

# POLICY BRIEF

## Integrating Diversity in the European Union (InDivEU)

### Constitutional standards of democracy and accountability in differentiated integration

#### Introduction

Differentiated integration (DI) has become a pervasive feature of the EU legal and political reality. It happens when legal rules are not uniformly valid across the EU Member States. DI can take several forms, ranging from opt-outs of certain Member States from EU policies to closer cooperation regimes. One of its big advantages is that it 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”.<sup>1</sup> From this point of view differentiation strengthens the democratic underpinning of the Union in that it allows 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 democracy, such as that “those who are equally affected by shared institutions should have an equal say on how they are run and modified”.<sup>2</sup>

As part of the InDivEU legal package, we have explored to what extent regimes of DI are compatible with EU constitutional standards

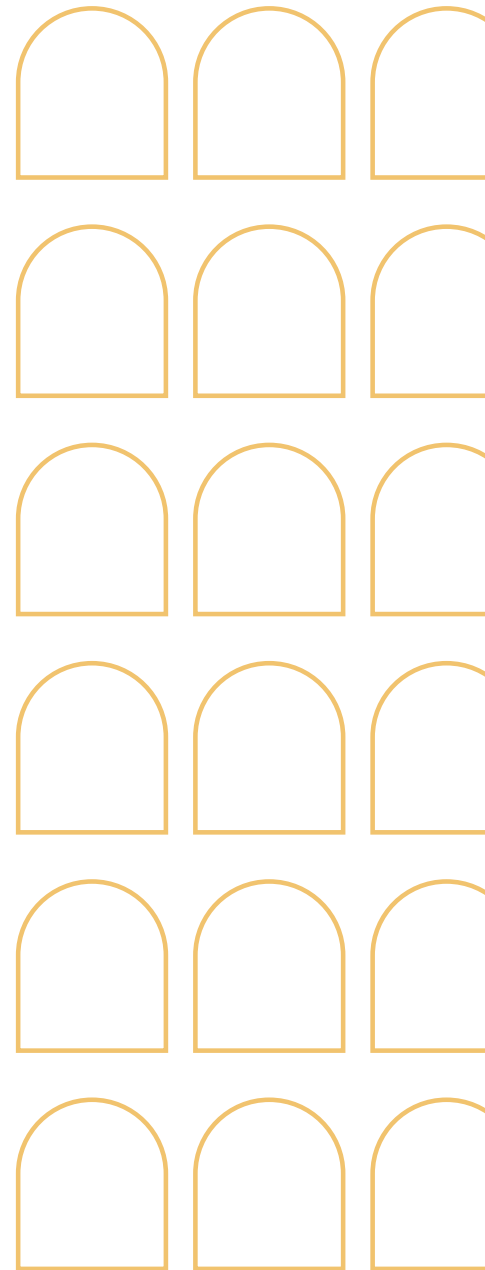
<sup>1</sup> Christopher Lord, ‘Utopia or Dystopia? Towards a Normative Analysis of Differentiated Integration’ (2015) 22 *Journal of European Public Policy* 783, 784.

<sup>2</sup> 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.

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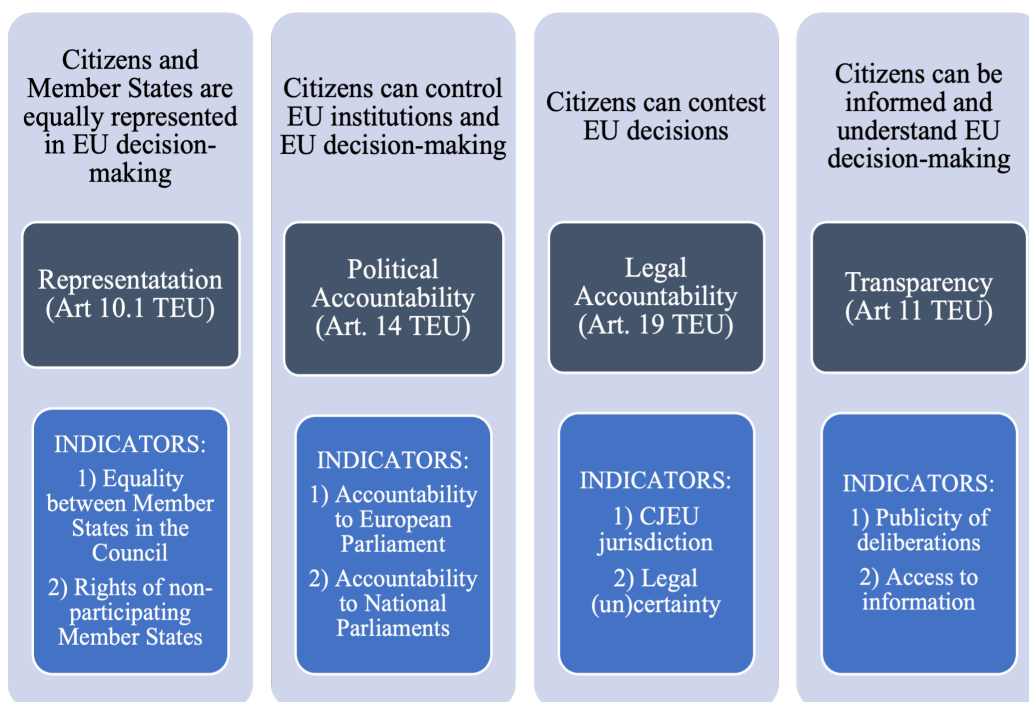


of democracy and accountability. We have derived relevant constitutional standards from the EU Treaties and we have applied them to the two most differentiated EU policy areas: the Economic and Monetary Union (EMU) and the Area of Freedom, Security and Justice (AFSJ). Our main findings are presented in this policy brief.

## Analytical framework

Art. 2 of the Treaty on European Union (TEU) lists democracy among the values upon which the Union is founded. Title II of the TEU is explicitly devoted to “provisions on democratic principles”. Based on these Treaty provisions and on the jurisprudence of the Court of Justice of the European Union (CJEU) we have built an analytical framework, comprising four main constitutional standards: representation, political accountability, legal accountability, and transparency. These standards are operationalised and measured based on key indicators of assessment. We use these indicators to assess how various differentiation regimes in the domains of EMU and AFSJ respond to EU democracy and accountability requirements.

**Table 1: The analytical framework**



## Findings

### EMU: Stable Differentiation In Search Of A Flexible Institutional Framework

Enshrined in EU primary law since the Treaty of Maastricht, 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 EMU 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, with some of them enjoying a de-facto permanent opt-out from EU monetary policies. The EU institutional framework has adapted to this stable form of DI, by establishing dedicated platforms for differentiated policy-making (e.g. the Eurogroup).

Following the euro-crisis the membership landscape of EMU has become even more complex and multi-layered. The reforms adopted to face the 2008 economic and financial crisis have resulted in a patchwork of instruments, partly operating within the EU Treaty framework (e.g. the six-pack), partly outside of it (e.g. the European Stability Mechanism – ESM). Some apply to the euro-area only (the ESM), some

others also associate non-euro area countries (some provisions of the six -pack).<sup>3</sup> As a result, the level of DI in EMU has deepened. It poses several challenges to EU standards of democracy and accountability.

### Representation

Decisions regarding the euro-area affect non-eurozone members and future eurozone-members too. The relation between the Eurogroup - the euro-area informal ministerial gathering - and the formal EU-27 decision-making institution, the Council on Economic and Financial Affairs (ECOFIN), should therefore strike a fair balance between the representation of euro-area and non-euro area Member States. However, recently the Eurogroup has increasingly become the main hub for EU economic and financial decision-making, often associating non-euro area Member States in “inclusive” meetings. This development deprives non eurozone Member States of the guarantees of the formal EU decision-making 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 (such as in the case of the ESM), where those guarantees do not apply.

### Political Accountability

The asymmetry between EMU's limited geographical application and the free mandate of MEPs has given rise to concerns as regards potential incongruence between those who take decisions (MEPs from all EU countries) and those affected by them (citizens of the eurozone).<sup>4</sup> Furthermore, the Eurogroup, as an informal body, is not subject to the political accountability requirements of the Council, such as a regular dialogue with the European Parliament (EP). Neither is the ESM, which was adopted outside of EU law. In this context, the involvement of national parliaments is crucial in order to guarantee proper accountability channels in the presence of differentiation.

### Legal Accountability

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.<sup>5</sup> As a result, the Eurogroup is not liable for its activities. Furthermore, CJEU jurisprudence is only partially guaranteed in the presence of inter-se treaties such as the ESM Treaty. The CJEU has jurisdiction on 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.

### Transparency

The Eurogroup, unlike the Council, is not subject to EU transparency requirements and its deliberations are confidential. The ESM follows its own rules on public communications and disclosure of documents. Finally, the six-pack legislation must comply with EU standards on transparency, yet its geographical composition is that convoluted that it becomes a hard task to entangle who is subject to which piece of legislation.

### **AFSJ: Variable Differentiation At Work Within The Eu Single Institutional Framework**

The area of Freedom, Security and Justice (AFSJ) has developed a high degree of internal and external differentiation. 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. Opt-outs are very common. Yet, following Brexit, only Denmark and Ireland have maintained their opt-out regimes, which however allow for various forms of participation at different levels. Furthermore, the EU Treaties

3 Treaty establishing the European Stability Mechanism 2012; For the Six-pack see for instance: Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States 2011 (306); Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies 2011 (OJ L).”plainCitation”:”Treaty establishing the European Stability Mechanism 2012; For the Six-pack see for instance: Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States 2011 (306)

4 Thu Nguyen, 'Differentiated Integration and Accountability in the European Union – An Analytical Framework' [2020] EUIDEA.

5 Joined Cases C-105/15 P to C-109/15 P Mallis and Others v Commission and ECB [2016] ECLI:EU:C:2016:702; Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P Council v K Chrysostomides & Co and Others [2020] ECLI:EU:C:2020:1028.

provide for fast-track enhanced cooperation procedures in some specific cases (such as the establishment of the European Public Prosecutor Office)<sup>6</sup>. Finally, agencies such as Europol have set up different forms of participation, associating non-EU member states or opt-out member states through international parallel agreements. As a result, differentiation in AFSJ presents a fragmented legal framework, with overlapping participation patterns. Yet it is embedded within existing EU decision-making structures and has not led to demands for ad-hoc institutional platforms. The analysis of differentiation in AFSJ shows mixed results as regards EU democratic constitutional standards.

### Representation

On the one hand, internal differentiation in the form of opt-outs can strengthen democratic standards, by reflecting the citizens' democratic choices on participation in EU policies. Moreover, informal practices as well as opt-in provisions allow for widespread association of non-participating countries to most decision-making processes, minimizing the impact of differentiation on the Council work. On the other hand, however, differentiation can also negatively affect the relation between participating and non-participating countries, by granting some Member States a privileged status (e.g. the opt-in regime of Ireland). Finally, AFSJ features overlaps between internal and external differentiation, whereby a layer of international agreements is often added on top of the EU supranational legal framework. A typical example of this is Denmark participating into Schengen under the international law agreement.

### Political Accountability

Because AFSJ differentiation is solidly embedded in the EU legal framework, the impact on accountability towards the EP is limited. There is no distinction between MEPs from opt-out countries and other MEPs. Yet, reinforced accountability mechanisms towards national parliaments could strengthen democratic oversight over both participating and non-participating countries. 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 so is the level at

which parliamentary control must take place. As a result, there is a risk that accountability falls through the cracks.

### Legal Accountability

The mixed EU-international regime, coupled with opt-outs and parallel agreements weakens the legal accountability of AFSJ differentiation. Because of the varying participation patterns, the boundaries between fully participating, opt-out and opt-out/opt-in countries are not always clearly demarcated, potentially leading to some legal uncertainty as regards the scope of participation in borderline cases. Moreover, the extent of the CJEU jurisdiction in opt-out/opt-in regimes and parallel agreements is not always clear.

### Transparency

The fragmentation of the AFSJ legal framework and its complexity also result in transparency flaws. 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. The extent of Europol's external differentiation also results in complex participation patterns. The difficulty to entangle participation in AFSJ is problematic also in light of the fact that most deliberations in the Council happen behind closed doors.

<sup>6</sup> Art. 86 of the Treaty on the Functioning of the European Union (TFEU)

**Table 2: Summary of findings**

	<b>Representation</b>	<b>Political accountability</b>	<b>Legal accountability</b>	<b>Transparency</b>
<b>EMU</b>	Striking a fair balance between representation of eurozone countries and association of non eurozone countries	Problematic combination of EU and international law provisions	Unclear CJEU jurisdiction & gap in judicial protection	Complexity of legal framework and overlaps between instruments
<b>AFSJ</b>	Overlap between internal and external differentiation	Limited impact on EP – greater impact on NPs	CJEU jurisdiction & legal uncertainty	Complexity and fragmentation of participation patterns & Council’s secrecy

## Recommendations

On the basis of our analysis of constitutional standards of democracy and accountability in DI, we propose the following recommendations:

1. Maintaining the single institutional framework, which already combines potentially differentiated institutions (European Council, Council and National Parliaments) with non-differentiated institutions (Commission, European Parliament, CJEU). This implies allowing only for very limited differentiation within the EP, mostly at the committee level (ECON).
2. Strengthening accountability channels through more regular and effective involvement of national parliaments in the presence of differentiation.
3. Strengthening the legal and political accountability of the Eurogroup, clarifying the relationship between the Eurogroup and ECOFIN and re-establishing ECOFIN as the main institutional forum for non-differentiated decision-making.
4. Privileging enhanced cooperation as a differentiation tool, where possible
5. Ensuring coherent opt-out regimes, allowing for a fair balance between participating and non-participating Member States
6. Improving the political accountability channels of forms of differentiation taking place through inter-se Treaties – and bringing transparency requirements in line with EU standards.
7. Clarifying the CJEU jurisdiction on differentiation taking place outside of EU Treaties and of opt-out regimes.
8. Streamlining the institutional and legal framework by reducing the number of differentiation instruments and participation patterns.

**Integrating Diversity in the European Union** (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states.

InDivEU is coordinated by the Robert Schuman Centre at the European University Institute, where it is hosted by the European Governance and Politics Programme. The project comprises a consortium of 14 partner institutions and runs from January 2019 to December 2021. The scientific coordinators are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

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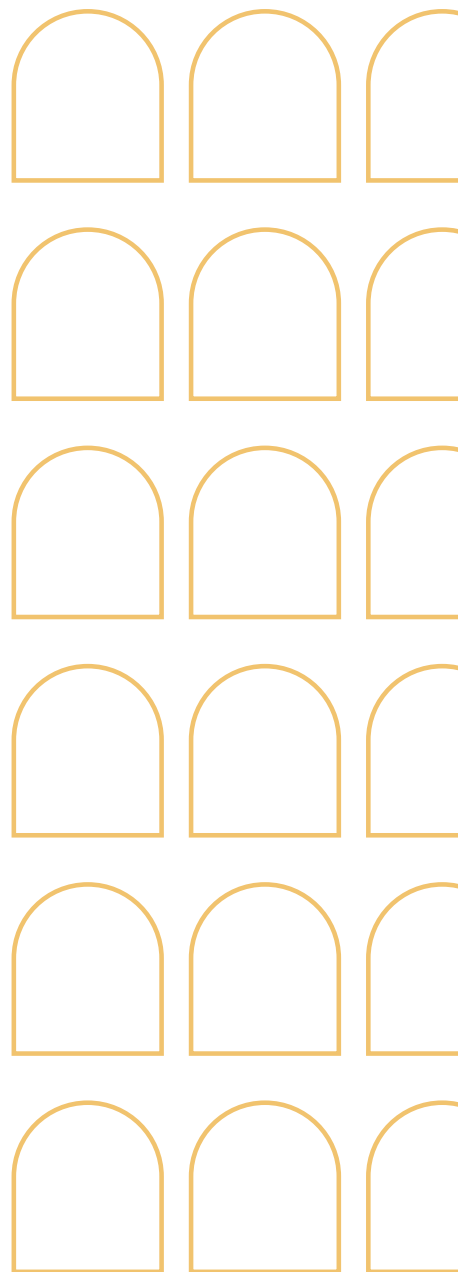
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