarifying the implementation of the excessive deficit procedure	Art 136 only for fines
Regulation 1176/2011	EU-27	Prevention and correction of macroeconomic imbalances	-
Directive 2011/85/EU	EU-27	Requirements for Member States' budgetary frameworks	-
Two-Pack			
Regulation 472/2013	Euro-area	Strengthening of economic and budgetary surveillance of Member States in the euro area in serious difficulties with respect to their financial stability	Art 136
Regulation 473/2013	Euro-area	Monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area	Art 136

Source: made by the authors

On the one hand, the use of the Art. 136(1) procedure has widened the gap between euro-area and non euro-area Member States in terms of economic governance obligations[131]. It has been argued that its use in the post crisis reform has reached beyond the purpose of the Treaties[132]. The procedure does not allow the Council to create new competences but only to use existing powers. Yet some of the measures adopted have produced an overhaul of the obligations of euro-area members and strengthened the surveillance powers of EU institutions, thereby impacting on the institutional balance.

On the other hand, the procedure offers a flexible instrument enshrined in the Treaties to adopt legislation in a policy area highly differentiated. In addition, the adoption of EU legislation ensures the oversight of the European Parliament, thus increasing democratic control. Finally, the concern to involve non euro-area Member States in the economic governance framework emerges clearly if one

131 Fabian Amtenbrink and Jakob Haan, 'Economic Governance in the European Union – Fiscal Policy Discipline Versus Flexibility' (2003) 40 Common Market Law Review 1101–1102.

132 Alicia Hinarejos, 'The Legality of Responses to the Crisis' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic & Monetary Union* (Oxford University Press 2020) 1390.

looks at the convoluted geographical scope of the two- and six- pack (see Table 3 above). Admittedly, this also makes political accountability more challenging, as such complex legal framework does not enable citizens to understand and therefore effectively control EU decision-making.

Inter-se Treaties: the European Stability Mechanism

The final form of EMU differentiation that we will examine concern international agreements (*inter-se* agreements) adopted outside of the EU Treaty framework[133]. In the aftermath of the euro-crisis part of the EU response took the shape of *inter-se* agreements. The most important one, the *European Stability Mechanism Treaty*, was signed in 2012 by the eurozone countries as a successor to the *European Financial Stability Facility* (EFSF). It sets up an international financial institution, the European Stability Mechanism (ESM), to assist euro-area countries through emergency loans. ESM's financial assistance is anchored to strict conditionality. The establishment of the ESM was made legally possible by a previous amendment of Art. 136 TFEU, that made the mechanism subject to conditionality[134].

Although the ESM is an international institution, it is profoundly embedded into EU EMU law[135]. The Treaty makes ample reference to EU law. The contracting parties can only be members of the eurozone but the Treaty is open to any new member state adopting the single currency (Art. 2 ESM Treaty). The institutions of the EU are involved in the ESM operations and governance in several ways[136]. The European Commission and the ECB are entrusted key functions in financial assistance. For instance under Art 13.3 the European Commission – in liaison with the ECB – is charged with the task of negotiating memorandums of understanding ("MoU") and detailing the conditionality attached to the financial assistance facility. Jurisdiction of the CJEU is recognised as regards disputes on the interpretation and application of the Treaty. Finally, the Board of Governors is composed of Finance Ministers of the Member States, thus duplicating the composition of the Eurogroup.

Despite the tight connection with EU law, the resulting legal framework of the ESM raises several issues when confronted with constitutional standards of democracy.

The relation between euro-area and non euro-area member states may seem unaffected by the externalisation of legal provisions. However, this is not the case. Whereas under the EU Treaties non eurozone Member States maintain the right to participate in the ECOFIN discussions, albeit with limited voting rights (such as in the cases of acts adopted under Art. 136(1) TFEU), they do not participate in the discussions on ESM decisions. Art 5.3 of the ESM Treaty establishes that "representatives of non-euro area Member States participating on an ad hoc basis alongside the ESM in a stability support operation for a euro area Member State shall also be invited to participate, as observers, in the meetings of the Board of Governors when this stability support and its monitoring will be discussed". And this is the only provision allowing for participation of non-eurozone countries. Moreover, the overlapping between the ESM Board of Governors and the Eurogroup tilts the institutional balance in favour of the latter institution, that increasingly becomes centre stage and risks marginalising non-euro area member states. As rightly pointed out by Pistoia: "The anchoring of Euro-area decisions to the Council in plenary composition is the connecting web of the Union in a domain where differentiation has significant political weights and legal implications. This connecting web fades away in the ESM"[137].

133 De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (n 5). Schengen is the typical model for such agreements. See further Part 3 on AFSJ .

134 Art 136(3) TfEU: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.'

135 Deirdre Curtin, 'From a Europe of Bits and Pieces To a Union of Variegated Differentiation' in Grainne de Búrca and Paul Craig (eds), *The Evolution of EU Law*; De Witte, 'An Undivided Union?' (n 23).

136 Herrmann (n 62) 245.

137 Pistoia (n 49) 69.

Another potential source of concerns for non-eurozone member states is the use of EU supranational institutions in the framework of an international differentiated agreement, often referred to as the "borrowing of EU institutions". In the ESM, the Commission operates within an international agreement signed by only some Member States[138]. In the seminal Pringle judgment, the Court endorsed the borrowing of EU institutions outside of the EU Treaties, arguing that, since the objective of the ESM Treaty is the financial stability of the euro-area, the Commission promotes the general interest of the Union by its involvement in the ESM[139]. Such an interpretation resonates with the Treaty provisions on the euro and the fact that all Member States should be bound to adopt the euro sooner or later. Indeed, under this spotlight, the general interest of the euro-area is the general interest of the Union. However, there seems to be once again a mismatch between legal rules and practice, since full adhesion to the euro by all Member States appears as highly unlikely. In addition, in the ESM case such a borrowing was endorsed by the non-eurozone countries, but it remains an open question to know whether it could work in the absence of such a formal authorisation by non-participating Member States[140].

The international nature of the ESM also significantly affects the political and legal accountability of its decisions. As regards the former, the ESM is not accountable to the European Parliament, since it operates outside of the EU law system. It is accountable to the national parliaments via the Ministers sitting in the Board of Governors. Art. 30.5 of the ESM Treaty requires that the Board of Governors makes the annual report accessible to the national parliaments. However, national parliaments lose their usual rights of scrutiny of EU legislative acts (e.g. the control on subsidiarity)[141]. Recently there has be an upheaval in the scrutiny of the ESM activities, spurred by contestations over its strict conditionality clauses. Recourse to the ESM during the Covid-19 crisis was opposed by many Member States on fear for the conditions attached to financial support. In this context, we have witnessed an active involvement of national parliaments and national political parties, which testifies of the potential for parliamentary oversight at the national level[142].

The legal accountability framework of the ESM is very complex. As anticipated, the CJEU has jurisdiction over the disputes between ESM members or between the ESM and its members on the interpretation and application of the Treaty, yet it is not competent for actions for annulment nor for preliminary rulings. ESM acts cannot be challenged in front of the Court[143]. In *Pringle* the Court established its jurisdiction "to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether the provisions of the ESM Treaty are compatible with European Union law"[144], however it did not clarify whether it could also review financial assistance conditionality. In *Ledra Advertising* and *Mallis* the Court specified that the ESM's decisions could be reviewed through the EU institutions involved in it[145]. Despite the broadening of the Court's jurisprudence, ESM's legal accountability presents several loopholes, as observed in the case of Eurogroup's decisions in the *Chrysostomides* case (see above on the Eurogroup).

Finally, EU transparency requirements do not apply to the ESM. Its website states that the ESM proactively publishes policies and legal documents. However the ESM bylaw is strict on confidentiality requirements. Minutes and summary records of proceedings of the Board of Governors and other ESM bodies are confidential unless the Board decides to disclose them for particular publicity needs (Art 17.6 by-laws). EU rules for the disclosure of documents apply only to ESM documents drawn up

138 To be sure, a differentiated use of the Commission equally happens during enhanced cooperation. Yet, several legal conditions are attached to the procedure. See further section 4.2 of this paper.

139 *Thomas Pringle v Government of Ireland and Others* [2012] Court of Justice Case C-370/12, ECLI:EU:C:2012:756 para 163-164.

140 Bruno de Witte and Thomas Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*' (2013) 50 Common Market Law Review 805.

141 Neyer (n 124) 228.

142 A paradigmatic case in this context is Italy, that has not refused to seek financial assistance under the ESM during the Covid crisis, but where the revision of the ESM Treaty was very contested in the national Parliament, which argued that it had not been properly informed and associated to the negotiations. See further: Il Sole 24 Ore: https://www.ilsole24ore.com/art/qualtieri-accordo-eurogrup-po-ha-importanza-strategica-ADBgQQ5;

143 Craig and Markakis (n 71) 1440; Pistoia (n 49) 92.

144 *Pringle* (n 139) para 80.

145 *Mallis* (n 95); *Ledra Advertising* (n 95).

by EU institutions (Art. 17.2 by-laws), whereas proper ESM documents can be disclosed upon the authorisation of the Managing Director only (Art. 17.5 by-laws)[146].

The several shortcomings in transparency and political accountability combined with concerns for the unity of the EU legal order have pushed the Commission to propose measures in order to repatriate the ESM within EU law. The Commission's proposal, that was presented in 2017, foresaw the replacement of the ESM with a European Monetary Fund under EU law[147]. However, there was no follow up to the proposal and in the meantime the reform of the ESM was conducted under international law[148].

Conclusions & assessment

The analysis of DI in EMU unveils a complex and multi-layered legal framework, combining EU and international law. Although differentiation is built upon the eurozone and reveals stable features as regards membership (which however can vary with the adoption of the euro), participation patterns are not uniform across EMU policies. This section will assess the main findings against the four standards of democracy and accountability as elaborated in part 1.

Representation

Striking a fair balance between the representation of euro-area and non-euro area Member States in EMU is no easy task. Eurozone measures do not only produce effects within the countries of the Euro area. They have significant 'spillover effects' also on non eurozone countries.

The 'representation dilemma' concretizes in the relation between the Eurogroup and the ECOFIN and in the debate about potential differentiated representation in the European Parliament. The increasing importance of the Eurogroup as the main forum for EMU related decision-making deprives non eurozone Member States of the guarantees of the unitary EU institutional framework. The relation between euro-area and non euro-area member states is also affected by the shifting of part of the EMU obligations outside of the EU law framework, where those guarantees equally do not apply. Although the Art. 136(1) procedure allowing for closer cooperation in the euro-area widens the gap between ins' and outs', it provides for differentiated legal provisions to be adopted within the treaties, with all related guarantees applying. As for the EP, the asymmetry between geographical application and MEPs representation has given rise to several proposals for a dedicated parliamentary forum for EMU with a eurozone exclusive representation. We believe, instead, that the European mandate of the EP should not be dismissed in favour of differentiated representation, especially since national parliaments can contribute to enhance the national line of representation.

Political accountability

As another side of the coin, the constitutional standard of political accountability is hardly respected in both EU and intergovernmental forms of EMU differentiation. Neither the Eurogroup nor the ESM are subject to the political accountability requirements of the Council. Accountability channels towards the European Parliament are weak and the institutions was effectively only involved in the adoption of the two- and six-pack legislation.

Overall, the analysis points to the importance of national parliaments in order to guarantee proper accountability channels in the presence of differentiation. Either through direct accountability of national governments or via interparliamentary platforms, the involvement of national parliaments can make up for a non-differentiated (or a slightly differentiated) EP. Although shortcomings in terms of information exchange and communications persist, EMU could provide a fruitful domain to catch

146 European Stability Mechanism, By-Laws 2014.

147 European Commission Proposal for a Council Regulation on the establishment of the European Monetary Fund 2017 [COM/2017/0827 final].

148 The revised Treaty was signed in January 2021 and is in the process of being ratified by national parliaments. https://www.esm.europa.eu/press-releases/esm-members-sign-revised-treaty-entrusting-institution-new-tasks.

the attention of national parliaments, as arguably the post-crisis EU has been increasingly assuming tasks that pertain to their core competences (e.g. European Semester).

Finally, it must be noted that, if each instrument per se raises accountability issues, the combination of all instruments together even more so. The convoluted legal framework, the overlap between formal and informal forums, the gap between legal rules and actual practices creates a space in which accountability channels can easily get blurred.

Legal accountability

In most of the examples analysed in this paper legal accountability does not come up trumps. Full CJEU jurisdiction is ensured only in the adoption of the post-crisis legislation under the Art. 136(1) procedure. Although the CJEU has oversight over Union's EMU related measures, a gap in judicial protection can arise with reference to the informal nature of the Eurogroup, whose decisions cannot be challenged neither in an action for annulment nor in an action for damages. Furthermore, CJEU jurisprudence is only partially guaranteed in the presence of inter-se treaties such as the ESM Treaty.

Transparency

Finally, and as a consequence of many of the points raised above, the constitutional standard of transparency is not adequately upheld in the current EMU institutional framework. The informal character of the Eurogroup allows it to work on a level of confidentiality that is forbidden to the formal EU institutions; the ESM follows its own rules on public communications and disclosure of documents; finally, the legislation adopted under Art. 136(1) procedure must comply with EU standards on transparency, yet its convoluted geographical scope makes it hard to identify who is subject to which piece of legislation.

Overall, the complexity of the system does not play in favour of transparency and has repercussions on the other standards, as transparency constitutes a key prerequisite to ensure both legal and political accountability.

Table 4. Assessment: Differentiation in EMU & constitutional standards of democracy

	Representation	Political accountability	Legal accountability	Transparency
Institutions	• Eurogroup vs ECOFIN • non differentiated representation of the EP • Commission as representing the European interest, not the interest of only some MS	• Eurogroup's lack of direct accountability to the EP • Gap between Eurogroup's informal nature and decision-making power	• Eurogroup's liability	• Eurogroup not subject to Council's transparency standards but committed to improve its practices. • Confidentiality remains
Two- and Six- Pack (Art. 136 TEFU)	• Non euro-area Member States associated to decision-making through ordinary legislative procedure	• European Parliament involved	• Normal jurisdiction of the CEJU	• Unclear legal framework with provisions applying partly to eurozone only and partly to EU27
ESM (Inter-se Treaties)	• Agreement limited to Eurozone members with little provisions for participation of non eurozone countries • Borrowing of supranational institutions	• Not accountable to the EP • Accountable to the NPs: strengthened involvement possible	• Unclear scope of CJEU jurisdiction • No action for annulment nor preliminary rulings • CJEU's progressive interpretation of its jurisdiction	• No recording of ESM meetings • Difficult access to ESM documents • EU standards not applying (except for documents from EU institutions)
Overall Outlook – Main challenges	Striking a fair balance between representation of eurozone countries and association of non-eurozone countries in the presence of high externalities and geographical spill-overs	Maintaining the EP European mandate while empowering national parliaments Problematic combination of EU and international law provisions in a single institutional framework	CJEU jurisdiction is unclear and creates gap in judicial protection	Complexity of legal framework and overlaps between instruments and forums Most decisions taken behind closed doors

Source: made by the authors

Democratic standards and differentiated integration in AFSJ

The area of Freedom, Security and Justice (AFSJ) has developed a high degree of internal and external differentiation. It covers a broad range of policies, including migration, asylum and border control, judicial cooperation in civil law and cooperation in criminal matters and policing. Those policies relate to core state powers which are constitutive for national identity and sovereignty and they are, for this reason, often very politicised[149]. As a result, integration in these fields is generally subject to a tension between the willingness of many Member States to proceed with further cooperation at the Union level and the reluctance of others to relinquish sovereignty[150]. As supranational integration has progressively replaced intergovernmental cooperation in AFSJ, several forms of differentiation have emerged. Indeed, progress in the AFSJ supranational integration was achieved at the cost of derogations granted to those Member States who opposed further supranational cooperation: mainly the UK, Ireland and Denmark (but now increasingly also the Czech Republic and Poland). As will be shown in the following analysis, these derogations often resulted in parallel intergovernmental regimes, thus adding an intergovernmental shadow to an otherwise increasingly supranational policy area. The interplay between supranational integration and intergovernmental cooperation has furthermore led to a complex decision-making system, whose different elements are often difficult to dissect. As pointed out by Peers: "Because of continuing disputes between Member States on JHA [Justice and Home Affairs] institutional issues and the resulting renegotiations of the basic legal framework concerning JHA as set out in the Treaties establishing the EU, the institutional framework for EU JHA law is historically complex, in particular due to its use of different rules over time regarding decision-making, jurisdiction of the EU courts, legal instruments and their legal effect, and territorial scope"[151].

Thus, the process of differentiation in AFSJ has given rise to a variety of regimes and instruments[152]. Opt-outs are very common, such as in the Danish and Irish cases; the Schengen agreement was signed outside of the EU Treaty framework by only some Member States and was subsequently integrated back into EU law (I); the Treaties provide for special enhanced cooperation procedure in some specific cases (such as with the establishment of the European Public Prosecutor Office (EPPO)) (II). Finally, agencies such as Europol have set up different forms of participation for members and non-members, associating non-EU member states or opt-out member states in different legal and institutional arrangements (III). Through illustrative case-studies, the following sections will examine in turn these legal differentiation regimes within AFSJ, assessing whether they conform or not to constitutional democratic standards, as described in part 1 of this paper.

The AFSJ opt-outs and Schengen

Before the Maastricht Treaty cooperation in the field of justice and home affairs (JHA, as it was then known) was intergovernmental only and took place outside of the Community framework[153]. The first structured form of cooperation, the 1985 Schengen agreement, took the form of a treaty under international law, originally signed by only five EU countries (Germany, France and the Benelux countries). However, apart from the UK and Ireland, all the other Member States at that time joined the agreement shortly after.

The 1992 Maastricht Treaty included JHA into the EU Treaty Framework (in the third Pillar of the Treaty on European Union), however maintaining an intergovernmental basis. The Treaty of Amsterdam, that entered into force in 1999, transferred immigration and asylum issues under community law, while policing and criminal matters remained under the third intergovernmental pillar,

149 Berthold Rittberger, Dirk Leuffen and Frank Schimmelfennig, 'Differentiated Integration of Core State Powers' in Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the regulatory polity? : the European integration of core state powers* (Oxford University Press 2013) 194–195.

150 Steve Peers, *EU Justice and Home Affairs Law : Volume I: EU Immigration and Asylum Law* (2016) 7.

151 ibid 3.

152 Georgia Papagianni, 'Flexibility in Justice and Home Affairs:An Old Phenomenon Taking New Forms' in Bruno De Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 113.

153 Peers, *EU Justice and Home Affairs Law* (n 150) 8.

thus splitting JHA in two parts under two different decision-making regimes[154]. It also integrated the Schengen agreement into the community framework, in the form of a closer cooperation between Member States so as to allow for non-participation of the UK and Ireland, but also of Denmark, which, although a party to the Schengen Convention, did not wish to join supranational cooperation. Indeed, in Amsterdam the UK and Ireland negotiated the right to opt out of Schengen and of the first pillar AFSJ policies. Denmark was also granted an opt-out from all EU justice and home affairs rules[155].

When the Treaty of Lisbon in 2009 abolished the pillar structured and merged police and judicial cooperation in criminal matters into the main body of the EU, making initiatives in this policy domain subject to qualified majority voting and supranational decision-making, the UK and Ireland negotiated a block opt- out with a special opt-in option[156]. They could decide whether to 'opt out' of pre- Lisbon police and criminal justice measures or whether to remain bound by them. Conversely, Denmark rejected in a 2015 referendum the option to move towards an opt-out/opt-in regime on the UK/Irish model and has therefore maintained its full opt-out regime[157].

The Schengen *acquis* is today attached to the Treaty on the Functioning of the European Union (TfEU) via the Protocol n 19[158]. Schengen unveils a highly fragmented regime of internal and external differentiation. Although the majority of Member States are part of Schengen, differentiation has persisted. Romania, Bulgaria and Croatia did not yet joined Schengen but they are supposed to do so pending Council's approval, whereas Cyprus has not joined for political reasons related to the Greek-Turkish division of the island. Thanks to its opt-out/opt-in regime, Ireland (as well as the UK prior to Brexit) can participate into selected Schengen-related measures, as in the case of the Schengen Information System (SIS). Denmark participates on an intergovernmental basis and not in the framework of Union law. Protocol 22 to the TFEU on the position of Denmark establishes that Denmark has six months to decide whether to apply in its national law any new Schengen-related measure[159]. Finally, many third countries are associated with Schengen, including Norway, Iceland, Switzerland and Liechtenstein.

Denmark between opt-outs and parallel international agreements

As in the Schengen case, differentiation in AFSJ takes predominantly the form of "hard" differentiation, meaning that it is constitutive of the way the policy area has developed and is generally deemed to be permanent. Opt-outs, as voluntary self-exclusion enshrined into primary law, mean non-participation on the ground of substantive disagreement about the objectives of EU integration and about the involvement of supranational institutions. These choices are often sanctioned by national referenda in the Member States and future inclusion is hampered by democratic, constitutional and sovereignty concerns.

The case of Denmark is paradigmatic, as a model of '(quasi)-permanent' differentiation[160]. With the Maastricht Treaty the Danish Government negotiated a series of extensive opt-outs on AFSJ, that ware then reinforced with the 1993 Edinburgh Agreement after the Danes rejected the Treaty's ratification in a 1992 referendum. Political scientists have shown that Danish political élites were generally contrary to a hard opt-out regime, but they were 'forced' to negotiate it because of popular preferences[161]. As the Lisbon Treaty placed all AFSJ policies under community law, Denmark held a further referendum in 2015 in order to move towards an opt-out/opt-in regime on the UK/Irish model.

154 See further Deirdre Curtin and Ige Dekker, 'The EU as a "Layered" International Organization :Institutional Unity in Disguise' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999).

155 Peers, *EU Justice and Home Affairs Law* (n 150) 8–9.

156 Consolidated version of the Treaty on the Functioning of the European Union - Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice 2010.

157 Steve Peers, *EU Justice and Home Affairs Law : Volume II: EU Criminal Law, Policing, and Civil Law* (2016) 44.

158 Consolidated version of the Treaty on the Functioning of the European Union - Protocol No 19 on the Schengen Acquis integrated into the framework of the European Union 2010.

159 Consolidated version of the Treaty on the Functioning of the European Union - Protocol (No 22) on the position of Denmark 2010.

160 Migliorati (n 4) 6.

161 Rebecca Adler-Nissen, *Opting out of the European Union Diplomacy, Sovereignty and European Integration* (Cambridge University Press 2014); Migliorati (n 4).

The Danish government believed that total exclusion from AFSJ, including from agencies such as Europol and Eurojust, would be costly for Denmark and would also be difficult to implement in practical terms. Yet the Danes rejected this flexible option and Denmark maintained a full opt-out from ASFJ. The democratic mandate of the Danish opt-out is hence very strong and can hardly be reversed in the absence of another popular vote. In this light, differentiation as self-exclusion of a Member State from common policies and integration reflects the democratic ambition of national citizens.

At a practical level, however, EU cooperation in AFSJ was maintained, albeit not within the formal EU law framework. Parallel agreements were negotiated, allowing for Danish association to most policy areas (in addition to Schengen also see e.g. Europol below). Finally, empirical evidence shows that political élites attempted to reduce the effects of the opt-out exclusions by proving particularly cooperative in practice. Adler Nissan offers interesting insights on how Denmark's peculiar status translates into participation in practice in the case of Schengen. She found that Denmark is mostly treated as a normal Schengen country in the Council. As decisions are mostly made by consensus, the fact that the country does not have a formal right to vote makes little difference in concrete terms[162]. "As long as it does not create problems, nobody mentions the protocol" she reports a Commission official saying[163]. This situation, however, puts Denmark in an arguably awkward position. In practice, the country has endorsed all Schengen-related measures. Yet it has done so holding a subordinated role in their negotiation, as it acted "under the threat of exclusion" and as a second-order country who needs to behave if it wants to maintain a seat at the table[164].

Migliorati has recently studied the effect of this phenomenon by highlighting a decoupling between rules and practices. She argues that the Danish strategy consists in maintaining the formal opt-outs, while minimizing it informally by reverting to parallel arrangements and adopting converging national policies[165]. This practice allows for effective cooperation between the outsider (Denmark) and the insiders (the other EU Member States), yet it raises several questions in terms of democratic standards. The fact that practical arrangements revert or at least minimize the explicit wish of exclusion of a Member State undermines the democratic legitimacy of such cooperation and diminishes the significance of popular vote. With the words of Adler-Nissen: "If sovereignty is expressed in the form of referenda and opt-outs from treaties, and yet in practice leads to integration in much the same way as policy areas where there is no opt-out, the whole legitimising edifice of intergovernmentalism and differentiation is destroyed"[166].

Opting-out and opting-in: Ireland and pre-Brexit UK

The opt-out/opt-in regime of the UK (prior to Brexit) and Ireland is different from the Danish opt-out as it foresees the *ad-hoc* selection of the AFSJ policies in which the two countries want to take part. This opt-out scheme is problematic from at least three points of view. Firstly, the UK and Ireland enjoy a privileged status since they were granted prerogatives that the other Member States, which are either bound or not bound by EU law, were denied. In particular, the Schengen Protocol establishes that the Schengen *acquis* would apply to all future member states, following a unanimous Council decision. This means that acceding countries cannot choose whether becoming part of Schengen or not, whereas the UK and Ireland are left with full discretion on what part of the *acquis* to join[167].

162 It may be noted that Schengen is not the only AFSJ intergovernmental agreement that was transferred into Union law. The Schengen model was replicated with the 2005 Prüm Treaty, that initially took the form of a closer cooperation between seven EU Member States outside of the EU legal framework. Its main objective was to combat terrorism, cross-border crime and illegal immigration, by setting up information exchange mechanisms for DNA, fingerprint and vehicle registration data. As Member States quickly realized that co-operation in this field was useful and needed, the agreement was turned into EU secondary legislation just a couple of years later.

163 Adler-Nissen (n 161) 136.

164 Adler-Nissen (n 161); Arguably, Denmark finds itself in a similar position to that of the Schengen non-EU partners, such as the EFTA countries. In its EUIDEA report, Nguyen convincingly shows that Schengen's mixed internal and external differentiated regime raises problems concerning the accountability relations of Schengen's measures vis-à-vis Norway and Iceland, which are not represented in the EU's decision-making, they have a very limited influence on related decisions and yet they are virtually obliged to adopt those decisions. Nguyen (n 4) 17.

165 Migliorati (n 4) 11.

166 Adler-Nissen (n 161) 186.

167 Anne Weyembergh, 'Enhanced Cooperation in Criminal Matters: Past, Present and Future' in R Kert and A Lehner (eds), *Vielfalt des*

Secondly, all member States but Ireland (and the UK prior to Brexit) committed to fully implement (or not at all in the case of Denmark) a coherent set of rules and laws, that builds upon each other in a comprehensive legal regime of rights and obligations. The opt-out/opt-in regime challenges the coherence and integrity of this legal framework. The CJEU has put a limit to the scope of cherry-picking prerogatives at least as regards new measures building upon the Schengen *acquis*. In *UK vs Council* the Court dismissed the British and Irish claim that they could simply join any new Schengen-related measure newly adopted by the EU without the need of Council's approval. In the case the Court ruled that the UK and Ireland could not be allowed to take part in the adoption of a measure building upon the Schengen *acquis* without having first opted into the related policy area (and thus following the Council's authorization to do so)[168]. The judgment indicates that the coherence of the legal framework, even in the presence of differentiation, is an important element for the effectiveness and accountability of EU policies. It allows for political scrutiny of the measures adopted and of their legality. The more the legal framework is fragmented and convoluted the more difficult that scrutiny becomes, especially in a differentiated setting. As observed by the Commission in the same case: "The Schengen Protocol indeed contemplates partial participation by a Member State that is not party to the Schengen Agreements, but does not go so far as to provide for a system of 'pick and choose' by the Member States concerned, resulting in a patchwork of participation and obligations"[169]. This is an important legal limit (and a democratic standard) set by the Court to the scope of differentiation. It postulates that differentiation must not threaten the integrity of the legal framework and should therefore remain embedded in that framework.

Thirdly, the UK and Ireland enjoyed full discretion on what policies to join. For instance, they could join security-driven policies, without participating in the free movement related ones. As regards Schengen, they participated in most irregular migration, criminal law and policing provisions but they did not participate in visas, border controls, or freedom to travel related policies[170]. In the field of asylum, the UK and Ireland opted in the Dublin regulation, without adopting the legislation providing for minimum protections standards (the so called second-phase asylum directives on qualification, reception conditions and procedures). In practice the two countries could return asylum-seekers to the country of first entrance, but they were not bound by the rights-enhancing provisions and the oversight of the CJEU[171]. The practice is questionable from a normative point of view, as it allows opt-out members to lower the protection standards for asylum seekers while participating in the Dublin scheme.[172] Such a differentiated regime grants those countries a preferential status, while raising questions about the respect of fundamental rights in such a sensitive policy area. As Advocate General Trstenjak stressed in his opinion in *UK v Council* "Cooperation in a part of the Schengen acquis requires, by virtue of the principle of integrity, that any Member State that cooperates to any extent in the Schengen acquis should accept both the advantages and the burdens inherent in cooperation in that part of the acquis"[173].

In sum, the opt-out regimes of Denmark, Ireland and the pre-Brexit UK raise issues of representation, political and legal accountability as well as transparency. First, they provide for different statuses of Member States. Within the Council not all Member States are equal, as the UK and Ireland have special "rights" when it comes to the selective participation in AFSJ policies. Denmark, in turn, is a privileged Member State in theory, but a subordinated one in practice. It is not bound by EU law in AFSJ, it can decide what new measures of the Schengen acquis to adhere to. Yet, in practice, the country is forced to mimic EU law or to adopt parallel arrangements that allows to implement in national law rules that it did not contribute to create[174].

Strafrechts im internationalen Kontext: Festschrift für Frank Höpfel zum 65. Geburtstag (NWV 2018) 622.

168 *UK vs Council* [2007] Court of Justice Case C-137/05, ECLI:EU:C:2007:805 para 63.

169 ibid para 50.

170 Peers, *EU Justice and Home Affairs Law* (n 150) 30.

171 Nadine El-Enany, 'The Perils of Differentiated Integration Inf the Field of Asylum' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between flexibility and disintegration : the trajectory of differentiation in EU law* (Edward Elgar Publishing 2017) 367.

172 Emmanuel Comte, 'The European Asylum System: A Necessary Case of Differentiation' EUIDEA 11.

173 *UK vs Council* (n 168) Opinion of Advocate General Trstenjak, para 115.

174 Adler-Nissen (n 161) 140 ff.

Secondly, because the Council generally works behind closed doors and the important debates and deliberations are not public, it is hardly possible to retrace how opt-out Member States are associated to EU decision-making in these areas. In such a context political accountability to both the European Parliament and the national parliaments is hard to implement. This is problematic especially for the national parliaments of the opt-out Member States, which shall watch over the implementation of their popular choices at the EU level.

Third, the jurisdiction of the CJEU is not uniform. Prior to the Lisbon Treaty, differentiation was systematic and entrenched in primary law. The Treaties foresaw an opt-in scheme as regards preliminary references in some former third pillar matters. Accordingly, Member States could decide whether to accept or not the interpretation of the CJEU via preliminary rulings, and, in the affirmative, what national courts could refer to the CJEU[175]. These provisions, which introduced a direct type of 'institutional differentiation' as regards the competences of the Court, have now been repealed so that at least from this point of view the Court's jurisdiction applies to all Member States that are subject to AFSJ Treaty provisions. Opt-out countries, however, do not undergo CJEU control when they do not engage in EU supranational cooperation. Conversely, as they take part in Schengen-related policies or they opt into some other AFSJ measures, they are not entirely subtracted from CJEU jurisdiction. In addition, as observed by De Waele, because of the high interdependence of AFSJ policies and their impact on fundamental rights, the opt-out Member States will not be able "to immunise themselves from the side-effects obliquely penetrating their legal orders, by virtue of the rights and obligations the Union judiciary may derive from the (integrally binding) EU Fundamental Rights Charter"[176].

Fourth, the opt-out legal framework is confusing and challenges the transparency and coherence of the EU legal system. As shown in the example of *UK vs Council*, the CJEU has been called to entangle the extent and application of the opt-out regimes, especially in the case of new legislation. It has clarified the rights and obligations of the opt-out members but there remain many grey areas. The departure of the UK has further blurred the picture. Following Brexit, the UK/Irish regime has partially lost its significance as Ireland remains the only Member State which can profit thereof. We will see what form the future EU/UK cooperation will take in areas that were deemed of vital importance for the UK and whether this will impact the EU differentiation regime in AFSJ.

Fast track enhanced cooperation: European Public Prosecutor Office (EPPO)

AFSJ policies are subject to the general regime of enhanced cooperation foreseen by the Treaty of Lisbon. According to Art. 20 TEU, a group of at least nine Member States may establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences. The cooperation must be authorised by the Council as a last-resort measure and can only take place if cooperation cannot be attained by the Union as a whole within a reasonable time period. Also, it must be open to all the other Member States to join[177].

A simplified form of enhanced cooperation can be used in some areas of criminal law and police cooperation. This fast-track route allows Member States to proceed with enhanced cooperation with a simple notification to the Commission, the Council and the European Parliament without obtaining the prior authorization of the Council. This procedure can be used in the policy areas which are still subject to unanimity, such as Art. 86 TFEU on the establishment of European Public Prosecutor

175 Papagianni (n 152) 104.

176 Henri De Waele, 'Entrenching the Area of Freedom, Security and Justice: Questions of Institutional Governance and Judicial Control' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an area of freedom, security and justice* (Routledge 2017) 502; The scope of this report does not allow us to consider the legal effects of the British, Polish and Czech exemptions from the Charter. For more details on the Charter's opt outs see further: Steve Peers, 'The "Opt-out" That Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12 Human Rights Law Review 375.

177 As the AFSJ is an area of shared competences, enhanced cooperation can in principle be established for any policy. However, up to now the general enhanced cooperation provisions have only been used to allow the UK and Ireland to opt into immigration, asylum, and civil law measures after their adoption. Peers, *EU Justice and Home Affairs Law* (n 150) 27, 39.

within Eurojust, to investigate, prosecute and bring to judgment crimes against the EU budget.[178] Indeed EPPO is the first piece of EU legislation in the field of criminal law to have been adopted via this simplified procedure for enhanced cooperation.

The European Commission issued its proposal for an EPP Regulation in 2013.[179] The proposal was met with skepticism by Member States and was subject to a yellow card procedure from 14 national chambers on the ground of subsidiarity concerns[180]. The high potential impact on Member States' sovereignty was especially controversial. It was the first time that an EU office was granted the power to carry out acts of investigation and prosecution, albeit limited to offenses against the EU budget, but with the possibility to cover also cross-border crimes in the future. EPPO will indeed operate within the legal systems of the Member States fully independently and will also bring prosecutions before national courts. Yet, most of the concerns had little to do with subsidiarity and proportionality and the Commission decided to go forward with the proposal without modifying it[181]. As unanimity could not be achieved, 16 member States notified the EU institutions that they intended to trigger enhanced cooperation. The EPPO Council Regulation was adopted on 12 October 2017 as an enhanced cooperation[182]. So far, 22 Member States have joined it. In addition to Denmark and Ireland, who have an opt-out from the whole AFSJ, also Hungary, Poland and Sweden have decided not to join the EPPO for the time being. As enhanced cooperation is always open to non-participating member states, they may decide to join at any time in the future.

EPPO is an interesting test-case for the use of enhanced cooperation and provides some insights on an instrument that keeps differentiation solidly within the Union law framework. We will address EPPO's differentiated participation and the institutional implications of the special fast-track procedure against our constitutional standards of democracy. As EPPO became operational only as of June 2021, many observations will have to remain provisional.

The relation between participating and non-participating Member States is again at the core of the assessment. As enhanced cooperation is mostly used in unanimity areas, and often with a veto-buster function, the problem is especially delicate from the point of view of the rights of non-participating member States. This issue is not exclusive to the EPPO but affects more generally all enhanced cooperation procedures. It emerged most blatantly in the case *Spain and Italy v Council*, where Spain and Italy challenged the authorization of enhanced cooperation for the establishment of a unitary patent system in front of the CJEU[183]. Italy and Spain had opposed the language regime of the unitary patent protection scheme, that recognised English, French and German as the official languages. They contested that such a regime would give a competitive advantage to German and French undertakings and they thus vetoed the measures in the Council, which had to act by unanimity. The Council therefore authorized the measures to be adopted via enhanced cooperation. Italy and Spain claimed that this decision breached their rights and that the Council thereby aimed at excluding them from the negotiations by circumventing the unanimity rule. The Court in its judgment dismissed the two countries' claims, arguing that the Treaties leave open the possibility of using enhanced cooperation also when unanimity applies and therefore enhanced cooperation can proceed even

178 It can also be used in the policy areas where Member States can trigger a so called emergency brake if they consider that a provision affects fundamental aspects of their criminal justice system (e.g. Arts 82[3] and 83[3] TFEU). For more info on these two procedures see Peers, *EU Justice and Home Affairs Law* (n 157) 34–40.

179 For more background information on EPPO's proposal see: Gerard Conway, 'The Future of a European Public Prosecutor in the Area of Freedom, Security and Justice' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), The European Union as an area of freedom, security and justice (Routledge 2017).

180 The Lisbon Treaty's Protocol on subsidiarity and proportionality foresees a lower threshold of one-quarter (instead of the usual one-third) of all the votes allotted to the national parliaments to trigger the procedure in AFSJ. Consolidated version of the Treaty on the Functioning of the European Union - Protocol (No 2) on the application of the principles of subsidiarity and proportionality 2010, Art 7(2).

181 De Waele (n 176) 491.

182 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') 2017 [OJ L 283].

183 *Spain and Italy vs Council* [2013] Court of Justice Joined Cases C-274/11 and C-295/11, ECLI:EU:C:2013:240; For a comprehensive analysis of the case see Emanuela Pistoia, 'Enhanced Cooperation as a Tool to...Enhance Integration? Spain and Italy v. Council' (2014) 51 Common Market Law Review 247.

in the presence of some Member States' disagreement on the substance of legislation, as long as compromise has previously been sought. In practice, the Court endorsed the veto buster function of enhanced cooperation[184].

The Court's ruling raises a delicate point as measures adopted via enhanced cooperation against the will of some Member States could be seen as undermining the democratic representation of those Member States in policy areas subject to unanimity. Pistoia notes that "while facilitating the relations among participating Member States, enhanced cooperation potentially hinders those between the participating and non-participating States"[185]. Yet, this is the very purpose of enhanced cooperation as a differentiated integration tool, as a tool, to use the words of the AG Bot in *Spain and Italy vs Council*, that allows to "deal with a deadlock while remaining within the institutional framework"[186]. After all, the guarantees set out by the Treaties have the objective to ensure that the rights of non-participating members are upheld, in particular that such measures respect their competences, rights and obligations (Art. 326 TFEU), allowing them to participate in the deliberations of the Council (Art. 20(3) TEU), and leaving the scheme open to future adhesion (Art. 328(1) TFEU). These guarantees are often mentioned as obstacles to the roll-out of enhanced cooperation as they reduce the range of situations in which recourse to enhanced cooperation can take place[187]. In our opinion, however, they are essential to safeguard the democratic balance of the system[188]. Enhanced cooperation is an instrument that can be triggered through secondary law and within the EU law framework. It allows for flexibility but must also ensure that such flexibility does not undermine the rights of Member States under EU law. In particular, the fact that non-participating member states can take part to Council's deliberations, which are often consensual, associates them to the decision-making process in an inclusive approach. Ultimately, the principle of loyal cooperation under EU law also watches over the respect of the rights and prerogatives of both participating and non-participating member states in their reciprocal relationships[189].

The interplay between participating and non-participating members strikes as even more complex in the case of EPPO. The office was controversial from the start and is likely to have significant repercussions for the criminal justice systems of the Member States[190]. Moreover, it was adopted via enhanced cooperation but is embedded within the Eurojust framework in a non (or least) differentiated legal framework. As there are several overlaps between the role of Eurojust and the EPPO, it will not always be easy to distinguish the level of participation and involvement and it is likely that non-participating member states will be affected by EPPO's operations. The very relation between Eurojust and EPPO is not entirely clear, as many of the prosecution tasks of Eurojust may be taken over by EPPO, with Eurojust remaining operational for the non-participating Member States[191]. Finally, Art. 86 TFEU provides for the possibility of extending the mandate of EPPO to cover serious crimes with a cross-border dimension. Such a decision, however, must be taken by the European Council by unanimity, thus also involving the non-participating Member States[192].

184 The Court also dismissed on similar grounds other challenges to enhanced cooperation measures. See for instance relative to the enhanced cooperation on the financial transaction tax: *United Kingdom vs Council* [2014] Court of Justice Case C-209/13, ECLI:EU:C:2014:283.

185 Pistoia (n 183) 257.a

186 *Spain and Italy vs Council* (n 183), Opinion of the Advocate General Bot, para 82.

187 Steve Peers, 'Enhanced Cooperation: The Cinderella of Differentiated Integration' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between flexibility and disintegration : the trajectory of differentiation in EU law* (Edward Elgar Publishing 2017).

188 See similarly De Witte, who notes: 'The Treaty text contains numerous substantive and procedural conditions for launching an enhanced cooperation initiative, which makes sense because the participating states receive the benefit of using the EU institutional system to adopt policies only among themselves instead of for the whole EU'. De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (n 5)z

189 For the principle of loyal cooperation in enhanced cooperation see further Miglio (n 46) 107 and ff.; Alberto Miglio, 'Differentiated Integration and the Principle of Loyalty' (2018) 14 European Constitutional Law Review 475.

190 Conway (n 179) 176, who argues that the establishment of an EPP may represent the "deepest potential encroachment on the core of state sovereignty".

191 Ester Herlin-Karnell, 'Between Flexibility and Disintegration in EU Criminal Law' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between flexibility and disintegration : the trajectory of differentiation in EU law* (Edward Elgar Publishing 2017) 393.

192 Weyembergh (n 167) 621–623.

As regards the national level, EPPO operates within the legal systems of the Member States and must therefore ensure that "all national legal systems and traditions of the Member States are represented in the EPPO"[193]. Its decision-making structure foresees a European Chief Prosecutor, assisted by a College of European Prosecutors and decentralised Delegated Prosecutors operating in each Member State. This governance, however, does not allow for the association of non-participating countries. They may participate in the Council's meetings, but they do not have access to the EPPO governance. From this point of view, there is little difference between those Member States who do not participate on the ground of their opt-outs (Ireland and Denmark) and the others, who did not join the enhanced cooperation.

The EPPO regulation stresses that "strict accountability is a complement to the independence and the powers granted to the EPPO" and establishes that the body should be accountable to the European Parliament, to the Council and to the Commission[194]. Its public annual report must be sent to the three institutions and to the national parliaments. "The European Chief Prosecutor shall appear once a year before the European Parliament and before the Council, and before national parliaments of the Member States at their request, to give account of the general activities of the EPPO" [195]. Given the significant intrusion in the national legal systems, the role of the national parliaments may become crucial.[196] As EPPO is setting up its own governance structure, parliaments of non-participating Member States will not be associated to its activities. Non-participating countries will be informed of EPPO's activities through the Union's institutions, in particular via the European Parliament, which acts as a non-differentiated institution, and via the Council, as enhanced cooperation allows for participation in the deliberation stage.

Such a multi-level governance could prove challenging in a differentiated model as it creates a mismatch between democratic guarantees for non-participating Member States at the European and at the national level. The relation with non-participating Member States will be governed by special working arrangements[197]. It remains to be seen what form these working arrangements will take. Be it as it may, the different "statuses" of Member States within the Council may render the work of EPPO cumbersome, with implications also on the transparency and accountability of the office. It is not clear who is in and who is out, who participates entirely, who is not participating in the enhanced cooperation but may join in the future, who has an opt-out from AFSJ as a whole.

Finally, it is worth spending some words on the fast-track procedure by which EPPO was adopted, which admittedly affects the balance between institutions typical of enhanced cooperation. A normal enhanced cooperation procedure requires a proposal by the Commission, approval by the Council by qualified majority and the consent of the European Parliament. Conversely the Art. 86 TFEU procedure only requires a notification to these institutions by at least nine Member States, which are then automatically free to pursue closer cooperation. This procedure is easier to enact, which also probably explains the reason why a controversial proposal such as EPPO was successfully adopted in the first place. However, it also limits the margin of manoeuvre of opposing member states, because there are less constraints attached to the launch of the cooperation. For instance, there is no need to demonstrate that enhanced cooperation was a last-resort measure. In addition, the involvement and control of supranational institutions is limited. There is no need for the consent of the European Parliament and the Commission loses its prerogative to initiate the procedure, thus arguably foregoing, at least formally, its right of initiative. However, the importance of these institutional shifts should not be overestimated. In a note on the EPPO procedure, the Council Legal Service has confirmed that the Member States proceeding to enhanced cooperation do not need to wait for a new Commission proposal, but it has also pointed out that the Commission remains free to

193 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (n 182) Rec 20.

194 ibid Rec 18.

195 ibid Art. 2.

196 As noted above, several concerns were raised via the yellow card procedure.

197 The EPPO website declares that "working arrangements with these five non-participating Member States are being established to define how the EPPO will cooperate with them." EPPO Website: https://www.eppo.europa.eu/members, last seen on 28 April 2021

change or withdraw its text as along as the Council did not act, as in any other ordinary procedure[198]. In addition, the European Parliament is always involved in the adoption of the Regulation itself (which in the case required its consent). Finally, the Council Legal Service has also highlighted that, although the EPPO enhanced cooperation is an accelerated procedure, the Council is nevertheless required to take due account of the objectives of reinforced cooperation in general. For instance, the note encouraged the Council to perform a thorough analysis of the file, before concluding on the absence of unanimity, paying particular attention to the difficulties expressed by national parliaments in their reasoned opinions: "These particular difficulties make it all the more necessary for the Council to conduct a full, detailed and in-depth examination of the proposal over a sufficient period, in order not least to take account of the reasoned opinions issued by national parliaments and to seek to achieve delicate compromises in the light of national investigative and prosecution systems, which vary significantly from one Member State to the next"[199]. One could indeed argue that in the case at hand the involvement of national parliaments did not stop to the yellow card procedure but engendered a more careful examination by EU institutions throughout the decision-making procedure. After all, the "shadow" of the fast-track enhanced cooperation arguably pushed national parliaments to react more vehemently as they knew that unanimity could be easily circumvented.

Europol: differentiation in AFSJ agencies

The AFSJ has witnessed an intense process of agencification[200]. Initially established with the main task to assist national authorities with coordination and operational support, agencies have progressively become the main bridge for AFSJ cooperation with third country[201]. After Brexit, only Ireland and Denmark have maintained a differentiated regime, so that internal differentiation is not very extended. However, external differentiation is significant and takes a variety of forms. The democratic accountability of EU agencies has been largely studied in recent academic literature[202]. This report therefore only focuses on the impact of differentiation and considers one agency in particular, Europol, as a benchmark to dissect the implications of DI for the standards of democracy in AFSJ agencies.

Created in 1998 under international law (the Europol Convention), Europol was transformed in an EU agency in 2009[203]. Its main role is to support member states in preventing and combating serious international crimes and terrorism. Following the Lisbon Treaty, the 2016 Europol regulation was adopted, making Europol the epicentre of police information exchange[204]. By the same token the agency became increasingly embedded into the EU institutional framework through, for instance, increased oversight by the European Parliament.

All EU Member States but Denmark are members of the agency. In addition, Europol has partnership agreements with 22 non-EU countries, including the Schengen states Switzerland and Norway, but also key strategic partners such as the US and Canada and neighbouring countries, such as the Western Balkans.[205] Only Europol's members participate fully in both decision-making and implementation.[206] Only they have direct access to Europol databases.

198 Council Legal Service, Contribution on the Proposal for a Council Regulation on the establishment of the EPPO 2014 [6267/14].
199 ibid.
200 Among the biggest AFSJ agencies are Europol, Eurojust, Frontex, EASO (the European Asylum Office)
201 Juan Santos Vara, 'The EU's Agencies: Ever More Important for the Governance of the Area of Freedom, Security and Justice' in Ariadna Ripoll Servent and Florian Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2018) 445.
202 Elena Madalina Busuioc, *European Agencies : Law and Practices of Accountability* (Oxford University Press 2013).
203 Europol Council Decision on 6 April 2009.
204 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) 2016 (OJ L).
205 Camino Mortera-Martínez, Zoran Nechev and Ivan Damjanovski, 'Europol and Differentiated Integration' (2021) Policy Paper 13 EU-IDEA.
206 The new Europol Regulation states that the management board is to be composed of 'one representative from each Member State and one representative of the Commission'. Each representative has a voting right. The management board can invite non- voting observers to its meetings. Europol 2016 Regulation.

Equal representation is ensured by participation in the Management Board of the agency, which is composed of one representative per Member State and one Commission's representative and which is open to EU countries only. After Brexit, Ireland is the only EU Member States who has an opt-out from the AFSJ but is a full member of Europol and therefore sits in the agency's management Board. Denmark thus remains the only opt-out country and is associated as an observer without voting rights.[207] Despite Denmark being a major contributor to the Europol database, in a 2015 Referendum the Danes voted to opt out of the new Europol Regulation so that Denmark is no longer a member of Europol as of 1 May 2017. The cooperation between Denmark and Europol is now governed by an international agreement (the Agreement on Operational and Strategic Cooperation), which entered into force in May 2017[208]. As a result, Denmark exited from Europol as an EU member and rejoined it as an associated third party immediately after. Article 8 of the Agreement allows a representative to be invited to the Europol Management Board as an observer but does not grant it the right to vote. The Agreement explicitly recognizes the jurisdiction of the CJEU in any decision of the European Data Protection Supervisor, as well as on the validity or interpretation of the agreement.

Europol is accountable to the Council, who is responsible for guidance and control and for the appointment of the agency's Executive Director. In addition, as the agency is financed through the EU budget, it is accountable to both the European Parliament and the Council as the main budgetary authorities. The Europol Regulation has strengthened the accountability relation to the European Parliament and to national parliaments. It has established Joint Parliamentary Scrutiny Groups (JPSGs) (in application of Art 88 TFEU), which associate the European Parliament and the national parliaments in the oversight of Europol's activities. Europol regularly submit documents on threat assessments, strategic analyses, multiannual programming and annual work programme that are discussed by the JPSG. This joint supervisory mechanism is an interesting development in light of the differentiated regime of EU agencies. The LIBE committee has notoriously not been particularly involved in the control activities of agencies and of Europol in particular[209]. Furthermore, it operates as a non-differentiated platform. The association of national parliaments conversely allows for strengthened control by the parliaments of the countries which are mostly involved in the agency, but also of those associated (in this case Denmark). The rules of procedure of the JPSG set out in a final Protocol the provisions on the Danish Parliament, which participate in the work of the JPSG as a "member with limited rights." For instance, it cannot preside meetings nor be appointed as a representative to the Europol Management Board[210]. Such a solution strikes a fair balance between the rights of outer members to be associated to the control of the agency and their decision to withdraw from full membership. It can also be instrumental to overcome the issue of accountability overload and the multiplicity and fragmentation of accountability fora by bringing together different accountability holders in a single platform.

Overall, however, internal differentiation has little impact on the accountability and democratic performance of the agency. The main issues concern the relations with former members, such as Denmark and the UK. In particular, Denmark's limited access to the database creates problems for the country, that continues to be closely associated to the agency's work, however without having a say in its management and strategic guidance[211]. As regards the UK, Brexit has shifted the relations with Europol from an internal to and external differentiation perspective. Future developments need to be closely watched. The UK was probably one of the most active Europol's supporters and provided a leadership role. It had been a member of Europol since its creation in 1998 and for almost 10 years, from 2009 to 2018, Europol's director was a British national, Rob Wainwright[212]. After the Brexit Referendum, the UK considered the future relationship with Europol as 'a critical priority', yet

207 See Europol's website: https://www.europol.europa.eu/about-europol/governance-accountability, last consulted 24/06/2021
208 Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and Europol 2017.
209 Busuioc (n 202) 131.
210 Rules of Procedure of the Joint Parliamentary Scrutiny Group on Europol, available at: https://www.europarl.europa.eu/committees/en/europol-joint-parliamentary-scrutiny-gro/product-details/20201104CDT04421
211 Mortera-Martínez, Nechev and Damjanovski (n 205) 3"Europol can share data with Denmark only provided the member states where those data originate from agree".
212 ibid 12.

the country failed in negotiating a close partnership with Europol. The terms eventually agreed in the EUUK Trade and Cooperation Agreement (TCA) of December 2020 identify procedural means for inter-governmental cooperation, and remain rather vague as regards the possibility of further extending cooperation in the future. British influence will probably not fade away completely and the country will continue contributing to Europol strategic choices and orientation. Yet, the predominance of informal ties challenges the formal accountability relations and the institutional checks and balances that oversee formal decision-making.

Thus, external differentiation seems to pose greater challenges to democratic standards. The mismatch between full members, associated members and former members which have now become third parties create confusion as regards the functions of the agency and it weakens its accountability regime. It adds a layer of intergovernmental cooperation to a supranational EU agency. As EU - or formerly EU - member States who had been heavily involved in the agency become associated on the basis of parallel intergovernmental agreements, the supranational regime of the agency is arguably affected. Although only EU membership gives access to full institutional decision-making and resources, in practice such a stringent distinction sounds artificial, as the membership landscape seems to be constantly moving and results in different combinations and new intergovernmental arrangements. At the same time, these intergovernmental arrangements cannot have the same accountability mechanisms and representation prerogatives of full membership (to provide but one example, their representatives are not full members of the Board). Also, the jurisdiction of the CJEU is problematic in these agreements. The Lisbon Treaty now explicitly mentions in Art. 263 (1) TFEU that the CJEU can review the legality of acts adopted by EU agencies. Whereas in the case of Denmark it is clearly spelled out that the CJEU will have jurisdiction on the validity or interpretation of the agreement, the situation is more complex for the UK. CJEU control was utterly problematic during the Brexit negotiations and the UK will certainly not accept the Court's jurisdiction[213].

Finally, the reinforced supranational accountability regime introduced by the new Europol Regulation may have a negative effect on Europol's effectiveness. As observed by Mortera-Martínez, Nechev and Damjanovski, "One of the reasons why DI has been a success in Europol is because of how quickly the agency was able to make deals with third countries and even with its own members"[214]. The new Europol Regulation now requires partnerships between Europol and non-EU countries to be negotiated by the European Commission and approved by both the Council and the European Parliament. This new governance framework is likely to slow down Europol and curtail its agility. There seems to be a trade-off between strengthened input legitimacy for its internal differentiation and a reduced output legitimacy of external differentiation.

Conclusions & assessment

The analysis of differentiation in AFSJ as presented in the case studies on Schengen, EPPO and Europol has shown mixed results as regards democratic constitutional standards. This concluding section wraps up the main findings and provides a final assessment of the AFSJ differentiation in relation to the four standards as elaborated in part 1 (see Table 5 at the end of the section for a summary).

Representation

Differentiation in AFSJ affects the democratic standard of representation in several ways. It can have a reinforcing effect, because internal differentiation in the form of opt-out reflects the democratic choices of citizens, expressed by referenda (see for instance Denmark) or via national preferences embedded in the national political debate (the UK and Ireland). From this perspective, it can be argued that differentiation strengthens the democratic link between citizens and their governments

213 Deirdre Curtin, 'Brexit and the EU Area of Freedom, Security, and Justice. Bespoke Bits and Pieces' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (2017).

214 Mortera-Martínez, Nechev and Damjanovski (n 205) 15.

in the Member States that have negotiated opt-outs from AFSJ. Moreover, internal differentiation in AFSJ is solidly embedded into the EU legal framework through opt-in provisions (e.g. Ireland), enhanced cooperation (EPPO) and informal cooperation in practice (e.g. Denmark). This uniform institutional framework has contributed to minimize the impact of differentiation on the Council work, as Danish, Irish and British Ministers have been associated to most decision-making processes[215].

On the other hand, however, internal differentiation can also negatively affect the relation between participating and non-participating countries, with important consequences for the equality of Member States as represented in the Council. In this regard, the case-studies highlight diverging parameters for the permanent Treaty-based differentiation of opt-outs and the ad-hoc secondary law differentiation through enhanced cooperation. Opt-outs can grant some Member States a privileged status (e.g. the cherry-picking regime of Ireland), or else exclude them from the governance of important policies (e.g. Denmark in police cooperation). They thus introduce asymmetries in the work of the Council. In the aftermath of Brexit internal differentiation via opt-outs may be losing some appeal, as one of its biggest advocates has left the Union. In many AFSJ policies internal differentiation is now limited to Ireland and Denmark, or only to the latter as in the case of Europol. Internal differentiation may thus shift towards legal instruments that are better embedded in the EU law framework and which allow for flexible participation in secondary law. The example of the EPPO's enhanced cooperation showcases a regime of internal differentiation underpinned by legal guarantees which strikes a fairer balance between the rights and obligations of participating and non-participating members.

Another trend emerging from the analysis, and which has also been favoured by Brexit, is the overlapping between internal and external differentiation, whereby the latter tend to replace the former in opt-out schemes. Not only many third countries are associated to most EU AFSJ policies (albeit with a different status) but opt-out EU member states (Denmark's parallel agreement with Europol), or former opt-out EU member states (the UK in the framework of the TCA) participate in EU cooperation as third countries. As a result, a layer of international agreements is added on top of the EU supranational legal framework. This overlap between internal and external differentiation creates a hybrid legal framework that affects the work of EU institutions and the relation between 'ins' and 'outs'. It weakens the normativity of EU legal rules by creating a secondary layer of alternative, often external, rules and arrangements. If Denmark cannot participate in EU cooperation as a full Member State, cooperation can take place at another level, through international law, as in the case of Schengen. An international law which replicates EU rules, yet outside of the 'guarantees' of EU law. As observed by Migliorati, Denmark's participation to Schengen also shows that the fusion of internal and external differentiation can create a gap between legal rules and informal practices[216]. There is a mismatch between the choice of the Danish people not to engage in EU supranational cooperation and the country's involvement in most AFSJ policies.

Political accountability

Because AFSJ differentiation is solidly embedded in the EU legal framework, the impact on the accountability towards the European Parliament is also limited. The European Parliament acts on a non-differentiated basis, with no distinction between MEPs from opt-out countries and other MEPs. In the case of enhanced cooperation there is equally no special regime for selective involvement of the European Parliament. This is by the way a logic consequence of the fact that enhanced cooperation is an open instrument, which aims at associating the highest possible number of countries.

A different assessment must be made for the accountability relations towards national parliaments. Reinforced accountability mechanisms towards national parliaments would strengthen democratic oversight over both participating and non-participating countries. In the Danish case, who takes part via parallel agreements in many AFSJ policies, political accountability shall take place at the

215 Thym (n 24) 15.
216 Migliorati (n 4) 11.

national level rather than, or in addition to, at the EU level. The EPPO case study also shows that the involvement of national parliaments through the yellow card procedure had the effect of reinforcing the Council's efforts to seek an inclusive solution and more generally to associate countries that did not wish to take part in the enhanced cooperation. In this light, the joint parliamentary scrutiny Group foreseen by the new Europol regulation can provide an interesting model that associates the European Parliament and national parliaments in a single accountability forum.

Probably the biggest impact of differentiation in terms of political accountability lies with the hybrid regime of internal and external differentiation of AFSJ. The resulting participation patterns are not clearly delineated and neither is the level at which parliamentary control must take place. This is even more the case as the area used to be highly intergovernmental and previously saw little involvement of the European Parliament. Although a lot of progress has been made in this regard, as the case studies have largely shown, scholars have pointed to the low level of involvement of the LIBE committee in the control of agencies such as Europol[217]. Indeed, as the *locus* of, and responsibility for, political accountability has shifted to the EU level, there is a risk that accountability falls through the cracks.

Legal accountability

The mixed EU-international regime, coupled with opt-outs and parallel agreements makes legal accountability in AFSJ differentiation a hard endeavour. Because of the varying participation patterns, the boundaries between fully participating, opt-out and opt-out/opt-in countries are not always clearly demarcated. As a result, differentiation leads to some legal uncertainty as regards the scope of participation in borderline cases. Schengen is a case in point, where the CJEU has been called on several occasions to draw the limits of the British and Irish opt-in scheme as regards measures building upon the Schengen *acquis*[218].

The extent of the CJEU jurisdiction equally raises several issues in differentiated regimes. Opt-out Member States and non-participating countries in enhanced cooperation are in principle not submitted to CJEU control on the matters subject to differentiation. However, when they opt into selected AFSJ policies those countries also recognize the CJEU jurisdiction. In addition, parallel agreements often foresee EU jurisdictional control, such as in the case of the working agreement between Denmark and Europol. CJEU oversight was a key concern for the UK government during Brexit negotiations. Opposition to the CJEU was indeed the main reason why the UK was not able to obtain closer cooperation with Europol, that was conditioned by the acceptance of the CJEU competences, such as in the Danish case[219].

Finally, interdependence between policy areas and differentiation instruments can lead to unclear legal situations, such as in the relation between EPPO and Eurojust. As Eurojust is subject to the control of the CJEU, it remains to be seen whether EPPO's non- participating countries will be affected by the ties between the two bodies.

Transparency

The fragmentation of the AFSJ legal framework and its complexity also result in transparency flaws. In all the cases studied one of the major problems is precisely the difficulty to entangle ambiguous and convoluted participation designs. Schengen for instance is based on a mixed internal/external differentiation regime. Not only does Schengen bring together some EU Member States with some non-EU Member States. It also provides for the possibility for Member States to participate as non-Member States. Within this legal framework it is not straightforward to understand who is in, who is out and who is partially out. The extent of Europol's external differentiation also results in complex

217 Busuioc (n 202) 131.
218 *UK vs Council* (n 168).
219 Deirdre Curtin, 'The Ties That Bind: Securing Information Sharing after Brexit' in B Martill and U Staiger (eds), *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press 2018) 150 ff.

participation patterns, especially when it comes to grant access to sensitive information. Finally, enhanced cooperation by definition creates a multi-layered legal order, which is even further layered if one considers, such as in the EPPO case, the difference between Member States who do not participate because of their opt-out schemes (Denmark and Ireland) or those who decided not to join EPPO cooperation (Sweden, Hungary and Poland).

The coherence of the legal system is thus affected by the high level and variety of differentiation. We would bet that the big majority of EU citizens is not even aware of the policy areas which their countries participate in, let alone understand the whole opt-out/opt-in system. Forms of direct participation of citizens are hampered by this confusing legal architecture. The difficulty to entangle the level of participation in AFSJ is problematic also in light of the fact that most deliberations in the Council happen behind closed doors. In this situation exercising an adequate oversight over the work of the Council is almost a mission impossible. Under the veil of secrecy informal practices can continue to proliferate undisturbed, independently from the legal rules. As a consequence, EU citizens have little possibility to control their country's adherence to the mandate expressed in referenda or national elections.

Table 5. Assessment: Differentiation in AFSJ & constitutional standards of democracy

	Representation	Political accountability	Legal accountability	Transparency
Opt-outs/ Schengen	• Respect of democratic choices of national citizens • Privileged status for opt-out/opt-in members	• EP: limited impact • Association of NPs	• Legal uncertainty • Jurisdiction of the CJEU	• Unclear participation patterns -Council deliberations not public
EPPO	• Legal guarantees protecting rights of non-participating MSs • Non-participating MSs are not associated to EPPO governance	• Oversight by supranational institutions • Multi-level governance problematic • Institutional balance upset in fast-track enhanced cooperation	• Unclear relation between EPPO/ Eurojust	• Unclear relation between EPPO/Eurojust • Fragmentation
Europol	• Extensive external DI, limited internal DI • Overlap between supranational and intergovernmental cooperation	• Joint Parliamentary Scrutiny Groups (EP + NPs) • Parallel agreements (DK)	• Role of CJEU under parallel agreements • Future cooperation with the UK	• Access to information problematic for Schengen non-EU countries • Complex participation patterns
Overall Outlook/ Main challenges	Differentiation embedded in EU legal framework and Council work Overlap between internal and external differentiation	Limited impact on EP – greater impact on NPs Overlap between internal and external differentiation and varying participation patterns	CJEU jurisdiction Legal uncertainty	Complexity and fragmentation of participation patterns Council's secrecy

Source: made by the authors

Conclusions

This report has investigated differentiated integration in EMU and AFSJ based on EU constitutional standards of democracy. It has developed four main standards - representation, political accountability, legal accountability and transparency - and it has applied them to concrete differentiation case-studies the two policy areas. In the EMU domain, we have examined the institutional governance, the adoption of the two-pack and six-pack through the Art. 136(1) TFEU procedure and the ESM. In the field of AFSJ we have considered the general opt-out regime in connection with Schengen, the fast-track enhanced cooperation procedure of Art. 86 TFEU establishing EPPO and Europol.

Overall, the analysis has highlighted several democracy and accountability shortcomings linked to differentiation in both policy areas. Admittedly, although the two domains are highly differentiated, they are also very different in their forms of differentiation. EMU differentiation mainly revolves around the euro and takes the shape of a core set of Member States sharing a quasi-permanent level of deeper integration. There, the divide between insiders and outsiders is very accentuated and the institutional framework has adapted to this stable form of DI, by establishing dedicated platforms for differentiated policy-making (e.g. the Eurogroup). Differentiation in AFSJ presents a perhaps more fragmented legal framework, which however is embedded and works efficiently within existing EU decision-making structures. Following Brexit, only Denmark and Ireland have maintained their opt-out regimes, which however often allow for various forms of participation at different levels. Hence, there are limits to the comparative potential of the two areas.

Nevertheless, our analysis has uncovered several points in common when it comes to the application of EU constitutional standards of democracy and accountability. The main findings are summarised in a comparative overview in Table 6. In both EMU and AFSJ the complexity of the differentiation framework undermines transparency standards and makes political accountability difficult to achieve. In addition, the jurisdiction of the CJEU is not uniform and, especially in the presence of opt-outs or differentiation outside of EU Treaties, presents legal protection gaps. Although the relations between participating and non-participating Member States are central in both cases, patterns are slightly different. Whereas in EMU the critical issue is how to protect the interest of non-eurozone countries while allowing the eurozone to integrate, in AFSJ the overlap between internal and external differentiation and the variation of participation geometries are mostly problematic.

Finally, in terms of instruments, somehow unsurprisingly, enhanced cooperation procedures seem to perform better in terms of political accountability, legal certainty and transparency. As they are solidly embedded in the EU legal framework, they comply with all relevant constitutional standards. Opt-outs and inter-se agreements, conversely, are more problematic as they establish exceptions to normal EU procedures, yet they are connected to, and they operate within, the EU legal system.

By way of conclusion we would like to share two final observations linking the results of our analysis to future perspectives on differentiation.

First, a key concern with differentiation is how to adapt the single EU institutional framework to accommodate forms of DI that can also respect the rights of the outsiders, are fully politically and legally accountable and comply with EU standards of transparency. In other words, how to ensure that differentiation respects the democratic and accountability standards at least as much as non-differentiated integration? This is an essential point in view of the fact that use of DI may continue and even intensify in the future[220]. With this in mind, several scholars have proposed to reform the EU institutional framework to match it with stable paradigms of differentiation. In addition to the idea of a parliamentary assembly for the eurozone already mentioned in this report (section 3.I), another proposal has called for a hybrid model of DI, combining a bare-bones EU (mainly based on economic integration) in which all EU members participate with a set of differently integrated clubs in specific policy areas, (for example EMU, Migration and Schengen, security and foreign policy etc.)[221].

220 Thym (n 21).

221 Maria Demertzis and others, 'One Size Does Not Fit All: European Integration by Differentiation | Bruegel' [2018] Bruegel.

Table 6. Constitutional standards in EMU and AFSJ: a comparative overview

	Representation	Political accountability	Legal accountability	Transparency
EMU	Striking a fair balance between representation of eurozone countries and association of non-eurozone countries in the presence of high externalities and geographical spill-overs.	Maintaining the EP European mandate while empowering national parliaments Problematic combination of EU and international law provisions	CJEU jurisdiction is unclear and creates gap in judicial protection	Complexity of legal framework and overlaps between instruments and forums Most decisions taken behind closed doors
AFSJ	Differentiation embedded in EU legal framework and Council work Main issue is overlap between internal and external differentiation	Limited impact on EP – greater impact on NPs Main issue is overlap between internal and external differentiation and varying participation patterns	CJEU jurisdiction Legal uncertainty	Complexity and fragmentation of participation patterns Council's secrecy

Source: made by the authors

This report, however, has highlighted that the EU institutional framework already strikes a balance between the interests of participating Member States to proceed with DI and the rights of the other Member States to be associated and informed, by combining potentially differentiated institutions (European Council, Council and National Parliaments) with non-differentiated institutions (Commission, European Parliament, CJEU). In principle, this combination can also guarantee adequate representation and accountability channels, as it brings together the European Parliament and the national parliaments to oversee a differentiated Council (where non-participating Member States do not vote) and a non-differentiated Commission. In this light, we would argue that there is no need for new parliamentary chambers or assemblies. After all, a differentiated EP would accommodate only a core-type of differentiation with more or less stable membership (such as in the eurozone), but it would not work in the presence of more fragmented variable geometries, such as in the cases of enhanced cooperation or opt-outs cutting across policy areas and geographies. Arguably, however, the latter scenario is more likely to happen, as projects of a core-Europe, often built around the Eurozone, have never materialized, and seem by now off the table[222].

What is needed, however, is to 'fix' some of the democratic and accountability shortcomings that persist in the current EU institutional framework for differentiation. For instance, the Eurogroup as an informal institution does not allow for adequate legal and political accountability. Because of its increasing powers and the tendency to work in inclusive format, the Eurogroup has been replacing the ECOFIN in many matters. Yet if it has become ECOFIN, or similar to ECOFIN, as the main decision-making forum for EU financial and economic policy, then it should become a proper institution, just like ECOFIN. Such a step would enshrine differentiation even more deeply within the EU institutional framework but it would increase the possibility for democratic control. National parliaments are powerful accountability fora for EU governments, yet they are only randomly involved in EU decision-making and information flows are weak. In differentiated settings a more structured participation may reinforce the political control exerted by the European Parliament…. when it can. Indeed, some forms of differentiation, such as those taking place outside of the Treaties, side-line the European Parliament. In such cases the control of national parliaments becomes even more critical.

222 Also Piris, who was one of the greatest advocates a Eurozone based avantgarde, has recently acknowledged that this is no longer likely to happen. Piris (n 63). for the more recent declarations: Dice Networking Conference on Brexit, 11 March 2021, Keynote speech by Jean-Claude Piris.

Second, a new chapter in the differentiation story was recently written by EU leaders and institutions in their response to the Covid-crisis. Arguably it is a chapter that contains a *coup de théâtre*. EU leaders have in fact abandoned differentiation and embraced a unitary EU-27 approach to the crisis. It required lengthy negotiations, but eventually the European Recovery Plan was agreed by all Member States within the EU law framework. Arguably, Brexit also favoured the prevalence of a unitary approach, by getting the strongest advocate of exceptions and derogations out of the way. It remains to be seen if this will be a longer term or only a one-off show of unity in the light of an unprecedented crisis affecting all Member States symmetrically. Be it as it may, the adoption of the Recovery Plan can impact on accountability and democratic standards of differentiation. Actually, the Covid-19 emergency instruments do not supersede, but rather overlap with DI. The national recovery and resilience plans are linked to the European Semester, which apply to the EU-27 but entails special, more stringent recommendations for the euro area. As a result, EMU governance is embedded within a more unitary approach to economic policy, while maintaining distinctive provisions. Hopefully, the new trend which has emerged with the corona crisis will bring some order in the patchwork and piecemeal EMU legal framework. For now, it has marginalised the ESM, which, as it was shown in the report, raises several issues as regards legal and political accountability. Solidly anchored into EU law, the Covid 19 package can instead guarantee compliance with EU standards of transparency and accountability. Furthermore, it has the potential to associate national parliaments more effectively, as the recovery and resilience plans bear high salience in the national debate. Against this background, DI is not about to disappear, but it may be enshrined in an overall more coherent centralised framework that may also enhance its democratic and accountability credentials.

Authors contacts

Deirdre Curtin

Full-time Professor, Department of Law

European University Institute

Villa Salviati, Florence, Italy

email: deirdre.curtin@eui.eu

Maria Patrin

Research Associate, Robert Schuman Centre for Advanced Studies

European University Institute

Villa Schifanoia, Florence, Italy

email: maria.patrin@eui.eu