Introduction

The Accountability Impasse of the EU's New Economic Governance

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I.1 IS EMU ACCOUNTABILITY 'IMPOSSIBLE'?[1]

The development of the Economic and Monetary Union (EMU) from the early 1990s onwards has been a landmark change in the trajectory of EU integration. While the internal market has historically been seen as the 'core' of the European Union, EMU has increasingly been at the centre of crucial debates in EU law and politics. It is the area where the EU has built powerful new institutions, such as the Eurogroup and European Central Bank (ECB). It is also the area where core normative principles of the EU order – such as solidarity, equality between Member States and competence conferral – have been contested and fleshed out. It has witnessed enormous changes in the vertical balance of power between the Union and its Member States, in areas ranging from financial supervision to fiscal policy and financial assistance. Finally, it has recently become an area in which the EU may have experienced an important 'constitutional moment', namely the development of a genuine fiscal capacity, funded through debt rather than Member State contributions.[2] If the EU has taken a leap forward in the past three decades, this is where the leap is most apparent.

With greater power, authority and innovation, however, come ever more crucial questions about how this new authority ought to be controlled. Previous leaps forward in integration have generally been accompanied by the parallel development of accountability structures designed to keep newly held

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[1] Brandsma, Heidbreder and Mastenbroek, 'Accountability in the Post-Lisbon European Union', 82 *International Review of Administrative Sciences* 4 (2016), 621–637, at 624.

[2] Georgiou, 'Europe's "Hamiltonian Moment"? On the Political Uses and Explanatory Usefulness of a Recurrent Historical Comparison', 51 *Economy and Society* 1 (2022), 138–159.

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EU powers in check. The early development of the Community was therefore quickly followed by a Court of Justice endowing itself with strong powers of judicial review; the development of the single market was accompanied by a simultaneous growth in the authority of the European Parliament; and the establishment in the 1990s of the EU's 'regulatory state' through agencies and Commission delegation equally saw new means of political control, such as comitology and other forms of regulatory oversight.

In the case of EMU, however, the EU has accrued powers without necessarily developing the parallel institutions needed to hold that power to account. To give one prominent example, while the ECB of the early 2020s has a radically different set of powers to that of the late 1990s – such as new unconventional monetary policy instruments and regulatory authority over all large Eurozone financial institutions – it still relies (with some tweaks) on the same set of basic accountability tools it carried from its inception (e.g. press conferences, limited access to documents and sporadic dialogues with the European Parliament).[3]

We therefore have two phenomena side by side. On the one hand, EMU is an increasingly powerful and important element both of EU and of national politics. EMU has prompted a significant politicization of EU integration, leading to greater contestation of its policies and institutions than ever before.[4] In the wake of the financial crisis, some protesters went so far as to attempt to burn down its central bank.[5] At the national level, numerous euro-sceptic political movements have leveraged dissatisfaction with EU economic policy to successfully challenge establishment parties.[6] On the other hand, EMU does not carry the obvious mechanisms of political responsiveness and accountability to temper or respond to this contestation.

This is so because EMU suffers from all of the classical problems of rendering accountability in an EU setting,[7] while adding a few more complications of its very own. Certainly, it is an example of multi-level governance, with a multitude of responsible actors. This creates enormous difficulties for voters, Courts and political bodies in disentangling who is responsible for what. To take the example of financial assistance, who ultimately determined the conditionality

[3] For a (more optimistic) overview, see Fraccaroli, Giovannini and Jamet, 'The Evolution of the ECB's Accountability Practices During the Crisis', *Economic Bulletin Articles* 5 (European Central Bank, 2018).

[4] Hutter and Kriesi, 'Politicizing Europe in Times of Crisis', 26 *Journal of European Public Policy* 7 (2019), 996–1017.

[5] 'Why Europeans are trying to burn down their central bank' (13.04.14), The World Post.

[6] Kneuer, 'The Tandem of Populism and Euroscepticism: A Comparative Perspective in the Light of the European Crises', 14 *Contemporary Social Science* 1 (2019), 26–42.

[7] Arnull and Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2003).

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measures responsible for the degradation of social rights in numerous 'bail-out' states in the mid-2010s: the Council, which adopted the measures; the Eurogroup, which determined them; the Member States that implemented them; or the 'expert' institutions, such as the ECB and International Monetary Fund (IMF), which monitored and enforced them?[8] This is but one of numerous problems in 'locating' accountability found across EU governance.

In the specific case of EMU, however, unique problems are thrown into the mix. One is the problem of independence. How can we ensure proper political accountability for institutions, such as the ECB and accompanying agencies, who are unaccountable as a matter of intentional institutional design?[9] A second is the problem of salience. Even if it were legally possible to render full political accountability for bodies like the ECB or European Banking Authority (EBA), do traditional political institutions like the European Parliament or national Parliaments have the ability and incentives to really scrutinize and contest economic decisions? While there may therefore be high political contestation of some EMU policies, many others (of equal long-term importance) carry significant complexity and low political salience, making serious scrutiny by media, politicians and citizens unlikely.[10] The problem of EMU accountability is not just, therefore one of institutional design but one of the correct political incentives.

I.2 THE SCHOLARLY IMPASSE

How do we square these tensions? The starting point of this volume is that the seeming 'impasse' of EMU accountability is not simply a problem of everyday politics but also a conceptual problem. Scholarship on EMU accountability has also reached an impasse, as is further discussed in the first conceptual chapter of this volume (by Akbik and Dawson). The starting point of the impasse is the difficult question of how to approach accountability in EMU. Existing literature has tried a number of methods with two standing out. The first is a comparative method, for example, comparing the accountability regime of the ECB with other central banks.[11] While this literature has

[8] See Violante and Poulou in this volume.

[9] Dawson, Maricut-Akbik and Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism', 25 *European Law Journal* 1 (2019), 75–93.

[10] See Goldmann, Fromage and Akbik in this volume.

[11] See, for example, Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Hart Publishing, 1999); Chang, 'Sui Generis No More? The ECB's Second Decade', 42 *Journal of European Integration* 3 (2020), 311–325.

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produced numerous insights – highlighting, for example, the narrowness of the ECB's mandate and its unique independence in comparison to others – it also carries limitations. In simple terms, like is not being compared with like: there is, for example, simply no other central bank operating in the absence of a state setting and with a mandate determined by an international Treaty.

To remedy this problem, a second set of literature tries to build accountability standards within the specific setting of the EU.[12] A logical starting point is the EU Treaties themselves, which carry both a number of general principles (such as those of Article 2) and a number of specific principles guiding the Treaties' economic chapter, for example, the need for the ECB to maintain price stability and for governments in delivering fiscal policies (under Article 119(3) TFEU). This approach also, however, carries severe limitations. One is a problem of clash and indeterminacy. What should we do, for example, when general principles, like solidarity and equality, clash with principles specific to the EMU context, such as price stability and sound finances? A second more intractable problem is whether these standards are justifiable from a normative perspective. Using specific EU law principles to analyse the accountability of EU institutions limits the scope of accountability research by begging the question of whether these principles *themselves* – and the institutional design that results from them – in fact meet basic accountability standards. To make an even bolder claim, the specific principles and institutional design of EMU may be precisely the problem in that the demand for accountability is precisely often a contestation of EMU's design and not just a contestation of the way that design is implemented and carried out.[13]

What we will describe in the first chapter as the impasse between deductive and inductive approaches to EMU accountability thus leaves a framework of accountability research that in our view demands either too little or too much of economic decision-makers. One is left either with national standards – that EU actors cannot realistically meet as they do not operate in the thick democratic setting of the nation-state. *Or*, one is left with EU and EMU-specific standards that economic decision-makers normally can easily meet because their institutions were calibrated to meet them (and which largely overlap with their functional missions). The impasse of a more powerful EMU, without

[12] See, for example, Markakis, *Accountability in the Economic and Monetary Union* (Oxford University Press, 2020); Zilioli, 'The ECB's Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice of the European Union', 23 *Maastricht Journal of European and Comparative Law* 17 (2016).

[13] For a related argument regarding the OMT jurisprudence of the Court of Justice, see Schepel, 'The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone', 44 *Journal of Law and Society* 79 (2017).

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powerful accountability mechanisms, is therefore in our view matched with an academic literature unable to fully conceptually grasp EMU's accountability deficit.

This diagnosis was the starting point for the larger project on which this volume is founded. The project – 'Taming the Leviathan: Legal and Political Accountability in Post-crisis EU Economic Governance' – was sponsored by the European Research Council and carried out by four researchers, all of which have contributed their work to this volume. A large part of the project's work was empirical, examining the effectiveness of EMU accountability mechanisms in practice. This work – by Ana Bobić examining judicial review;[14] Adina Akbik, the European Parliament;[15] and Tomas Wozniakowski, national Parliaments[16] – empirically testifies to many of the accountability dilemmas mentioned above. The other empirical chapters contained in this volume expand this work yet further, examining other institutions and policy areas not examined by the core research team (thus providing an empirical picture across all of EMU's main fields).

A further goal of the project, however, was to advance the conceptual debate regarding EMU accountability. That debate is represented by a number of chapters in this volume (e.g. those of Heidelberg, Steinbach and Goldmann). Our own work makes two conceptual contributions. The first of these is to think about what accountability is *for* in EMU. As Akbik and Dawson argue, one way of approaching the academic impasse over EMU accountability is to develop a general framework for accountability understood in terms of the underlying normative claims being advanced in accountability research. Such a framework should be applicable to the EU and EMU context but not produced by it (in that it should also be applicable to other economic institutions and policy areas).[17] By examining what accountability is *for*, the framework shifts attention from actors, that is, who is accountable to whom (an often intractable problem in EU accountability research) to norms, that is, what kinds of demands are being made in accountability relations and have they in fact been met?

[14] See, for example, Bobić, '(Re) Turning to Solidarity in EU Economic Governance: A Normative Proposal', in *Contesting Austerity: A Socio-Legal Inquiry Into Resistance to Austerity* (Hart, 2021), 115–134.

[15] Akbik, *The European Parliament as an Accountability Forum: Overseeing the Economic and Monetary Union* (Cambridge University Press, 2022).

[16] Woźniakowski, Maatsch and Miklin, 'Rising to a Challenge? Ten Years of Parliamentary Accountability of the European Semester', 9 *Politics and Governance* 3 (2021), 96–99.

[17] See, for example, for an application of the framework to a different field, Dawson, 'The Accountability of Non-governmental Actors in the Digital Sphere: A Theoretical Framework', *European Law Journal* (forthcoming, 2022).

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The framework disaggregates accountability into four main normative goods, which are drawn from the general accountability literature. The first – openness – is the demand that public action is open, transparent and contestable. The second – non-arbitrariness – is the use of accountability to place meaningful constraints on public power. The third – effectiveness – is the use of accountability to correct errors and to improve policy performance. The final good – publicness – is the use of accountability to ensure that public actors pursue the common (and not individual or sectional) good. The framework offers, therefore, a means to unpack different accountability claims in order to pinpoint more accurately across the fields and institutions of EMU where accountability deficits lie, and in which form. We have invited our authors to use the framework in this light.

The project and volume's second conceptual contribution is to think about *how* accountability is rendered in EMU. Here, we borrow a distinction from law. As is well known in judicial review, Courts often distinguish between reviewing policy measures procedurally and substantively, that is, they may either restrict themselves to the procedural steps followed by the policy-maker or, alternatively, might consider the legal worth or merit of the decision itself (e.g. whether a given law violates a fundamental right).[18] In our view, this distinction is also informative when considering accountability. Much of EMU's current construction considers accountability in procedural terms. Actors such as the Eurogroup or ECB are routinely therefore probed on *how* they reach their decisions, that is, which information they take into account, who they consult and how transparent they are. Such a procedural form of accountability has clear advantages in the EMU setting. Most notably, asking economic decision-makers to alter the *process* by which they arrive at decisions seems to respect (or at worst, marginally limit) their operational independence.

The politicization of EMU discussed above, however, also suggests both the presence and the need for a second, substantive form of accountability. Here, decision-makers must answer not for how they reached their decisions but for the decisions *themselves*. They are asked to defend the merit, efficiency and justness of their decisions. To give a prominent example, while there is now a debate about the 'greening' of the ECB,[19] at stake in this debate is not just whether the ECB consults environmental non-governmental organisations (NGOs) or releases figures on its environmental impacts. What matters

[18] See, for example, Lenaerts, 'The European Court of Justice and Process-Oriented Review', 31 *Yearbook of European Law* 1 (2012), 3–16.

[19] Ioannidis and Zilioli, 'Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies', 59 *Common Market Law Review* 2 (2022).

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is whether the ECB *should* in fact meet environmental targets *and whether it has done so*.

This latter substantive form of accountability – for precisely the reasons of independence outlined above – is much harder to realize in today's EMU. It is much more scarcely found in the explicit design of accountability institutions (such as the economic and supervisory dialogues, which ask officials to respond to parliamentarians without the possibility of sanction). At the same time, while we lack substantive accountability as a matter of design it is increasingly being asked for, and even demanded, of economic decision-makers. As highlighted in a number of the chapters of this volume (such as those by Akbik, Bobić, Violante and Wozniakowski), the distributive stakes and constitutional justness of economic decisions increasingly drive both important political accountability mechanisms and judicial review, with some of Europe's highest Courts frequently clashing over the standards to which economic decision-makers such as the ECB should be held. EMU's accountability deficit is also therefore a substantive accountability deficit – an inability to properly allow scrutiny of the justness, efficiency and worth of economic decisions (a key argument of the project and book as a whole).

I.3 THE GOALS AND CHAPTERS OF THIS VOLUME

Accordingly, in the following chapters, authors in different disciplines investigate specific institutional contexts and subareas of the EMU in order to assess EMU accountability as reflected in this framework. Several research questions have guided their investigation. First, constituting the first part of the book, which normative goods and concepts should orient the accountability of trans-national economic decision-makers and should subsequently orient EMU? How in particular do the different normative goods identified in the opening chapter of Akbik and Dawson relate to one another and to related concepts, such as democracy, legitimacy, transparency and the rule of law? Examining the theoretical standards we can use to evaluate accountability – and the extent to which they require re-formulation in the EMU context – constitutes a first objection of our collection.

One perspective, adopted in the chapter of Roy Heidelberg, is to consider accountability as a cross-cutting and political concept, which must be understood well beyond the specific context of the EU. Heidelberg's chapter offers a critical perspective on accountability that finds echo in a number of other contributions. More particularly, Heidelberg questions the often-discussed nexus between accountability and democratic legitimacy. Many chapters assume a complementary relation between the two, that is, that accountability

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is a normative good because it ultimately serves democratic ends. Heidelberg asks us, however, to think again. We should understand accountability, for him, not as a tool of democratic governance but rather as a technique of bureaucratic control, concerned primarily with facilitating relations between experts rather than building a chain of answerability to the general public. As he puts it, '[U]ltimately, accountability is a practice that formalizes expertise into governing, an idea contrary to the prevailing notion of it as a value that ensures democratic control.'

Heidelberg's re-casting of democratic accountability connects well to a second theoretical chapter, by Armin Steinbach, that focuses on the specific form of accountability developing in EMU (yet which comes to quite different conclusions). Steinbach casts EMU's accountability regime in terms of a continuum between a market form of accountability introduced in the Maastricht settlement to a form of political accountability that is much more prominent in post-crisis EU economic governance. As Steinbach argues, both forms are connected to different ideas of democratic legitimacy: one focused on state sovereignty and market discipline, and the other on the legitimacy of EU institutions themselves, who must take a prominent role in the management of debt and deficits. For Steinbach, both forms are capable of meeting the normative goods of accountability, with market accountability similarly striving towards open financing conditions (openness), limiting unviable and therefore arbitrary fiscal policies (non-arbitrariness) and improving the overall stability of EMU (effectiveness) and its ability to achieve the common European good (publicness). Steinbach's chapter thus illustrates EU economic governance's attempt to re-model the very meaning of democratic accountability. When examining the 'substance' of accountability in EMU, we need to be conscious not just of the traditional accountability relation between public officials but between economic decision-makers and market actors, who may (for good or bad) displace public accountability relationships.

A final theoretical chapter is offered by Mathias Goldmann. Whereas Steinbach's focus is on fiscal policy, Goldmann's is on how we might adapt our understandings of accountability given the design of another crucial area of EMU: banking and financial supervision. The multi-level and regulatory nature of this field presents severe accountability challenges. As Goldmann demonstrates, even the seemingly technical field of banking supervision entails wide discretion, implying a deepened need for political control. The particular features both of the EU legal order (such as the applicable standard of review and preparatory nature of legal acts in Banking Union (BU)) and of the EU's political institutions (such as the limited role of the European Parliament and diverging positions of national Parliaments) leave little space

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for traditional forms of legal and political accountability. Goldmann's message retains, however, some optimism – precisely the institutional complexity of banking Union also provides greater scope for 'intra-executive accountability' (understood in terms of relations between executive institutions such as the ECB, Commission and European Court of Auditors). Whereas for Heidelberg, accountability is 'impossible', for Steinbach and Goldmann, there remain opportunities to close the accountability gap, so long as the institutions and meaning of democratic accountability are re-thought.

A further set of questions pursued in our volume concern how the normative goods of accountability are delivered in different areas of EMU and via different institutional settings. If we can understand accountability through the distinction between procedural and substantive means of rendering the normative goods of accountability, we require a comparative understanding of where different 'types' of accountability predominate across different fields of EMU. Furthermore, we require a more detailed understanding of how accountability is institutionalized in different settings, particularly through the two main sets of institutions on which we focus: Courts and Parliaments.

The second part of the book thus focuses on one particular variety of accountability – political accountability, understood as accountability to political and majoritarian institutions. This part begins with a chapter by Diane Fromage, in investigating both the legal form and practice of political accountability in the Banking Union (BU). Whereas Goldmann's earlier chapter pointed to the difficulties of operationalizing legal and political scrutiny in this area, Fromage points to a further challenge, namely the differentiated landscape in which the BU has been constructed (partly centred on the EU as such, partly on the Euro area and partly on the specific Member States participating in the Banking Union). This leaves a messy web of accountability relationships that can confuse the question of who is accountable to whom and for what (an example being the annual report of the single supervisory mechanism to the Eurogroup, which does not per se include all BU members and is itself a non-official institution of the Union). Members of the European Parliament (MEPs) thus demonstrate confusion as to whom they must address their questions – the ECB, national authorities, the Commission, the EBA or some other actor? A further problem concerns political salience as discussed above – there exist many accountability 'offers' in terms of ability of MEPs to ask questions of both the Single Resolution Board (SRB) and the supervisory board of the Single Supervisory Mechanism (SSM). The limited political salience of banking issues, and their complexity, however, mean that these offers are not always taken up. Fromage suggests reforms to tackle these gaps, from the ambitious (a Treaty change that would more rigorously legally

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ground Banking Union and the agencies it contains) to the more realizable in the short term (e.g. a dedicated sub-group of the ECON committee in which MEPs could specialize in this policy field).

Two further chapters in this section focus on one key institution across different areas of the EMU – the Eurogroup. In his chapter, Menalaos Markakis provides a broad overview of the available mechanisms to hold this uniquely powerful institution procedurally and substantively accountable. First, Markakis notes the limited political accountability of the Eurogroup, with the European Parliament carrying an ability to question the Eurogroup President but not meaningfully sanction its activities. This gap is in danger of being worsened by recent case law of the Court of Justice which, by declaring the Eurogroup a non-official EU institution, leaves a legal blackhole with no room for legal review of Eurogroup decisions.[20] This leaves important gaps in legal accountability, for example, when other organs lacking judicial review of their decisions, such as the European Stability Mechanism (ESM), give practical effect to Eurogroup decisions. For Markakis, quasi-legal institutions, such as the European Ombudsman have had more success in closing legal accountability gaps, by gradually prompting the Eurogroup and its preparatory working group to provide greater document access (i.e. to reach at least towards procedural openness).

While Markakis focuses on the available procedures to scrutinize Eurogroup decisions, an equally important question – and one at the centre of our focus on 'substantive accountability' – concerns the uses to which these mechanisms are put. As the chapter of Adina Akbik demonstrates, while one would expect the deficiencies which Markakis outlines to seriously inhibit substantive accountability, the practice of the main mechanism for political accountability of the Eurogroup – the economic dialogue – suggests a more nuanced picture. In spite of procedural and transparency hurdles, the European Parliament has used its regular dialogue with the Eurogroup President to throw a spotlight on substantive deficiencies in EMU (which Akbik demonstrates by categorizing MEP questions according to four accountability 'goods' discussed in Chapter 1). As Akbik shows, while openness and transparency are an important focus for MEPs, so is policy effectiveness, indicating an increasing willingness for parliamentarians to focus on the substantive outcomes of economic decisions. More worryingly, the answers of the Eurogroup President often indicate a reflex to defend and justify existing conduct rather than to re-consider policy

[20] See Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, Council v K. Chrysostomides & Co. and Others, Judgment of the Court (Grand Chamber) of 16 December 2020, EU:C:2020:1028.

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in response to critical feedback. As she puts it, '[O]verall the economic dialogues with the Eurogroup illustrate a unilateral accountability relationship in which substantive demands from the forum remain unmet by the actor.' Substantive accountability is thus sought but not delivered.

In his chapter, Tomasz Wozniakowski complements the analysis of Akbik and Markakis by adopting a national perspective on political accountability. His chapter thus investigates the accountability of fiscal governance from the perspective of National Parliaments, focusing on the scrutiny of economic decisions at EU level in the context of one crucial process, the European Semester. The chapter's in-depth study focuses on the scrutiny powers of the Polish Parliament. Here too, effectiveness is a main focus, that is, the use of accountability to shine a light on domestic and EU-level economic performance. As the chapter illustrates, however, there is no easy and automatic link between 'accountability as effectiveness' and policy implementation, that is, the fact that Parliaments scrutinize and demand answers regarding the Semester's Country Specific Recommendations (CSRs) seems to carry no obvious link in terms of the seriousness of the domestic government's commitment to actually implementing CSRs. Once again, we seem to have an example of substantive accountability being sought but not delivered, this time in respect of an important non-Eurozone Member State.

The final section of the book focuses on legal accountability, that is, the accountability of economic decision-makers towards Courts and legal institutions. If, as the chapters of the second section generally conclude, substantive political accountability is lacking in EMU, to what extent can legal institutions fill the gap? The section begins with Ana Bobić's chapter on the role of law in delivering accountability goods. One might expect this to be limited: courts are normally entrusted with the narrower task of ensuring the 'legality' of official action not with ensuring their accountability to the wider public. As Bobić's chapter shows, however, the current clashes between national and EU Courts about core features of the EMU are precisely conflicts about how to improve 'substantive' accountability in EMU. At the core, for example, of the German Constitutional Court's objection to the CJEU's appraisal of recent ECB programmes has been what it sees as a deficient standard of review, focused on procedural mechanisms (has the ECB given reasons to justify quantitative easing?) but without any substantive assessment of whether *in substance* these programmes lead to their intended results or carry burdensome effects. There is therefore an accountability conflict within the legal conflict – to whom is the ECB answerable and what does it have to demonstrate to meet its legal duties? If this is so, the conflict between legal institutions need not only be seen in a negative light – as a threat to the unity of the

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EU legal order – but as an opportunity for judicial dialogue to improve the overall accountability set-up of EMU. Constitutional conflict, in her words, may be a feature, not a bug (and one able to improve key substantive goods, such as the non-arbitrariness and publicness of ECB action).[21]

Anuscheh Farahat's chapter is also interested in the three-way relationship between law, accountability and political conflict. In Farahat's case, her interest is in the trans-national solidarity conflicts precipitated by the Euro crisis. The increasing inter-dependence of the Euro area, as Farahat shows, dramatically diminishes the political agency of the Member States, making their ability to fight the negative effects of economic crises dependent not just on their own decisions but also those of other Member States on whom they have limited political influence. This leaves the crucial question of whether legal institutions carry the potential to limit the destructive potential of these conflicts. Such legal accountability might be considered as an important factor for two goods highlighted in this chapter – openness, understood as the ability of Courts to force policy-makers to reveal the reasoning behind decisions with cross-border impacts, and publicness, understood as the use of legal procedures to 'clarify in the first place which common goods are legitimate or ought to be considered according to the normative (constitutional) framework'. By examining the jurisprudence of national Courts, Farahat's accounts of the Portuguese and German Courts illustrate the tendency of national Courts to 'nationalize' what are in effect trans-national conflicts. In other words, the effort to ensure substantive legal accountability at the domestic level (e.g. with reference to equality and social rights provisions in the Portuguese Constitution) can cut against allowing it trans-nationally (by securing a legal outcome without reference to European law standards or CJEU guidance). In this pessimistic diagnosis, however, there is an optimistic under-current – the unimpressive contribution of Courts in limiting destructive trans-national conflict is not some deeply embedded structural feature of the EU legal order but rather, as Farahat shows us, often an explicit choice of the relevant legal institutions, that could be adjusted over time. Here, an awakening of national and European Courts to their inter-dependency – the fact that their decisions are inherently inter-connected – is a crucial task (one that Bobić and Farahat share).

While dealing with a different policy field – financial assistance – Teresa Violante's chapter follows the chapter of Fromage in focusing our attention on a different challenge: how the multi-level nature and complexity of EMU

[21] On the broader use of constitutional conflict, see Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press, 2022).

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can blunt (legal) accountability. In so far as financial assistance in bail-out states was conditional on compliance with terms laid out in a Memorandums of Understanding (MOUs), Violante's chapter demonstrates how the unclear legal foundations of financial assistance created a severe gap in legal accountability, namely a situation where neither national nor EU Courts could be turned to when seeking accountability for bail-out measures violating shared European fundamental rights. The chapter also crucially demonstrates the inter-linkages between the aftermath of the Euro crisis and the other great crisis of legal integration – the rule of law crisis. While, therefore, *Portuguese Judges* has been celebrated as a landmark judgment with respect to the fight against rule of law erosion, in Violante's words, it also established new divides between citizens: 'On the one hand, those that cannot resort to the protection afforded by EU law, that is, the communities that are treated as "deserts" of EU law. On the other, domestic judges, who enjoy not only the national level of protection but also the supranational guarantees, including the EU institutional machinery.' As with Farahat, Violante's chapter thus alters us to the importance (and failures) of legal accountability in addressing the crucial question of 'who is the public', that is, who are the citizens in whose name EU economic decisions are to be made, and who deserve redress when their rights are interfered with? Violante's conclusion based on the Portuguese case is certainly worrying from the perspective of 'substantive accountability' – while she shares Farahat's conclusion that Portuguese Courts nationalized the accountability question, she also points to the limited substantive lens under which the EU Courts analysed austerity measures, considering them in light of the Treaty's economic governance provisions but not via the full range of substantive goals the Treaties seek to protect.

In a second chapter on financial assistance, Anastasia Poulou places as her focus precisely the relation between legal and political accountability. Legal accountability may be particularly important when political accountability is lacking. As she demonstrates, the informal and rushed nature of financial assistance makes this area an important example. Her focus is accountability for human rights violations, primarily before the EU Courts. Human rights litigation therefore tracks the goods of non-arbitrariness and publicness in both their procedural and substantive dimensions. To take non-arbitrariness as an example, litigation has therefore concerned both the procedural steps followed in financial assistance, that is, the presence or otherwise of a human rights impact assessment, and the substantive impact, that is, was there a violation of the right even where procedural accountability was provided?

Poulou's chapter carries here two important arguments. The first concerns two distinct phases in the relationship between the CJEU and the other EU

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institutions: a first where the Court sees financial assistance as outside the scope of EU law, and a second, where the Court is more willing to bring measures within the scope of the Charter yet adopts a weak standard of review. The effect in both stages from a substantive point of view is the same: applicants are denied accountability, either because assistance is not seen as emerging from an EU source, or because it is seen as a discretionary matter where the Court cannot tie the hands of policy-makers. The second argument is a normative critique. As Poulou argues, loose, procedural forms of judicial review, may be justified in circumstances where policy-makers can demonstrate a robust policy process but not where this is lacking. Poulou therefore makes a robust normative defence of a more substantively ambitious form of legal accountability in particular cases. As she puts it, '[T]he basic principle is that, in order for the courts' judgement in disputed financial assistance cases to be legitimized, judges should assess the observance of the procedural dimension of human rights and, depending on the outcome, calibrate the standard of review on the basis of the substantive dimension of the respective rights accordingly.'

Finally, Joana Mendes completes the legal accountability section by examining a further area of EMU – the monetary policy of the ECB and its review by the EU Courts. This chapter is also closely concerned with the standard of review used by judges. Like Goldmann, Mendes is sceptical of the ability of judicial review to meaningfully limit the discretion of the ECB.[22] Analysing the Bank's 'constitutive powers' in the field of monetary policy, she demonstrates the difficulty both with a limited procedural form of review and the type of full substantive review demanded by the German Constitutional Court in its Public Sector Purchase Programme (PSPP) decision. Whereas the former demands too little of economic decision-makers, the latter demands the use of tools that Courts – with their ability merely to prohibit action or to conduct 'proportionality' analysis – simply lack. Cautious optimism is also, however, a feature of Mendes's chapter: the difficulty of achieving legal accountability through judicial review does not render law meaningless. In spite of the ECB's independence, Mendes points us to the use of the duty to give reasons as a device to structure ECB activity, to oblige economic decision-makers to explain their reasoning and to tie economic decisions more closely to the common good (or in the language of the introductory chapter, to improve the publicness of ECB activity). As Mendes argues in her conclusion, 'the constitutional dimension of the duty to give reasons highlighted here, if developed

[22] See also Goldmann, 'Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial Review', 15 *German Law Journal* 265 (2014).

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institutionally, may secure public-interest based executive action understood in substantive terms, even if independence places clear limits to the ability of political accountability to induce substantive policy changes'.

I.4 TOWARDS SUBSTANTIVE ACCOUNTABILITY

This collection of chapters provides a diverse and complex look into the practice of EMU accountability. In broad terms, it illustrates a system of accountability that is dynamic but also one that is in crisis. Political accountability mechanisms provide an important opportunity for parliamentarians to nudge economic decision-makers but classical problems of the EU's institutional set-up – its multi-level nature and the limited time and political horizons of MEPs and economic institutions – can often render political accountability a formal and administrative exercise. Legal institutions show indications of equally nudging economic decision-makers to improve their accountability practices, as demonstrated for example via the PSPP decision. At the same time, we have many examples of two-step forwards and one-step back – as highlighted by the refusal of the CJEU to fully recognize the Eurogroup's institutional power in *Chrysostomides*. While our chapters do not provide a uniform picture, our initial diagnosis – of an EMU that carries mechanisms of procedural accountability, without providing for accountability 'in substance' seems born out by the chapters.

This leads to a final set of questions the project was interested in, which concerns how our evaluation of EMU accountability should evolve in light of the theoretical concepts we introduce, and the empirical picture gathered through the chapters. If, for example, more substantive accountability in EMU is needed, given its increasingly distributive character, how can this be realistically fostered? How can the pay-offs and trade-offs (in terms of the costs to substantive accountability we have identified) be appropriately balanced? This forward-looking perspective – how to transform and re-build the accountability structure of EMU – constitutes a final objective of the volume.

A number of chapters take up these questions in specific ways. As already discussed, many authors see clarifying legal responsibilities as important. For Fromage, this would require providing a clear legal basis and division of labour between the institutions of the Banking Union. For Farahat and Bobić, it would require greater horizontal dialogue between national Courts, who need to better internalize the impacts of their constitutional jurisprudence on the options available to other states. For others, the work of improving substantive accountability must primarily be born by political institutions: for example, by economic dialogues in which the leaders of institutions like the

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Eurogroup commit to engaging in a substantive discussion of the Eurozone's economic priorities with MEPs (a discussion inhibited by the marginal role they provide the European Parliament in setting the Union's economic goals when compared to the 'co-decision' enjoyed in other policy areas).

More broadly, our chapters suggest a need for all those actors engaged in holding economic decision-makers accountable to *prioritize* the substantive dimension of EMU. In simple terms, the EU has shifted decisively in its ambitions in the past decade. One can no longer speak of the Union as a 'regulatory state', where technocratic institutions can make decisions in which all win.[23] Instead, EMU involves distributive choices, in which winners and losers appear. In such a brave new world, accountability can no longer simply be a technical exercise of determining whether decision-makers followed practices of good governance but entails considering the justness of economic policies. Our volume's call for substantive accountability is a call to build an EU accountability structure for EMU within which questions of substantive justness and effectiveness can be posed, debated and answered.

[23] Dawson and Maricut-Akbik, 'Accountability in the EU's Para-regulatory State: The Case of the Economic and Monetary Union', *Regulation & Governance* (early-view, 2021).

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