

further institutional complexity to an already confused institutional set up in terms of responsibilities and obligations. Even more controversial is the proposal to equip national parliaments collectively, as political institutions *par excellence*, of a quasi-judicial function.⁶²

How can this idea of structured and institutionalized cooperation among national parliaments then be translated into a better democratic governance of the Eurozone? As will also be illustrated in section 3.6., a “Third Chamber” for the Eurozone would comprise national parliaments from the Euro Area only,⁶³ to take or veto Eurozone decisions. However, even in the event the Treaties will ever be reformed as to include such a new Chamber of national Eurozone MPs, one might question the desirability of this option. Not only does it pose a series of problems of coordination with the EP, similarly to the critique that the T-Dem’s proposal of a Parliamentary Assembly for the Euro Area triggers, but it raises the question of what is the added value of mechanisms of collective action amongst Eurozone Parliaments? Indeed, on the one hand, the EU-wide interest is already represented at the parliamentary level by the EP and, on the other hand, national interests inherent in the Eurozone are already looked after collectively in the Euro Group and the Euro Summit.

A related proposal suggests performing a joint parliamentary scrutiny of the Eurozone by refining and revising existing instruments of interparliamentary cooperation, starting from the Art. 13 TSCG Interparliamentary conference.⁶⁴ The “jointness” of the scrutiny, however, has never meant to exclude the EP from the control exercise, and for very good reason, namely to combine a supranational parliamentary perspective with that of each national parliament, moving interparliamentary cooperation beyond the mere function of exchanging information and best practice.⁶⁵ This proposal would entail a more specialized and policy-oriented kind of interparliamentary forum to be

⁶² On the essentially political nature of the role of national parliaments in the early warning system, see N. Lupo, National parliaments in the European integration process: re-aligning politics with policies, in M. Cartabia, N. Lupo and A. Simoncini (eds.), *Democracy and Subsidiarity in the EU*, Il Mulino, 2013, p. 120 ff. and M. Goldoni, The early warning system and the Monti II regulation: the case for a political interpretation, *European Constitutional Law Review*, vol. 10, 2014, pp. 90-108.

⁶³ See I. Cooper, A Separate Parliament for the Eurozone? Differentiated Representation, Brexit, and the Quandary of Exclusion, *Parliamentary Affairs*, vol. 70, 2017, pp. 655–672.

⁶⁴ E. Griglio and N. Lupo, The conference on stability, economic coordination and governance: filling the gaps of parliamentary oversight in the EU, *Journal of European Integration*, vol. 40, 2018, pp. 358-373.

⁶⁵ See E. Griglio and Stavridis, Inter-parliamentary cooperation as a means for reinforcing joint scrutiny in the EU: upgrading existing mechanisms and creating new ones, *Perspectives on Federalism*, vol. 10, 2018, pp. I-XVIII.

established, of a reduced size, with MPs sitting by European political party, with more frequent meetings, and a committee style of activities. The main limit, however, similar to one of the weaknesses of the Parliamentary Assembly of the Euro Area, is that the increasing level of parliamentary activity at Eurozone level would not necessarily be coupled by more clarity of the democratic accountability chains in this context. How can the responsibility of the European Commission or that of the Euro Group be challenged through this joint parliamentary scrutiny and with which effects, given the variety of powers and mandates these parliaments have? Furthermore, it does not appear that by giving these parliaments the possibility to ask questions to the Eurozone executives or to vote on resolutions and motions to shape their positions would really make a difference in terms of effectiveness and efficiency of the present accountability mechanisms. Given the many asymmetries highlighted even inside the Eurozone it appears unlikely that national MPs might be able to agree on substantive policy options on the EMU in a manner that is quicker or simpler than within the Euro Group or the Euro Summit. This notwithstanding, given the more transparent nature of the interparliamentary procedures, almost always broadcast live, compared to intergovernmental bodies or the Commission, having this form of joint parliamentary scrutiny could enhance the “throughput legitimacy” of the current Eurozone style of decision-making.⁶⁶

3.4. The internal differentiation of the European Parliament

MEPs participate, on an equal footing and with the same rights and duties in all EP procedures. A partial exception to this rule, as in any Parliament, is represented by the appointment of certain MEPs to specific offices, like that of the President of the House, Committee Chairmen, Presidents of Political Groups or, for a specific dossier, as rapporteurs. These appointments give relevant MEPs particular powers, but also responsibility. Beyond this, however, MEPs cannot be treated differently: the quality of the representation stems from the equality of the votes cast to elect the EP.

The tension between being representatives of EU citizens and the circumstance of having been elected in a specific national constituency, through a purely domestic electoral campaign, however, is very much present in the work of MEPs. They have a free mandate and, in theory, their actions are not bound by any national or political instructions, following Edmund Burke’s famous

⁶⁶ On this notion, see V. Schmidt and M. Wood, Conceptualizing throughput legitimacy: Procedural mechanisms of accountability, transparency, inclusiveness and openness in EU governance, *Public Administration*, vol. 97, 2019, pp. 727-740.

statement that “A Parliament is not a college of ambassadors”.⁶⁷ National delegations are not officially recognized in the EP’s rules of procedure and the EP’s commitment to become more than simply a gathering of national delegations was already very clear at the time of its constitutive meeting as an unelected Parliamentary Assembly when it was decided to let the representatives seat according to transnational groups rather than by nationality. Yet, political groups in the EP tend to regularly split and meet by national delegations and when national interests are particularly affected by an EP vote, MEPs tend to ally across groups, disregarding the group’s discipline, depending on their country of election or nationality. Furthermore, key positions in the EP, including the chairmanships of political groups and committees and the appointment of rapporteurs, are also allocated taking into account the balance amongst nationalities though the groups’ affiliation is the first point of reference in this choice.⁶⁸

Lacking a uniform EU electoral procedure for the EP, an EU-wide electoral constituency and/or more transnational lists,⁶⁹ it is rather difficult for MEPs to really behave as supranational representatives. EU primary law, however, contains a series of important provisions leading in this direction: not only the generic statement, already evoked, according to which the EP represents EU citizens, but also the acknowledgment of the right to vote and to be elected as a MEP in a country different from that of nationality provided that residency and registration requirements are respected (Art. 22 TFEU and Art. 39 of the Charter). As a result, only a small proportion of MEPs are elected in a Member State of which they are not a national.⁷⁰ Such a provision is in fact one of the main hurdles in the Treaties that prevent an internal differentiation of rights and duties amongst MEPs from happening, with a significant impact on the integrity and the institutional indivisibility of the parliament.

Indeed, this discourse is linked to the controversy on whether the EP is a parliamentary institution suitable to take legitimate decisions in areas of

⁶⁷ See the renowned Edmund Burke’s Speech to the Electors of Bristol, 3 November 1774, <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>.

⁶⁸ See R. Corbett, F. Jacobs and R. Neville, *The European Parliament*, John Harper Publishing, 2016, pp. 171-185.

⁶⁹ A. Alemanno, Europe’s Democracy Challenge: Citizen Participation in and Beyond Elections, and M. Bartl, *Hayek Upside-Down: On the Democratic Effects of Transnational Lists*, both in *German Law Journal*, vol. 21, 2020, p. 36 and p. 59 ff respectively.

⁷⁰ A. Alemanno, There are 17 million mobile EU citizens. We deserve a political voice, *The Guardian*, 1 May 2019.

differentiated integration and notably on the Eurozone.⁷¹ To put it differently, does the circumstance that all MEPs, regardless of their nationality, vote to adopt a decision that will then bind only some Member States and their citizens undermine the democratic legitimacy of such a decision? This is a question that goes directly to the issue of the public acceptance of the EP's authority to act in those fields. To date, based on the principle of the free mandate and of the Treaty provisions mentioned above, all MEPs are allowed to debate and vote on any issue.

The legitimacy of the EP has often been contested, not necessarily over faults of the EP itself.⁷² The seats are still assigned to the Member States, despite several (failed) attempts to create at least one transnational constituency with a portion of seats to be allocated there; the last (failed) case being the proposal to assign the 73 “UK seats” to a truly European constituency after Brexit.⁷³ The rationale for distributing the seats amongst the Member States – the principle of degressive proportionality – has been equally contested, given the disproportionate representation of Big States, especially Germany,⁷⁴ even though this serves to balance the way the Council decides by qualified majority (in fact, this was more the case in the past, when a weighted voting system, depending on the population, was in place, as opposed to now when there is a demographic check on the majority formed). Not much attention has been devoted to the fact that, however, seats are not assigned counting the EU citizens residents in the

⁷¹ M. Heermann and D. Leuffen, Why Differentiated Integration Challenges the Composition of the European Parliament, *Journal of Common Market Studies*, early view, 2020.

⁷² And, according to some, the EP has fulfilled a very important symbolic function in the Union, “a powerful symbol of a continent turning away from its past divisions and conflicts”: see D.M. Farrell and R. Scully, The European Parliament: One Parliament, Several Modes of Political Representation on the Ground?, in P. Mair and J. Thomassen (eds.), *Political Representation and European Union Governance*, Routledge, 2011, p. 36.

⁷³ See M. Bartl, *Hayek Upside-Down*, cit., p. 57. Before the 2019 EP elections, the European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament opted for a different solution, namely to redistribute part of the 73 seats (27) to the 14 Member States that had been penalized the most by the criterium of degressive proportionality and to keep the remaining seats (46) available for future accessions. As a result, after Brexit the number of MEPs shrank from 751 – the maximum number allowed under Art. 14 TEU – to 705. As Brexit did not occur before the 2019 European elections and until 31 January 2020, the EP composition was regulated by Art. 3 of the European Council Decision 2013/312/EU.

⁷⁴ Art. 14 TEU also sets the minimum (6) and the maximum (96) number of seats per Member State. Germany, by far the most populated EU country, has been assigned 96 seats. This means that, even though the size of its population further increases, unless Art. 14 TEU is changed, it cannot go beyond this threshold.

Member States, but based on the population resident at large, thus including non-EU nationals.

A paradox seems to emerge when these reflections are linked to the question of the improved democratic scrutiny of the Euro Area. On the one hand, the EP with its vocation for “universal representation” of EU citizens does not appear fitting for the purpose of carrying out total control of Eurozone-only institutions and bodies. On the other hand, the EP in fact still reflects national divides and interests in the way it is composed and in its functioning. It is at the same time too supranational, compared to what is needed in the EMU, and too reliant on domestic interests to contribute to the democratic governance of the Eurozone aiming to fulfill the EU-wide common good.

The problem to address, then, is how to make the EP work in a way that allows it to take Eurozone-only decisions in a more democratically legitimate manner. Elsewhere the limits of the proposal to go for a structural internal differentiation of the EP have already been highlighted.⁷⁵ There are, indeed, limits deriving from EU primary law to the structural exclusion of non-Eurozone MEPs from debating and voting on Euro Area decisions in addition to limits stemming from the constitutional principle of free mandate, which is valid for any institution that wants to call itself parliament.⁷⁶ The change in the formulation of the targets of the EP’s representation from Art. 189 TEC referring to the “peoples of the

⁷⁵ See, for example, D. Curtin and C. Fasone, *Differentiated Representation: Is a Flexible European Parliament Desirable?*, in B. de Witte, E. Vos and A. Ott (eds.), *Between Flexibility and Disintegration: The State of EU law today*, Cheltenham, Edward Elgar Publishing, 2017, pp. 118-145.

⁷⁶ For example, German *Bundesrat*, being an Upper House composed of Ministers of the various Länder bound to vote by delegation according to the instructions provided by the Land Government, as confirmed by the federal Constitutional Court (BVerfGE 106, 310), cannot easily be equated to a parliamentary chamber. In its decision of 25 June 1974 the Constitutional Court appears to endorse this view when affirming that the *Bundesrat* is not a second chamber of a uniform legislature (BVerfGE 37, 363-380). If this statement is remarkable from the perspective of the lack of truly parliamentary credentials of the *Bundesrat*, nevertheless the decision does not affect the constitutional entitlement of the *Bundesrat* to act as a second chamber and, in fact, it is considered as such for the subsidiarity scrutiny of EU legislative proposals under Protocol no. 2 annexed to the Treaty of Lisbon. On the Council of the European Union, however, a new reading of its role as a genuine “Parliamentary Chamber” and its further parliamentarization have been recently envisaged by O. Rozenberg, *The Council of the EU: from the Congress of Ambassadors to a genuine Parliamentary Chamber? Study commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the AFCO Committee*, Brussels, 2019, [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL_STU\(2019\)608855_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL_STU(2019)608855_EN.pdf)

States brought together in the Community” to the already mentioned Art. 14 TEU linking the EP to EU citizens, after the Lisbon Treaty, signals at least a prospective shift in the way the EP’s relations with the voters should be thought about and understood.⁷⁷

There are also practical objections to the differentiation of MEPs’ rights and duties between those elected inside or outside the Eurozone.⁷⁸ Indeed, it is not easy to detect when a draft legislative act or a resolution affects just the interests of the Eurozone nor to identify the authority – inside the EP – who can be asked to determine the reach and scope of the deliberation.⁷⁹ The decision, indeed, can be possibly subject to frequent contestations. Moreover, in the likely event in which a draft legislative act contains provisions that deal with the Eurozone only and others that go beyond that, how to manage the legislative process remains an open question. Some MEPs, during the same meeting, will be first included and then excluded from the deliberation and the situation can be made even more complex if we were to differentiate MEPs from Eurozone countries and from ERM II countries – given the inclusion of the latter in some recent reforms proposals – and the rest of the assembly.⁸⁰

⁷⁷ One might then assume that the new wording of Art. 14 TEU alongside Arts. 22 TFEU and 39 of the Charter can let consider the “precedent” of the Court of Justice in *Spain v. the UK*, Case C-145/04 reversed, in light of the Treaty of Lisbon. In that case the UK extension of voting rights in the European elections to third country nationals resident in Gibraltar was considered in compliance with EC law, lacking in Art. 189 TEC and in the Act of 1976 a clear definition of who is entitled to vote and to stand in the EP elections.

⁷⁸ The proposal has been advanced for example by P. Moscovici, *The European Parliament is the Parliament of the Euro Area*, in S. Hennette et al. (eds.), *How to democratize Europe*, Harvard University Press, 2019, p. 113, who sees the EP as the locus where the scrutiny of the Euro Area governance should take place at supranational level, but he suggests to create a “Euro-area format” inside the EP without spelling out clearly what powers and role it is expected to have.

⁷⁹ Indeed, the EP President, unlike the speakers of several national parliaments, has a very limited autonomy in the interpretation of the rules of procedure and is not a particularly influential office inside the parliament (s/he is, instead, much stronger in the framework of the interinstitutional relationships). See O. Costa, *The President of the European Parliament*, *Il Filangieri*, special issue on *Le trasformazioni del ruolo dei Presidenti delle Camere*, 2012-2013, pp. 143-161.

⁸⁰ The only House of Parliament in Europe where such an internal differentiation has been codified, at the level of the standing orders, is the UK House of Commons, through the so-called “English vote for English law” procedure (EVEL) to address the West Lothian question, with a disputable result: see D. Gover and M. Kenny, *Answering the West Lothian Question? A Critical Assessment of ‘English Votes for English Laws’ in the UK Parliament*, *Parliamentary Affairs*, vol. 71, 2018, pp. 760-782 and B. Guastafarro, *Territorial*

Subsequently it needs to be decided at which level the differentiation takes place, whether it influences only the voting stage or also the debate and the deliberation. Limiting the freedom of speech of MEPs, in plenary and/or in committees, appears to be an extreme solution and would probably undermine the rather consensual style of decision-making featuring the EP. Also, constraining voting rights of MEPs is problematic; especially because once they are limited to EMU-related issues then there is no point in not applying this limitation to other areas of differentiated integration too. While preventing non-Eurozone MEPs from voting in the final deliberation in the plenary seems in patent contrast to Art. 14 TEU, one can probably play with the vote in committees as this is only an intermediate, though a significant, stage in the deliberation (and sometimes with Eurozone issues more than one committee is involved). Also, at the national level, MPs' rights in committees are somewhat diminished compared to the plenary. For instance, in several domestic legislatures, including in Germany, if an MP leaves his group he immediately loses his seat in that committee and the group can appoint someone else in his place. In other words, the principle of free mandate is somewhat tempered in committees. However, the Parliament itself has always been quite reluctant to back up any plan of internal differentiation in the status of MEPs.⁸¹

Perhaps a solution can exist in playing with the EP's rules of procedure and with "institutional courtesy rules". For example, following the troubled experience of the 2009-2014 parliamentary term when the ECON committee was chaired by a MEP elected in the UK, Sharon Bowles, it could be appropriate to exclude *de facto* from the chairmanship of that committee non-Eurozone MEPs. The same goes for the role of group coordinators or for the rapporteurs and shadow rapporteurs on dossiers dealing predominantly with the Euro Area. This way, when such dossiers are at stake, MEPs in key positions and that are likely to participate in trialogues with the Commission and the Council's delegations will be chosen from among the Eurozone MEPs only, without creating too many procedural problems. An additional tool can consist of the creation of a Eurozone subcommittee within the ECON Committee⁸² to provide a first assessment of the provisions of a legislative proposal linked to Eurozone issues, to come up with amendments and to appoint rapporteurs and shadow

Representation in Unitary States. Reforming National Legislatures in Italy and in The United Kingdom, *Italian Journal of Public Law*, 1, 2019, pp. 147-195.

⁸¹ See D. Curtin and C. Fasone, Differentiated representation, cit., p. 118-121.

⁸² See EU Observer, 'Would a Eurozone committee enrich the EU parliament?', 12 February 2014 and S. Verhelst, 'A Eurozone Subcommittee in the European Parliament: High hopes, low results?', European Policy Brief no. 31, Egmont Institute, 2014, who however advocates for more substantive decision-making powers of this committee.

rapporteurs, with the agreement of the groups, even though in the end the proposal should potentially be put to the vote of all MEPs. A similar proposal was advanced in the last EP parliamentary term (2014-2019) by the AFCCO Committee and the Rapporteur Lamassoure for every case of enhanced cooperation, although it was never endorsed by the plenary.⁸³

3.5. A real transnational assembly through a European electoral procedure

In contrast to the idea of an internally divided parliament, there are scholars that clearly see the EP, even in its current shape, as a real transnational assembly, where nationalities and countries of election should have a marginal or non-existent role,⁸⁴ thereby making the EP the very centre of the parliamentary accountability mechanisms also in areas of differentiated integration. This “federalist” approach, looking at the EP as a federal parliament in the making in the framework of a federal process,⁸⁵ considers it as representative of a truly European citizenry.⁸⁶ However, the EP as it stands cannot be equated to a federal Congress, and not just because there is no unitary European “People” as such.⁸⁷

⁸³ See European Parliament, Draft report on the implementation of the Treaty provisions concerning enhanced cooperation, 2018/2112(INI), Committee on Constitutional Affairs Rapporteur, Alain Lamassoure, 22 January 2019, para 26: “each case of enhanced cooperation should be followed by the relevant standing committee and recommends that Parliament’s rules of procedure should therefore authorise the setting up of ad-hoc sub-committees in which full membership is primarily given to those MEPs elected in the Member States that are participating in such enhanced cooperation”.

⁸⁴ In this regard, there are also some extreme positions recently advanced on the EP, arguing, for example, that the supranational nature of the EP and the accountability mechanisms in place in relation to the European Commission would justify the continuing presence in the EP of MEPs elected in the UK in 2019 even after Brexit takes place, as if the EP composition was completely indifferent to countries’ membership in the Union. See F. Fabbrini and R. Schmidt, The composition of the European Parliament in Brexit Times: Changes and Challenges, *European Law Review*, vol. 44, 2019, pp. 711-725.

⁸⁵ On the importance to analyze the EU in the light of federal categories and models, see R. Schütze, *European Union Law*, cit., pp. 43-73.

⁸⁶ See A. Duff, Genuine Economic and Monetary Union Will Be Federal or It Will Not Be, *European Papers*, vol. 3, 2018, pp. 67-73.

⁸⁷ Indeed, comparative federalism, especially in systems of ethnic federalism, is full of examples of federations without a unitary “People”, but with a federal parliament, usually bicameral, with a lower chamber pursuing the interest of the federation at large and the second chamber representing Member States’ interests. See P. Popelier, Bicameralism in Multi-tiered Systems, in R. Albert, A. Baraggia and C. Fasone (eds.), *Constitutional Reform of National Legislatures: Bicameralism under Pressure*, Edward Elgar, 2019, pp. 107-118.

Some Treaty provisions create confusion in this respect. According to Art. 10.2 TEU, “Citizens are directly represented at Union level in the European Parliament” and, conversely, based on Art. 14.2 TEU, “The European Parliament shall be composed of representatives of the Union’s citizens”. Art. 223 TFEU hints at the adoption of a uniform European electoral procedure to this end, but in fact, despite several attempts exerted since the founding Treaties to introduce it, since 1979 and particularly since 2002⁸⁸, there are only common “constitutional” principles on the EP elections to be completed by national legislation, the second best option foreseen by Art. 223 itself. These common principles range from the proportional nature of the electoral system, including the prohibition to design – too small – electoral constituencies in a way as to distort proportional representation, to follow a common schedule (in one week) for holding the European elections, to the (now) mandatory introduction of an electoral threshold that may vary from 2% to 5% for Member States that are assigned more than 35 seats or the optional introduction of an electoral threshold, up to 5%, for the remaining countries.⁸⁹

The limits of an electoral procedure still predominantly regulated at domestic level are evident. So far national decisions to rule the electoral threshold unconstitutional, justified on the ground of the weak democratic credentials of the EP and on the lack of the need to protect it from political fragmentation and instability,⁹⁰ and nationally-dominated procedures for the proclamation of the

⁸⁸ See the Council Decision 76 [787] ECSC, EEC, Euratom, of 20 September 1976 as modified by the Council Decision 2002/772 of 25 June 2002 and 23 September 2002 and, more recently, by the Council Decision 2018/994 of 13 July 2018.

⁸⁹ As is well known, the introduction of such an electoral threshold has triggered a lot of discussion in some Member States, in particular in Germany, Italy and the Czech Republic. See B. Michel, *Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice: Bundesverfassungsgericht Judgment of 9 November 2011*, 2 BvC 4/10, 5% threshold Judgment of 26 February 2014, 2 BvE 2/13, 2 BvR 2220/13, 3% threshold, *EuConst.*, vol. 12, 2016, pp. 133-147; H. Smekal and L. Vyhnánek, *Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections: Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14*, *EuConst.*, vol. 12, 2016, pp. 148-163; G. Piccirilli, *Maintaining a 4% Electoral Threshold for European Elections, in order to clarify access to constitutional justice in electoral matters: Italian Constitutional Court Judgment of 14 May 2015 No. 110*, *EuConst.*, vol. 12, 2016, pp. 164-176 (and the subsequent judgment no. 239 of 2018, which eventually confirmed the constitutionality of the 4% threshold in Italy). See now the Council Decision (EU, Euratom) 2018/994 of 13 July 2018.

⁹⁰ See German Constitutional Court, Judgment of the Second Senate of 26 February 2014, 2 BvE 2/13 et al., 2 BvR 2220/13 et al. detecting a serious interference of the 3% threshold in the EP elections with the principles of equal suffrage and equal opportunities for political parties.

MEPs elected have created severe problems for the symbolic value of the EP representative function.⁹¹

A very important case, in this respect, has recently been decided by the Court of Justice.⁹² It deals with the EP elections held in Spain on 26 May 2019 and the related immunity of the former Vice-president of the Catalán Government Junqueras, detained after the unconstitutional and illegal secessionist “referendum” of 1 October 2017 in Catalonia and condemned by the Tribunal Supremo to 13 years in prison and the loss of civil and political rights for as many years on 14 October 2019. Indeed, although he was proclaimed elected by the Spanish central electoral Commission, his seat was temporarily (but indefinitely) declared vacant and he was not allowed to benefit from parliamentary immunities as an MEP since he did not fulfill the requirements to take office and to exercise the function of an MEP according to the Spanish legislation on the EP’s elections. Based on this legislation, for the name of an MEP elected in Spain to be included on the list of elected representatives that the Spanish Government transmits to the EP Secretariat, the MEP has to take the oath to respect the Spanish Constitution while in office in front of the electoral commission. Mr. Junqueras was prevented from taking that oath being in prison and having been refused by the Tribunal Supremo a special permit to leave prison for that purpose. This case, which was referred to the Court of Justice by the Spanish Tribunal Supremo through a preliminary ruling procedure, involves several important constitutional questions, including Mr. Junqueras’ claim before the national court against the violation of his immunity as an MEP. For what concerns the discourse on the EP’s legitimacy and accountability, the procedure for its election and the idea of a supranational assembly, the Court of Justice’s ruling is very important in that it seeks to clarify the respective remit of national law and of EU law in connection to the acquisition of the status of MEP. Following the judgment the Court delivered on 19 December 2019 Member States are prevented from fixing specific formalities – including the oath to respect the Spanish Constitution while serving the mandate of MEP, in theory representing EU citizens. With a view to protect the *effet utile* of the principle of European representative democracy (Art. 10 TEU) and the right of EU citizens to freely choose their MEPs in the European elections (Arts. 2 and 14 TEU and Art. 39.2 of the Charter of fundamental rights), the status of MEP for the Court

⁹¹ Still heavily dependent on national rules due to the never changed wording of Art. 9 of Protocol no. 7 on the privileges and immunities of the European Union.

⁹² Court of Justice of the European Union, case C-502/19, Junqueras case, 19 December 2019.

derives solely from the official declaration of the electoral results.⁹³ Although the ruling was not subsequently implemented by the Tribunal Supremo in favor of Mr. Junqueras, the Court of Justice has endorsed a more European-supranational reading of the electoral procedure for the EP and has “overruled” its previous case law on parliamentary immunities giving a more central stage to the EP that – unlike what had happened in this case – should have the final say on whether the immunity is to stay or to be lifted.⁹⁴

Notwithstanding this judicial move, objective and structural limits to the transnational nature of the European elections and of the party system still persist,⁹⁵ despite the “Europeanization” of these elections, at least in the public debate, being confirmed in 2019.⁹⁶ A real “Europeanization” of the procedure for the EP elections, which would probably entail the adoption of a uniform electoral procedure under Art. 223 TFEU, with transnational electoral constituencies and lists, would then have significant implications for the thorny questions surrounding the democratic governance of the Euro Area. Most likely, such a turn could make many of the objections moved against the EP and its democratic credentials disappear – from the allocation of the seats to the Member States to degressive proportionality – including the alleged inability to represent citizens in areas of differentiated integration, like the Eurozone. The EP would be accredited – next to the intergovernmental institutions and bodies that could gather together Eurozone countries only without much troubles – as fully legitimated to represent the European citizenry at supranational level, regardless of the nationalities and of the cleavages imposed by an asymmetric union. Even in this case, however, the new truly transnational character of the EP’s representation has to be complemented by the conferral of new powers of this institution in the Eurozone. For instance, a parallel involvement of the EP’s role in procedures of the Euro Area governance from which it is excluded, like the ESM, or that have to be created, like those for the fiscal capacity of the

⁹³ See P. van Elsuwege, *A Matter of Representative Democracy in the European Union. The Catalan Question before the Court of Justice*, in *Verfassungsblog*, 25 December 2019.

⁹⁴ See Court of Justice of the European Union, *Italian Republic and Beniamino Donnici v. the European Parliament*, Joined cases C-393/07 and C-9/08, 30 April 2009 on the very limited powers of the EP on the verification of the MEPs’ credentials. See also *M.G. Eman and others v. College van burgemeester en wethouders van Den Haag*, Case C-300/04, where the Court held that Member States can define the criteria for exercising voting rights in these elections, provided that the principle of equal treatment is respected.

⁹⁵ A. Alemanno, *Europe’s Democracy Challenge*, cit., p. 37.

⁹⁶ Although on average the turnout in these elections has increased from 42.61% in 2014 to 50.66% in 2019 while the success of Eurosceptic parties has not declined; “Europeanization” here does not mean necessarily committed adhesion to the EU, but also politicization and contestation of the current state of affairs with a view to changing it.

Eurozone, has to be considered. The supranational nature of the representation in the EP and the strengthened powers of this institution would also help in rebalancing the weight of national interests, protected in the intergovernmental bodies, in the EU and Eurozone decision-making procedures with a view to give extra consideration to the impact of the decision on the European common good.

3.6. A Parliamentary Assembly for the Euro Area

A completely different approach, taking stock of the difficulty or the non-desirability to reform the EP as a truly supranational institution, suggests the creation of a new parliamentary body next to the EP or replacing it to ensure the democratic governance of the Euro Area. The proposal to establish a Third Chamber next to the EP and the Council – if we were to consider these two institutions as the two legislative chambers of the Union⁹⁷ – or a Second Parliamentary Chamber next to the EP composed of national MPs has been long advocated since the EP was turned into an elected assembly and has gained new momentum now, in relation to the democratic governance of the Euro Area.⁹⁸ The idea to create a Parliamentary Assembly composed of national MPs from Eurozone countries and MEPs is, instead, wholly new.⁹⁹

The authors of the already evoked “Democratic Compact for the Euro Area” put this Parliamentary Assembly at the centre of their project as an institution “representing the European peoples within the governance of the Euro Area” and “which is not meant to supplant any of the European Union institutions, nor is to question their respective competences”.¹⁰⁰ Indeed, the assembly shall work in close cooperation with the EP, shall exercise the legislative function, jointly

⁹⁷ See R. Schütze, *European Union Law*, cit., pp. 150-188.

⁹⁸ According to D. Fromage, *European Economic Governance and Parliamentary Involvement: Some Shortcomings of the Article 13 Conference and a Solution*, in *les Cahiers européens de Sciences Po*, no. 1, 2016, p. 14, “another, stronger [than the Art. 13 TSCG Interparliamentary Conference], forum has to be introduced for the parliaments of the Member States that are engaged in closer economic integration, and this is simply justified by the fact that the involvement of MPs who represent constituencies outside the Eurozone lack the democratic legitimacy to act in the name of the citizens of the Eurozone.”

⁹⁹ At the time of the Convention on the Future of Europe in 2003, the President Valéry Giscard D’Estaing suggested to create a “European Congress” gathering national MPs and MEPs together on certain significant occasions. J. White, *Authority After the Emergency Rule*, *Modern Law Review*, vol. 78, 2015, p. 589.

¹⁰⁰ See S. Hennette, T. Piketty, G. Sacriste and A. Vauchez, *How to democratize Europe*, cit., p. 69. As the T-Dem leaves the doors open for future Eurozone accessions the delegations of the national parliaments whose countries are not yet part of the Euro Area may participate as observers in the meetings of the assembly (Art. 4.3. T-Dem).