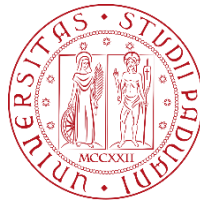


UNIVERSITÀ DEGLI STUDI DI PADOVA

DEPARTMENT OF POLITICAL SCIENCE, LAW,  
AND INTERNATIONAL STUDIES

**Master's degree in  
Human Rights and Multi-level Governance**



Enhanced cooperation and human  
rights: legal avenues for protecting  
the right to abortion within the EU

*Supervisor:* Prof. Sara Pennicino

*Candidate:* Angelina Cvetkovska

Matriculation No.: 2052363

A.Y. 2022/2023

## **Acknowledgements**

Achievements are rarely a one-(wo)man job, and I feel lucky to have such a strong and loving community by my side. I would like to extend my sincerest thank you to my parents, my sister and my grandmothers, my friends and my loved ones, who although scattered around the world have never let me feel that I have to face my challenges alone. Thank you for bringing joy, encouragement and honest intellectual exchange to my life. I am so grateful.

Thank you to my supervisor Prof.ssa. Sara Pennicino, who has provided not only thesis supervision but also valuable professional guidance. I am grateful to have had the opportunity to learn from such a driven, empathetic and hardworking professor who inspires students every day with her work.

I would like to extend my appreciation to the University of Padua for providing accessible education and a safe space to students from around the world.

Finally, I would like to thank all those who work to expand access to safe and legal abortion around the world, in times of backlash against human and women's rights. Thank you for your courage and inspiration, and for your work, without which this thesis would not have been possible.

## **Abstract**

The European Union (EU) faces differences in member states' positions on EU integration. The European Commission's 2017 White Paper on the Future of Europe emphasized the need for enhanced cooperation among those member states willing to integrate more deeply. While current literature on differentiated integration is extensive, it has mostly focused on understanding the legal and political nature of this phenomenon. Literature considering the opportunities and risks of enhanced cooperation in relation to human rights is limited. To address such a gap, this research assesses the legal potential of enhanced cooperation as a method to protect the right to abortion at the EU level. Abortion is a legally and politically contested issue among member states. Moreover, it is an issue that encompasses the tensions between intergovernmentalism and supranationalism in the EU. With this in mind, the aim of this research is to explore a new legal possibility, using enhanced cooperation to protect the right to abortion, and analytically approach the potential outcomes of selective protection at the EU level.

<b>LIST OF ACRONYMS .....</b>	<b>1</b>
<b>INTRODUCTION .....</b>	<b>2</b>
<b>SECTION I: DIFFERENTIATED INTEGRATION IN THE EU .....</b>	<b>6</b>
1. Types of differentiation .....	8
1.1. Vertical and horizontal differentiation .....	8
1.2. Models of horizontal differentiation .....	8
<i>1.2.1. Models of internal differentiation.....</i>	<i>9</i>
<i>1.2.2. External differentiation .....</i>	<i>10</i>
1.3. Legal framework of differentiated integration and enhanced cooperation .....	11
1.4. Practical implementation of differentiated integration and enhanced cooperation .....	13
2. The risks and benefits of differentiated integration .....	14
2.1. Keeping the EU together .....	15
2.2. Legitimacy of the EU .....	17
2.3. Rule of law and democratic backsliding .....	18
3. Differentiated integration and gender equality .....	20
<b>SECTION II: RIGHT TO ABORTION IN THE EU .....</b>	<b>21</b>
1. National legislation on abortion in member states.....	21
1.1. Historical overview .....	21
1.2. Member states with permissive abortion laws .....	22
1.3. Member states with restrictive abortion laws.....	23
1.4. Political and legal controversy .....	25
2. The EU legal framework and abortion .....	26
2.1. Case law .....	27
<i>2.1.1. CJEU .....</i>	<i>27</i>
<i>2.1.2. ECtHR.....</i>	<i>28</i>

2.1.3. <i>Criticism</i> .....	30
2.2. EU Treaties and abortion.....	30
2.2.1. <i>Charter of Fundamental Rights</i> .....	30
2.2.2. <i>Ad-hoc measures</i> .....	32
2.2.3. <i>EU trade law</i> .....	32
<b>SECTION III: RESEARCH DESIGN</b> .....	<b>33</b>
1. Research question .....	33
2. Concepts and definitions.....	35
3. Methodology .....	36
4. Data selection.....	37
4.1. Primary sources .....	37
4.1.1. <i>Utility of the primary sources</i> .....	37
4.1.2. <i>Procedure for selecting primary sources</i> .....	38
4.2. Secondary sources .....	39
<b>SECTION IV. LEGAL FEASIBILITY OF ENHANCED COOPERATION ON THE RIGHT TO ABORTION</b> .....	<b>40</b>
1. The idea of a supranational right to abortion .....	40
2. Competence in regulating abortion .....	41
3. Furthering the objectives of the Union .....	45
3.1. Objectives advanced by enhanced cooperation on the right to abortion.....	46
3.1.1. <i>Gender equality, non-discrimination, social justice and citizens' well-being</i> .....	46
3.1.2. <i>Enhanced social, economic and territorial cohesion</i> .....	50
3.2. Objectives unaddressed by enhanced cooperation on the right to abortion .....	50
4. Alternatives to enhanced cooperation .....	51
4.1. EU support for civil society .....	51

4.2. Addition of the right to abortion in the next EU Health Strategy .....	53
4.3. Legal measures against gender-based violence in the EU .....	53
4.4. Application of Directive 2004/113/EC to SRHR goods and services.....	55
4.5. Enhanced cooperation as a measure of last resort.....	57
5. Feasibility of a united approach.....	57
6. Member states participating in enhanced cooperation.....	59
6.1. Member states with permissive abortion laws .....	60
6.2. Voting patterns on the inclusion of a fundamental right to abortion .....	61
7. Compliance with the EU Treaties and Law .....	63
7.1. Competence.....	64
7.2. Fundamental rights.....	65
7.3. Subsidiarity.....	66
7.4. Lack of compliance .....	67
8. Internal market & trade.....	67
9. Effects of enhanced cooperation on non-participating states .....	68
9.1. Governments of non-participating member states .....	69
9.2. Citizens of non-participating member states .....	70
10. Findings .....	71
<b>CONCLUSION.....</b>	<b>76</b>
1. Summary of findings .....	76
2. Reflections on research design and findings.....	78
3. Areas of future research.....	79
<b>BIBLIOGRAPHY.....</b>	<b>81</b>
<b>APPENDIX I: DATA .....</b>	<b>87</b>
<b>ANNEX I: LEGAL FRAMEWORK ON ENHANCED COOPERATION .....</b>	<b>92</b>

## **LIST OF ACRONYMS**

CEDAW – Committee on the Elimination of Discrimination Against Women

CFR – Charter of Fundamental Rights

CJEU – Court of Justice of the European Union

EC – European Commission

ECHR – European Convention of Human Rights

ECtHR – European Court of Human Rights

EEA – European Economic Area

EMU – European Monetary Union

EP – European Parliament

EU – European Union

SRHR – Sexual & reproductive health & rights

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

## **INTRODUCTION**

The European Union (EU) is characterised by a dynamic institutional and political landscape, in which a complex interplay of intergovernmentalism and supranationalism shape decision-making. At the same time, the EU is an organisation with strong normative commitments, especially in the areas of gender equality and human rights. In light of the EU's evolving institutional framework, especially in terms of integration among member states, it is important to examine how such integration interacts with human rights. The aim of this research is to constructively contribute to a better understanding of whether the EU's institutional tendency towards differentiated integration and specifically enhanced cooperation, could have implications for the protection of human rights in the Union. In order to examine this broad question, this research has chosen to focus on a contentious subject among member states, which could be subject to differentiated integration, namely the establishment of a right to abortion supranationally protected at the EU level.

The evolution of EU integration has received much scholarly attention, as researchers have attempted to classify, theorise and predict the trajectory of integration among member states. What began as an economic community between six states in 1957 has grown into a politically integrated and deeply interconnected Union of 27 member states (Leuffen et al., 2022, p. 1). The multiplicity of preferences among member states has led to convergence and divergence, resulting in dynamic processes of integration, differentiation and even disintegration (Leuffen et al., 2022, p. 9). Not all member states of the EU see deeper integration favourably, and this has led to high levels of contention and even deadlock in certain policy areas. In order to address the divergent interests among member states, the EU has moved towards an approach of differentiated integration, allowing member states to occasionally opt out of policies or implement them at later stages. At the same time, those member states committed to deeper EU integration have persisted in their ambition to move the EU closer to a strongly integrated organisation with strong supranational powers. To accommodate such ambitions within a differentiated Union, the EU has introduced enhanced cooperation in the Treaty of Amsterdam (Peers, 2015, p. 10). Over the years, the legal framework for enhanced cooperation has become more concrete. The normative commitment to enhanced cooperation as a way to allow "those who want to do more" to integrate more



deeply has been reaffirmed in the 2017 European Commission White Paper on the Future of Europe (Leruth et al., 2022, p. 2). Yet, differentiated integration has not been without its critics and concerns have been raised on how this approach to integration could undermine unity in the EU, rather than accommodate diversity (Bertolini & Dawson, 2021, p. 646; Kröger & Loughran, 2022, pp. 715-716; Thym, 2017, p. 70). More recent literature has raised concerns about the potential risks of differentiated integration on core principles of the EU such as rule of law, democratic integrity, and fundamental rights. Still, until now, the literature has not dealt with the interactions between differentiated integration and gender equality, a core aim of the EU. The following research seeks to contribute to this body of work by uncovering a potential interaction between enhanced cooperation and the advancement of gender equality in the EU, by specifically looking at the protection of the right to safe and legal abortion.

To do so, this research focuses on the possibility of protecting the right to abortion through enhanced cooperation. Access to abortion within the EU currently falls under the competence of individual member states, leading to a wide variation in how states regulate abortion. The majority of member states have adopted permissive laws, while some member states have restrictive abortion laws, including one member state with a complete ban on abortion services (Center for Reproductive Rights, 2022). The diversity in approaches among member states highlights the contentious nature of this issue in the EU. It is important to note that the Charter on Fundamental Rights (CFR) does not recognise the right to abortion. Hence, supranational protection on access to abortion currently does not exist in the EU. However, over the years, authors have observed a move in the direction of supranational protection to an extent, notably through case law by the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). The European Parliament (EP) has also been active in promoting access to safe and legal abortion, showing that there is interest among some member states to regulate the issue of accessing abortion at the supranational level.

Considering the dual dynamics of abortion, which on the one hand falls under the national competence of member states, and on the other hand is subject to increasing attention by some of the EU's institutional actors, it becomes a compelling case to explore within the context of enhanced cooperation. Therefore, this research delves into a hypothetical legal exploration of whether the right to abortion could be selectively

protected using the legal framework of enhanced cooperation. From here, the main research question tackled in this thesis is as follows: *“To what extent is there legal potential for enhanced cooperation in protecting the right to abortion at the EU level?”*.

This research carries significant societal importance, considering the growing interest in abortion globally and within the EU, both by governments and civil society actors. In light of the EU’s commitment to evidence-based policymaking, it is important for research to contribute to identifying ways for improved access to safe and legal abortion in the EU. Over the years, international human rights norms have acknowledged the denial of safe and legal abortion as a violation of human rights (Fine, Mayall, & Sepúlveda, 2017, p. 70). The evidence shows that access to abortion is an essential aspect of gender equality, as restrictive laws disproportionately affect the human rights and health of women and other persons with gestational capacity, as well as marginalized communities. Given the Union’s commitment to both EU and international human rights standards, it is imperative to advance access to abortion services, allowing for equal access to all women and persons with gestational capacity regardless of their member state of residence. The current differentiation in the approaches towards abortion is detrimental to the rights of women in the EU, and any progress on the legal and safe access to abortion services would present a step forward in achieving gender equality and social justice in the Union.

The academic significance of this research is that it contributes to the pool of literature examining the interaction between differentiated integration and human rights in the EU. Currently, there is almost no literature on enhanced cooperation and human rights, highlighting the need for exploration of the possibilities and implications of enhanced cooperation on human rights. Considering the persistence of differentiation in the EU and the stark differences in the approaches towards women’s rights and gender equality that emerge among member states, it is important to consider that differentiated integration on human rights could become a reality in the EU. As such, it is important to understand whether differentiated integration presents a risk or an opportunity in terms of women’s rights. For that reason, the hope is that this research would meaningfully contribute to a better understanding of whether enhanced cooperation can be used to advance human rights that might be controversial among member states and analyse

potential risks that come with it. Importantly, while responding to one aspect of this query, this research opens an array of new relevant academic and legal questions as well. The applicability of enhanced cooperation on human rights opens much space for further research among legal and political science scholars on the legal and socio-political consequences of these types of cooperations.

The research design of this thesis has been carefully crafted to address the research question in the most accurate way possible. Therefore, a set of ten sub-questions have been identified on the basis of the legal framework for enhanced cooperation, taking into account the relevant articles from the Treaties of the EU. These questions assess the conditions under which enhanced cooperation is a viable legal approach to regulating the right to abortion. The data is made up of both primary and secondary sources, clearly stated in Appendix 1. While the data was carefully chosen to reflect the institutional diversity of the EU, some limitations can be identified in terms of the research design. Given the extensive scope of the research, it is important to acknowledge that the data utilised may offer an adequate response to some sub-question while providing less comprehensive answers to others. Considering that the data is based on sources from the last parliamentary term, 2019-2024, the data selection provides a good overview of recent developments and current debates on abortion, especially in the EP. At the same time, the primary sources fall short of fully capturing the evolution of abortion debates in the EU over time. To compensate for this limitation, this research employs secondary data, consisting of academic articles, which provide a more in-depth understanding of relevant case law and the historical evolution of debates surrounding abortion in the EU.

The findings of the thesis show that although enhanced cooperation on the right to abortion would meet most of the criteria outlined in the Treaties, the fact that it complies only partially with EU Treaties presents a significant barrier. Therefore, the research shows that there is some legal potential, which would be contingent on a proposal for enhanced cooperation that successfully addresses legal concerns arising out of the tensions between enhanced cooperation on the right to abortion and the principle of subsidiarity along with Treaty provisions on public health in the EU.

With this in mind, the thesis is structured as follows: Section I provides an overview of the current literature on differentiated integration in the EU, combining both theoretical classifications of differentiation and practical debates among scholars on the risks and benefits of differentiation. It clearly defines the legal framework of differentiated integration and enhanced cooperation specifically, which is of great importance for the analytical part of this thesis.

Section II provides a review of the current literature on access to abortion and abortion laws in the EU. This section seeks to provide an overview of abortion from the national, supranational and international levels. It therefore looks at the national regulation of abortion in member states, the case law by the CJEU and ECtHR, and finally abortion in the founding treaties of the EU.

Section III provides a complete overview of the research design developed to answer the main research question. This section provides a detailed description of the research question and sub-questions relevant to the study, defines the main concepts of the research and provides an in-depth description of and justification for the data selection.

This leads into Section IV, which is the analytical chapter of this thesis, which includes the implementation of the research design and the presentation of the findings. Each sub-question defined in the research design is carefully analysed in this section. The findings are explained in detail in the last part of Section IV.

Finally, the conclusion chapter provides a summarised answer to the research question, discusses limitations to the research design and proposes several important areas of future research on abortion in the EU and enhanced cooperation that emerge as relevant from this research.

## **SECTION I: DIFFERENTIATED INTEGRATION IN THE EU**

From its very beginning, the EU has combined intergovernmental and supranational governance in different policy areas (Leuffen et al., 2022, p. 1). The Union's diversity in terms of member states' development and in terms of the wide array of policy areas it now covers has led to both increased integration and increased differentiation (Leuffen et al., 2022, p. 9). Today, differentiated integration is a reality in the EU and there is strong evidence that this will continue to be the case (Leuffen et al., 2022, p. 5).

The Treaty of Amsterdam introduced the idea of enhanced cooperation, as a procedure that would allow some states to collaborate more closely on certain policy issues, as necessary or desired (Leuffen et al., 2022, p. 3). Throughout the years this commitment to enhanced cooperation has only increased, as tensions have grown between sovereigntists who challenge further EU integration and member states or governments which advocate for the deepening of such integration (Leuffen et al., 2022, pp. 5-8). In fact, according to some authors, differentiated integration as a process in policy-making has emerged as a response to crises and deadlock in EU decision-making (Markakis, 2020, p. 490). Historically, EU integration has been characterised by a process of spill-over, with integration that began in the form of economic integration that slowly intensified and eventually spilled-over into integration on more contentious and political issues. Yet, the intensification of integration has not been welcomed at all times by all member states. As the Union has grown in member states, so has the diversity of policy preferences among them, leading to a need for differentiating which policies are enacted and how they are implemented (Antoniolli, 2019, p. 85). Notably, Brexit clarified the possibility of an EU disintegration, leading scholars and politicians to focus on finding solutions for the future of EU integration (Leruth et al., 2022, p. 2). Therefore, differentiation did not emerge as a deliberate strategy of policymaking in the EU, but as a natural consequence of the diversity of preferences among the actors and the need to maintain integration in the face of various crises. As such, the EU has had to grapple with this reality and eventually embrace it as an inherent part of its functioning. In 2017 the European Commission published a White Paper on the Future of Europe, a direct response to Brexit. In this White Paper the Commission proposed several scenarios for the EU's future, sketching out a number of options: maintaining the status quo; reducing policy areas of integration and focusing on "doing less more efficiently"; seeking stronger integration across the entire Union; allowing "those who want to do more" to do so (Leruth et al., 2022, p. 2). The last option established a possibility for a scenario in which some member states move towards an ever deeper Union (Leuffen et al., 2022, p. 8). The White Paper only implicitly discusses differentiation, showing the sensitive nature of this approach to integration in light of the EU's notions of unity among member states (Leruth et al., 2022, p. 2). Nonetheless, these developments have led to an increased interest in the topic of differentiated integration in the EU, which has only

recently gained attention among scholars of the EU (Leuffen et al., 2022, p. 1-3). While scholars and EU technocrats today agree that differentiated integration is a political reality, they disagree on the benefits of such an approach against the potential dangers it might have on the legitimacy of the EU.

## **1. Types of differentiation**

### **1.1. Vertical and horizontal differentiation**

For the purposes of this research, it is essential to provide an overview of the types of differentiation and establish some definitions. The classifications of differentiated integration are numerous. But, before diving into detailed categorisations it is important to clarify the overarching definition of differentiated integration that will be used for the scope of this research. In general, the concept of differentiation can be divided into vertical and horizontal differentiation. Vertical differentiation refers to the variation between policy areas in terms of supranationalism or intergovernmentalism (Leuffen et al., 2022, p. 1). Policy areas which are mainly decided on a supranational level, such as those related to monetary policy are considered to be highly vertically integrated. As opposed to this, policy areas which are subject to intergovernmental deliberation and thus, where the pooling of sovereignty of states is lower, are considered to be less vertically integrated. Such an example is the EU's defence policy which remains for the most part a competence of the member states (Leuffen et al., 2022, p. 11). The difference between the level of vertical integration between policy areas is called vertical differentiation. Horizontal differentiation refers to the variation of policy adoption between different member states, where some member states participate only selectively or do not participate in a policy, while others participate fully (Leuffen et al., 2022, pp. 1,9). In recent scholarship, the term differentiation has come to be associated purely with horizontal integration. Therefore, for this research, differentiated integration will be used interchangeably with the concept of horizontal differentiation as described above.

### **1.2. Models of horizontal differentiation**

The EU is often understood as a *sui generis* organisation because of its complex multi-level system that is neither a state nor an intergovernmental organisation, that integrates

some but not all policy areas and that in its integration includes both member and non-member states (Leuffen, 2022, pp. 22). As such, the policy developments within the EU require its own set of classifications that capture the specificities of its institutional framework.

### ***1.2.1. Models of internal differentiation***

Internal differentiation refers to differentiation within the borders of the Union, meaning the differences in the policies adopted by member states (Leuffen, 2022, p. 39).

According to Stubb (1996), differentiated integration can be subdivided into three types – multispeed, variable geometry and à la carte. Multispeed differentiation refers to the difference in the implementation of policies across time. The idea is that all member states eventually adopt a policy, but they might need to do so at different speeds depending on their capacities (Thym, 2017, pp. 29-30). This is also known as capacity differentiated integration and is particularly present in new member states who may be unprepared to fully adopt a policy due to development or economic constraints (Kröger et al., 2021, p. 566). Therefore, capacity differentiation allows new member states to transition towards the full adoption of a policy at the pace of their development (Leuffen et al., 2022, pp. 3-4). Variable geometry or enhanced cooperation is a more durable type of differentiation, as it refers to the separation of member states that are more deeply integrated versus those that lag behind. This is also referred to as a federal core differentiation, where some member states form a more integrated unit as opposed to other member states who may not be capable or interested in further integration (Thym, 2017, pp. 32-34). Since 1996, when Stubb proposed this classification, the EU has moved through a series of integration crises which have led to a durable difference in preferences among member states when it comes to deepening integration. To resolve the deadlock in decision-making, in 2017 the White Paper on the Future of Europe discusses the possibility of closer integration among those willing to integrate more deeply, which bears similarity with Stubb's variable geometry differentiation. This form of differentiated integration would allow those member state willing to integrate further to do so, in policy areas where it is impossible to reach a consensus (Kröger et al., 2021, p. 566). Enhanced cooperation is regulated in the Treaties of the EU and requires that at least nine member states must want to participate in the proposed policy and there needs to be evidence that consensus cannot be reached (Kröger et al., 2021, p. 566). It is a

form of regulated differentiated integration which is not decided on an ad-hoc basis. Stubb's last category, à la carte differentiation allows for member states to flexibly decide which policies to participate in and which to opt out of (1996; Thym, 2017, pp. 34-34). This final type of differentiation is based on a philosophy of prioritising a member state's national interest and thus goes against a supranational approach to policymaking (Thym, 2017, p. 35).

### ***1.2.2. External differentiation***

While the previous classifications relate to internal differentiation, the nature of some of the core EU policies such as Schengen or the European Economic Area require an understanding of differentiation that extends beyond the borders of the Union itself. This is referred to as external differentiation and it denotes the application of EU law to non-member states (Pedreschi & Scott, 2022, p. 1). External differentiation can be applied fully to all member states and then some non-member states. Importantly though, in some cases, external differentiation can be applied only to some member states as well as some non-member states (Leuffen, 2022, pp. 38-40). The Schengen area is an example of this, as member states such as Bulgaria and Romania are excluded from this policy, whereas non-member states such as Switzerland and Norway are part of it. External differentiation can arise through international agreements, meaning the extension of EU law beyond EU borders, or through a unilateral external differentiation. The latter refers to the regulation of foreign conduct in line with standards set out in EU law (Pedreschi & Scott, 2022, p. 2). There are obvious constraints to external differentiation, set out by both EU law, international treaties and international customary law (Pedreschi & Scott, 2022, p. 2).

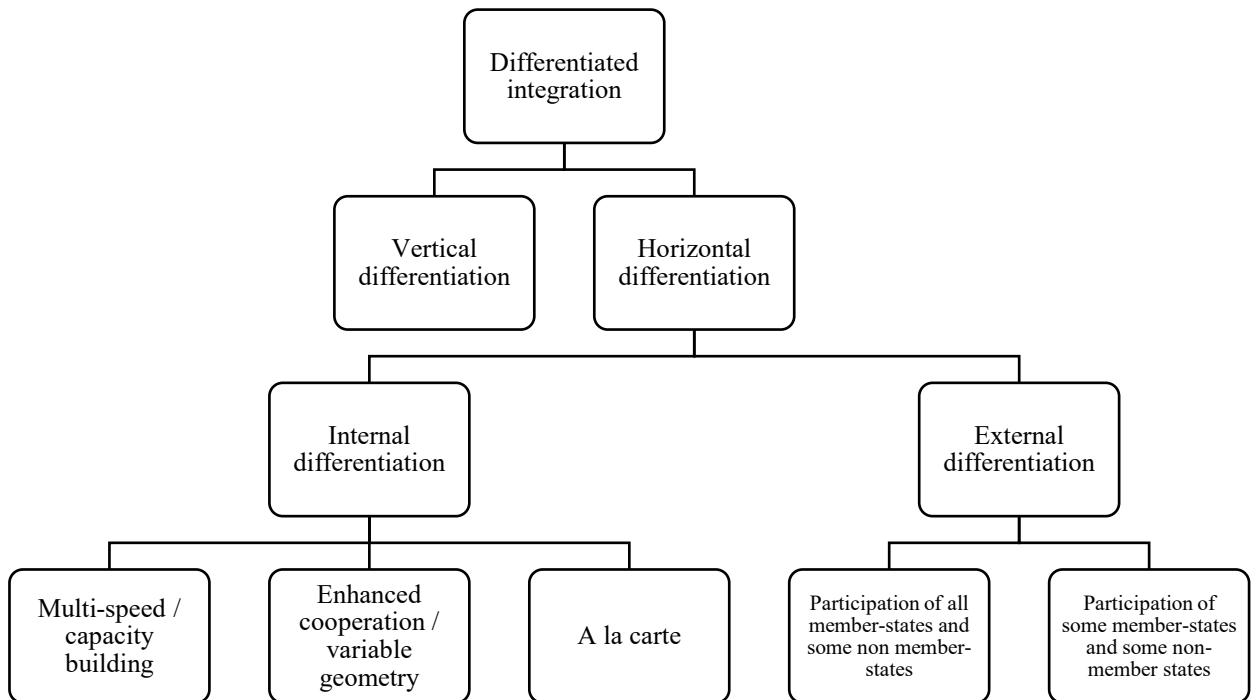
The importance of external differentiation cannot be understated in light of Brexit on the one hand, and the candidate states waiting to join the EU on the other. On the one hand, UK's exit from the EU showed that disintegration is possible when member states' diverse preferences are not accommodated successfully within the institutional framework (Markakis, 2020). Therefore, differentiated integration may be an urgently needed process to prevent such disintegration in the future. On the other hand, candidate states which have long been stuck in the "waiting room" for EU accession have faced both internal and external challenges (Milenković, 2022). Some EU member states have expressed scepticism towards the further accession of new member states in light of the



ongoing crisis of integration among the existing member states (Milenković, 2022). This so-called enlargement fatigue creates the need for opening new opportunities to maintain ties with candidate states which would not be admitted into the Union in the foreseeable future. In his analysis of the Western Balkan candidate states Woelk, (2019) argues that the EU should focus on proposing alternatives to EU accession, such as privileged partnerships and other forms of external differentiated integration (p. 40). Such possibilities of external differentiated integration in the EU's neighbourhood can be particularly beneficial to overcoming issues of enlargement fatigue and provide a solution to debates of deepening vs. widening the Union.

**Figure 1**

Types of differentiated integration



### 1.3. Legal framework of differentiated integration and enhanced cooperation

Today, differentiated integration and enhanced cooperation are regulated, to some degree, in the founding agreements of the EU. However, differentiated integration was not always part of the EU's legal framework (Peers, 2015, p. 6). It was first mentioned in the Treaty of Maastricht, which was signed in 1992 and entered into force in 1993. The Treaty established the European Monetary Union (EMU), an example of

differentiated integration in that the policy did not apply to all member states (p. 6). The Maastricht Treaty established an obligation for member states to apply the rules of the EMU once they are able to, therefore enabling a form of multi-speed differentiation. At the same time, it allowed for complete exemption from the EMU for the UK and Denmark, which was an example of *à la carte* differentiation (Peers, 2015, pp. 8–9). Opt-outs such as these continued to be modified with the subsequent Treaties of Amsterdam and Lisbon. However, opt-outs continue to be dealt with on a case-to-case basis, usually through rulings by the CJEU (Peers, 2015, p. 11). As such, they are not systematically regulated under EU law.

The legal framework for enhanced cooperation was first established with the Treaty of Amsterdam, which was signed in 1997 and came into force in 1999. At this point, enhanced cooperation was known as “closer cooperation” and was allowed under strict conditions (Peers, 2015, p. 10). These conditions changed over time, with the Treaty of Nice, which was signed in 2001 and entered into force in 2003, making these conditions less rigid. Eventually, the Treaty of Lisbon signed in 2007 introduced further modifications. Under today’s legal framework, enhanced cooperation is regulated in Article 20 of the Treaty on European Union. It is permissible in areas of non-exclusive competences of the EU, and can only be exercised in cases of last resort when other forms of compromise and cooperation among member states are not feasible (Antoniolli, 2019, p. 87). The provision stipulates that there must be at least nine member states interested in participating in enhanced cooperation. Enhanced cooperation must also be in line with the objectives and interests of the Union and coherent with the Treaties and laws of the Union (Antoniolli, 2019, p. 87). The proposal for enhanced cooperation must come from the Commission, and the decision is to be taken by the Council and the EP. Any decisions made concern only the participating states, and do not bind non-participating states or candidate states once they enter the Union (Antoniolli, 2019, p. 88). Therefore, enhanced cooperation cannot affect the EU *acquis* and can only produce secondary EU legislation (Antoniolli, 2019, p. 88). Importantly, enhanced cooperation on issues of foreign policy is regulated differently and has a highly intergovernmental character and no minimum amount of participating member states (Antoniolli, 2019, p. 89).

Peers (2015) notes that the legal framework for differentiated integration is still limited, as it only clarifies some provisions on specific policy areas such as EMU and JHA and enhanced cooperation (p. 11). Therefore, differentiated integration remains legally controversial. The CJEU has sought to clarify cases in which opt-outs of policies are admissible through numerous rulings (Peers, 2015, p. 11). However, authors note that there is significant legal ambiguity surrounding the legal application of differentiated integration (Antoniolli, 2019, p. 100, Leruth et al., 2022, p. 5). Therefore, there is a real need for future developments in EU legislation that would clarify differentiated integration's legal framework (Peers, 2015 pp. 15-18).

#### **1.4. Practical implementation of differentiated integration and enhanced cooperation**

The theoretical classifications of differentiation provide a useful framework to understand the multi-faceted nature of differentiated integration, however, in practice, the situation is far more complex. Practically, differentiated integration manifests itself differently in every policy area (Leuffen et al., 2022, p. 9). For example, the internal market is an example of intense horizontal integration, that also has an external dimension. The policy is adopted among all member states and some non-member states. It is also supranational in nature and therefore an example of high vertical integration as well. As opposed to this, monetary policy is characterised by intense horizontal differentiation as only 19 out of 27 member states are part of the Eurozone (Leuffen et al., 2022, p. 10). The monetary policy is considered to have caused divisions between Eurozone and non-Eurozone member states, and thus might also be an example of a variable geometry differentiation (Antoniolli, 2019, pp. 91-92). As seen, differentiation can be very heterogeneous and contingent on the policy areas. For some scholars, it is precisely this ambiguity that represents a major challenge in the application of differentiation (Antoniolli, 2019, p. 100). This can also create potential challenges in anticipating how differentiation could play out in new policy areas and what risks might arise, consisting of a potentially unpredictable challenge or opportunity for EU policymaking.

Enhanced cooperation, as envisioned by the Treaty of Amsterdam and later modified with the Treaty of Nice, was applied for the first time in 2010. Currently, there are only

a handful of policy areas where enhanced cooperation has been applied: transnational divorce, EU legislation on a unitary patent, legislation on financial transaction tax, and the establishment of a European Public Prosecutor (Antoinolli, 2019, p. 88; Peers, 2015, p. 13). While enhanced cooperation has been applied to a seemingly random set of issues, the common thread is that it has been used to establish secondary legislation pursuing further integration among member states (Antoinolli, 2019, pp. 89-90).

To add a further level of complexity, authors also distinguish between *de jure* and *de facto* differentiation (Leruth et al., 2022). Most of the literature focuses on formally agreed forms of differentiation, such as the previously mentioned examples where member states are legally permitted to opt out of policies. However, differentiation can also be informal, or *de facto* (Hofelich, 2022). Essentially, informal differentiation is a form of non-compliance with the EU legal framework, that is sometimes institutionally tolerated. It usually arises when a state has a limited capacity for implementation or when there is fierce disagreement over the implementation of a policy in a member state (Hofelich, 2022). One prominent example of this is Sweden's non-compliance with its obligations to adopt the euro, a form of a *de facto* opt-out. Hofelich (2022) also notes that there are examples of *de-facto* opt-ins whereby states participate in a policy despite the fact that they are legally not able to. This is exemplified by the unilateral adoption of the euro by Kosovo and Montenegro (Hofelich, 2022).

The previous discussion shows that differentiated integration is a conceptually challenging phenomenon the outcomes of which may be difficult to anticipate. In light of such complexity, the following section will offer an overview of how authors evaluate the effects of differentiated integration.

## **2. The risks and benefits of differentiated integration**

Differentiated integration is an inherently contradictory process with a variety of manifestations in practice (Kröger & Loughran, 2022, pp. 715-716). According to some authors differentiation is natural in light of the EU's democratic nature, a "union of people that govern together but not as one" (Bertolini & Dawson, 2021, p. 639). The diversity in preferences between member states has led to a strong need for compromise, and differentiated integration emerges as a natural solution (Antoniolli, 2019, p. 100). In fact, multiple scholars emphasize the importance of differentiated

integration in responding to crises faced by the EU (Markakis, 2020, p. 490). As such, differentiated integration poses both risks and opportunities for the future of the EU.

## **2.1. Keeping the EU together**

According to some authors and EU politicians, differentiated integration effectively addresses the issue of diverse preferences. The different types of differentiation may accommodate different scenarios, allowing member states to protect their interest without resorting to more extreme measures such as disintegration. For example, capacity differentiation allows new member states the time they need to adopt policies effectively, which arguably leads to better implementation and coherence in the EU in the long run (Kröger & Loughran, 2022, pp. 715-716). Furthermore, voluntary opt-outs of policies may also have positive effects on overall EU integration, as they allow member states to integrate on their own terms. Flexibility in EU policies is a way to balance out a diversity of interests (Leruth et al., 2022). According to 83.7% of the experts surveyed by Kröger & Loughran, (2022), differentiation is better than the break-up or disintegration of the Union and therefore constitutes a valuable compromise in the interest of the longevity of the EU (pp. 715-716). This shows that differentiation is often seen as key to preventing further exits by member states and a realistic approach to reconciling differences.

However, authors have also raised concerns about how differentiation may exacerbate fragmentation in an already divided Union. By allowing states to opt out of policies, they become distant from the European project and prioritise their national interests (Kröger & Loughran, 2022, pp. 715-716; Thym, 2017, p. 70). This in turn undermines the ideas of a unified Europe and allows for so-called centrifugal dynamics of differentiation to take place (Bertolini & Dawson, 2021, p. 646). Centrifugal dynamics refer to processes of division or fragmentation in the application of an initially unified legislative framework (Bertolini & Dawson, 2021, p. 646). Capacity differentiation is not immune to such centrifugal dynamics, as while it allows member states to “catch up”, it also contributes to a divide between member states. Some experts, particularly post-socialist member states have raised concerns over the use of enhanced cooperation as an exclusionary mechanism of policymaking that leads to first-class member states and second-class member states (Kröger & Loughran, 2022, pp. 715-716). The

challenge of differentiated integration would then be for it to be implemented in a way that does not perpetrate existing inequalities between member states. Theoretically, authors have often wondered to what extent differentiated integration is compatible with the EU project, and whether it could lead to a “domino effect” that ultimately further fragments the Union (Leruth et al., 2022, p. 6). The long-term impacts of differentiation on the equality of member states and the supranational nature of the EU are very much present in the literature. What complicates the study of such effects is a level of semantic confusion in the literature on differentiation, born out of the complexity of the EU’s institutional framework and the multitude of categorisations of differentiation (Leruth et al., 2022, p. 6).

Despite these debates, authors agree that differentiated integration is not a question of “for” or “against”, but a reality of the EU which has to be accepted and managed optimally. This understanding of differentiation opens a set of other challenges. Notably, the EU’s documents endorsing differentiated integration do not set out clear priority areas, nor limits on where differentiated integration can and cannot be applied (Antoniolli, 2019, p. 100). Enhanced cooperation is the only type of differentiated integration that has been subject to a detailed legal framework in the Treaties of the EU (Peers, 2015). Earlier literature on differentiation advanced criticisms precisely on the ambiguity and uncertainty of differentiated integration and how it is to be implemented (Leruth et al., 2022, p. 5). More recent scholarship has also noted the lack of clarity on how differentiation on sensitive issues should be dealt with and how this might interact with cohesion policies in the EU, or with fundamental rights (Antoniolli, 2019, p. 100; Bertolini & Dawson, 2021). Such vagueness has led to concerns among scholars on the potential impacts of differentiated integration on the EU’s legitimacy, respect for the rule of law and fundamental rights. However, there is limited scholarship analysing such effects, which presents a significant gap in the literature on differentiated integration. While these concerns do not take away from the positive effects that differentiated integration may have on resolving deadlock in the EU decision-making processes, they highlight the divided opinion among scholars on whether differentiated integration is an opportunity or a risk for the Union.

## 2.2. Legitimacy of the EU

Considering the tension that arises between the notion of a united EU and the political reality of differentiated integration, it is worth asking what consequences differentiation bears for the EU's legitimacy. In his consideration of this question, Eriksen (2022) raises the "democratic problem of differentiated integration". He argues that differentiation cannot be seen as a purely pragmatic approach to policymaking. Instead, its far-reaching consequences on legitimacy must be explored seriously, taking into account the extent to which differentiation affects the ability of the EU to secure "equal freedom for all" (Eriksen, 2022). He finds that the puzzle of DI is that it is an efficient way to cooperate when compromise or consensus is not possible, while at the same time promoting certain forms of domination arising out of unequal power relations between member states. Ultimately, Eriksen concludes that under a specific set of conditions, differentiation can be legitimate, to the extent that it is mutually acceptable to parties that have different interests and it does not compromise certain basic principles (Eriksen, 2022).

Furthermore, a study on citizens' opinions on differentiated integration showed that the ability to opt out of policies may have a positive effect on citizens' perception of EU's legitimacy (Schraff & Schimmelfennig, 2020). Importantly, it may diminish Eurosceptic sentiments among some citizens. Both Eurosceptic and Europhile voters in the Danish 2015 referendum on opting out from policies in relation to police and justice and the adoption of the Euro, had a favourable view of differentiated integration. The authors found that the voters perceived the ability to opt-out of a policy as a testament to the political efficacy of the EU decision-making process (Schraff & Schimmelfennig, 2020). While the findings of this survey are interesting, they should be approached with caution in terms of their generalizability beyond the specific case of Denmark. (Schraff & Schimmelfennig, 2020). Still, the study provides an interesting insight into the effects of differentiation on public opinion on EU legitimacy among citizens.

While opt-outs and differentiation may satisfy citizens in one member state, it is important to reflect on the effects this might have on the Union as a whole, as highlighted by Eriksen (2022). Therefore, while differentiated integration can be legitimate and can produce legitimating outcomes, it might also do the opposite,

especially if concerns over fragmentation as highlighted by Antoniolli (2019) and Betolini & Dawson (2021) are taken into account.

### **2.3. Rule of law and democratic backsliding**

In times of democratic backsliding and sanctions towards member states over rule of law issues, it is worth questioning whether a system of differentiated integration can have adverse effects on the EU's most basic values. This is the main question that Keleman (2019) asks in his work on the relationship between differentiation, constitutional pluralism and the rule of law in the EU. Keleman (2019) is particularly critical of the possibility of differentiation in the rule of law in the EU, which he sees as an existential threat to the EU (p. 248). He argues that the doctrine of constitutional pluralism, which emerged out of a conflict between the CJEU and the German Federal Constitutional Court and has since been supported in good faith by a range of scholars and jurists, is a doctrine that is prone to abuse by autocrats (pp. 253-254). As such, Keleman (2019) finds it unsurprising that the governments of Hungary and Poland have referred to arguments by constitutional pluralists to defend actions that violate principles of rule of law enshrined in the fabric of the EU (pp. 255-256). While opting out of policies or adapting them to the member states' constitutional identity may not be problematic in and of itself, in the context of democratic backsliding this becomes a risk to the overall democratic stability of the EU (Keleman, 2019, p. 258). The EU is particularly vulnerable to a differentiation in the rule of law because it is a polity that lacks the power of coercion and relies on the mutual cooperation of member states (Keleman, 2019, pp. 248-251). Therefore, differentiation opens a dangerous route for de facto differentiation by states who want to pursue forms of illiberal democracy (Hofelich, 2022). The consequences of such differentiation, for Keleman (2019), can be catastrophic for the functioning of the EU which has limited ways to defend its founding principles in such a case. According to Saurugger & Terpan (2022), the CJEU possesses some instruments to counter differentiation through judicial activism and judicial dialogue. While the CJEU case law has in some cases fostered judicial differentiation, it is evident that in recent challenges to rule of law posed by Hungary and Poland, the Court has reacted strongly in favour of unity in the application of EU law (Saurugger & Terpan, 2022). Therefore, according to Keleman (2019), unity should



constitute a priority in EU integration, as differentiation opens a set of risks to the principles of rule of law.

Differentiation in the application of fundamental rights may also present a complex challenge similar to that of rule of law. The Charter of Fundamental Rights in the EU is part of the constitutional charter of the EU, and is as legally consequential as the other EU Treaties (Bertolini & Dawson, 2021, p. 638). Even though member states cannot opt out of this Charter, the potential for a slippery slope of differentiated integration arises, since member states could insist on implementing vague fundamental values in a way that best aligns with political interests (Bertolini & Dawson, 2021, p. 649). Some states have adopted protocols to the CFR. For example, the UK and Poland adopted a Protocol on the Application of CFR, also known as Protocol No. 30 which has led to a lack of recognition for the jurisdiction of the CJEU over issues pertaining to the Charter (Fabbrini, 2011, p. 64). These protocols represent an à la carte opt-out clause and show the real possibility of further differentiated integration on fundamental rights (Kastelik-Smaza, 2018, pp. 103–104).

The reason for the differentiation of fundamental rights could come from the so-called “indeterminacy” of fundamental rights (Bertolini & Dawson, 2021, pp. 648-649). Essentially, fundamental rights are vague norms that leave lots of room for interpretation, and there are frequent disagreements over how a rule fits a factual circumstance between jurisdictions of member states. When member states disagree on core norms, such as fundamental rights, mutual trust decreases. This has already happened to an extent, with Poland and Hungary’s governments which have been accused of threatening the implementation of the fundamental rights of their citizens (Saurugger & Terpan, 2022). As such, the possibility of differentiation on fundamental rights has already proven to be a realistic risk. Additionally, where there is high politicisation or disagreement, authors find that enhanced cooperation is more likely. Fundamental rights are one such area, that causes sometimes significant rifts between member states (Kroll, 2022).

While the literature on the interaction between differentiated integration and fundamental rights is not extensive, there are real reasons for concerns about how this approach might undermine the equal rights of EU citizens, especially in light of the

ambiguous legal framework. This research project aims to respond to this gap in the literature in part by looking at the interaction between differentiated integration and the right to gender equality.

### **3. Differentiated integration and gender equality**

Equality between men and women is a central aspect of the European project (MacRae, 2013, p. 3). As part of this project, the EU formally aims to introduce gender equality into every aspect of its decision-making, including through gender mainstreaming in all policy areas the EU legislates on. This is motivated by the fact that oftentimes policy areas which seem gender-neutral may in reality produce gendered outcomes. Gender mainstreaming aims to anticipate the effects a policy might have on gender equality (MacRae, 2013, p. 4). In light of Bertolini & Dawson's (2021) considerations on the potential negative effects that differentiated integration might have on fundamental rights, it is worth asking what kind of effects this process could have on gender equality more specifically. There is almost no literature examining the relationship between differentiated integration and gender equality. This might be explained by the fact that policy areas which have been subject to differentiated integration and enhanced cooperation relate more often to monetary policy, customs union or potential defence and security in the future (Antoniolli, 2019, p. 88). However, the scope of differentiated integration is not limited only to those policy areas. Therefore, it is fair to anticipate that at some point enhanced cooperation can be used to legislate on issues related to justice and fundamental rights, and gender equality. As Berthet (2022) points out, some aspects of gender equality and women's rights prove controversial and polarising in the EP, especially on topics such as domestic violence or abortion. There is a good reason to believe that such politicised issues may lead to an inability to form a consensus and therefore could be subject to some forms of differentiated integration in the future. In light of these considerations, the purpose of this research would be to explore whether there are any gendered outcomes of the seemingly gender-neutral process of differentiated integration by looking more specifically at enhanced cooperation and the highly contentious issue of abortion in the EU.

## **SECTION II: RIGHT TO ABORTION IN THE EU**

The scope of this research is to envision the possibility of applying enhanced cooperation on the right to abortion as a fundamental right in the EU. Therefore, it is important to provide a contextual overview of the current regulation of access to abortion services and the right to abortion in the EU, both at the national and supranational levels.

### **1. National legislation on abortion in member states**

In the EU, for the most part, abortion is legal on request or on broad social grounds (Center for Reproductive Rights, 2022). The only two countries which currently have restrictive laws are Poland, with a highly restrictive law, and Malta with a total ban on abortion (Center for Reproductive Rights, 2022). See Figure 2 for a map of the legislation on abortion by member state, based on data from the Center for Reproductive Rights (2022). Despite the majority of EU member states having legislation that legalises abortion, this remains a politically and legally controversial issue at the EU level. The political controversy is represented by a polarising debate on whether abortion should be legal, and where it is legal, under which conditions it should be permissible. The legal controversy is born out of the complex institutional organisation of EU decision-making.

#### **1.1. Historical overview**

Historically, EU member states have taken on a variety of approaches to the domestic regulation of abortion. Initially, the criminalisation of abortion in Europe, in the 19<sup>th</sup> century was born out of the risks of performing the medical procedure, considering the unreliable methods available at the time (Fabbrini, 2011, p. 9). Later on, restrictive laws were justified in terms of efforts to preserve traditional family values. Eventually, in the 1960s most Western European states moved towards reforming and liberalising domestic abortion laws. Such reform occurred later in Belgium, Greece and Spain which passed progressive reforms of their respective abortion laws in the 1990s (Fabbrini, 2011, pp. 9–10). In eastern Europe, abortion was legal for the most part prior to the 1990s. Post-socialist states inherited an already permissive law on abortion, reaffirmed after their independence in the 1990s, with the exception of Poland (Fabbrini, 2011, p. 10).

## **1.2. Member states with permissive abortion laws**

In 24 out of the 27 member states, abortion is available on request, which means that the service is accessible without the need to provide a justification (Center for Reproductive Rights, 2022; see Figure 2). This is the case in the following member states: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden (Center for Reproductive Rights, 2022). Only one member state, Finland, allows abortion on “broad social grounds” meaning access to the service needs to be based on a social or medical reason (Center for Reproductive Rights, 2022; see Figure 2).

Despite the relatively unified approach to abortion, there are some differences between member states with permissive abortion laws when it comes to the level of procedural barriers that might make accessing abortion more difficult. For example, mandatory waiting periods before accessing abortion are present in some member states’ jurisdictions, which arguably delay access to the service (Center for Reproductive Rights, 2022). Time limits for accessing abortion, meaning only allowing abortion in a set timeframe can be a barrier to the access to abortion where abortion is legal, as individuals may not always be able to access the abortion within that timeframe (Center for Reproductive Rights, 2022). The Center for Reproductive Rights (2022) also notes that in some member states laws stipulate mandatory counselling prior to accessing abortion. Particularly in Germany and Hungary, the Center for Reproductive Rights (2022) finds such counselling to be “biased” and “explicitly intended to influence decision-making”. Finally, one extra-legal barrier to accessing abortion is the so-called conscientious objection, present in some member states, where medical professionals can refuse to perform abortions on the basis of personal beliefs (Center for Reproductive Rights, 2022). This means that women in some regions, more than others, may face significant barriers to accessing abortion.

This shows that even among member states with legal abortions, differing approaches to the access to abortion persist. Internally, member states may also have different levels of consensus among parties on how to regulate abortion. Therefore, the issue is highly contentious when subject to more careful analysis beyond the legal framework.

### **1.3. Member states with restrictive abortion laws**

The two member states where abortion is highly restricted or illegal are Poland and Malta (Tucak & Blagojević, 2020, p. 1135; see Figure 2). This section will provide an overview of Poland and Malta's legal frameworks on abortion. Additionally, a brief section on Ireland will also be included. Ireland today has a permissive law on abortion, however, it is an important historical example for understanding abortion at the EU level, as it had a restrictive abortion law until 2019 and has been subject to significant scrutiny by European courts.

Poland has a highly restrictive law on abortion, which since its independence has been subject to further restrictions. One of the legal grounds on which abortion was available previously has recently been removed from the law, showing a move towards further restriction in the country (Center for Reproductive Rights, 2022). Attempts to liberalise the Polish restrictive law have failed, as the Constitutional Court ruled that a more permissive abortion law would be incompatible with the Constitution's protection of the right to life. Recently, Poland has come under increasing scrutiny for its efforts to further limit access to abortion in the country (Center for Reproductive Rights, 2022). Currently, Poland allows abortion only in cases of health, in the case of a life-threatening pregnancy and when the pregnancy is a result of sexual violence, making it the only country in the EU which does not fully ban abortion but has a highly restrictive abortion law (Center for Reproductive Rights, 2022). The level of barriers imposed by the current legislative framework makes the right to abortion "quasi inexistent" (Mondo, 2014, p. 123).

Malta is the only EU member state with a full ban on abortion, meaning that the procedure is not legal under any circumstances (Center for Reproductive Rights, 2022). Such a law, which criminalises abortion, has come under scrutiny by local activists, non-governmental organisations, international organisations and the media for its implications on human rights. The recent backlash against the law has led to a proposal in the Maltese parliament to allow abortion in cases of risk to the life or health of the person (Parker & Kirby, 2022). The Maltese case is an important one because its law banning abortion is protected from EU interference. When entering the EU, Malta's accession agreement included the Treaty Protocol No. 7 of 2003 (Fabbrini, 2011, p. 65).

According to this protocol, Malta's membership in the EU cannot affect its law on abortion (Fabbrini, 2011, p. 65). Consequently, Malta has protected itself from institutional mechanisms seeking to affect the contents of this law. The role of this protocol is described in more detail in section 2.2.2.

One of the most prominent historical examples of restrictive abortion laws in the EU is the Irish case. As of 2019, abortion became legal in Ireland, following a landmark referendum to remove the ban (Fabbrini, 2023). This important reform came after decades of controversy and debate surrounding the moral and legal justifications for an abortion ban. In 1983, Ireland passed a constitutional amendment that enshrined the right of the unborn child as a fundamental right (Fabbrini, 2011, p. 10). The constitutional amendment strengthened an already extremely prohibitive abortion system which retained the form of a 19<sup>th</sup>-century law on the criminalisation of abortion (Fabbrini, 2011, p. 10). Considering the highly restrictive regulation, Ireland's abortion law had been subject to scrutiny at both the CJEU and ECtHR. In both courts, Irish cases challenging the abortion ban have led to important case law on the subject of abortion, arguably increasing efforts for supranational regulation of access to abortion in the EU (Fabbrini, 2011, pp. 20-23). According to Fabbrini (2023), the cases brought before the CJEU and ECtHR amplified the pressure on the Irish government to reform its legislation.



2022, p. 1798). Oftentimes, despite permissive abortion laws, there are significant disagreements over abortion between parties and a change of government can shift positions on abortion in some member states. Furthermore, increasing backlash towards abortion rights in some member states, such as that seen in Poland, has led to fiercer disagreements among member states on the state of human rights and rule of law more broadly in the Union. Abortion is a contentious issue in and of itself, but it is also often considered as part of broader debates on human rights and values of liberal democracy among member states.

The legal controversy on abortion in the EU arises out of the complex multilevel institutional architecture of the Union. In the division of competences in the EU, abortion is a competence of the member states (Fabbrini, 2011, pp. 22–23). Despite this, it has been subject to increasing subject to scrutiny by the EU's supranational institutions, notably the CJEU (Fabbrini, 2011, pp. 22–23; Tucak & Blagojević, 2020, p. 1135). The legal dimension is further complicated by the role of the ECtHR, an international court independent from the EU, whose jurisdiction is recognised by the EU. The ECtHR oversees the implementation of the European Convention of Human Rights (Fabbrini, 2011, p. 35). Therefore, the legal challenge of regulating abortion in the EU arises out of a three-level institutional structure, where national (member state), supranational (CJEU) and international (ECtHR) jurisdictions overlap in ways that are not always consistent or predictable (Fabbrini, 2011, p. 35). The following section will explore the EU legal framework and abortion, providing a more detailed overview of the role of supranational and international institutions.

## **2. The EU legal framework and abortion**

In the EU, abortion is a competence of the member states and as such cannot be regulated on the supranational level. At present, there is no individual right to abortion recognised at the EU level (Tucak & Blagojević, 2020, p. 1137). Still, the nature of the functioning of the EU leads to inevitable overlaps between EU law and national law on issues of abortion, especially considering the consequences of abortion laws on the respect for fundamental rights. Fundamental rights, as stipulated by the CFR are supranational and part of the constitutional fabric of the EU. As such, tensions between national laws on abortion and provisions in the CFR have proven inevitable. Before



both the CJEU and ECtHR, cases on abortion have been litigated with reference to the right to life, right to respect for private and family life, freedom of information and freedom of speech, among others (Fabbrini, 2011, p. 27). Beyond the courts, abortion has been a subject explicitly and implicitly included in the Treaties of the EU, particularly in the legally binding Protocols enacted by Poland, Malta and Ireland (Fabbrini, 2011, pp. 64–65). Therefore, the assumption that abortion is regulated purely at the member state level in the EU can be challenged on multiple grounds. The supranational and international pressures on domestic abortion legislation, while limited, have increased over time (Fabbrini, 2011, p. 6).

## **2.1. Case law**

Both the CJEU and ECtHR have over time created a pool of case law relevant to the issue of abortion. These cases have challenged the legislative autonomy of member states to decide on their abortion laws, and have contributed to moving the issue to the supranational arena. Still, they have stopped short of directly addressing certain issues, in light of the fact that abortion laws remain within the competence of member states. The following section will provide an overview of the most relevant case law from both courts.

### **2.1.1. CJEU**

The CJEU's most notable case on abortion is the *Grogan* case of 1991, which challenged Ireland's national ban on disseminating information to patients about abortion services abroad. In this case, the Court was asked whether the ban on circulating information constitutes a violation of the European Economic Community Treaty (EECT) and fundamental rights, with specific reference to the right to freedom of expression and the right to receive and impart information (Fabbrini, 2011, p. 24). The verdict of the CJEU has had longstanding consequences for the conceptualisation of abortion in the EU, as the court ruled that abortion in member states where the procedure is legal constitutes a "service" under the EECT and as such provision of information on this service cannot be restricted (Fabbrini, 2011, p. 25). The Court, therefore, found that the ban on information in Ireland violated the EECT and was inconsistent with the principles of freedom of movement of people, goods and services (Fabbrini, 2011, p. 25). However, the Court's ruling was limited to considerations based

on the principle of the internal market and freedom of movement, stopping short of addressing issues regarding access to abortion as a right (Fabbrini, 2011, p. 25). This shows the restraint with which the Court dealt with the subject of abortion, stemming from the fact that abortion is part of the exclusive competence of member states. Nonetheless, the Grogan case is seen as consequential in that it showed how abortion, even when regulated as a national issue, inevitably interacts with EU law (Fabbrini, 2011, p. 23).

In the 2011 *Oliver Brustle v. Greenpeace e.V.* case in front of the CJEU, the Court provided a judgement which was later considered by some as relevant to the question of whether life begins at conception. It is important to note that this case was not related to abortion, but dealt with the patentability of biotechnological inventions (Tucak & Blagojević, 2020, p. 1159). Since the verdict determined that “the ovum must, as soon as fertilised, be regarded as a ‘human embryo’”, some interpreted this ruling to determine that life begins at conception (Tucak & Blagojević, 2020, p. 1159). This view was contested by those who saw the verdict to be distant from such an assertion, as it related to the legal protection of biotechnological inventions (Tucak & Blagojević, 2020, p. 1159). A ruling by the Constitutional Court of the Republic of Croatia later clarified that the definition of the human embryo cannot be understood to mean an entitlement to equal protection as that which would be extended to human beings, thus clarifying the interpretation of this ruling in the context of abortion (Tucak & Blagojević, 2020, p. 1159).

### **2.1.2. ECtHR**

The ECtHR has more extensive case law on abortion than the CJEU. Since the EU has ratified the European Convention on Human Rights (ECHR) and recognises the jurisdiction of the ECtHR (Fabbrini, 2011, p. 62), this case law affects the issue of abortion at an EU level as well. The *Open Door and Dublin Well Women v. Ireland* case of 1992 was significant in that it affirmed the right of entities in Ireland, such as clinics, to disseminate information about access to abortion abroad (Fabbrini, 2011, pp. 28-30). The applicants argued that the Irish law at the time violated the right to privacy and freedom of expression, the right to receive and impart information, as well as the women’s right to make choices over their health (Fabbrini, 2011, pp. 28-30). This was an important ruling in that it removed a barrier to access to abortion for women in

countries where abortion is not permissible (Fabbrini, 2011, pp. 28-30). Still, even in this ruling, the Court avoided arguing that abortion is protected under the ECHR, and only determined the violation of the right to freedom of expression (Fabbrini, 2011, pp. 28-30). At the same time, the ECtHR has also rejected pro-life arguments made in the contestation of permissive abortion laws (Fabbrini, 2011, p. 30). Therefore, this ruling is significant although it shares some similar limitations with CJEU case law in that it falls short of explicitly recognising a right to abortion.

Later on, the ECtHR took on multiple other cases which strengthened its jurisprudence on the issue of abortion. In the *Vo v. France* case, a woman was denied an abortion because she did not meet the criteria set out by the French abortion law at the time. The ECtHR determined that it was not possible nor desirable to determine whether life starts at conception and therefore abortion does not violate the right to life, as set out by Article 2 of the ECHR (Fabbrini, 2011, p. 31).

The *Tysic v. Poland* case was a landmark case which dealt with the denial of the right to an abortion of a woman who had medical reasons to terminate the pregnancy in Poland (Fabbrini, 2011, pp. 31-32). The ECtHR found that the state violated Article 8 by interfering with the physical and psychological integrity of the person and failing to fulfil its obligation to protect such integrity (Fabbrini, 2011, pp. 31-32). In the *Tysic* case, the ECtHR set an important precedent arguing that where abortion is legal, the state must ensure that the legal framework does not in any way impede the effective exercise of that right to its citizens (Fabbrini, 2011, p. 33). However, the ECtHR in this case focused purely on the procedural aspects of implementing the abortion law, stressing the positive obligation of the state to enact its laws, without entering into the merits of the restrictive abortion law in Poland and women's rights (Fabbrini, 2011, p. 33).

To sum up, the ECtHR case law, which expands well beyond the three cases mentioned here, has found that restrictive abortion laws violate some rights entrenched in the ECHR (Fabbrini, 2011, p. 30). At the same time, the Court has fallen short of claiming that abortion is a right that is protected under the ECHR and has emphasized the ability of states to regulate abortion domestically (Fabbrini, 2011, p. 30). According to Fabbrini (2011), the Court has shown more restraint on the topics than the

Parliamentary Assembly of the Council of Europe which has continuously expressed its concerns over restrictive abortion laws in European states and their effects on human rights (p. 33).

### ***2.1.3. Criticism***

An issue that emerges out of the existing case law by the CJEU and ECtHR is that the case law effectively protects the right of a woman to access abortion outside of her state and avoid prosecution for it (Fabbrini, 2011, p. 69). The CJEU and ECtHR case law is cautious, avoiding any provisions that would establish a right to safe and legal abortion. Such caution has arguably led to justifying the effective application of restrictive national laws only to those citizens who do not have the resources to access abortion services elsewhere (Fabbrini, 2011, p. 70). Less economically privileged citizens or persons from marginalized communities may be unable to exercise their right to travel to another jurisdiction where abortion is legal. This applies especially to cases where abortion is highly restricted, such as in Malta, Poland or formerly Ireland. However, women and persons with gestational capacity from states where abortion is legal might feel the need to travel too. De Zordo et al. (2021) found that women from states with liberal abortion laws sometimes travel in order to access reproductive care. In these cases travelling is motivated by the gestational limits within which an abortion can be performed, which vary across countries (De Zordo et al., 2021, p. 844). In both cases, women resort to travelling because they cannot access high-quality abortion care in their countries (Zordo et al., 2021, p. 844). However, only some citizens may be able to afford such travel. Therefore, the current case law on abortion in Europe potentially exacerbates or legitimates certain barriers to access to abortion stemming out of citizens' financial resources, visa or migrant status, or conditions such as travel restrictions caused by pandemics (Zordo et al., 2021 p. 844).

## **2.2. EU Treaties and abortion**

### ***2.2.1. Charter of Fundamental Rights***

With the Lisbon Treaty, the EU sought to increase its supranational powers, especially in the area of human rights. It did so by ratifying the jurisdiction of the ECtHR, and by making the CFR as legally significant as the other constitutional treaties of the Union (Tucak & Blagojević, 2020, p. 1146). The CFR is the first codification of fundamental

rights in the EU and represents a comprehensive human rights instrument (Fabbrini, 2011, p. 62). While it does not recognise the right to abortion, there are several provisions in the CFR that are relevant to the issue, such as the right to life, the right to protection of the private life and the principle of equality and non-discrimination (Fabbrini, 2011, pp. 62-63).

In light of the Lisbon Treaty and the elevation of CFR to constitutional relevance in the EU, authors at the time wondered whether this would make abortion become an increasingly supranational issue, as the CFR can be invoked to deal with violations of human rights in cases of restrictive abortion laws. Considering the reactions of states such as Poland to the CFR provisions of the Lisbon Treaty, Fabbrini (2011) argues that member states saw this as a real possibility (p. 64). Namely, both UK and Poland signed a Protocol on the Application of CFR, also known as Protocol No. 30 with which they did not recognise the CJEU's jurisdiction over CFR issues (Fabbrini, 2011, p. 64). In the context of differentiated integration, this type of protocol can be understood as an *à la carte* opt-out clause (Kastelik-Smaza, 2018, pp. 103–104). In the UK the exemption was not related to its laws on abortion, which were already liberal at the time. However, in the case of Poland, the Protocol was seen as a way to ensure that Poland cannot have its restrictive abortion law challenged before the CJEU on the basis of CFR considerations (Fabbrini, 2011, p. 64; Kastelik-Smaza, 2018, p. 104). Legal scholars have criticised the protocol for its legal futility. The Protocol does not truly exempt Poland from complying with the CFR and Polish courts apply the CFR as a legal source (Lock & Layden, 2011, p. 29; Kastelik-Smaza, 2018, p. 112). In fact, it is argued that this provision was put in place symbolically, to appease domestic opposition to the possible effects of CFR on the regulation of “moral issues” in Poland, such as family law, abortion, or LGBT rights (Kastelik-Smaza, 2018, p. 104). While acknowledging the potential legal inefficiency of the Protocol, the fact that the Protocol is arguably related to protecting provisions on abortion shows the tension between fundamental rights and restrictive abortion laws in some member states (Fabbrini, 2011, pp. 64).

Considering the binding nature of the CFR, whenever abortion is contested in front of the CJEU, the CFR is a legal source for dealing with the human rights implications of restricting abortion (Fabbrini, 2011, p. 63). Therefore, there is potential for using provisions in the CFR to review restrictive abortion laws in member states, especially in

light of the equality and non-discrimination principle (Tucak & Blagojević, 2020, pp. 1167–1168).

### ***2.2.2. Ad-hoc measures***

In the EU, there are two other examples of ad-hoc measures which seek to protect the member states from having their prohibitive abortion laws challenged. These are the 1992 Irish Protocol, no longer in place due to Ireland’s legislative change on abortion in 2018 and the 2003 Maltese Protocol No. 7. The 1992 Irish Protocol, also known as Protocol No. 35, which was maintained in the Treaties after Lisbon, stipulates that EU treaties cannot affect the Constitution of Ireland (Fabbrini, 2011, p. 65). At the time, the Irish constitution protected the right to life of an unborn child, so this protocol was clearly envisioned to protect this constitutional provision from being challenged at the EU level (Fabbrini, 2011, p. 65). Malta has a similar protocol, still in force, which is part of its accession agreement of 2003. According to Protocol No. 7, Malta is subject to a special provision which ensures that “Malta’s national legislation relating to abortion” cannot be affected by its ratification of the EU treaties (Fabbrini, 2011, p. 65). Both of these protocols show that the EU is ready to make compromises to settle issues of disagreement on human rights issues, particularly on sensitive topics such as abortion (Fabbrini, 2011, p. 67). This restricts the CJEU’s ability to rule on issues on abortion in some cases, as the Protocols are as legally binding as the CFR and the constitutional treaties of the EU.

### ***2.2.3. EU trade law***

So far, this section has focused on legal provisions which explicitly relate to abortion services in one way or another. However, a paper by Hervey & Sheldon (2019) showcases the way that other areas of EU law can interact with access to abortion, such as EU trade law and the telemedical provision of abortion pills. What they find is that under current EU free movement provisions, an accredited doctor from a member state where abortion is legal could provide a prescription for an abortion pill to a patient residing in a country with a restrictive abortion law, who would then purchase that pill online (Hervey & Sheldon, 2019). EU law in this case would make it difficult for member states with restrictive abortion laws to set a non-tariff barrier to such an exchange on the basis of public morality (Hervey & Sheldon, 2019). This shows that EU law could serve to protect access to abortion in indirect ways, in light of evolving

technology and the diffusion of telemedicine. However, this does not effectively remove the barriers posed by national restrictive abortion laws, but simply provides a legal way to evade restrictive laws for a limited number of citizens who would be aware of such services and able to use them.

What emerges is that beyond some overlaps between EU law and national law, there is little supranational protection of access to abortion in the EU. Case law is the only supranational tool, which has become increasingly useful in tackling issues regarding abortion, but can have only a limited impact in light of the EU treaties. The EU Treaties currently function as barriers to supranational protection.

### **SECTION III: RESEARCH DESIGN**

#### **1. Research question**

To address the gap in the literature on the interaction between differentiated integration and human rights in the EU, this research will look at enhanced cooperation and the specific right to safe and legal abortion. This research aims to address the gap in the literature on enhanced cooperation, and at the same time contribute to the wide range of literature dealing with the right to abortion at the EU level and the potential for supranational regulation on the issue. Therefore, the research question is as follows

*“To what extent is there legal potential for enhanced cooperation in protecting the right to abortion at the EU level?”*

To answer the research question, it is necessary to devise a set of sub-questions which would be used to evaluate the “legal potential for enhanced cooperation”. These sub-questions are based on the relevant articles in the legal framework of enhanced cooperation – Article 20 of the Treaty of the European Union (TEU) and Part Six, Title III of the Treaty on the Functioning of the European Union (TFEU) (see Annex I for full text). These articles set out the criteria under which enhanced cooperation is permissible in the EU. Based on this, I have transformed the relevant provisions into a set of questions which are going to be answered with reference to the right to abortion.

Table 1 shows the questions which have been devised to understand the possibility of enhanced cooperation based on Article 20 of the TEU, and Articles 326 and 327 of the TFEU. It is important to note that the questions are based only on those articles of the

legal framework which set out the necessary conditions for enhanced cooperation. As such, articles 328-334 of the TFEU have not been transformed into respective questions, as they deal with the procedure of inter-institutional review of enhanced cooperation. While the procedure of approving enhanced cooperation bears relevance, limiting the research only to those Articles which set out the substantive conditions for enhanced cooperation provides a clearer scope for this research.

**Table 1**

*Methodological questions on enhanced cooperation*

<b>Legal provision</b>	<b>Question(s)</b>
<b>Article 20 (TEU)</b>	<ol style="list-style-type: none"> <li>1. Is the issue at hand part of the Union's non-exclusive competences?</li> <li>2. Does enhanced cooperation on this issue further the objectives of the Union, protect its interests and reinforce its integration process?</li> <li>3. Is this a measure of last resort?</li> <li>4. Can the objectives of the cooperation be attained within a reasonable period by the Union as a whole?</li> <li>5. Are there at least nine Member States participating in the cooperation?</li> </ol>
<b>Article 326 (TFEU)</b>	<ol style="list-style-type: none"> <li>6. Does the enhanced cooperation comply with the Treaties and Union Law?</li> </ol>



	7. Does the enhanced cooperation undermine the internal market, economic social and territorial cohesion?
	8. Does it constitute a barrier in trade between Member States or distort competition between them?
<b>Article 327 (TFEU)</b>	9. Does the enhanced cooperation respect the competences, rights and obligations of those Member States which do not participate in it?

## 2. Concepts and definitions

Before explaining the methodology further, it is important to provide a set of definitions for the relevant concepts in the research question. This section provides definitions for the following terms: legal potential, enhanced cooperation, access to safe and legal abortion, and EU level.

Legal potential refers to the legal possibility of applying a provision, which at the moment of writing has not yet been applied to the case in question (*Potential: Definition & Legal Meaning*, n.d.). More concretely, for the purposes of this paper, the legal potential is the extent to which the criteria set out in the sub-questions have been met. Where the criteria have been fully met, there is legal potential for the application of the provisions in the future. Where the criteria have been partially met, this compromises the level of potential depending on the criterion in question.

Enhanced cooperation, as defined in Section I, refers to a form of differentiated integration which allows those member state willing to integrate more deeply on a

specific policy area to do so, in cases where agreement cannot be reached at the Union level (Kröger et al., 2021, p. 566).

Access to safe and legal abortion is a concept that will be defined in terms of the meaning of “safe” and the meaning of “legal”. Access to safe abortion has been defined by the World Health Organisation as a health care service which includes access to accurate information, quality medicine and support from a trained health worker to ensure abortion management and post-abortion care (World Health Organization, 2021). Access to legal abortion, for the purposes of this research, will be defined as abortion which can be legally accessed on request or on the basis of broad social grounds. This categorisation has been informed by the work of the Center for Reproductive Rights (2022) which defines on request abortion as a service where professionals “are not required to attest to, or certify the existence of a particular reason for the abortion” (p. 7). Abortion on broad social grounds refers to laws which permit abortion for a “range of social reasons that are attested to by medical professionals or social workers” (Center for Reproductive Rights, 2022, p. 7). An important note to make as part of the conceptualisation of abortion is that while this research acknowledges the contentious debates surrounding the right to abortion, it will approach this right as a healthcare issue rather than a moral issue. As such, arguments in favour or against the protection of this right at the EU level would be based on evidence-based effects of such protection, rather than moral considerations.

Finally, the term “EU level” refers to the regulation of issues as part of the EU’s exclusive or shared competences. It will be used interchangeably with the term “supranational”. Areas regulated supranationally are those where the EU can adopt a regulation that is legally binding to member states. Currently, the EU has no competence over abortion laws, making this a competence of the member states. Therefore, coordinating such legislation at the “EU level” would mean that the issue becomes part of EU’s competence.

### **3. Methodology**

In order to answer the research question and sub-questions described above, this research will build arguments using the IRAC method of legal analysis as a way to ensure all relevant elements are present. The IRAC model is an acronym for the five

main elements used in the methodology – *Issue, Rule, Analysis and Conclusion*. This method was chosen as it has been designed to evaluate “hypothetical situations in law cases” particularly relevant for case studies (Bittner, 1990, p. 227). The main advantage of this method is that it helps organise the answer to questions about the legal application of a provision to a case (Touro Law Center, 2006). Therefore, IRAC will be used especially as a way to inform the structure of the legal argument in this thesis.

For each of the questions outlined in Table 1, Section IV will provide answers with the following structure: 1) a general issue the question pertains to, 2) the relevant legal provisions applicable, 3) an analysis of the implications of applying those legal provisions; 4) a conclusion providing a summarised answer to the question (Touro Law Center, 2006). The third step, analysis, is particularly valuable for exploring the implications of political debates surrounding abortion among member states and going beyond purely legal issues. The potential limitation of this method is that the ability to provide a comprehensive answer in all four steps may be limited by the availability of data, considering the hypothetical nature of the analysis. Such limitations will be accounted for in the findings of this research.

#### **4. Data selection**

The data used to answer the questions consists of both primary and secondary sources. The primary sources are EP Resolutions and parliamentary questions, as well as one Treaty Protocol. The secondary sources consist of academic articles referenced in Section II. The tables with the full list of sources can be found in Appendix I.

##### **4.1. Primary sources**

The primary sources have been identified using the database EUR-LEX. They consist of one Protocol to the Treaty, 12 EP resolutions and 14 parliamentary questions in written format.

###### **4.1.1. Utility of the primary sources**

The sources have been chosen because they represent a range of EU institutions, and give a good overview of the variety of views that exist among and within member states on the subject of abortion. The Treaty Protocol was chosen as the only Treaty document which explicitly mentions abortion. It is also a legally binding document, unlike the rest

of the primary data. Non-binding documents enrich the analysis by bringing in the political dimension relevant in examining the potential for enhanced cooperation.

The EP Resolutions have been chosen for two reasons. Firstly, due to the role of the EP as a legislative and supervisory institution in the EU, its resolutions can serve as an important indicator of the direction in which the EU policymaking is moving. Secondly, considering that the EP is the only directly elected institution in the EU, its resolutions are a way to understand the plurality of positions between and within member states. This is helpful for determining the level of (dis)agreement on a particular issue. To enhance the analysis of EP Resolutions, they will be considered for their content, which will be analysed in relation to the research sub-questions. Additionally, the voting patterns of MEPs on some EP resolutions will be considered as well. To retrieve accurate information on voting patterns, the database MEP Watch, which provides detailed information on voting patterns based on state and political party, will be used and referenced where necessary.

Finally, looking at parliamentary questions serves to clarify legal provisions and raise issues with the Commission and Council, as such they are informative documents both legally and politically. This is also a way to include the views of other institutional actors beyond the Parliament. Due to the sheer amount of documents, this research will only look at EP Resolutions and parliamentary questions from the last parliamentary term, 2019-2024. More recent documents are more relevant to the current political debates on abortion and to the current legal provisions in the Union. While a wider timeframe may be beneficial to capture the dynamics of change in the Union over time, this would make the research less feasible due to time and resource constraints. Therefore, secondary data will be included to compensate for any relevant events preceding this time frame.

#### ***4.1.2. Procedure for selecting primary sources***

In order to select the relevant primary sources, documents on the EUR-LEX data base were filtered using keywords.

Initially, documents were filtered on the basis of their use of the key word “abortion” in the title. This search produced a range of documents, which consisted of one Treaty, six preparatory documents by the European Parliament (EP) dating between 1994 and 2022

and 65 parliamentary questions. This first search was important in that it identified the documents most explicitly related to the issue at hand, one of which was the Treaty Protocol. However, secondary research pointed to important resolutions which did not appear when filtering only for the keyword “abortion” in the title, meaning that this search potentially excluded important documents which treat the issue of abortion under broader terms, such as reproductive health or women’s rights. Therefore, another three searches were conducted, this time also applying the time limitations and searching for preparatory documents, i.e. resolutions and own-initiative resolutions by the EP.

The first search looked for resolutions including the keyword “abortion” in the title, which produced five results. The second search filtered for documents which contain the keywords “reproductive” in the title, and the keyword “abortion” in the text, which produced one result. The third search filtered for documents which contain the keyword “women” in the title, and the keyword “abortion” in the text, which produced 7 results, one of which overlapped with a document identified in the first search. Therefore, a total of 12 EP resolutions from the timeframe 2019-2024 are to be taken into account as the primary sources for this research.

Furthermore, the parliamentary questions were identified using the EP database, filtering for the word “abortion” in the title and applying the time frame 2019-2024. As such, 14 parliamentary questions will be considered in this research as well. A potential concern arising out of this way of identifying primary data is that not all of the sources may be relevant for addressing the methodological questions. Therefore, while all the data below will be taken into account as a potential source, only those that are found to be relevant to the methodological questions will be included in the analysis.

#### **4.2. Secondary sources**

Considering the hypothetical nature of the research, it is important to complement primary sources with secondary sources which can shed further light on the political feasibility of enhanced cooperation. For this reason, secondary data will be considered as well.

Academic articles analysing the legal and socio-political debates on abortion in the EU, most of which have been introduced in Section II, will be taken into account. This also

includes articles which analyse existing case law from the CJEU and ECtHR on the right to abortion. While using primary case law data may be more beneficial for an in-depth legal analysis, due to the constraints of the research, the choice is to rely on a secondary analysis of this case law. Secondary research is helpful for extracting the main legal consequences emerging out of supranational and international case law on abortion. Beyond the case law, the purpose of the inclusion of secondary sources is to develop the legal analysis by taking into account factors which may not emerge out of the institutional primary sources.

Finally, for the purposes of some research sub-questions, secondary sources from Section I on differentiated integration and enhanced cooperation will be included as well. These sources have been chosen as they contribute to an improved analysis of the institutional framework surrounding enhanced cooperation and contribute to a more accurate legal analysis.

## **SECTION IV. LEGAL FEASIBILITY OF ENHANCED COOPERATION ON THE RIGHT TO ABORTION**

### **1. The idea of a supranational right to abortion**

Before diving into the questions set out in Section III.1. Table 1, it is important to explain the origins of the idea of supranational protection of the right to abortion. As noted in Section II, the EU has slowly increased its supranational efforts in regulating abortion, particularly through the rulings of CJEU and ECtHR (Fabbrini, 2011, p. 30). However, only recently have there been efforts for the safeguarding of the right to safe and legal abortion at the EU level. Notably, in an EP resolution from 2022 titled “US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and Women’s health in the EU”, MEPs proposed a new right to be added to the CFR – the right to abortion. The resolution P9\_TA(2022)0302 proposes the following formulation of such a right:

*“Article 7a (new):*

*‘Article 7a*

*Right to abortion*

*Everyone has the right to safe and legal abortion.*” (European Parliament, 2022d).

The idea of including a right to abortion in the CFR, a supranational and legally binding treaty upon member states is a novel development, as existing case law has avoided establishing abortion as a right. The primary sources, notably resolutions P9\_TA(2022)0302 and P9\_TA(2022)0243, show that some member states would be interested in moving towards a supranational regulation of the right to abortion. From here, this research will attempt to explore whether protecting the right to abortion is a type of issue area that could be covered by enhanced cooperation, a method that has so far not been discussed as an option for addressing the level of contention surrounding abortion. Importantly, this research will not deal with the legal form in which this enhanced cooperation could occur, for example, a protocol to the CFR or a regulation passed through the ordinary legislative procedure of the EU, as this is beyond the scope of this paper. Rather, it will attempt to understand whether the right to abortion as a policy issue can be admissible to enhanced cooperation in some legal form.

The following sections will each address the questions outlined in Table 1, of Section III.1.

## **2. Competence in regulating abortion**

*Is the issue at hand part of Union’s non-exclusive competences?*

The question of whether regulating abortion is part of the Union’s non-exclusive competences is a primary element in determining the applicability of the enhanced cooperation provisions on the protection of the right to abortion. In the EU, competence refers to the actor(s) who are able to adopt legally binding acts on a particular issue area. Considering the multi-level institutional organisation of the EU, there are three types of competences that pertain to the EU (see Table 2).

Firstly, the EU has exclusive competence over those policy areas which have to be legislated at the EU level, regulated in Article 3 of the TFEU. Secondly, the EU has a shared competence with member states on issues which can be legislated either by the EU or member states. Member states can only decide on issues where the EU has not already exercised its competence. Shared competence is regulated in Article 4 of the TFEU. Thirdly, the EU has a non-exclusive competence in policy areas primarily or

exclusively decided by member states, as regulated by Article 6 of TFEU. In these areas, the EU's activities can be limited to coordination and support, but no legally binding acts can be adopted at the EU level. Such a supportive role by the EU is relevant to the policy areas of human health, among others.

**Table 2**

*Summary of the distribution of competences in the EU.*

Type of competence	Policy area
Exclusive competence	<ul style="list-style-type: none"> <li>• customs union</li> <li>• establishing competition rules necessary for the functioning of the internal market</li> <li>• monetary policy for the Member States whose currency is the euro</li> <li>• conservation of marine biological resources under the common fisheries policy</li> <li>• common commercial policy</li> <li>• concluding international agreements</li> </ul>
Shared competence	<ul style="list-style-type: none"> <li>• internal market</li> <li>• social policy, limited to the aspects defined in the TFEU</li> <li>• economic, social and territorial cohesion</li> <li>• agriculture and fisheries, excluding the conservation of marine biological resources</li> <li>• environment</li> <li>• consumer protection</li> </ul>



	<ul style="list-style-type: none"> <li>• transport</li> <li>• trans-European networks</li> <li>• energy</li> <li>• area of freedom, security and justice</li> <li>• common safety concerns in public health matters, limited to the aspects defined in the TFEU</li> </ul>
Competence to support, coordinate or supplement actions of the member states	<ul style="list-style-type: none"> <li>• protection and improvement of human health</li> <li>• industry</li> <li>• culture</li> <li>• tourism</li> <li>• education, vocational training, youth and sport</li> </ul>
Competence to provide arrangements within which the EU member states must coordinate policy	<ul style="list-style-type: none"> <li>• economic policy</li> <li>• employment</li> <li>• social policies</li> </ul>

---

*Note. Table based on EUR-LEX webpage Division of competences within the European Union (n.d.).*

In 12 out of the 14 parliamentary questions analysed, the Commission clarifies its limited competence in addressing abortion provisions in member states on the basis of Article 168 of the TFEU. This provision stipulates that health policy is the exclusive competence of the member states. Sexual and reproductive healthcare are aspects of health policy, and thereby the regulation of access to abortion is the exclusive competence of member states and cannot be decided on the EU level under the current EU Treaties. The EU cannot produce any legally binding acts on regulating abortion. The Commission, in the responses to parliamentary questions, has clarified that despite the competence of member states in regulating healthcare, such regulations must comply with human rights commitments made under national, EU and international law. Therefore, the human rights provisions produce some limitations in how abortion is to

be regulated in member states. However, this does not make it a shared competence but rather means that states' abortion regulation can be subject to judicial scrutiny for its compatibility with legal human rights standards.

The issue of competence in abortion regulation is legally clear. Four out of 12 EU Parliament Resolutions include clauses that directly relate to the competence of the EU, whereas most make an implicit reference to the competence issue. Namely, when calling for action on abortion legislation, EP resolutions address member states, for example “calls on the Polish Government to swiftly and fully guarantee access to and the provision of abortion services, to provide safe, legal, free and high-quality abortion services, and to make them accessible to all women and girls” (European Parliament, 2021c). Calls for action towards the Commission and Council are limited to supportive activities that would promote safe and legal access to abortion, without EU legislation on it, such as “calls on the Commission to support the Member States in guaranteeing universal access to sexual and reproductive health and rights (SRHR), including access to safe and legal abortion for all citizens” (European Parliament, 2021c). This shows that under the current framework, abortion is a non-exclusive competence of the EU when it comes to regulating reproductive and sexual health in member states, where supranational institutions can play a supportive rather than decisive role. The EU has exclusive competence in the area of SRHR in its foreign policy, the definition of which is an exclusive competence under the TEU. Two out of the 12 EU Parliament resolutions note that the EEAS has a “direct competence to act in advancing SRHR in external action”, meaning that it can, in a unified manner, promote access to safe and legal abortion abroad (European Parliament, 2021b).

Internally, the EU is limited to a supportive role when it comes to the advancement of SRHR. Examples of such support include the EU4Health programme which promotes equal access to health services and addresses health inequalities, and the EU Gender Equality Strategy 2020-2025 which seeks to set clear policy objectives related to gender equality (Pereira & European Commission, 2020). However, the EU does not have the competence to affect the legislative framework on abortion within member states. As such, the first criterion of enhanced cooperation is satisfied with regard to the right to abortion.

### 3. Furthering the objectives of the Union

*Does enhanced cooperation on this issue further the objectives of the Union, protect its interests and reinforce its integration process?*

The issue addressed in the second question is the compatibility between the enhanced cooperation and the objectives of the EU, specifically in terms of its integration process. This is an expansive and broad question, and in order to address it systematically this section will refer to the objectives of the Union as defined in Article 3 of the TEU. Based on Article 3 TEU, the EU has 11 aims which broadly refer to peace, well-being, security, internal market, monetary union, sustainable development, justice, equality, cohesion and diversity. Figure 3 presents these aims in more detail.

#### Figure 3

*List of the aims of the European Union as defined in Article 3 TEU*

Aims of the European Union	1. Promote peace, its values and the well-being of its peoples
	2. Combatting social exclusion and discrimination
	3. Promote social justice, equality between men and women, and the protection of the right of the child
	4. Enhanced economic, social and territorial cohesion
	5. Respect for cultural and linguistic diversity
	6. Scientific and technological progress
	7. Protection of the environment
	8. Internal market
	9. Free movement with respect to external borders, immigration and the prevention and combating of crime
	10. Sustainable development based on a competitive market economy
	11. Economic and monetary union

*Note. The summary is based on a webpage of the European Union (Aims and Values, n.d.)*

On this basis, the following sections will seek to understand whether there is potential for enhanced cooperation on protecting the right to abortion would further these objectives.

### **3.1. Objectives advanced by enhanced cooperation on the right to abortion**

#### ***3.1.1. Gender equality, non-discrimination, social justice and citizens' well-being***

This section assesses whether enhanced cooperation would contribute to aims 1-3 as defined in Figure 3. What emerges out of the data analysis is that enhanced cooperation on the protection of the right to safe and legal abortion would advance the EU's aims of promoting the well-being of citizens, combatting social exclusion and discrimination, and promoting social justice and the equality between men and women. Five out of the 12 EP resolutions explicitly mention Article 3 (TEU) as a legally relevant source when discussing the right to abortion, thus arguing that the protection of this right would contribute to the objectives set out in EU constitutional treaties.

The first and most obvious aim that is directly related to access to safe and legal abortion services is the objective of achieving equality between men and women. All of the EP resolutions emphasize the connection between access to legal and safe abortion and the advancement of gender equality. All EP resolutions analysed are favourable to access to legal and safe abortion, and see gender equality as unachievable as long as member states in the EU maintain restrictive abortion laws or de-facto barriers to abortion services. Importantly, EP resolutions consider restrictive abortion laws to be a form of violence against women, as the denial of such a service negatively affects the realization of fundamental rights protected by the CFR. These are the right to life and dignity, freedom from inhuman and degrading treatment, the right to access healthcare, the right to privacy, the right to education and the prohibition of discrimination (European Parliament, 2021b). When analysing access to abortion, EP resolutions often make reference to international instruments for the protection of women's rights that the EU and EU member states are signatories to. As such, access to abortion is seen as an essential aspect of women's reproductive health according to the UN Committee on the Elimination of Discrimination against Women (CEDAW) and the UN Committee on the Rights of Persons with Disabilities (European Parliament, 2020b). Therefore, under the status quo in which the right to abortion is not defined as a right at the EU level, states

are able to adopt restrictive legislation on abortion without violating EU law, despite the fact that this is to the detriment of gender equality. Restrictive abortion legislation directly contradicts the core aim of the EU of gender equality as it disproportionately disadvantages women's ability to exercise a set of fundamental rights protected by the CFR.

Relatedly, gender equality goes hand in hand with the EU's aims of ensuring citizen's well-being and promoting social justice. In a similar fashion to gender equality, restrictive abortion laws have a negative effect on well-being and social justice, as they create conditions of marginalization and decrease the quality of healthcare available to citizens. The EP resolutions considered in this research emphasize that in states where abortion laws are restrictive, a high number of women are forced to undergo life-threatening, clandestine abortions. Referencing CEDAW, EP resolutions note that "criminalising abortions serves no deterrent value", which means that restrictive abortion laws lead to the resorting to unsafe medical procedures without the ability to subsequently access professional medical help or supervision (European Parliament, 2022e). The effects of restrictive abortion legislation are devastating, as one EP resolution highlights that "almost all deaths stemming from unsafe abortions occur in countries where abortion is severely restricted" (European Parliament, 2022d). The evidence considered in this research shows that the current EU framework where member states are able to adopt restrictive abortion laws contradicts the aim of ensuring the well-being of citizens.

In terms of social justice, restrictive abortion legislation worsens the discrimination of marginalised groups and should be considered not only as an issue of equality between men and women, but also for its consequences on intersecting discrimination. For example, women who are less economically privileged are disproportionately affected by restrictive abortion laws as they may not be able to afford to travel to access abortion services (European Parliament, 2020b). The case law of the CJEU defines abortion as a "service", and therefore citizens cannot be barred from accessing information or accessing this service abroad (Fabbrini, 2011, p. 70). This means that they are able to travel to other member states with liberal abortion laws and access abortion services (Fabbrini, 2011, p. 70). Yet, as Zordo et al. (2021) argue, this exacerbates inequalities between women based on other aspects of their identity, such as economic resources,

essentially leading to a situation where the EU de-facto allows only those women who are able to afford travelling to access abortion services (Fabbrini, 2011, p. 70). The issue of intersecting identities is particularly important for understanding how the status quo worsens social exclusion, thus hindering the advancement of this objective in the EU. The EP resolution titled “Intersectional discrimination in the EU: socio-economic situation of women of African, Middle-Eastern, Latin American and Asian descent”, emphasizes that women who face discrimination based on their race, socio-economic background, disability, sexuality and migrant women are often less able to access services for their reproductive and sexual health. Discriminatory laws and social prejudice create additional barriers for these women, as they are also more likely to face gynaecological violence and have their right to choice and bodily autonomy restricted. Therefore, social exclusion and injustice are aggravated through restrictive abortion laws, as inequalities not only persist but are perpetuated. The evidence in the EP resolutions considered shows how restrictive abortion laws negatively affect women in general. Yet, the barriers are even greater for those who cannot travel or cannot access information online due to economic, language barriers or education level, or face additional discrimination when accessing healthcare services. It is clear, therefore, that the status quo in the EU whereby the right to legal and safe abortion is not recognised hinders the achievement of the EU’s aims of equality, social justice and citizen’s well-being. The question that persists is whether enhanced cooperation would meaningfully contribute to furthering these objectives.

Enhanced cooperation would contribute to the advancement of the EU’s objectives by preventing backsliding on the right to abortion in participating. Five out of 12 EP Resolutions address the backsliding of the protection of SRHR both globally and among member states. Often, such backsliding is manifested in the reversal of progress made in ensuring safe and legal access to abortion. The two most notable examples discussed in the data are Poland, where in 2020 the law became more restrictive, amounting to a “de facto ban” according to the EP resolutions (European Parliament, 2020b), and the US’ overturn of the constitutional protections on the right of abortion in 2021 (European Parliament, 2022b). In the EP resolutions, member states and the Commission are invited to react to such backsliding, as further restrictions on abortion would further inhibit the realization of human rights commitments by the EU. The backsliding is seen

as a broader trend globally, and EP resolutions express concern on how this could “embolden the anti-abortion movement in the European Union” (European Parliament, 2022b). Enhanced cooperation on the right to safe and legal abortion would contribute to a supranational protection of this right, at least in those member states participating. Therefore, reversing existing permissive legislation on abortion in these member states would become more difficult, and through that enhanced cooperation would insulate the effects of the trend of backsliding on access to abortion. This positively contributes to the advancement of the aims of the EU, as it protects the equality between men and women, prevents social exclusion caused by restrictive abortion legislation and ensures the well-being of those citizens who would need to access abortion services. When the right to abortion is subject to national legislation and is not constitutionally or supranationally protected, liberal legislation on abortion is vulnerable to amendments in line with trends of reversal of the progress on women’s rights. Parliamentary majorities, if they are ideologically opposed to abortion, can modify abortion laws in a more restrictive direction. As opposed to that, supranational protections prevent backsliding by consolidating the right and making restrictions more difficult to enact. Furthermore, member states which would be part of enhanced cooperation would be subject to increased peer-accountability from other member states, potentially making backtracking access to abortion services detrimental to the state’s position in the Union, and as such undesirable. While the political pressure that might emerge out of enhanced cooperation cannot be anticipated with precision, it is clear that member states with restrictive abortion laws come under fire for such restrictions even in the absence of enhanced cooperation. Therefore, it could be argued that in the presence of closer integration of this issue, the political pressure on protecting the right to abortion would increase.

The benefits of safe and legal access to abortion for social justice and inclusion, citizens’ well-being and gender equality are explicitly discussed in the data considered. In conclusion, there is reason to believe that enhanced cooperation on the right to abortion would change the status quo on the advancement of three out of the 11 aims identified in Figure 3.

### **3.1.2. Enhanced social, economic and territorial cohesion**

To understand whether or how protecting the right to abortion through enhanced cooperation would affect cohesion, it is important to define the meaning of this term in the context of the EU. Social, economic and territorial cohesion refers to the minimization of development inequalities between member states and between regions within member states, as defined by articles 174 and 178 of the TFEU (2016). The current cohesion policy, in place for the period of 2021-2027, focuses mostly on economic and technological development, and as such is not explicitly related to issues of fundamental or human rights (*New cohesion policy*, n.d.). Therefore, it could be argued that enhanced cooperation on the right to abortion would not have an impact on the achievement of this objective. Nonetheless, there is one aspect relevant to cohesion that is addressed in the primary sources considered in this research. There are adverse effects of inadequate access to safe and legal abortion in rural areas in the EU, a central aspect of considerations regarding territorial cohesion.

The EP resolutions analysed show that in member states where access to abortion is restricted, women in rural areas are disproportionately disadvantaged. In general, SRHRs are more limited in rural areas due to lower quality of healthcare services, limited access to information and higher prevalence of stigma among the population and among medical staff (European Parliament, 2021b). Considering that under the current EU framework, access to abortion is dealt with at the national level, national disparities in access to abortion stemming from urban/rural divisions are also reckoned with nationally. Therefore, enhanced cooperation which would entrench the right to safe and legal abortion would require an EU-level commitment to addressing cohesion issues when it comes to access to this right. Potentially, enhanced cooperation would increase attention to these disparities as part of a broader commitment to territorial cohesion, hence advancing progress towards the cohesion objective.

### **3.2. Objectives unaddressed by enhanced cooperation on the right to abortion**

From the data analysed, there is no indication that the protection of the right to access safe and legal abortions would directly contribute to the advancement of aims 5-11 as outlined in Figure 3. While there could be indirect links between these aims and the right to abortion, these do not emerge clearly from the data considered.



#### **4. Alternatives to enhanced cooperation**

*Is this a measure of last resort?*

The issue addressed by this question is fundamentally about whether enhanced cooperation is the only way to improve the supranational protection of access to safe and legal abortion for women in the EU. To answer this question it is important to consider potential alternatives to establishing a right to abortion at the EU level that would meaningfully contribute to supranational protection of the access to safe and legal abortion in the EU. These solutions would need to be based on the current distribution of competences in the EU, as defined by Articles 3 and 4 of the TFEU and explained in more detail in Section IV.2.

The EP resolutions and the parliamentary questions analysed show that there are a number of possibilities which would allow the EU Commission to contribute to the promotion of SRHR and access to abortion, which could be meaningful alternatives to combat backsliding on SRHR and ensure better access to abortion services in the EU. The tangible proposals emerging out of the EP resolutions are financial support to civil society organisations which raise awareness and promote SRHR, the addition of the right to abortion in the next EU health strategy, the addition of gender-based violence to the list of EU crimes, and the application of Directive 2004/113/EC to SRHR goods and services. Each of these proposals will be looked at in more detail in this section and considered on the basis of whether they make enhanced cooperation on the right to abortion not a measure of last resort but one of multiple possibilities to improve access to abortion.

##### **4.1. EU support for civil society**

In two EP resolutions analysed, there are calls towards the Commission to improve the “political support for human rights defenders and healthcare providers working to advance SRHR” (European Parliament, 2022d; European Parliament, 2021b). In an EP resolution on the growing backlash against women’s rights, MEPs have called on the Commission to “provide direct and significant financial support to women’s organisations in those countries experiencing a systemic defunding” (European Parliament, 2019). The implementation of these proposals would lead to increased

support for the work of civil society organisations, thus facilitating a bottom-up approach in ensuring access to safe and legal abortion. A bottom-up approach has proven to be very important in changing societal attitudes, as has been the case in Ireland, where activists and civil society organisations have contributed greatly to the achievement of enacting a permissive legalisation of abortion (Fabbrini, 2023). However, the effectiveness of political and financial support to civil society organisations as a way to improve access to safe and legal abortion services has two issues. Firstly, providing financial support to organisations with the specific scope of promoting access to abortion is beyond the current competences of the EU. The EU cannot endorse organisations which seek to modify domestic legislation to abortion, as this would interfere with the exclusive competence of member states. Secondly, it could be argued that this is not a viable alternative to enhanced cooperation, as it does not elevate the right to abortion to supranational protection, but contributes to a stronger bottom-up approach which would not challenge the current issue of competence in the EU.

In the parliamentary question E-000870/2020, the Commission clarifies that it “has no competence to introduce legislation on abortions in the Member State” and therefore “it will not support specific activities and projects which promote better access to legal abortions through the upcoming multiannual financial framework for 2021-2027” (Uhrík & European Commission, 2020). This means that financial and political support have to be limited to not interfere with the member states’ exclusive competence. This explains why the EP resolutions, where increased support is demanded, are phrased in terms of support for “women’s organisations” or “healthcare providers looking to advance SRHR”, without explicitly mentioning abortion. SRHR can be interpreted as not including access to safe and legal abortion, as explained in a parliamentary question which states that: “there is no consensus about whether abortion is included in sexual and reproductive health” (Kloc & European Council, 2021). As such, the Commission can limit itself to support on the basis of a broader definition, without explicitly directing support or funds to improve abortion services. This makes such a proposal insufficient in addressing the human rights abuses emerging out of restrictive abortion laws or extra-legal barriers to abortion services among member states.

Additionally, even if there would be a way for the EU to support organisations which promote access to abortion services, this would not constitute an alternative to enhanced cooperation on the right to abortion. While such support can be effective in promoting a bottom-up approach, with the scope of modifying national abortion regulation, it would not address the lack of supranational recognition or protection of the right to abortion. It is therefore not an alternative because it would not lead to the same result as the one intended by enhanced cooperation.

#### **4.2. Addition of the right to abortion in the next EU Health Strategy**

In EP resolution P9\_TA(2020)0336, MEPs have called on the Commission to “guarantee SRHR by including abortion rights in the next EU Health Strategy” (European Parliament, 2020b). The EU health strategies seek to outline priority areas in the Commission’s support to member states on issues of public health (*Health strategy*, n.d.). However, it is important to note that these recommendations and policy initiatives have to respect the competences of member states. Therefore, the activities of the Commission in this field are limited to enhancing policies that are already endorsed by the member states, without interfering with their public health provisions. In a parliamentary question on the situation of abortion rights in Poland, the Commission has been asked what it will do “including under EU health strategy and programmes, to support Member States in guaranteeing access to sexual and reproductive health services, including safe abortion?” (Rafaela et al., 2020). The Commission’s response emphasizes the responsibility of member states to define their health policies and that “Union action may complement [health policy] or improve public health by means of information and education to promote cooperation between Member States and lend support to their actions” (Rafaela et al., 2020). Therefore, through this response, the Commission has indirectly excluded the possibility of the inclusion of the right to abortion in a future EU health strategy on the basis of a lack of competence. As such, this does not constitute a viable alternative to enhanced cooperation.

#### **4.3. Legal measures against gender-based violence in the EU**

An EP resolution on the restrictive abortion legislation in Poland calls on EU institutions to ratify the Istanbul Convention, an international convention that deals with

gender-based violence, and “calls on the Commission to submit a proposal to add gender-based violence to the list of EU crimes pursuant to Article 83 TFEU” (European Parliament, 2020b). As such, it should be considered to what extent these proposals would contribute to supranational protection of access to safe and legal abortion at the EU level. It is important to note that improving legislation on gender-based violence is an area of increasing priority for the EU. However, this is also a contentious issue in the EU as some member states express disagreement, with some EP resolutions even referring to a “campaign against the Istanbul Convention” (European Parliament, 2019). For example, Poland has considered withdrawing from the Istanbul Convention (European Parliament, 2020b). Both the ratification of the Istanbul Convention at the EU level and the inclusion of gender-based violence to the list of EU crimes would constitute legally binding obligations. However, there are two considerations to be made. Firstly, gender-based violence needs to explicitly include the denial of abortion services for these provisions to improve access to safe and legal abortions. Secondly, it is not clear whether such an explicit provision would be possible given that the regulation of abortion would remain an exclusive competence of member states. According to the resolutions analysed, the EP recognises the denial of access to abortion to constitute a form of gender-based violence (European Parliament, 2019; European Parliament, 2020b; European Parliament, 2021b; European Parliament, 2021c; European Parliament, 2022b; European Parliament, 2022d; European Parliament, 2022e). This is due to the fact that the denial of abortion “may amount to torture and/or cruel, inhuman and degrading treatment” (European Parliament, 2020b) and affects women’s and girls’ rights to life, physical and mental integrity, equality, non-discrimination and health” (European Parliament, 2021c). However, it is not clear whether this interpretation of gender-based violence would be included in legislative provisions that member states need to agree on, including those member states with highly restrictive abortion laws. Even if gender-based violence would include some explicit reference to denying abortion services, it is still not clear whether this would fully tackle access to safe and legal abortion in the Union. As defined in Section III, access to legal abortion is defined as abortion which can be legally accessed on request or on the basis of broad social grounds. Therefore, it is not clear whether in all cases the denial of abortion services on request could fall under the definition of gender-based

violence. Additionally, the inclusion of a definition of gender-based violence which would criminalise the denial of access to abortion would not be compatible with the current EU's distribution of competences, considering that this would make member states' restrictive abortion laws incompatible with EU law.

As such, while an important step forward, the inclusion of gender-based violence in the EU list of crimes and the ratification of the Istanbul Convention would not achieve the same level of supranational protection of the right to abortion, which would be the intention of enhanced cooperation on the issue. This does not make these solutions inadequate, as they would improve the comprehensive approach to women's rights in the Union, however, they cannot be considered viable alternatives to enhanced cooperation.

#### **4.4. Application of Directive 2004/113/EC to SRHR goods and services**

Another way to improve access to abortion which has been mentioned in one EP resolution is through the application of Directive 2004/113/EC to SRHR services (European Parliament, 2020b). The Directive 2004/113/EC is an EU law which regulates the implementation of the principles of equal treatment between men and women in the access to and supply of goods and services in the Union. While this Directive is considered to be quite consequential for gender equality, it has a very broad scope and its application is not always clear. As Caracciolo di Torella (2022) points out, the full potential of this Directive to tackle gender-based discrimination has not yet been explored. There are possibilities for this Directive to be clarified or amended, which could potentially lead to it being applied to new areas of service provisions as an effective remedy to gender-based discrimination (Caracciolo di Torella, 2022, p. 94).

One of the services that could be considered can be healthcare services, which is why several EP resolutions make reference to the application of this directive to SRHR and thereby abortion services. The Directive does consider healthcare services to be within the scope of this regulation, however, is not clear whether healthcare services also extend to SRHR (Caracciolo di Torella, 2022, pp. 52-53). According to case law by the CJEU, specifically the *Grogan case*, abortion, where legal, does constitute a service (Fabbrini, 2011, p. 25). In theory, this would mean that conscientious objection

constitutes a barrier to accessing a service, which can have negative impacts on women's ability to exercise their legal rights. However, it is not clear whether this barrier would constitute a violation of the equality principle in the access to services, as set out by Directive 2004/113/EC. This is due to the fact that according to the Directive, differences in the provision of healthcare services which are based on physical differences between men and women cannot constitute discrimination (Caracciolo di Torella, 2022, pp. 53).

For this reason, the EP resolution referencing this directive has called on the Commission to “confirm the application of Directive 2004/113/EC to SRHR goods and services and recognise that limits on and barriers to accessing SRHR goods and services constitute gender-based discrimination, as they disproportionately affect one gender (women) or vulnerable groups (e.g. trans and non-binary persons)” (European Parliament, 2020b). The clarification of the application of this Directive could be quite consequential for the access to abortion services across the Union but requires the recognition that denial of the right to abortion constitutes a form of gender-based discrimination.

According to Caracciolo di Torella's (2022) in-depth analysis of the expansion of the Directive, there are three legal ways for the Commission to act on the EP Resolution's recommendation. Firstly, the Commission could provide non-binding guidelines to member states to clarify their obligations in regard to the implementation of Directive 2004/113/EC (Caracciolo di Torella, 2022, pp. 99-100). To do this, the Commission would firstly need to decide whether the Directive actually applies to “limits and barriers to accessing SRHR goods and services” as stated in the EP resolution. Afterwards, it would be able to issue soft guidelines, which are not legally binding and therefore could be of little consequence in states where conscientious objection is acceptable and widespread (Caracciolo di Torella, 2022, pp. 53-54, 99-100). This type of soft mechanism would not be a viable alternative to enhanced cooperation as it would not be legally binding. Secondly, the Commission, along with the Council and Parliament could revise and amend the directive to include new areas of protection (Caracciolo di Torella, 2022, pp. 99-100). Thirdly, the Directive could be scrapped and a new one could be adopted which would set out a clearer scope of what constitutes gender-based discrimination in the provision of services (Caracciolo di Torella, 2022,

pp. 99-100). Both the second and the third solutions could be impeded by disagreements among member states, especially considering the level of controversy among member states on the issue of abortion. However, this could be a potential solution, which would be legally binding and far-reaching. Part of the political impasse could be more easily overcome because the Directive does not explicitly relate to abortion, which might make it less politically controversial. Therefore, it could be argued that this is a viable way to advance access to safe and legal abortion in the EU, without resorting to enhanced cooperation. However, it is also possible that where member states cannot achieve a consensus, enhanced cooperation on the application of this Directive could be considered. The one difference between such enhanced cooperation and the one discussed in this research is that enhanced cooperation on the Directive would not establish a right to abortion, but rather expand access to the service.

#### **4.5. Enhanced cooperation as a measure of last resort**

Enhanced cooperation on the right to abortion would allow some member states to supranationally protect access to safe and legal abortion. What emerges out of this analysis is that there are few alternatives that can provide such supranational protection, meaning that such enhanced cooperation can be considered a measure of last resort. The one viable alternative identified is the application of Directive 2004/113/EC to SRHR goods and services, which if applied to abortion services would provide adequate supranational protection against barriers to access to abortion. However, some lack of clarity persists on the possibility of making such a provision in light of the current distribution of competences in the EU. As such, it could be argued that the integration of special provisions on the right to abortion within an existing directive would be more difficult than the creation of new legal instruments through enhanced cooperation. With some reserve, therefore, this section considers that enhanced cooperation on this issue can be considered a measure of last resort.

#### **5. Feasibility of a united approach**

*Can the objective of the cooperation be attained within a reasonable period by the Union as a whole?*

The issue tackled by this question is the possibility that the member states can agree on a united approach to regulating safe and legal abortions in the EU. To understand whether this can be the case, it is important to understand the level of contention on the issue of abortion, as well as identify potential legal barriers to consensus. To do so, this section will make use of the primary sources to identify firstly political and then legal barriers to a unified approach.

As noted in Section II, abortion is a politically and legally contentious issue in the EU. Member states with partial restrictions to abortion are opposed to interference on the issue by the EU. This is the case with Poland, which has been under scrutiny for its increasing restrictions on access to safe and legal abortion, with two of the 12 EP resolutions and six out of 14 parliamentary questions explicitly tackling the Polish situation. In Poland, where restrictions on abortion services have increased in recent years, the majority of the parliament has expressed “support of the so-called ‘pro-life’ movements”. Even when abortion is legal, governments have shown to be tolerant of other forms of barriers to access to abortion services. In Poland, only 10% of hospitals provided legal abortion in 2018 (European Parliament, 2020b). Conscientious objection is diffused in other member states as well, such as Croatia, Greece, and Italy, where medical staff may refuse to perform an abortion or related services due to personal beliefs (Caracciolo di Torella, 2022, p. 53). This represents a de-facto barrier to the exercise of the right to abortion, which is often a result of inaction on the part of governments to decrease such barriers (Center for Reproductive Rights, 2022). This shows that within the Union, not all governments and political factions hold liberal views on access to abortion or even less so consider access to abortion to be a right. Furthermore, recent backsliding on women’s rights, as outlined by multiple EP resolutions, has led to further polarisation on the issue of abortion. As such, it is to be expected that consensus on the issue would be almost politically impossible in the current political climate.

Legally speaking, consensus on the issue of abortion regulation in the EU is impossible due to the Maltese Protocol No 7, which states that: “Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in the territory of Malta of national legislation relating to abortion.” This means that under the



current Treaties of the EU, it is legally impossible for a consensus to be reached. Considering that the Maltese law is the most restrictive in the Union, not permitting abortions even in cases of grave danger to the health of the individual or rape (Center for Reproductive Rights, 2022), any provision on the EU level on protecting access to safe and legal abortion would contradict Protocol No 7. As such, unless this Protocol is amended or scrapped, there is no way forward for a unified approach to access to abortion at the EU level.

Finally, it is important to address the possibility of a unified approach in the near future, meaning “within a reasonable period”, as stipulated by Article 20 of TEU (2016). Considering that member states with historically restrictive abortion laws like Ireland have shown that there is a possibility for enacting change on these issues, it could be argued that it is possible to envision a similar pattern being followed by other member states with restrictive abortion laws in the near future. Namely, Malta has shown some interest in liberalising its abortion law following media scrutiny of the case of an American tourist who was denied an emergency abortion (Parker & Kirby, 2022). Therefore, it could be anticipated that in the near future there will be a change that would allow for a more unified approach to abortion. On the contrary, it could also be argued that increasing backtracking on women’s rights and in particular access to abortion, as seen in Poland, and some member states that tolerate barriers to abortion services are part of a global trend of backsliding. Therefore, it is difficult to envision how the political impasse on the right to abortion in the EU could be resolved in the near future, considering the persistence of differences between member states in how they conceive of the right to abortion and how they regulate it.

## **6. Member states participating in enhanced cooperation**

*Are at least nine Member States participating in the cooperation?*

One of the more basic requirements of enhanced cooperation is the number of member states necessary for enhanced cooperation to occur. The issue at hand is whether there are at least nine member states for which we can credibly argue that they would be interested in enhanced cooperation on protecting the right to abortion in the EU. To determine whether this would be the case, it is important to look at the number of member states which currently have liberal national laws on access to abortion services.

However, a permissive national abortion law cannot be taken to automatically mean that governments would be interested in enhanced cooperation on the issue. Namely, in many countries with permissive abortion laws, abortion remains a contentious issue and extra-legal barriers to access to abortion are present and insufficiently addressed by governments (Center for Reproductive Rights, 2022). For this reason, this section will also analyse the voting patterns of MEPs on the two EP resolutions which explicitly propose the inclusion of the right to safe and legal abortion in the Charter of Fundamental Rights – EP resolutions P9\_TA(2022)0243 and P9\_TA(2022)0302.

### **6.1. Member states with permissive abortion laws**

Out of the 27 EU member states, only two do not have a permissive abortion law, meaning a law which legalises abortion on request or on broad social grounds (Center for Reproductive Rights, 2022). These are Poland and Malta, as previously discussed in Section II. The most liberal abortion laws are those which permit abortion on request, meaning there is no requirement for the person to justify their decision (Center for Reproductive Rights, 2022). There are 24 member states which allow abortion on request, whereas only one member state allows abortion on “broad social grounds”, meaning there needs to be a justification based on social reasons for the abortion to be allowed. This is the case only in Finland. According to this evaluation, it seems that the majority of member states in the EU are favourable to the right to abortion, and therefore there would be no issue with satisfying the criteria laid out in Article 20 of the TEU. It should be added that permissive abortion laws do not mean that the government is favourable towards taking further steps to protect the right, for example supranationally as would be the case with enhanced cooperation. The Center for Reproductive Rights, as well as the EP resolutions, are adamant to point out that barriers to access persist. Such barriers are not always adequately dealt with by governments, as the Center for Reproductive Rights (2022) has criticised Italian state authorities for “failing to ensure that refusals [based on consciences and religion] do not result in delays or denial of care for those seeking legal abortion care”. Similar criticisms have been advanced against conscience clause practices in Greece and Croatia (Caracciolo di Torella, 2022, p. 53). Despite these barriers, it is clear that there are more than nine member states which support access to abortion within their national jurisdictions. To understand whether this would translate into the will to cooperate at

the EU level, the next section will provide an overview of voting patterns on the EP resolutions which propose the inclusion of a fundamental right to abortion.

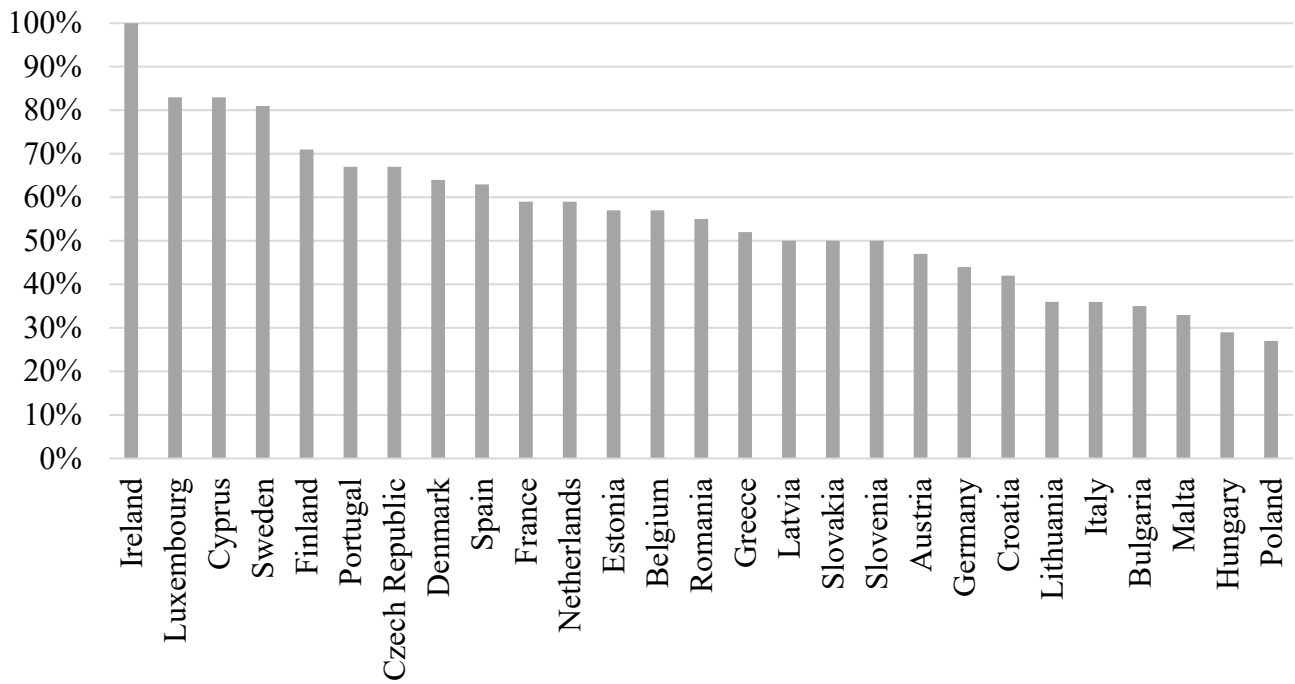
## **6.2. Voting patterns on the inclusion of a fundamental right to abortion**

While most states have permissive abortion laws, there needs to be more evidence to sustain the argument that at least nine member states would be interested in supranational protection of the right to abortion at the EU level. For this reason, this section will look at MEP voting patterns on EP resolution P9\_TA(2022)0243 and P9\_TA(2022)0302. These are the two resolutions which explicitly propose the inclusion of the right to abortion in the CFR. EP resolution P9\_TA(2022)0302 provides the exact formulation for the right in the charter to be as follows “*Everyone has the right to safe and legal abortion*” (European Parliament, 2022d). Therefore, the expression of agreement with these resolutions can be seen as an agreement with the supranational regulation of abortion. All member states where a majority of MEPs voted in favour of these resolutions will be taken to mean that they would potentially be interested in enhanced cooperation on the issue.

The voting patterns on EP resolution P9\_TA(2022)0243 show that in 18 member states, 50% or more of the MEPs voted in favour of the resolution (see Figure 4). The voting patterns on EP resolution P9\_TA(2022)0302 are slightly different, with eleven member states where 50% or more of the MEPs voted in favour of the resolution (see Figure 5). This means that in both cases there were at least nine member states where the majority of MEPs are in favour of supranational protection of the right to abortion, in the form of inclusion of the right in the CFR. The nine member states where over 50% of MEPs have voted in favour of both resolutions are Luxembourg, Ireland, Sweden, Finland, Denmark, Latvia, France, Netherlands, Spain, Estonia and Romania. The limitation of this reasoning is that MEP voting patterns may not fully reflect the stances of national governments, and they may not be consistent overtime. However, if taken together with other parameters, such as the level of the permissiveness of domestic abortion laws, it might provide a good idea nonetheless of the level of interest of the member states in addressing issues related to abortion access.

**Figure 4**

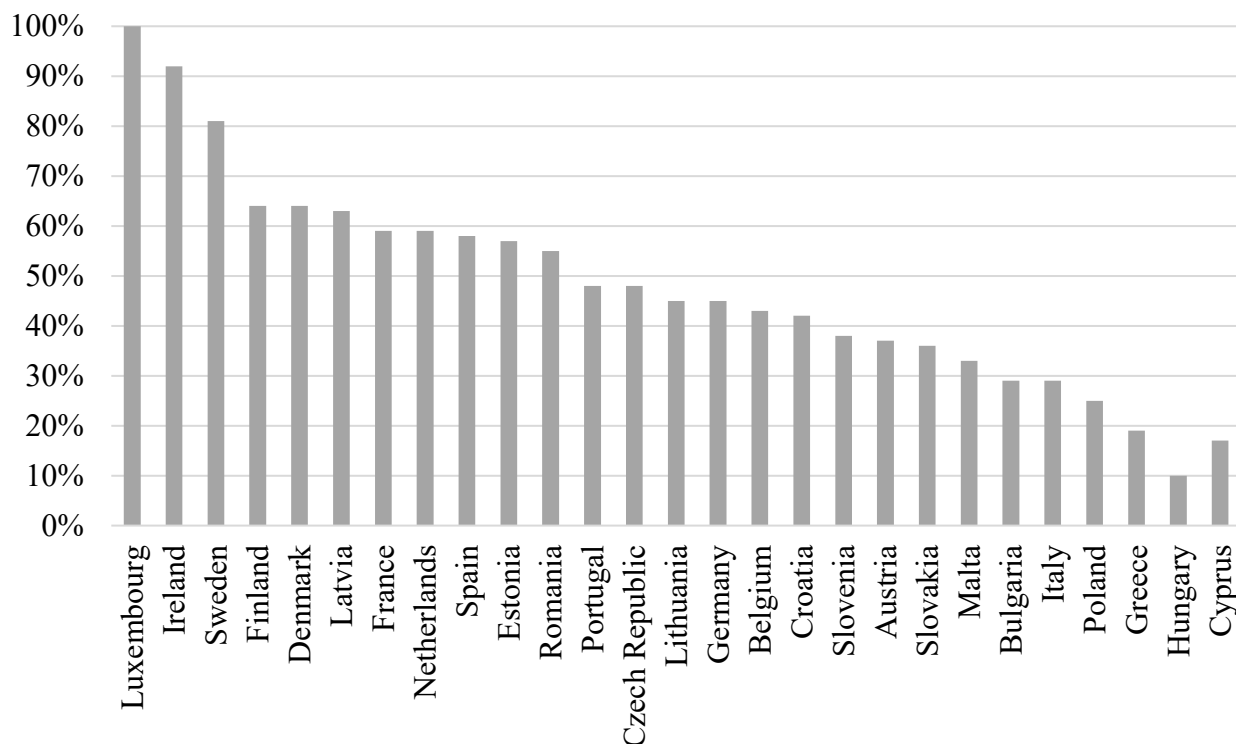
*Voting patterns on EP Resolution P9\_TA(2022)0243 (European Parliament, 2022b)*



*Note. Data retrieved from MEP Watch (2022a).*

**Figure 5**

*Voting patterns on EP Resolution P9\_TA(2022)0302 (European Parliament, 2022d).*



*Note. Data retrieved from MEP Watch (2022b).*

Therefore, it can be argued that there is good reason to believe that there would be nine member states willing to enhance cooperation on creating an EU right to abortion.

## **7. Compliance with the EU Treaties and Law**

*Does the enhanced cooperation comply with the Treaties and Union Law?*

The issue tackled by this question is concerned with whether protecting abortion at the EU level would be consistent with the Treaties of the EU and EU law. This is a broad question, that might require an entire analysis of its own, however, the attempt here will be to lay out the major arguments related to compliance and open new allies for research. In order to argue that the protection of abortion at the EU level is in line with the Treaties, it is necessary to look at competence, fundamental rights and the principle of subsidiarity.

## 7.1. Competence

As outlined in Section IV.2., Articles 2-6 of the TFEU outline the distribution of competences in the EU. According to the TFEU, healthcare is an exclusive area of competence of member states, which means that transferring the competence of regulating abortion from the national to the EU level has consequences for the regulation of healthcare policy overall. While enhanced cooperation is designed to transfer competences, from the national level of participating states to that of the EU, it has never been applied to a policy area where the EU has a supportive role only. The existing enhanced cooperation initiatives in the Union broadly relate to the internal market, for example in the cases of enhanced cooperation on divorce law or financial transaction tax (Antoniolli, 2019, p. 88). The effort to transition from a non-exclusive competence to an exclusive competence, which would be the case for a right to abortion, may give way to significant legal and political challenges. It is important to carefully consider the consequences that this might have on other aspects of healthcare policy, all of which are currently regulated at the national level.

With regard to Article 168 of the TFEU, which regulates public health in the EU, it is evident that the EU currently has a purely supportive role when it comes to healthcare. Changes to this competence would imply modification to the EU Treaties, which is not what enhanced cooperation is envisioned to do (Antoniolli, 2019, p. 88).

*“Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health.”* (Article 168, TFEU)

Enhanced cooperation would counter the provision on public health explicitly. Even if enhanced cooperation would only seek to establish a minimum standard for the respect of the right to abortion, this would interfere with Article 168 of the TFEU. The EU currently has no regulation that directly affects the functioning of member states' domestic healthcare systems, as clarified in the Commission's responses to 12 out of the 14 parliamentary questions analysed. Therefore, considering that EU case law establishes that abortion is a healthcare service (Fabbrini, 2011, p. 24), arguing in favour of the transfer of competence on issues of healthcare, with specific reference to abortion, seems challenging under the current legal framework.

## 7.2. Fundamental rights

Despite the fact that the previous section has explained the inconsistencies between EU treaties and the proposal for enhanced cooperation, it is important to note other potential avenues on the basis of which enhanced cooperation can be justified. In the context of the CFR, which is binding among member states, it can be argued that restrictive abortion laws prevent full compliance with EU laws. In such a case, the status quo does not truly comply with EU treaties, as it leads to preventable violations of the fundamental rights of EU citizens. Therefore, enhanced cooperation not only complies with the CFR but would advance the protection of such rights.

Fundamental rights have been violated in member states where restrictive abortion laws have led to death, or serious health consequences for the women who have been denied abortion (European Parliament, 2021c). According to some EP resolutions, denial of abortion services constitutes a form of violence against women, as well as a tool for further marginalisation of groups which face discrimination, including racialised women, individuals with gender non-conforming identities, ethnic and religious minorities and persons from economically disadvantaged backgrounds. In one parliamentary question to the Commission, 47 MEPs asked for clarification on the applicability of the CFR to a case where a pregnant Polish woman died after being denied an abortion (Arvanitis et al., 2021). Considering the rule of law issues raised with the Polish Constitutional Tribunal, and the increasing backsliding on Poland's respect for human rights, the EU Commission is asked how it would safeguard the "women's right to bodily integrity, autonomy and health, as provided for by Article 3 of the Charter of Fundamental Rights". The Commission's response is that member states are responsible for ensuring "that fundamental rights are effectively respected" (Arvaniti et al., 2021). Therefore, under the current status quo, Poland's government is able to enact a restrictive abortion law and violate rights set out by the CFR, due to its national competence. Furthermore, citizens can only resort to domestic judicial recourse, as Poland does not recognise CJEU's jurisdiction in matters pertaining to the CFR (Fabbrini, 2011, p. 64).

It is not difficult then to argue that enhanced cooperation on the right to abortion and transferring the competence over this issue to the EU level would lead to better

compliance with the CFR. The decriminalisation of abortion is associated with compliance with human rights treaties, and a range of international instruments and agreements have been put in place to emphasize the importance of access to abortion as a method of protecting human rights (European Parliament, 2022b). It is precisely out of this that the debate on the inclusion of the fundamental right to abortion has emerged, and it is important to take into account how such enhanced cooperation could improve compliance with the CFR.

### **7.3. Subsidiarity**

One of the fundamental principles of the EU is the principle of subsidiarity, enshrined in Article 5(3) of the TEU and Article 5 of the TFEU. According to this principle, issues in the EU should always be dealt with at the lowest possible level, and the EU's intervention is only justified if member states cannot achieve the objective individually (*Principle of Subsidiarity*, n.d.). Therefore, if a policy area can be effectively regulated at the member state level, it should not constitute an exclusive competence of the EU. This is the logic that is behind the regulation of healthcare, and thereby abortion, at the national level. In order to justify the transfer of this competence on the EU level, it is necessary to effectively argue that regulating abortion at the national level does not lead to efficient outcomes and that transferring this policy area to the EU level would be beneficial. There are numerous reasons why regulating abortion at the member state level has proven to be detrimental, as shown by the differentiation in the access to abortion across the Union, which has led to inequality in the respect for fundamental rights that EU citizens are afforded. The issue with this argument is that in the context of enhanced cooperation, the status quo would not change for those countries that choose not to participate in the cooperation. Therefore, non-participating member states would continue to enjoy the ability to regulate or restrict abortion at the national level. Even for those participating states which have been criticised for tolerating extra-legal barriers to abortion, such as in the cases where conscientious objection is present, supranational protection may not necessarily make a positive difference. Such states would be able to retain smaller barriers unless the enhanced cooperation is formulated in a precise way which regulates waiting times and counselling as well. Arguably then, there is no added benefit from the transfer of competences, apart from a soft mechanism of pressure and transparency. Soft mechanisms should not be undermined in their ability



to affect compliance, however, it can be argued that the added soft benefits are not enough to justify the curbing of the principle of subsidiarity in this case. The added benefit would therefore, emerge more clearly only if all member states participate in the supranational protection of the right to abortion, which as shown in Section IV.5. is currently not possible.

#### **7.4. Lack of compliance**

To conclude this section, which is perhaps most consequential for the feasibility of enhanced cooperation, it can be argued that the enhanced cooperation on regulating abortion would not be in line with the current Treaties of the EU. For the scope of this paper, it is difficult to envision compelling legal arguments to overcome the challenges posed by the distribution of competences in the EU and the principle of subsidiarity currently. However, it is possible that not all legal aspects have been captured through this analysis, which in its own right is limited. As such, while the distribution of competence makes it quite clear that healthcare is an exclusive national competence, the other aspects such as fundamental rights and the principle of subsidiarity might give way to more flexible interpretation. Therefore, for the purposes of this research, enhanced cooperation on the right to abortion does not fully comply with EU treaties and law.

#### **8. Internal market & trade**

*Does the enhanced cooperation undermine the internal market, economic, social and territorial cohesion?*

*Does it constitute a barrier in trade between member states or distort competition between them?*

Both of these questions will be tackled together, as they represent aspects of enhanced cooperation related to the internal market and trade. The issue at hand is related to the economic consequences of enhanced cooperation on the right to abortion, which is a complex issue but for this paper will be tackled in a more simplified manner related to differentiated integration. It is beyond expertise that can be offered in this research to discuss specific dynamics related to competition, trade law, and the internal market. In any case, relying on the data considered in this literature, the status quo on differentiated

access to abortion services across the Union coexists with the free internal market of the EU. Enhanced cooperation would reinforce this differentiation, whereby member states with restrictive abortion laws that would not join the enhanced cooperation would retain their restrictive laws, while those states with more liberal laws would retain such laws. The EU case law, in the *Grogan case*, the CJEU established that abortion is a service, and as such citizens cannot be subject to restrictions on their free movement, if they travel to access such services (Fabbrini, 2011). In the case that enhanced cooperation is implemented, this would not change. Considering that none of the EP resolutions or parliamentary questions analysed offers any insight into the interaction between protecting abortion and issues of the internal market or free trade, the conclusion, in this case, will be that there are no direct consequences that would emerge out of the enhanced cooperation.

However, it is important to leave some space for discussion, as enhanced cooperation on this right, depending on the formulation of a hypothetical proposal, could include provisions on access to pharmaceuticals used in the provision of this service. In such cases, the market consequences would be more salient and would need to be analysed with respect to relevant EU law. However, a simpler cooperation which would resemble the recognition of a right to safe and legal abortion, which does not stipulate more specific conditions would hardly interact with trade law.

For the purposes of this analysis, the answer to these two questions is that enhanced cooperation on abortion would not affect trade and the internal market any differently than the status quo already does, which is currently in line with EU regulation.

## **9. Effects of enhanced cooperation on non-participating states**

*Does the enhanced cooperation respect the competences, rights and obligations of those Member States which do not participate in it?*

This question deals with the issue of respect for non-participating states, and whether these states would be able to retain their autonomy despite the closer cooperation among other member states. To answer this question it is necessary to keep in mind the current distribution of competences in the EU, as defined by the Treaties. For this criterion to be satisfied, it is necessary to show that the non-participating member states would see no

changes to their competences due to enhanced cooperation. Therefore, this section will firstly look at the competences, rights and obligations of member states, and secondly, it will provide a brief consideration on the effects of enhanced cooperation on the rights of citizens of non-participating states. The latter is not a necessary aspect of satisfying the condition of respect for non-participating member states, as the legal framework here references only respect to member states. However, the effects on EU citizens are an important aspect to consider in light of the discussion at hand.

### **9.1. Governments of non-participating member states**

Enhanced cooperation on the right to abortion would not impose any obligations on non-participating member states' governments or affect their competences. Non-participating member states would retain their right to regulate abortion at the national level. Obligations on compliance with the CFR and EU Treaties would not change. The impact of the enhanced cooperation would only be felt by those member states participating in the enhanced cooperation. Formally speaking, non-participating member states would retain the same rights, obligations and competences as in the absence of enhanced cooperation.

Having said that, it is worth analysing how enhanced cooperation could affect non-participating member states politically. Most of the EP resolutions analysed focus on Poland explicitly, or on other states in the context of the overall state of women's reproductive health in the Union. The resolutions criticise the abortion laws in member states which would likely not participate in the enhanced cooperation, as per the findings of Section IV.6.2. As such, it is worth addressing how enhanced cooperation could affect the position of member states that are not participating in the enhanced cooperation. There are important risks, in terms of fragmentation, that are associated with enhanced cooperation in general. Section I.2.1. of this thesis presents the concerns scholars of differentiated integration have raised when it comes to the centrifugal dynamics of differentiation (Bertolini & Dawson, 2021, p. 646; Kröger & Loughran, 2022, pp. 715-716; Thym, 2017, p. 70). Enhanced cooperation leads to the creation of durable and institutionalised divisions among member states, even though these divisions may be consensual among member states. While this is not a legal consideration, it is worth noting that enhanced cooperation can be seen as an

exclusionary mechanism (Kröger & Loughran, 2022, pp. 715-716). As such, it could be argued that non-participation in an issue such as abortion, which beyond regulating the right to access this service, may send a virtue signal about the ideals of a member-state, can negatively affect the position of that state in the Union. Still, formally, the enhanced cooperation would not affect the rights, obligations and competences of the non-participating member state, and as such this legal condition would be satisfied. However, important political considerations would accompany such enhanced cooperation.

## **9.2. Citizens of non-participating member states**

A more complex consideration is that on the effect of enhanced cooperation on the rights of citizens of non-participating member states. Namely, under the status quo, citizens of the EU have different rights based on their member state of residence when it comes to access to abortion. Therefore, differentiation already exists as national legislations are diverse (Berthet, 2022). However, this is not an example of differentiated integration, as currently there is no integration at the EU level on regulating abortion. Potential enhanced cooperation, where some member states would agree on constitutionally protecting the right to abortion at the EU level would lead to a de jure differentiated integration on the rights of EU citizens. By doing that, it would legitimate the EU-level protection of a right of only those women who reside in countries with liberal abortion laws which would set up a legal inequality in the right afforded at the EU level to citizens. The potential detrimental effects that this would have on the principle of equality are to be considered carefully, considering that differentiated integration has not been applied to such a right previously. Considering the erosion of the rule of law and the democratic deficit in some member states, it is necessary to analyse enhanced cooperation on the right to abortion, or any human right for that matter, in a broader legal and socio-political context, especially in terms of its long-term consequences for the principle of equality, democracy and legitimacy.

As opposed to that, it could be argued that this does not change the reality, whereby currently in the EU there is de-facto inequality when it comes to accessing safe and legal abortion depending on the member state of residence. Still, while enhanced cooperation does not affect the competences, rights and obligations of EU member

states governments, it might affect the rights of the citizens of these member states, which could bear significant consequences.

## **10. Findings**

The research finds that out of the nine conditions for enhanced cooperation set out in the research design, six have been fully satisfied, two have been partially satisfied, and one has not been satisfied (see Table 3). Therefore, the central answer to the research question is that while for the most part, the criteria for enhanced cooperation as set out by the Treaties has been met, there are incompatibilities with EU Treaties and EU law which limit the legal potential of enhanced cooperation on the right to abortion.

One of the main themes that emerge as relevant in this analysis is the role of the distribution of competences in the EU and the effect that this might have on the regulation of the right to abortion. Section IV.2. shows that regulating abortion is a form of healthcare policy, and as such subject to the exclusive competence of member states. The supranational institutions of the EU, such as the Commission, can limit themselves only to providing a supportive role to member states. Therefore, apart from considerations that relate to member states' obligations under the CFR or other founding treaties of the EU, there is no circumstance under which the EU can interfere with domestic legislation on abortion. Even in those cases, there are limited areas of intervention that where the EU can exercise any pressure on member states, as seen in the case of violations of the CFR in the context of the restrictive abortion law in Poland. In any case, abortion is a policy issue that can be subject to enhanced cooperation because it is part of the EU's non-exclusive competences, hence this condition is satisfied.

The most expansive section in the analysis on the legal feasibility of enhanced cooperation on the right to abortion is Section IV.3., which provides an overview of how this enhanced cooperation could further the objectives of the Union. The research finds that enhanced cooperation on the right to abortion can be a valuable tool in countering backsliding on women's rights, which can positively contribute to some of the EU's objectives as set out in Article 3 TEU. Namely, the most significant impact of enhanced cooperation would be made on promoting gender equality, non-discrimination, social justice, citizens' well-being and territorial cohesion. Currently,

restrictive abortion laws specifically disadvantage women and marginalised communities and exacerbate inequalities between men and women, as well as women of different economic backgrounds. In light of the increasing backsliding on women's rights that is mentioned in the data, whereby movements against the right to abortion are becoming increasingly diffused in the Union, enhanced cooperation would ensure the supranational protection of the access to abortion and prevent backsliding in participating states. In a less direct way, it might contribute to soft mechanisms of pressure on issues of abortion for non-participating states. Additionally, enhanced cooperation could increase territorial cohesion by improving access to abortion for rural women and women from more remote parts of the Union, who are currently disadvantaged when accessing abortion. Cooperation between member states can be a valuable tool for improving access, both through supranational promotion and through joint efforts on data collection and exchange of good practices. Therefore, the condition of enhanced cooperation advancing the objective of the Union is satisfied.

Enhanced cooperation is a measure of last resort, and should only be used if no other alternatives exist. As such in Section IV.4., this research finds that there are few alternatives that can provide the same level of protection as enhanced cooperation would. However, there is one alternative that emerges as potentially relevant, which relates to the application of Directive 2004/113/EC to abortion services. This is an interesting alternative option which would expand access to abortion and has been considered in this research in some detail. It is an important underexplored possibility, and as such it is worth looking into more deeply in future research. The application of this Directive to abortion services might provide supranational protection of access to abortion services without defining abortion per se as a separate right. As such, it could be a less contentious way to improve access to abortion. Other alternatives, such as the inclusion of the right to abortion in the next EU Health Strategy, as well as the financial and political support to civil society actors promoting access to abortion were found to be unfeasible and inadequate alternatives to enhanced cooperation. Therefore, with some reserve, the finding is that enhanced cooperation is the only way to establish the right to abortion as a right in the EU currently, making the condition of "last resort" partially satisfied. However, this research does not exclude that other alternatives, such

as the application of the Directive can be compelling and invites further research on this issue as it might hold important potential for improving gender equality in the Union.

As opposed to the previous section, Section IV.5. provides a straightforward answer to the question of whether it is possible to envision a unified approach to abortion by the Union as a whole. This section finds that it is both legally and politically impossible to envision a unified approach to the right to abortion currently. This is due to the political controversy surrounding the issue, with member states like Poland which have been backtracking access to abortion and other member states, like Greece, Croatia and Italy, where extra-legal barriers to abortion are not addressed adequately by governments. Political consensus on the issue of abortion, therefore, seems difficult to envision. However, even if most member states were to be more politically aligned, the Maltese Protocol No 7 represents a legal barrier to a unified approach to abortion. The EU cannot, according to its Treaties, impose any measures that would affect Malta's total ban on abortion. As such, any attempts for the regulation of this issue at the EU level would have to be subject to differentiated integration. This condition is considered to be satisfied.

For enhanced cooperation to be permissible, there should be at least nine participating member states. The findings of this research are hypothetical, but there is credible reason to believe that at least nine member states would be interested in enhanced cooperation on the right to abortion. This finding is based on the analysis of domestic laws on abortion and on voting patterns to the two EP resolutions which propose the supranational protection of the right to abortion in the CFR. When analysing the two relevant EP resolutions, the finding was that there are at least nine member states where, in both cases, the majority of the MEPs voted in favour of supranational protection of the right to abortion. These are Luxembourg, Ireland, Sweden, Finland, Denmark, Latvia, France, Netherlands, Spain, Estonia and Romania. Henceforth, it can be concluded that this condition for enhanced cooperation would be satisfied as well.

The only condition that this research has found not to be satisfied, is the condition that the enhanced cooperation should comply with the founding Treaties of the EU and EU law. The findings of this research are that enhanced cooperation on the right to abortion would require a modification of the exclusive competence of member states over

healthcare, as this would be an unprecedented change to this competence. Furthermore, the enhanced cooperation would comply with and even advance respect for the CFR. However, when it comes to respecting the principle of subsidiarity, enshrined in Article 5 of the TFEU, it is difficult to argue that the selective protection of the right to abortion at the supranational level would bring added benefits that would justify transferring this policy domain to the EU level. Considering that the status quo of differentiation between member states would stay the same, there is no good reason to curb the principle of subsidiarity. For this reason, the finding, in this case, is that the enhanced cooperation would not fully respect the EU Treaties and law.

Furthermore, this research finds that enhanced cooperation would not undermine the internal market or constitute a barrier in trade, as it would not modify the status quo in terms of the functioning of the internal market. Abortion, according to EU law, is currently considered a service, and this will not change in the case of enhanced cooperation. Therefore, this condition is considered to be satisfied.

Finally, the enhanced cooperation would not affect the competences, rights and obligations of non-participating member states. National governments of non-participating states would retain their right to regulate abortion domestically, without being subject to supranational obligations for compliance. Section IV.9.2. provides a brief reflection on the way that this cooperation would affect the rights of citizens of non-participating states, arguing that enhanced cooperation on the establishment of a right can create *de jure* inequalities between EU citizens. While this condition is considered satisfied, since member states' governments would not be affected by the enhanced cooperation, it is important to normatively consider the consequences of this enhanced cooperation on EU citizens' equality.

In Table 3, you can find a summary of the findings for each of the conditions devised in this research. The overall conclusion is that enhanced cooperation can only be legally feasible if there are compelling legal arguments to overcome current challenges on the issues of compliance with the EU Treaty, especially on the principle of subsidiarity.



**Table 3***Summary of findings*

<b>Condition</b>	<b>Finding</b>
1. The issue at hand is part of the Union's non-exclusive competences.	Condition satisfied
2. Does enhanced cooperation on this issue further the objectives of the Union, protect its interests and reinforce its integration process?	Condition satisfied
3. The enhanced cooperation is a measure of last resort.	Condition satisfied partially
4. The objectives of the cooperation cannot be attained within a reasonable period by the Union as a whole.	Condition satisfied
5. There are at least nine Member States that would participate in the cooperation.	Condition satisfied
6. The enhanced cooperation complies with the Treaties and Union Law.	Condition not satisfied
7. The enhanced cooperation would not undermine the internal market, economic social and territorial cohesion.	Condition satisfied
8. The enhanced cooperation would not constitute a barrier in trade between Member States or distort competition between them.	Condition satisfied
9. The enhanced cooperation would respect the competences, rights and obligations of those Member States which do not participate in it.	Condition satisfied partially

## CONCLUSION

Abortion continues to be a contentious topic in the EU, with member states taking a variety of positions domestically and internationally on the subject. Considering the threats to women's rights caused by the criminalisation of abortion and extra-legal barriers to accessing this service, EU institutions have over the years attempted to strengthen the supranational protection in accessing abortion in the Union. As such, the purpose of this research is to contribute to the pool of literature seeking to improve access to abortion in the EU, by examining a currently underexplored legal possibility in an increasingly differentiated EU. Therefore, this research began by asking the following research question: *“To what extent is there legal potential for enhanced cooperation in protecting the right to abortion at the EU level?”*. The objectives of this study were to examine whether enhanced cooperation, promoted in the EU as a way to allow those member states willing to integrate more to do so, could be applied to contentious human rights, such as the right to abortion. The research was further driven by the recent call for the establishment of a right to abortion put forward by MEPs of the EP, showing that there is a willingness to address this issue supranationally. However, the issue is still subject to much disagreement, and a unified approach seems unattainable. Hence, the need for exploring legal possibilities of differentiation, both in terms of their benefits and risks. The overall answer to the research question which emerged out of the findings summarised below is that while enhanced cooperation on the right to abortion satisfies most criteria set out by the Treaties, it fails to comply fully with the EU treaties and hence cannot be considered fully legally feasible.

### 1. Summary of findings

The findings of this research shed light on the importance of the distribution of competences in the EU and the implications this has on improving access to abortion at the EU level. This analysis finds that enhanced cooperation would advance the EU's objectives and contribute to gender equality, non-discrimination, social justice and citizen's well-being as well as territorial cohesion. It would provide an important tool for countering backsliding on women's rights and gender equality, a phenomenon considered salient by the EP resolutions analysed. Furthermore, the analysis showed that there are some alternatives to enhanced cooperation and the establishment of a “right to abortion” in the EU, such as the application of Directive 2004/113/EC on

SRHR and access to abortion. This is a valuable finding that merits further exploration in future research as it might provide an opportunity for expanding access to abortion in the EU without establishing a right to abortion. Despite this potential alternative, there is only one way to envision the possibility of establishing a right to abortion in a Union with polarising opinions on abortion among member states – and that is enhanced cooperation. There are at least nine member states that we can credibly argue would be interested in integrating more deeply on the issue of access to abortion, and their cooperation would not undermine the rights, obligations and competences of non-participating member states. Furthermore, enhanced cooperation on the issue of abortion would not affect trade or the internal market, as it would retain the status quo of differentiated integration.

Despite these results which show that for the most part, enhanced cooperation on the right to abortion can be feasible according to the criteria set out by the Treaties, there is one finding which points to the infeasibility of such cooperation. With reference to whether enhanced cooperation on the right to abortion would comply with EU Treaties and law, this research finds that there are significant legal barriers to the supranational protection of a right to abortion set out by the EU acquis. The closer integration on the right to abortion is in contradiction with the distribution of competences on healthcare set out by the TFEU, according to which healthcare is an exclusive competence of member states. Any regulation on access to abortion at the EU level would interfere with this provision and affect compliance with the acquis. The enhanced cooperation is in line with the CFR, as it would protect the fundamental rights of women. An additional legal barrier is presented by the EU's principle of subsidiarity, whereby justifying the transfer of abortion policy to the EU level might not provide sufficient added benefits in comparison to the status quo. The differentiation between member states would remain unchanged, and member states with restrictive abortion laws would be able to maintain such regulations. As such, there would be the need for strong and compelling reasons to argue that the right to abortion is better regulated at the EU level when such regulation would be selective and applicable only to some member states. Considering this finding, the answer to the research question is that there are some legal justifications for enhanced cooperation in favour of protecting the right to abortion in the EU, with regard to the advancement of the EU's objectives and the inability to

envision unity on the issue. However, legal feasibility is significantly impeded by the lack of compliance with the EU Treaties and law, which would arise out of the establishment of a new right in the EU which would only be applicable to some member states. Therefore, enhanced cooperation on the right to abortion would be feasible if formulated in a way that succeeds in arguing against the incompatibility with EU Treaties, especially on the principle of subsidiarity and Article 168 of the TFEU on public health.

## **2. Reflections on research design and findings**

This research has aimed to provide a comprehensive overview of the possibilities of establishing the right to abortion through partial cooperation among member states. Despite the detail-oriented analysis, there are some limitations to the research design worth taking into consideration when analysing the results.

Firstly, considering the comprehensive nature of the research there is a possibility that the scope of the research question touched on a variety of topics related to the legal, political and economic integration of the Union. The data selection was designed in order to provide a variety of perspectives from different institutional actors, showing the perspectives of the EP, Council and Commission to an extent. This was sufficient for answering some of the research sub-questions, especially those related to the competences of the EU, the possibility of nine member states participating, and the feasibility of a unified approach. However, the data selected was arguably not sufficient for answering some of the sub-questions, as it did not allow for a fully informed analysis on the complex dynamics, especially related to the economic and Treaty provisions of the EU. For example, there was limited data relating to the dynamics of the internal market and the consequences of supranational protection of the right to abortion on the financial and economic aspects of EU integration. With the help of secondary sources, particularly on case law, it was possible to answer these questions accurately. The question with the most room for interpretation was the question on the compliance with EU law and Treaties, the one condition for enhanced cooperation that this research finds to be not satisfied. The Treaties of the EU are extensive and it was difficult, using the data selected, to fully capture the complex legal interpretations of the Treaties that could be relevant to enhanced cooperation on the right to abortion. For this

reason, that section is limited in scope and relies on the information available, not excluding that alternative legal arguments can be made. Considering this limitation, it is important to take this into account as a possible area for future research which would focus exclusively on the compatibility between the Treaties and enhanced cooperation on access to abortion.

Secondly, the data selection was primarily focused on the EP, with parliamentary questions answered by the Commission and Council. This was positive in that it provided a good overview of different institutional actors. However, to truly understand the interest in enhanced cooperation on the issue, a different approach could also have been beneficial. Interviews with stakeholders, especially from the Commission, which would be responsible for initiating any enhanced cooperation, would have been particularly valuable in understanding aspects of the research question both legally and practically. However, due to resource and time constraints, this research relied on primary sources as a way to understand the dynamics surrounding the issue of abortion in the EU. By compensating with secondary sources, the research nonetheless produced reliable findings, which can be taken as a starting point for future research.

### **3. Areas of future research**

In light of these findings, and the societal and political relevance of the topic at hand, there are several alleys for future research that emerge as highly relevant.

This thesis provides an answer to whether enhanced cooperation could be applied to the issue of abortion. While that is an important and valuable first step to envisioning potential cooperation on the issue, the research does not focus on the procedural nature of enhanced cooperation. For example, it does not deal with the question of “how” such enhanced cooperation could come into being in terms of its legal form. Considering the difficulty in amending the CFR or any Treaty document, this is an important question that needs to be considered by future research to complement the findings of this research.

Future research could also look into further legal arguments on the compatibility between enhanced cooperation on the right to abortion and the EU laws and Treaties, as tackled in part by Section IV.7. of this thesis. Considering the complexity of the

Founding Treaties, this question opens a set of questions about the possibility of transferring competences on public health that could not be considered in their entirety by this thesis.

An important area for future research that emerges as particularly relevant to the right to abortion is the possibility of applying Directive 2004/113/EC to SRHR services and specifically to abortion services. This Directive is a law which regulates the implementation of the principles of equal treatment between men and women in the access to services in the Union but currently does not apply to SRHR services. As this research has shown, this constitutes an unexplored possibility for the expansion of access to abortion services in the EU. Future research could consider the application or amendment of this Directive so as to make it applicable to abortion services. This could be conceived of as a unified EU effort, or as an enhanced cooperation among certain member states, considering that the directive is part of EU secondary law. There is currently some literature on this topic, and it is a Directive mentioned in one of the EP resolutions considered in this research. As such, there is a possibility for expanding the debate on this directive, both with regard to enhanced cooperation and with regard to a unified EU approach.

Finally, future research should seek to further address the literature gap on enhanced cooperation and differentiated integration, and gender equality. The differentiation of approaches taken by member states with regard to contentious issues related to gender equality, taking into account not only abortion but also gender-based violence and gender identity, could have important consequences for the future of EU political integration. Therefore, understanding the interactions between differentiated integration and human rights is imperative.

This research sought to contribute to the pool of evidence-based research on how to protect access to abortion in the EU, in line with the Union's gender equality commitments and the work of civil society actors to ensure women's and human rights for all EU citizens. It is essential that issues of human rights and gender equality continue to be subject to rigorous academic research, especially in the context of an increasingly differentiated EU, with the scope of preventing backsliding on human and women's rights in Europe and in the world.

## BIBLIOGRAPHY

### Books and articles

- Antoniolli, L. (2019). “United in Diversity”? Differentiated Integration in an Ever Diverse European Union. In L. Antoniolli, L. Bonatti, & C. Ruzza (Eds.), *Highs and Lows of European Integration* (pp. 83–102). Springer International Publishing. [https://doi.org/10.1007/978-3-319-93626-0\\_6](https://doi.org/10.1007/978-3-319-93626-0_6)
- Berthet, V. (2022). United in Crisis: Abortion Politics in the European Parliament and Political Groups’ Disputes over EU Values. *JCMS: Journal of Common Market Studies*, 60(6), 1797–1814. <https://doi.org/10.1111/jcms.13378>
- Bertolini, E., & Dawson, M. (2021). Fundamental Rights as Constraints to and Triggers for Differentiated Integration. *Swiss Political Science Review*, 27(3), 637–653. <https://doi.org/10.1111/spsr.12443>
- Bittner, M. (1990). The IRAC Method of Case Study Analysis. *Social Studies*, 81(5), 227–230. <https://doi.org/10.1080/00377996.1990.9957530>
- Caracciolo di Torella, E. (2022). Directive 2004/113/EC on Gender Equality in Goods and Services – In search of the potential of a forgotten Directive. *Luxembourg: Publications Office of the European Union*. <https://doi.org/10.2838/21188>
- Center for Reproductive Rights. (2022). *European Abortion Laws: A Comparative Overview*. <https://reproductiverights.org/center-reproductive-rights-european-abortion-laws/>
- De Zordo, S., Zanini, G., Mishtal, J., Garnsey, C., Ziegler, A., & Gerds, C. (2021). Gestational age limits for abortion and cross-border reproductive care in Europe: a mixed-methods study. *BJOG: An International Journal of Obstetrics & Gynaecology*, 128(5), 838–845. <https://doi.org/10.1111/1471-0528.16534>
- Eriksen, E. O. (2022). On the legitimacy of differentiated integration. In B. Leruth, S. Gänzle, & J. Trondal (Eds.), *The Routledge Handbook of Differentiation in the European Union* (pp. 34–49). Routledge. <https://doi.org/10.4324/9780429054136-4>
- Fabbrini, F. (2011). The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: Roe V. Wade on the Other Side of the Atlantic? *Columbia Journal of European Law*, 18(1). <https://doi.org/10.2139/ssrn.2578665>
- Fabbrini, F. (2023). How EU Membership Transformed Ireland’s Socio-Legal Norms: The Case of Abortion. *Verfassungsblog: On Matters Constitutional*.
- Fine, J. B., Mayall, K., & Sepúlveda, L. (2017). The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally. *Health and human rights*, 19(1), 69–80.
- Hervey, T., & Sheldon, S. (2019). Abortion by telemedicine in the European Union. *International Journal of Gynecology & Obstetrics*, 145(1), 125–128. <https://doi.org/10.1002/ijgo.12738>

- Hofelich, T. C. (2022). De facto differentiation in the European Union: circumventing rules, law, and rule of law. In B. Leruth, S. Gänzle, & J. Trondal (Eds.), *The Routledge Handbook of Differentiation in the European Union* (pp. 66–80). Routledge. <https://doi.org/10.4324/9780429054136-6>
- Kastelik-Smaza, A. (2018). The application of the Charter of Fundamental Rights of the EU in Poland. *AUC IURIDICA*, 64(4), 101–112. <https://doi.org/10.14712/23366478.2018.37>
- Kelemen, R. D. (2019). Is differentiation possible in rule of law? *Comparative European Politics*, 17(2), 246–260. <https://doi.org/10.1057/s41295-019-00162-9>
- Kröger, S., & Loughran, T. (2022). The Risks and Benefits of Differentiated Integration in the European Union as Perceived by Academic Experts. *JCMS: Journal of Common Market Studies*, 60(3), 702–720. <https://doi.org/10.1111/jcms.13301>
- Kröger, S., Lorimer, M., & Bellamy, R. (2021). The Democratic Dilemmas of Differentiated Integration: The Views of Political Party Actors. *Swiss Political Science Review*, 27(3), 563–581. <https://doi.org/10.1111/spsr.12449>
- Kroll, D. (2022). Promise unfulfilled? Managing differentiated integration in EU secondary law through enhanced cooperation. In B. Leruth, S. Gänzle, & J. Trondal (Eds.), *The Routledge Handbook of Differentiation in the European Union* (pp. 170–183). Routledge. <https://doi.org/10.4324/9780429054136-13>
- Leruth, B., Gänzle, S., & Trondal, J. (2022). Introduction. In B. Leruth, S. Gänzle, & J. Trondal (Eds.), *The Routledge Handbook of Differentiation in the European Union* (1st ed., pp. 1–16). Routledge. <https://doi.org/10.4324/9780429054136-1>
- Leuffen, D. (2022). The European Union as a System of Differentiated Integration. In D. Leuffen, B. Rittberger, & F. Schimmelfennig (Eds.), *Integration and Differentiation in the European Union* (2nd ed., pp. 21–49). Springer International Publishing. [https://doi.org/10.1007/978-3-030-76677-1\\_2](https://doi.org/10.1007/978-3-030-76677-1_2)
- Leuffen, D., Rittberger, B., & Schimmelfennig, F. (2022). Introduction. In D. Leuffen, B. Rittberger, & F. Schimmelfennig (Eds.), *Integration and Differentiation in the European Union* (2nd ed., pp. 1–19). Springer International Publishing. <https://doi.org/10.1007/978-3-030-76677-1>
- Lock, T., & Layden, P. (2011). Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE National Report for the United Kingdom). *University of Edinburgh, School of Law, Working Papers*, 1–47. <https://doi.org/10.2139/ssrn.1940381>
- MacRae, H. (2013). (Re-)Gendering integration: Unintentional and unanticipated gender outcomes of European Union policy. *Women's Studies International Forum*, 39, 3–11. <https://doi.org/10.1016/j.wsif.2013.04.002>
- Markakis, M. (2020). Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles. *Journal of International Economic Law*, 23(2), 489–507. <https://doi.org/10.1093/jiel/jgaa004>



- Milenković, M. (2022). Trajectories of differentiated EU integration for the Western Balkans. In B. Leruth, S. Gänzle, & J. Trondal (Eds.), *The Routledge Handbook of Differentiation in the European Union* (pp. 551–564). Routledge.  
<https://doi.org/10.4324/9780429054136-37>
- Mondo, E. (2014). The role of values in EU bioethics politics. *Politique Européenne*, 45(3), 122–150. <https://doi.org/10.3917/poeu.045.0122>
- Parker, J., & Kirby, P. (2022, November 16). Malta moves to ease EU’s last total ban on abortion. *BBC*. <https://www.bbc.com/news/world-europe-63650476>
- Pedreschi, L., & Scott, J. (2022). *External Differentiated Integration: Legal Feasibility and Constitutional Acceptability*. *Policy Brief*. <https://doi.org/10.2870/695893>
- Peers, S. (2015). *Trends in differentiation of EU law and lessons for the future: in-depth analysis*. Directorate-General for Internal Policies of the Union, European Parliament. <https://doi.org/doi/10.2861/90055>
- Saurugger, S., & Terpan, F. (2022). Differentiation and the European Court of Justice. In B. Leruth, S. Gänzle, & J. Trondal (Eds.), *The Routledge Handbook of Differentiation in the European Union* (pp. 231–247). Routledge.  
<https://doi.org/10.4324/9780429054136-17>
- Schraff, D., & Schimmelfennig, F. (2020). Does differentiated integration strengthen the democratic legitimacy of the EU? Evidence from the 2015 Danish opt-out referendum. *European Union Politics*, 21(4), 590–611.  
<https://doi.org/10.1177/1465116520949698>
- Stubb, A. C.-G. (1996). A Categorization of Differentiated Integration. *JCMS: Journal of Common Market Studies*, 34(2), 283–295. <https://doi.org/10.1111/j.1468-5965.1996.tb00573.x>
- Thym, D. (2017). Competing models for understanding differentiated integration. In B. De Witte, A. Ott, & E. Vos (Eds.), *Between Flexibility and Disintegration* (pp. 28–75). Edward Elgar Publishing. <https://doi.org/10.4337/9781783475896.00009>
- Tucak, I., & Blagojević, A. (2020). Abortion in Europe. *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 4, 1135–1174.  
<https://doi.org/10.25234/eclit/11943>
- Woelk, J. (2019). From Enlargement Perspective to “Waiting for Godot”? Has the EU Lost Its Transformative Power in the Balkans? In *Highs and Lows of European Integration* (pp. 27–47). Springer International Publishing.  
[https://doi.org/10.1007/978-3-319-93626-0\\_3](https://doi.org/10.1007/978-3-319-93626-0_3)

## European Union Treaties

Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to

the Treaties on which the European Union is founded - Protocol No 7 on abortion in Malta. (2003). *Official Journal L 236*, p. 947. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12003T/PRO/07>

Treaty on European Union (TEU). (2016). *Official Journal C 202* (consolidated version). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT>

Treaty on the Functioning of the European Union (TFEU). (2016). *Official Journal C 202* (consolidated version). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT>

### **European Parliament resolutions**

European Parliament. (2019). Resolution P8\_TA(2019)0111 on experiencing backlash in women's rights and gender equality in the EU.

European Parliament. (2020a). Resolution P9\_TA(2020)0039 on the EU priorities for the 64th session of the UN Commission on the Status of Women.

European Parliament. (2020b). Resolution P9\_TA(2020)0336 on abortion rights in Poland.

European Parliament. (2021a). Resolution P9\_TA(2021)0058 on challenges ahead for women's rights: more than 25 years after the Beijing Declaration and Platform for Action.

European Parliament. (2021b). Resolution P9\_TA(2021)0314 on sexual and reproductive health and rights in the EU, in the frame of women's health.

European Parliament. (2021c). Resolution P9\_TA(2021)0455 on the first anniversary of the de facto abortion ban in Poland.

European Parliament. (2021d). Resolution P9\_TA(2021)0500 on equality between women and men in the European Union in 2018-2020.

European Parliament. (2022a). Resolution P9\_TA(2022)0206 the impact of the war against Ukraine on women.

European Parliament. (2022b). Resolution P9\_TA(2022)0243 on global threats to abortion rights: the possible overturn of abortion rights in the US by the Supreme Court.

European Parliament. (2022c). Resolution P9\_TA(2022)0289 on intersectional discrimination in the EU: socio-economic situation of women of African, Middle-Eastern, Latin American and Asian descent.

European Parliament. (2022d) Resolution P9\_TA(2022)0302 on US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and Women's health in the EU.

European Parliament. (2022e). Resolution P9\_TA(2021)0419 on the state law relating to abortion in Texas, USA.

## **European Parliament parliamentary questions**

- Arvanitis, K., Villumsen, N., Papadimoulis, D., Aubry, M., Spurek, S., Gozi, S., ...  
López Aguilar, J.F., & European Commission. (2021). Parliamentary question and  
answer E-005341/2021 on the death of a pregnant Polish woman after being  
denied an abortion.
- Colin-Oesterlé, N., & European Council (2022). Parliamentary question and answer E-  
002301/2022 on inclusion of the right to abortion in the Charter of Fundamental  
Rights.
- European Commission. (2020). Answer to parliamentary question P-006345/2020 on  
Poland's abortion ban ruling.
- Gregorová, M., & European Council (2021). Parliamentary question and answer E-  
000862/2021 on abortion rights for Polish women in other Member States.
- In 't Veld, S., Rafaela, S., & European Commission (2020). Parliamentary question and  
answer E-001049/2020 on right to safe abortion for war rape victims.
- In 't Veld., Matic, P.F., & European Commission. (2022). Parliamentary question and  
answer E-002345/2022 on overturning of the US federal constitutional protection  
of abortion rights and EU-US cooperation on law enforcement.
- Kizilyürek, N., & European Commission (2022). Parliamentary question and answer E-  
002522/2022 on abortion law in Malta.
- Kloc, I., & European Council (2021). Parliamentary question and answer P-  
002433/2021 on the inclusion of abortion in post-Cotonou partnership agreement.
- Papadakis, K., & European Commission (2020). Parliamentary question and answer E-  
006029/2020 on judgement banning abortions in Poland.
- Pereira, S. & European Commission (2020). Parliamentary question and answer E-  
005297/2020 on regression in women's rights.
- Rafaela, S., Melchior, K., Solís Pérez, S., Rodríguez Ramos, M. S., Al-Sahlani, A.,  
Vautmans, H., Tolleret, I., Maxová, R., Zacharopoulou, C., & European  
Commission (2020). Parliamentary question and answer E-005924/2020 on the  
situation of abortion rights in Poland.
- Tax, V., Piri, K., & European Commission (2020). Parliamentary question and answer  
E-002422/2020 on abortion ban in Poland.
- Uhrik, M., & European Commission. (2020). Parliamentary question and answer E-  
000870/2020 on access to legal abortion.
- Van Sparrentak, K., Strik, T., Roose, C., Urtasun, E., Reintke, T., Eickhout, B., ...  
Herzberger-Fofana, P., & European Commission. (2022). Parliamentary question  
and answer E-001401/2022 on access to safe abortion for women fleeing the war  
in Ukraine.

## Website references

- Aims and values.* (n.d.). European Union. Retrieved May 17, 2023, from [https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values\\_en](https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en)
- Division of competences within the European Union.* (n.d.). EUR-LEX. Retrieved June 04, 2023, from <https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html>
- Health Strategy.* (n.d.) European Commission. Retrieved June 05, 2023, from [https://health.ec.europa.eu/other-pages/basic-page/health-strategy-0\\_en](https://health.ec.europa.eu/other-pages/basic-page/health-strategy-0_en)
- MEP Watch. (2022a). *B9-0365/2022*.  
<https://mepwatch.eu/9/vote.html?v=147305&country=&eugroup=>
- MEP Watch. (2022b). *B9-0299/2022* .  
<https://mepwatch.eu/9/vote.html?v=145778&country=&eugroup=>
- New cohesion policy.* (n.d.). European Commission. Retrieved June 05, 2023 from [https://ec.europa.eu/regional\\_policy/2021-2027\\_en#:~:text=EU%20Cohesion%20Policy%20contributes%20to,the%20green%20and%20digital%20transition.](https://ec.europa.eu/regional_policy/2021-2027_en#:~:text=EU%20Cohesion%20Policy%20contributes%20to,the%20green%20and%20digital%20transition.)
- Potential: Definition & Legal Meaning.* (n.d.). The Law Dictionary. Retrieved May 3, 2023, from <https://thelawdictionary.org/potential/>
- Principle of subsidiarity.* (n.d.). EUR-LEX. Retrieved May 30, 2023, from <https://eur-lex.europa.eu/EN/legal-content/glossary/principle-of-subsidiarity.html#:~:text=Specifically%2C%20it%20is%20the%20principle,national%2C%20regional%20or%20local%20level>
- Touro Law Center. (2006). *Learning to Work With IRAC*.  
<https://www.tourolaw.edu/ADP/StudySkills/IRAC.aspx>
- World Health Organization. (2021). *Abortion*. <https://www.who.int/news-room/fact-sheets/detail/abortion>

## APPENDIX I: DATA

**Table 4**

*Primary sources organised by type of document*

<b>Document number</b>	<b>Year</b>	<b>Name of document</b>	<b>Type of document</b>
12003T/PRO/07	2003	Protocol No 7 on abortion in Malta	Treaty
P8_TA(2019)0111	2019	Experiencing backlash in women's rights and gender equality in the EU	European Parliament resolution
P9_TA(2020)0039	2020	The EU priorities for the 64th session of the UN Commission on the Status of Women	European Parliament resolution
P9_TA(2020)0336	2020	Abortion rights in Poland	European Parliament resolution
P9_TA(2021)0058	2021	Challenges ahead for women's rights: more than 25 years after the Beijing Declaration and Platform for Action	European Parliament resolution
P9_TA(2021)0314	2021	Sexual and reproductive health and rights in the EU, in the frame of women's health	European Parliament resolution
P9_TA(2021)0455	2021	The first anniversary of the de facto abortion ban in Poland	European Parliament resolution
P9_TA(2021)0500	2021	Equality between women and men in the European Union in 2018-2020	European Parliament resolution
P9_TA(2022)0206	2022	The impact of the war against Ukraine on women	European Parliament resolution
P9_TA(2022)0243	2022	Global threats to abortion rights: the possible overturn of abortion rights in the US by the Supreme Court	European Parliament resolution
P9_TA(2022)0289	2022	Intersectional discrimination in the EU: socio-economic situation of women of	European Parliament resolution

		African, Middle-Eastern, Latin American and Asian descent	
P9_TA(2022)0302	2022	US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and Women's health in the EU	European Parliament resolution
P9_TA(2021)0419	2022	The state law relating to abortion in Texas, USA	European Parliament resolution
E-000870/2020	2020	Access to legal abortions	Parliamentary question for written answer
E-001049/2020	2020	Right to safe abortion for war rape victims	Parliamentary question for written answer
E-002422/2020	2020	Abortion ban in Poland	Parliamentary question for written answer
E-005297/2020	2020	Regression in women's rights	Parliamentary question for written answer
E-005924/2020	2020	The situation of abortion rights in Poland	Parliamentary question for written answer
E-006029/2020	2020	Judgment banning abortions in Poland	Parliamentary question for written answer
P-006345/2020	2020	Poland's abortion ban ruling	Parliamentary question for written answer
E-000862/2021	2021	Abortion rights for Polish women in other Member States	Parliamentary question for written answer

P-002433/2021	2021	The inclusion of abortion in the post-Cotonou partnership agreement	Parliamentary question for written answer
E-005341/2021	2021	Written question on the death of a pregnant Polish woman after being denied an abortion	Parliamentary question for written answer
E-001401/2022	2022	Access to safe abortion for women fleeing the war in Ukraine	Parliamentary question for written answer
E-002301/2022	2022	Inclusion of the right to abortion in the Charter of Fundamental Rights	Parliamentary question for written answer
E-002345/2022	2022	Overturning of the US federal constitutional protection of abortion rights and EU-US cooperation on law enforcement	Parliamentary question for written answer
E-002522/2022	2022	Abortion law in Malta	Parliamentary question for written answer

---

**Table 5***Secondary sources organised alphabetically by author*

<b>Year</b>	<b>Title</b>	<b>Author(s)</b>	<b>Retrieved from</b>
2019	“United in Diversity”? Differentiated Integration in an Ever Diverse European Union	Antoniolli, L.	<a href="https://doi.org/10.1007/978-3-319-93626-0_6">https://doi.org/10.1007/978-3-319-93626-0_6</a>
2022	United in Crisis: Abortion Politics in the European Parliament and Political Groups’ Disputes over EU Values	Berthet, V.	<a href="https://doi.org/10.1111/jcms.13378">https://doi.org/10.1111/jcms.13378</a>
2021	Fundamental Rights as Constraints to and Triggers for Differentiated Integration	Bertolini, E., & Dawson, M.	<a href="https://doi.org/10.1111/spsr.12443">https://doi.org/10.1111/spsr.12443</a>
2022	Directive 2004/113/EC on Gender Equality in Goods and Services – In search of the potential of a forgotten Directive	Caracciolo di Torella, E.	<a href="https://doi.org/10.2838/21188">https://doi.org/10.2838/21188</a>
2011	The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: Roe V. Wade on the Other Side of the Atlantic?	Fabbrini, F.	<a href="https://doi.org/10.2139/ssrn.2578665">https://doi.org/10.2139/ssrn.2578665</a>
2019	Abortion by telemedicine in the European Union	Hervey, T., & Sheldon, S.	<a href="https://doi.org/10.1002/ijgo.12738">https://doi.org/10.1002/ijgo.12738</a>



2022	The Democratic Dilemmas of Differentiated Integration: The Views of Political Party Actors	Kröger, S., Lorimer, M., & Bellamy, R.	<a href="https://doi.org/10.1111/spsr.12449">https://doi.org/10.1111/spsr.12449</a>
2014	The role of values in EU bioethics politics	Mondo, E.	<a href="https://doi.org/10.3917/poebu.045.0122">https://doi.org/10.3917/poebu.045.0122</a>
2017	Competing models for understanding differentiated integration	Thym, D.	<a href="https://doi.org/10.4337/9781783475896.00009">https://doi.org/10.4337/9781783475896.00009</a>
2020	Abortion in Europe	Tucak, I., & Blagojević, A.	<a href="https://doi.org/10.25234/eclic/11943">https://doi.org/10.25234/eclic/11943</a>

---

## **ANNEX I: LEGAL FRAMEWORK ON ENHANCED COOPERATION**

### **Article 20 of the Treaty on European Union**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.

3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union.

4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.

### **Treaty on the Functioning of the European Union**

#### **TITLE III**

## **ENHANCED COOPERATION**

### **Article 326**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall comply with the Treaties and Union law.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

### **Article 327**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

### **Article 328**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. The Commission and, where appropriate, the High Representative of the Union for Foreign Affairs and Security Policy shall keep the European Parliament and the Council regularly informed regarding developments in enhanced cooperation.

### **Article 329**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive

competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

### **Article 330**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.

A qualified majority shall be defined in accordance with Article 238(3).

### **Article 331**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission. The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for reexamining the request. On the expiry of that deadline, it shall re-examine the request, in accordance with the procedure set out in the second subparagraph. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall decide on the request. The Council shall act in accordance with Article 330. It may also adopt the transitional measures referred to in the second subparagraph on a proposal from the Commission.

2. Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.

The Council shall confirm the participation of the Member State concerned, after consulting the High Representative of the Union for Foreign Affairs and Security Policy and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act unanimously and in accordance with Article 330. Article 332 (ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex

Articles 11 and 11a TEC) Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

### **Article 333**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.

2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

26.10.2012 Official EN Journal of the European Union C 326/191

3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.

### **Article 334**

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.