

No Representation without Integration! Why Differentiated Integration Challenges the Composition of the European Parliament*

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Abstract

This article provides a normative assessment of parliamentary representation in fields of differentiated integration in the European Union. Based on three criteria of legitimate democratic representation, autonomy, accountability and equality, we evaluate four alternative representation models. These models comprise (I) complete representation of all members of the European Parliament (MEPs), (II) insider representation through the creation of new, regime-specific assemblies, and (III) partial representation without and (IV) with inclusive deliberative stages. We find that the current system of complete representation, while honouring the principle of equality, violates autonomy and accountability in areas of differentiated integration. We therefore advocate a model of partial representation: MEPs elected in opt-out states should not take part in EP voting but should be invited to participate in the deliberative stages of parliamentary decision-making. This reconciles the principles of autonomy, accountability and equality, at least as long as there is no truly European electoral system in place.

Keywords: differentiated integration; institutional choice; European Parliament; European elections; representation

Introduction

Instances of political crises, disunity among member states and stalling integration in the EU have time and again led scholars and practitioners to argue for or against differentiated integration (DI). Following the Eurozone crisis and the Brexit vote, DI is again high on the political agenda. The European Commission's 'White Paper on the Future of Europe' acknowledged DI as one potential route forward (European Commission, 2017) and in March 2017, France, Germany, Italy and Spain embraced DI as a viable option for promoting integration during a gathering at Versailles. A European Parliament (EP) resolution adopted in January 2019 stated that 'the debate [...] should not be about pro-differentiation versus anti-differentiation, but the best way to operationalise

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differentiated integration – which is already a political reality – within the EU's institutional framework' (European Parliament, 2019).

However, these debates have remained remarkably silent with respect to questions of institutional design and democratic legitimacy. Particularly the implications of DI for the EP – which is after all the only directly elected institution of the EU – are often overlooked. One exception is the debate about the future governance of the Economic and Monetary Union (EMU), in which the role of the EP is regularly brought up (Curtin and Fasone, 2017). Addressing this gap in the literature, this article questions the role of the EP in a system of DI and asks: how should the EP participate in and make decisions on differentiated policies, which per definition directly affect only a subset of EU member states? If DI limits the scope of European public policies to a subset of EU member states, how can decision-making include members of the EP (MEPs) from the full set of member states? Starting from a democratic understanding of the EU, we argue that decision-making by all MEPs – while honouring the principle of *equality* – does not fully respect the democratic principle of *autonomy*, which foresees a unity between those who govern and those who are being governed. Moreover, MEPs from member states that are not legally bound by DI legislation cannot be held *accountable* by those subjected to the measures decided. Under the current institutional conditions, DI thus aggravates problems of democratic legitimacy in the EU.

We evaluate four models of EP representation in cases of DI, namely (I) complete representation in which the EP decides in its full composition; (II) insider representation through the creation of new assemblies for differentiated policy areas, such as, for example, a Eurozone parliament; (III) partial representation in which MEPs from non-participating member states lose their voting rights and are also formally excluded from the preceding deliberations; and (IV) partial representation where MEPs from opt-out states are excluded from voting, but included in the deliberative stages of parliamentary decision-making that precede the formal voting stage.

Based on the above-mentioned criteria, we advocate the model of partial representation that foresees exclusive voting rights for MEPs from member states participating in a DI regime, but includes the outsiders in the deliberative stages of decision-making. We end by pointing out that reforming the EP's electoral system towards transnational constituencies and voting lists could reduce current tensions by backing the idea that the EP truly represents the European demos instead of member state demos and thereby assure the legitimacy of complete EP representation also in fields of DI.

1 Differentiated Integration in the EU

In recent years, DI has moved to the centre stage of EU politics and its analysis. Defining DI as the incongruence between the 'territorial extension of EU membership and EU rule validity', Holzinger and Schimmelfennig (2012, p. 292) document the fact that differentiation has not just become a hotly debated topic since the 1970s but has characterized substantive parts of primary law since the 1990s. In addition, Duttler *et al.* (2017) show that DI has been a prominent feature of secondary law from the very beginning of the European integration project. According to the EUDIFF2 dataset (Duttler *et al.*, 2017), the most comprehensive collection of secondary law differentiation, a yearly average of 16.8 differentiated directives and regulations have been adopted under the co-decision (now ordinary legislative) procedure between 2003 and 2012, with a rising trend over

time. With a total of 47 legal acts adopted under co-decision, the ‘area of freedom, security and justice’ (AFSJ) is the policy domain with the highest absolute number of differentiated laws in this period (see Figure A1 and A2 in the online appendix).¹

Today, there is a growing body of empirical work investigating the causes and consequences of DI, with respect to both primary (Adler-Nissen, 2014; Leuffen *et al.*, 2013; Schimmelfennig and Winzen, 2014) and secondary law (Kroll and Leuffen, 2014; Winzen, 2016). The existing literature on the impact of DI has focused mainly on its consequences for the EU’s political system or non-participating states (Kölliker, 2001; Naurin and Lindahl, 2010; Schimmelfennig, 2016). What so far have largely been neglected are the implications for the organs of the EU, the European Commission and – the subject of the present article – the EP (for an early exception, see Ehlermann, 1995). How do these institutions adapt to differentiation? In particular, normative accounts on DI have largely overlooked EU organs. Instead, they discuss the desirability of differentiation either in general (Bellamy, 2019; Dahrendorf, 1979), in relation to the characteristics of policy problems (Lord, 2015) or its effects on non-members (Eriksen, 2018; Fossum, 2015). This has recently begun to change (Piris, 2012; Thym, 2018). The side-lining of the EP in responses to the Euro crisis, especially, has raised questions of the legitimacy of eurozone reforms (Curtin and Fasone, 2017; Fasone, 2014; Rittberger, 2014;). However, most of these contributions have focused explicitly on the role of the EP in EMU governance rather than on its overall position in a ‘system of differentiated integration’ (Leuffen *et al.*, 2013). We take up this task with the present article.

Legislating Differentiated Policies

For the Council of the EU, DI brings no fundamental problems. If a member state opts out from parts of the Treaties, ‘it shall not take part in the adoption by the Council of proposed measures’ in those areas.² Correspondingly, non-participating member states are not allowed to vote on secondary legislation in enhanced cooperation, even though they may take part in the deliberations preceding the vote (Art. 20 (3), TEU). In short, in the Council, non-participating member states do not have voting rights in differentiated policy areas.

In contrast, the EP votes on differentiated policies in its full composition. The opt-out protocols do not assign special procedures for the EP. In enhanced cooperation, the consent of the EP is required, just as it is in the ordinary legislative procedure (Art. 329 (1), TFEU). This means that MEPs from non-participating member states vote on legislation that does not apply to their home countries. This practice results in a mismatch between the territorial scope of EU policies and the composition of the legislature.

The mismatch is far from insignificant, as Table 1 illustrates. For example, roughly a third of all MEPs come from member states that so far have not adopted the euro; a significant figure that should be kept in mind when debating to increase EP involvement in EMU governance. The proportion of MEPs who are not subjected to it can be much higher when it comes to secondary law differentiation through enhanced cooperation, as the cases of the divorce rule and the financial transaction tax indicate. In the latter case, 45 per cent of MEPs were from non-participating member states (von Oндarza, 2013, p. 31).

¹These numbers constitute an upper bound of differentiated laws. They include both, acts that are differentiated because of primary law opt-outs, and more specific secondary law differentiations.

²See, for example, Protocols No 21, Art. 1 and No 22, Art. 1 & 5 of the TEU.

Table 1: Mismatch between policy scope and decision-making structure

	<i>Number of MEPs from participating states (I)</i>	<i>Number of MEPs from non-participating states (II)</i>	<i>Ratio (II to all MEPs) %</i>
EU	754	0	0
CSDP	741	13	1.7
EU patent	627	127	16.9
AFSJ	656	98	13.0
EMU	481	273	36.2
Divorce rule	465	289	38.3
FTT	412	342	45.3

Source: von Ondarza (2013, p. 31)

AFSJ, Area of Freedom, Security and Justice; CSDP, Common Security and Defence Policy; EMU, Economic and Monetary Union; FTT, financial transaction tax.

In the following, we explain why, from a normative point of view, the discrepancy between the scope of public policies and the composition of the legislature is troubling.

Differentiated Integration, Democracy and the European Parliament

Rittberger's (2005) dictum 'no integration without representation' succinctly sums up the nexus between the deepening of European integration and the strengthening of the EU's democratic credentials. Designed to provide a compensatory response to the presumed decline of national democracy resulting from the increased pooling and delegation of authority to the European level, the EP has been strengthened to secure the democratic legitimacy of the integration project.

To assess whether the EP lives up to this task in the context of DI, we first need to establish the criteria that define legitimate democratic representation. In doing so, we limit ourselves to three core democratic principles identified by the literature, namely *autonomy*, *accountability* and *equality*. These fundamental criteria are directly affected by DI, as we detail below. In contrast, other criteria commonly used for defining democracies, such as the respect for human rights, the separation of powers or the rule of law, are not directly affected by DI because they are neither immediately related to the process of legislating in differentiated policy areas nor to the territorial scope of these policies. Technically speaking, other principles should remain constant across the different models of representation that we compare and, therefore, do not contribute to their ranking. By focusing on the above-mentioned criteria, we do not, however, intend to suggest that we consider other criteria irrelevant for defining democratic governance more generally.

Autonomy is a key defining criterion of democracy. It relates to the neo-republican understanding of freedom as non-domination (Pettit, 1997) and is sometimes called collective self-government or self-determination. Autonomy demands that those who are subjected to laws should be authorized to make them (Eriksen and Fossum, 2012, p. 20; Gould, 2018, p. 388). In this sense, the principle is succinctly captured in Abraham Lincoln's address delivered at the dedication of the Cemetery at Gettysburg, in which he calls for the defence of 'government of the people, by the people, for the people' (Lincoln,

1953, p. 23). Because the coerciveness of law limits the individual autonomy and freedom of citizens (Gould, 2018, p. 388-389 f.), democracy requires the unity of citizen and legislator, either in person or through representation. The autonomy principle is conceived to establish congruence between those subjected to and those responsible for political decisions (see Eriksen and Fossum, 2000 p. 21; Scharpf, 1993, p. 167; Zürn, 1996, p. 39). Incongruence, on the other hand, exists when citizens are subjected to decisions that are beyond their control, which would result in a violation of freedom defined as non-domination (Pettit, 2010, p. 140).

In representative democracies the actual decision-making is delegated to agents of the people. Building on autonomy, the principle of *accountability* assures that the will of the people is respected in representative systems (cf. Beetham, 1994, p. 28; Fossum, 2014, p. 53).³ It is thus a corollary of or an instrument to guarantee autonomy (cf. Eriksen, 2019, p. 138). Accountability requires an institutionalized process in which elected representatives justify their actions to the citizenry and are eventually either dismissed or rewarded through re-election (cf. Bovens, 2007; Eriksen and Fossum, 2012, p. 20). Put simply, ‘democracy [...] is inconceivable where [citizens] do not control those who take decisions in their name’ (Lord, 2012, p. 40). In addition to electoral sanctions, which can only be enacted on election days, democracy requires a continuous process of accountability, in which representatives have to justify their actions publicly and are, in turn, scrutinized by an active public (Beetham, 1994, p. 29; Lord, 2012).

Political equality, in the sense of non-discrimination, is another foundational criterion of democracy (Christiano, 2010; Dworkin, 2000). In democratic states, citizens must enjoy equal political and civil rights. This demand is generally justified with references to natural law and universal human rights (Dahl, 1998, p. 62-63 f.; O’Flynn, 2010). Equality is closely linked to autonomy and accountability. As Kröger and Friedrich (2013, p. 174) put it, ‘all those who are bound by collective decisions are entitled to an equal say in their making and in controlling the rulers and the administration’. This includes ‘the equality of votes, an equal right to stand for public office, an equality in the conditions for making one’s voice heard and in treatment at the hands of legislators’ (Beetham, 1994, p. 28).

Moving from the level of the state to the realm of transnational, multilateral cooperation between democratic states, the equality between these states – and their respective state peoples – comes into play. To protect the autonomy of democratically organized peoples, all states must be equal and retain their sovereignty over the entry to, exit from and the basic rules of the multilateral order (Cheneval, 2011, p. 132).

In the EU, member states are represented in the Council while the EP represents individual citizens. The Lisbon Treaty has reinforced this distinction. Article 14(2) of the consolidated Treaty of the European Union states that the EP ‘shall be composed of representatives of the Union’s citizens’, referring explicitly to the concept of EU citizenship. Previously, the Maastricht Treaty used the phrasing ‘shall consist of representatives of the peoples of the States’. This change is remarkable, considering the ongoing debate

³We focus on the political accountability of elected representatives to the electorate rather than on other forms of accountability in a political system, such as those of the executive to the legislature or of bureaucrats to the government (cf. Beetham, 1994, p. 29; Bovens, 2007).

as to whether there is or can be a European demos that the EP can claim to represent. Moreover, the EP's electoral system remains rooted in the member states. Electoral laws are barely harmonized⁴ and degressive proportionality leads to an overrepresentation of smaller states and their citizens. The distribution of seats thus trades off the equality of votes against safeguarding an equal opportunity to be represented for citizens from smaller member states as well, reflecting a 'dual legitimacy' of the EP 'based on both citizens and states' (Kröger and Friedrich, 2013, p. 178; see also Lord and Pollak, 2013, p. 199). The German Constitutional Court, for example, has argued in its Lisbon ruling that the arrangement reflects a representation of peoples – or *demos* – rather than of a single European demos, irrespective of other normative claims in the Treaties (Lord and Pollak, 2013). In line with this reading, Bellamy (2019, p. 129) argues that the EP can 'also be conceived as an institutional embodiment of European democracy'.⁵ The EP should thus allow for a dual equality – a principled equality of the *demos* and of European citizens embodied by their representatives.

In the case of uniform integration, the three criteria of autonomy, accountability and equality do not conflict with one another. However, if DI limits the territorial validity of EU rules, EU citizens are affected differently depending on their place of residence. If citizens are unequally bound by collective decisions, should they have the same entitlement to make these decisions? Based on the above, we consider it problematic that an MEP decides on a bill if firstly, said bill does not apply to the MEP and their constituency, and secondly, if there is no mechanism through which those actually affected could hold the MEP accountable. Equal participation in decision-making by all MEPs thus harms the principles of autonomy and accountability.

2 Four Models of Representation in DI Policy Areas

In this section, we present four different models of transnational representation in differentiated policy areas (Table 2). The first scenario depicts the status quo in which the EP decides on differentiated matters in its full composition. The second option foresees the creation of new assemblies for differentiated policy regimes. Scenarios three and four introduce policy-specific differentiation between MEPs within the EP according to whether their electoral home state takes part in the policy concerned or not. Two alternatives can be distinguished: the 'opt-out MEPs' could be excluded from the entire legislative process or they could be invited to participate in the legislative deliberations up to the final vote, from which they would then be excluded.

Each of the four models meets the criteria of equality, autonomy and accountability to a different degree. In particular, by placing different weight on the equality principle, the models take different stances towards the debate about the existence and possibility of an indivisible European demos composed of equal European citizens.

⁴EP electoral laws vary across member states in terms of the openness of voting lists, the threshold and the system for counting votes and allocating seats, the number of constituencies and the minimum age for voting and standing in elections (European Parliament, 2014).

⁵The EP usually plays a minor role in theories of *demos*-cracy, which focus on the involvement of the national *demos* via national parliaments (see Cheneval *et al.*, 2015).

Table 2: Four models of parliamentary representation in differentiated integration (DI)

	<i>Full EP</i>	<i>New DI Assemblies</i>	<i>Partial EP I</i>	<i>Partial EP II</i>
Proposed rules				
Voting	All MEPs	Ass. members	Only DI MEPs	Only DI MEPs
Deliberation	All MEPs	Ass. members	Only DI MEPs	All MEPs
Democratic principles				
Autonomy	–	+	+	+
Accountability	–	+	+	+
Equality	+	–	–	–/+
Implications				
Aspired representation	EU demos	MS demoi	MS demoi	Mixed
DI model	multiple speed	Multiple unions	Concentric circles	Unspecified

+, yes; -, no; Ass, assembly; EP, European Parliament; MEP, member of the European Parliament; MS, member states.

The Status Quo: Keeping the EP ‘une et indivisible’

According to the legal status quo, the EP decides on differentiated policies in its full composition. Every MEP may take part in voting, even if the member state in which they were elected is not bound by the policy concerned. The equality of MEPs is at the heart of Curtin and Fasone’s (2017) forceful defence of this model. They argue that restricting voting rights to MEPs from member states participating in a differentiated regime would create ‘second-order MEPs and implicitly recognize second-order European citizens represented in the EP’. Stripping individual MEPs of their voting rights would violate the principle of equality, leading to the ‘demise of the EP as a parliamentary assembly’ (Curtin and Fasone, 2017, p. 130).

Differentiation among MEPs could be considered a retrograde step as MEPs would be conceived as national delegates instead of being representatives of all EU citizens, as foreseen by the Lisbon Treaty. By duplicating the logic of territorial representation, such a reform would negatively impact the statics of the EU’s institutional architecture as the EP would essentially fulfil the same representative function as the Council of Ministers (Curtin and Fasone, 2017, p. 140). This would not just harm the Parliament’s symbolic function as the Parliament of the European citizenry but also impair the EU’s legitimacy more generally.

A strong, unified EP is generally seen as the key institution to legitimize a supranational political union (see Fabbrini, 2015). For European federalists in particular, any reforms towards more intra-institutional differentiation would harm further development towards a supranational parliamentary democracy. It is therefore unsurprising that the EP itself has rejected any internal differentiation or asymmetric participation by MEPs in differentiated policies (Curtin and Fasone, 2017, p. 119). From the political union perspective, DI is understood only as a momentary setback on the path to an ever closer union, mirroring the concept of a multi-speed Europe in which member states may integrate at different speeds but, eventually, will all reach the same level of integration.

As in such a reading the legislation will eventually apply to all EU citizens, a uniform participation of MEPs in decision-making is not only normatively appealing but also practically useful. The inclusion of MEPs from non-participating member states could facilitate policy learning among insiders and outsiders (Curtin and Fasone, 2017).

Spill-over effects are yet another factor to consider: DI creates externalities affecting the non-participating member states (Schimmelfennig, 2016). If citizens from non-participating member states are affected by DI decisions, wouldn't it be natural to include their MEPs in the decision-making process, if only to mitigate potential negative externalities (Curtin and Fasone, 2017, p. 128)?

Curtin and Fasone (2017) maintain that the concerns with DI may be accommodated through informal norms or some minimal changes in the EP's rules of procedure. Differentiation could be taken into account when allocating offices such as committee chairs and rapporteurships. Von Ondarza (2013, p. 32) demonstrates that this is, in fact, already the case.⁶ Moreover, the empirical observation that coalition formation and voting behaviour in the EP follow ideological and not necessarily national patterns (Hix *et al.*, 2007) lends some support for the current system of equal voting rights of all MEPs, regardless of whether the electoral home country participates in a differentiated policy regime.

While those are solid arguments backing unified EP participation in DI, there are nevertheless severe difficulties. Most importantly, we maintain – as argued above – that this model, while attempting to safeguard the equality of MEPs and their voters, violates the principles of accountability and autonomy. Autonomy is violated because the MEPs from opt-out states and the voters they represent are not themselves bound by the decisions they make. By not honouring the 'all-subjected principle' (Gould, 2018), the full EP scenario risks inserting domination into the system. The principle of accountability is violated because MEPs from non-participating member states cannot be held accountable by the voters who are directly subjected to their decisions. Below we provide empirical evidence for the persistence of demoi-specific patterns of representation and possible policy impacts entailed thereby.

In practise, European elections currently fail to provide an effective mechanism of accountability. They remain largely second-order elections. Campaigning takes place in the member states, is organized by national parties and features predominantly domestic issues. Many voters take the opportunity to punish their national governments (Hix and Marsh, 2011). The dominance of national parties in the European elections also affects the parliamentary behaviour of MEPs once elected. MEPs are agents of two principals, their national party and their transnational parliamentary group (Hix *et al.* 2007, p. 133). While the EP group controls the distribution of parliamentary offices, MEPs depend on their national parties for re-election (or a future career in domestic politics). The inherent conflict of which principal to follow is obscured by the high levels of consensus between EP groups and national parties (Hix *et al.* 2007, p. 137). In fact, if the position of an MEP's national party diverges from those of the transnational group, the MEP is more likely to vote with their national party (Hix *et al.* 2007, p. 138). Disloyalty to the parliamentary group also increases in proximity to elections, underlying the importance of national parties for the career prospects of MEPs (Koop *et al.*, 2018). Moreover, Scully *et al.*'s (2012, p. 678) survey data shows that 40 per cent of the variance in MEPs' policy positions can be explained by their nationality. In contrast, according to their findings, EP group affiliation only explains 15 per cent (with 45% explained by

⁶A comparable example of how differentiation can be accommodated by informal norms is the practice of the Scottish National Party, which, in the UK House of Commons, followed a policy of not voting on legislation that applies only to England (Bogdanor, 2010, p. 161).

MEPs' individual ideological preferences). While Scully *et al.* (2012, p. 678) cannot explain the 'apparent gap between MEPs' attitudes and their voting behavior', their evidence demonstrates that national factors still largely impact on the behaviour of MEPs.

Roger *et al.* (2017) present evidence that a country's participation in a differentiated policy area may affect MEPs' issue-specific voting behaviour. Analysing the Two-pack legislation, they find that Eurozone membership matters: 'Whether or not the MEP is from a Eurozone member state had a negative and significant effect in both [analysed] models' (Roger *et al.*, 2017, p. 569). They conclude that it is 'easier to vote fiscal discipline when it does not apply to your country' (Roger *et al.*, 2017). This case succinctly shows that whether or not an MEP is affected by a measure may very well have an impact on their voting behaviour. Whether the observed differences in voting resulted from being differently affected or instead from ideological differences that may have led to opting-out in the first place, cannot be answered here. But given that roughly a third of all MEPs are elected in non-Eurozone countries (see Table 1), the legitimacy of their influence is doubtful at best. In the example, others have to follow the Two-pack rules but cannot hold decision-takers accountable. The autonomy of citizens of Eurozone member states is thus infringed.

Finally, at first sight, the externality argument looks compelling from a normative perspective. Normative political theorists have long sought ways to construct democratic mechanisms beyond the nation-state to address legitimately externalities, transnational policy problems (see Hidalgo, 2014) and the rights of others (Benhabib, 2004). However, this perspective ignores situations in which states freely choose to withdraw from supranational or intergovernmental decision-making structures.⁷ Member states deciding to opt out of an integration step know very well that the other states will move forward without them – in fact, in many instances they could have used their veto power to block further integration – and that their decisions may affect them as well. The international cooperation they are rejecting is precisely designed to overcome problems of externalities. Moreover, the externality argument is unconvincing from a practical point of view. Externalities are a general problem of policy-making in a globalized world and not just one of DI (Scharpf, 1993). After all, a similar argument could be put forward by any outside state not part of the EU or any national democracy for that matter. Norway and Switzerland, for instance, have, through referenda and parliamentary decisions, decided to remain outside the EU but to nevertheless subject themselves to a large body of EU law in order to get access to the EU's internal market.

In sum, there are good reasons for supporting the current system of full MEP representation in cases of DI: the model conforms to the Lisbon Treaty's idea of the EP representing the European citizenry and, in this respect, lives up to the democratic principle of equality. However, doubts concerning the complete enactment of this principle arise when acknowledging the inconsistencies of the electoral system and resulting policy-related consequences. Most importantly, the current system violates the fundamental principle of autonomy and prevents electoral accountability. Therefore, it can hardly be considered a perfect solution.

⁷Admittedly, this applies less to forced than to voluntary types of differentiation.

Establishing New Assemblies

If the EP in its current set-up is not sufficiently legitimized to make decisions in cases of DI, why not create new parliamentary assemblies whose composition matches the scope of the policy? This idea gained prominence in the wake of the Eurozone crises. In their responses to the crisis, Eurozone member states side-lined the EP and ordinary legislative procedure, instead opting for intergovernmental bargaining and new institutions outside EU law (Degner, 2018). The EP has since struggled to find its role in Eurozone governance, not only because budgetary and fiscal policy are sensitive core state powers but also because not all EU members have adopted the euro. One proposed solution is the creation of a new eurozone parliament; an idea that appears to be popular, particularly among French political and intellectual elites, including President Macron (2017) (see Curtin and Fasone, 2017, p. 135). According to the supporters of this idea, a Eurozone parliament could manage a newly created Eurozone budget, control potential interventions in national budgets and hold the European Stability Mechanism accountable (Hennette *et al.*, 2017).

There are several options for the composition of new DI assemblies. They could be gatherings of national MPs from the participating member states (just like the EP in its early days) or be composed of a mix of national parliamentarians and MEPs. Alternatively, these new parliaments could be directly elected, like the regular EP.⁸

The creation of new assemblies aims at guaranteeing the principles of autonomy and accountability for the peoples of the member states participating in a differentiated policy regime. In this way the model enacts a loss of equality among EU citizens, focusing on regime-specific member state *demos* rather than on a European *demos* as the source of democratic legitimacy. The EP would lose its symbolic function as *the* parliament of Europe and its aspiration to act as the representative of a European *demos*. By creating new assemblies, the differentiation of the EU would develop into a system of ‘multiple Unions’ (Fabbrini, 2015). Even if later opt-ins were permissible, setting up multiple parliaments would strongly signal that DI should be considered to be permanent rather than temporary. For example, a core Europe consisting of the Eurozone countries may, legitimized by its own parliament, become ever more integrated.⁹

Symptomatically for the lack of theorizing about the role of the EP in DI, this line of thinking has so far focused solely on a possible Eurozone parliament. Other areas of differentiation – like the AFSJ or the common security and defence policy – have not yet been considered. But in an EU characterized by increasing (primary law) differentiation, many more new assemblies would be needed. How these should handle secondary law differentiation is an additional puzzle yet to be solved.

From a practical perspective, the model comes with additional disadvantages in respect of the accountability principle. Establishing (multiple) new DI assemblies would make the EU even more complex and – from the perspective of the ordinary citizen – even less comprehensible. Scrutinizing their representatives would become costlier for voters and, in practice, overall accountability would hardly be advanced. In short, the model of new assemblies would not imply only a rejection of the *ever closer union*, that – to reiterate –

⁸Importantly, in our typology a new assembly is conceived as an institution separate from the EP even if its membership may overlap. Dedicated EP committees do not constitute a new assembly. Such arrangements belong to models 3 and 4.

⁹In addition, the material costs of, for example, an additional bureaucratic apparatus would indicate that new assemblies are expected to remain permanently in place.

is not one of our criteria, but it would also be unlikely to be an improvement in democratic accountability. We therefore, primarily on pragmatic grounds, do not consider it a desirable solution for parliamentary participation in DI decision-making.

Restricting Voting Rights: Differentiated Representation in the EP I

Another solution to the challenge of DI is to restrict voting rights to MEPs from member states participating in the integrated policy in question. ‘As is customary in the Council, the voting rights of MEPs elected in certain countries would, under this approach, be temporarily suspended *ratione materiae* both in plenary and in the committees’ (Curtin and Fasone, 2017, p. 131). As German Chancellor Angela Merkel once joked, MEPs from non-participating member states would, indeed, have to leave the room (Merkel, 2009). Such an arrangement would clearly secure the principles of autonomy and accountability. Only those MEPs whose constituents are directly affected would be allowed to vote in the EP and the affected voters could hold them accountable.¹⁰ If a member state decided to join a differentiated policy at a later point, its MEPs could easily be integrated into the voting mechanism.

Such a change in decision-making rules would, however, negatively affect equality among MEPs. In terms of the EU’s constitutional development, this approach would mean a step backwards from the Lisbon Treaty to the Treaty of Maastricht. In the latter, MEPs were still considered to be representatives of the member state *demos* rather than of a single EU *demos*.

As discussed above, Curtin and Fasone (2017) have rejected this form of differentiated representation. They have argued that it would create second-order MEPs, duplicate the representative function of the Council and lead to an overall demise of the parliamentary qualities of the EP. We have argued above that this line of reasoning neglects, on the one hand, the way in which the status quo violates the democratic principles of accountability and autonomy and, on the other hand, that a differentiated EP could very well honour the equality principle, albeit only regarding the member state *demos*.

Differentiated Yet Deliberative: Differentiated Representation in the EP II

To mitigate the trade-off between the three principles, we propose a modification of the third model by distinguishing two stages of EP decision-making: an inclusive deliberation stage and a subsequent exclusive voting stage, a distinction first envisioned by Ehlermann (1995, p. 30).¹¹ Restricting voting rights to MEPs from participating member states safeguards the principles of autonomy and accountability. All MEPs, however, take part in the deliberations preceding the voting stage and are thus able to insert their interests and ideas into the decision-making process. By asking for their substantial input, the harm to the equality of MEPs is minimized.¹²

¹⁰An alternative model could install a double veto, both for the MEPs concerned and all MEPs. This, however, would entail a stronger status quo bias, possibly hindering an ‘in-group’ from moving forward.

¹¹Participation in the deliberative stages reflects the current arrangement in the UK, where Scottish and Northern Irish MPs ‘may speak (but not vote)’ in the legislative grand committees (Gover and Kenny 2018, p. 769).

¹²Note that Christiano (2003, p. 39) explicitly mentions ‘equality of opportunity to participate in discussion’ as a core criterion of democracy.

We follow Mansbridge's (2015, p. 27) definition of deliberation as a 'mutual communication that involves weighing and reflecting on preferences, values and interests regarding matters of common concern'. Deliberation plays a key role in the parliamentary practice of the EP (Roger, 2016): unconstrained by the need to support a government, there is no stable majority coalition in the Parliament; instead, legislative coalitions are built on a case-by-case basis, opening up room for reasoning and compromise. These characteristics make the EP a favourable place for parliamentary deliberations compared with the parliaments of most member state (Schäfer, 2017). Importantly, the minimalist definition of deliberation does not require a consensual outcome. Rather, 'when interests or values conflict irreconcilably, deliberation ideally ends not in consensus but in a clarification of conflict and structuring of disagreement, which sets the stage for a decision by non-deliberative methods, such as aggregation [by voting]' (Mansbridge *et al.*, 2010, p. 68).

Accordingly, the deliberation stage in our model serves to clarify conflict not only between rival party groups but also between MEPs from member states who participate in a differentiated policy and their colleagues whose home countries do not take part. MEPs from non-participating states can bring in their dissenting views, experiences with and concerns about externalities resulting from DI. At the same time, they become familiarized with the contents and conflicts of differentiated policies; they are therefore well-prepared if their home countries decide to opt in at a later point. This feature is particularly valuable in cases in which differentiation is employed instrumentally in form of transition periods for newly accessing member states (see Schimmelfennig and Winzen, 2014). In short, policy learning is enabled.

The Council deals with DI in a similar way. Adler-Nissen (2014) shows how national officials of opt-out states participate in Council debates and how they are thereby socialized into EU institutions, bridging their national positions and those of the further integrating member states. They participate in meetings where they can express the perspective of their home countries and, in turn, bring the integrationist arguments back home. Naurin and Lindahl (2010) show that in Council working groups colleagues from opt-out countries are hardly discriminated against. MEPs from opt-out states could thus act as bridge builders. Their inclusion in committee and plenary deliberations thus counteracts fears of a divided Parliament.

To be sure, an inclusive deliberation stage is only an approximation, not a comprehensive realization of the equality of MEPs. Voting rights are still unequal. However, formally, the model provides MEPs an equal opportunity to make their voices heard. The advantages of this model become even more pronounced, if the quality of the output; namely, output legitimacy, is considered (cf. Scharpf, 1993). However, we have refrained from including this criterion in our catalogue for reasons of parsimony. We believe that our triad of autonomy, accountability and equality is sufficient for backing this latter model of representation.

Finally, the two-stage arrangement of this model reflects a mixed view of representation combining the normative aspiration to represent the citizens of Europe and the empirical grounding of MEPs in their national constituencies. A European demos may be in the making but is not yet fully realized and in any case not reproduced through the electoral rules currently in place. Under the present conditions, this last model is most suitable for reconciling the competing demands posed by the democratic criteria of autonomy, accountability and equality.

3 A New ‘Solange’

In the constitutional law literature on European integration, the German Constitutional Court is famous for its use of ‘solange’ (as long as) clauses. In two rulings known as Solange I and II the Court ruled that as long as the EU does not provide an adequate protection of fundamental rights, it [the German Constitutional Court] would retain its right to verify each European law with regard to its compatibility with the German basic law.¹³ Later in its rulings on the Maastricht and the Lisbon Treaties, respectively, the Court argued that as long as there is no European demos, democratic legitimation could not be guaranteed by the EP alone. Instead it is primarily the national governments and parliaments who must democratically legitimize EU decisions.¹⁴

In this tradition, we propose a solange argument for EP participation in DI. As long as there is no uniform electoral law with transnational party lists, decision-making by the full EP in DI is not democratically legitimate. For the time being, the fourth model presented in this article – inclusive deliberations but restricted voting rights – is therefore the preferable option. However, once the electoral law is further integrated, the first model – voting by all MEPs – becomes more legitimate. MEPs elected from transnational rather than from national lists will be, in principle, true representatives of the European demos. This solves the problem of autonomy, according to which MEPs must themselves be bound by the decisions they take. They will be accountable to voters, who will be able to punish or reward them (or their party list) in the next elections.

Going beyond this legalistic perspective, proponents of transnational lists expect this institutional innovation to incentivize behavioural changes of both political elites and voters, resulting in elections focused more on the EU than on national politics. We want to stress, however, that our argument in favour of transnational lists does not hinge on uncertain behavioural effects. Rather, ours is a principled argument. Transnational party lists satisfy the minimum criteria of equality, autonomy and accountability for decision-making of all MEPs, even in cases of DI. A consistent and democratically sound mechanism would be established, making MEPs true representatives of the European demos. In cases of DI, they can use this European mandate to bring a European perspective to decision-making, even if some of them come from member states that do not participate in the legislation at hand.

Conclusion

This article is concerned with mismatches between the differentiated territorial scope of public policies and the composition of legislatures. We assess the involvement of the EP in the decision-making on policies of DI. We argue that participation by all MEPs in the legislative process safeguards the equality of all EU citizens but violates the democratic principles of autonomy and accountability. Likewise, we object to the proposal to establish new bodies for the governance of differentiated policy areas. This solution aggravates centrifugal tendencies and weakens accountability due to its complexity. Instead,

¹³Bundesverfassungsgericht, Beschluß des Zweiten Senats, 22 October 1986 (2 BvR 197/83) and Beschluß des Zweiten Senats, 29 May 1974. (BvL 52/71).

¹⁴Bundesverfassungsgericht, Urteil des Zweiten Senats, 12 October 1993 (2 BvR 2134, 2159/92) and Bundesverfassungsgericht, Urteil des Zweiten Senats, 30 June 2009 (2 BvE 2/08 – Rn. [1–421]).

we propose a model that allows all MEPs to participate fully in the deliberative stages of law-making, but limits voting rights to those MEPs whose constituencies are subjected to the concerned legislation. Under current conditions, this model best reconciles equality, autonomy and accountability. Nevertheless, we qualify our preference for the fourth model with a *solange* clause. Once a unified electoral system with transnational lists is in place, the trade-off between equality, autonomy and accountability will be resolved and participation by all MEPs will become legitimate.

The implementation of our proposed solution – but also of model 2 – would require treaty change. While this admittedly represents a significant practical obstacle, it should not diminish the value of normative analyses of potential institutional arrangements for DI. It remains to be seen whether European member states would discard models of representation that may have the potential to strengthen the system's legitimacy.

The case of the EP illustrates how DI challenges the institutional set-up of the EU. It also invites us to broaden the DI research agenda to perspectives of comparative federalism. In asymmetric federations, the autonomy of federated units may come into jeopardy if MPs make decision that do not apply to their constituencies; a famous example being the 'West Lothian question' and the political demand for 'English votes for English laws' (Bogdanor, 2010). In federations, this question appears typically in relation to the devolution of competences; Spain and Canada being notable examples (Keating, 1998, p. 208). In these cases, somewhat similar to the case of differentiated EU integration, the right balance between the legitimate concerns of the centres and (different) peripheries constitutes a challenge. Our proposal mirrors the idea of English legislative grand committees (cf. Gover and Kenny, 2018) but goes beyond the negative power of a veto for the forerunners of integration. More generally, our article proposes that the simultaneously occurring processes of integration, differentiation and, nowadays, disintegration should be designed and governed with respect to a unified set of democratic principles in order to maintain the EU's overall legitimacy.

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Additional supporting information may be found online in the Supporting Information section at the end of the article.

Supporting Information S1