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EU ECONOMIC GOVERNANCE AFTER THE CRISIS

Revisiting the Accountability Shift in EU Economic Governance

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4 September 2018

Working Paper 2018-07

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Centre for Public Policy
Working Paper

EU Economic Governance after the Crisis: Revisiting the Accountability Shift in EU Economic Governance

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forthcoming in *Journal of European Public Policy*

Abstract

Numerous scholars have argued that economic governance in the European Union (EU) has undergone an undemocratic shift as part of the crisis, with accountability moving from parliamentary to executive powers. This paper challenges this view, arguing that the crisis has led to a shift from economic to political accountability. I define economic accountability as the market-led accountability regime enshrined in EU Treaties and contrast it to the current political accountability regime, by which creditor states and monetary institutions have supplanted markets as a forum for rewarding and disciplining market actors. This "substitution effect" has been sustained by European Court of Justice (CJEU) jurisprudence, with the CJEU positing a functional equivalence between market-driven pressures and political conditionality.

Keywords: Economic and political accountability; European Court of Justice; European debt crisis; democratic control; political conditionality.

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Introduction

"We live in the age of accountability" (Fisher 2004) – in virtually all areas of political and social life the term accountability is claimed to be of analytical value. Owing to the elusive character of accountability (Bovens 2010: 946), the term is commonly deployed as a tool in discursive practice focused on making governance "better" (Mulgan 2000). The panoply of contexts in which the term is deployed has emancipated it from its meaning in constitutional theory, where it is used to refer to the supervision and legitimacy of government action by linking them to the democratic chain of delegation (Bovens 2007: 448 et seq.).

The European Union has been a subject of the growing literature on accountability for some time (Arnull and Wincott [2003]; Harlow [2002]). Indeed, accountability now serves as benchmark in debates about the peculiarities of the multilevel governance system of the EU and how to make decision-making more democratic. More recently, crisis-induced EU economic governance has been managed through a novel governance structure that has attracted much scepticism. Criticism has been voiced regarding the executive dominance of the European Monetary Union (EMU), which has created uneven relations between national governments, as intergovernmental institutions favour creditor states (Curtin 2014); regarding the variability in consequences for national prerogatives, ranging from retrenchment of national parliaments prerogatives mainly in debtor states to the expansion of parliaments' influence on executives in some creditor states (Dawson [2015: 989]; Deters [2014]); regarding the minor role of the European Parliament as the only directly elected legislative institution (Chalmers [2012: 692]; Crum [2013]); and regarding an overall shift of decision-making power to non-representative institutions (Dinan [2012]; Fabrinni [2016: 591]; Rittberger [2014]). What these criticisms have in common is their concern about the institutional evolution of European integration. In particular, they assert that greater European integration is occurring without being undergirded by appropriate democratic governance (White 2015: 587–91).

Consequently, recent scholarship combines the two literature strands by examining the implications for accountability that have arisen from crisis-induced governance changes. Analytically, they depart from a phenomenon of mutation – namely, the shift in accountability from parliamentary to executive powers (Crum [2018]; Crum and Curtin [2015]). This article connects to that strand in the literature but seeks to adjust the perspective in a counter-intuitive direction: I argue that the crisis has led to a shift from economic to political accountability. My central claim is that this shift offers an explanation for the seemingly undemocratic evolution of EU economic governance as identified in literature.

On a theoretical level, the analysis undertaken here connects the pattern of economic governance to the concept of accountability. By refining the definition of the term, I seek to reveal the interaction between two accountability regimes: specifically, between political accountability for supervising and legitimising government action as a genuine core concept of accountability, on the one hand, and the normative choice of the EU Treaties, which establish a regime of economic accountability under which states and private actors must subject their conduct to market mechanisms, on the other hand. I ultimately argue that economic accountability has been supplanted by political accountability.

The finding of this paper seeks to contribute to the debate on economic governance in two directions: First, departing from the observation that institutional architecture evolved in an executive-dominated and parliament-hostile fashion, the paper offers an explanatory category for making this evolution plausible, with the governance type moving from a previously market-based type accountability towards an augmented scope of political accountability. As this perspective focuses on the source of democratic tensions rather than the effect of undemocratic tilt in economic governance, it only loosely connects to concepts of integration theories accounting for development of governance from the supranationalism/intergovernmentalism perspective, which typically focus on outcomes in terms of integration/disintegration (Joerges and Kreuder-Sonnen 2017: 126). It does relate though to liberal intergovernmentalism (Schimmelpfennig [2015]; Moravcsik [1998]) to the extent that dissolution of market-based accountability described in this analysis fed into the asymmetric financial and fiscal interdependence within the Euro area, which in turn led to institutional design tilted towards creditor states. In other words, with the focus of the paper on studying the metric behind the change in institutional architecture, it contributes to the study of driving forces of governance changes below the supranationalism/intergovernmentalism radar.

Second, even if debates revolving around the legitimacy of market driven public policies remain animated (Merkel [2014]; Streeck 2014: 40 et seq.), the argument of this paper suggests that accountability relationships led by (functioning) markets are less of a source of democratic tensions than under the setup of political anti-crisis institutions, because it does not imply shifts in political decision-making powers within multilevel setup of EU. On this basis, the normative dimension of this contribution claims that the authoritarian crisis mode of governance (White 2015a) should be overhauled by strengthening (and returning to) market accountability rather than – as typically requested in neo-functionalist approaches to crisis (Buti/Carnot [2012]; Niemann/Ioannou [2015]) – expanding scope of political accountability through a new calibration of parliamentary and executive powers.

This article is structured as follows: Section II outlines accountability as an analytical framework encompassing, in its core sense, both democracy-based and other constitution-based dependencies. On that basis discusses Section III the type of economic accountability as determined by the EU legal order and its mutation throughout the crisis. Section IV explores the substitution of economic by political accountability. Section V concludes.

Accountability: Setting the analytical framework

Accountability as an analytical and evaluative category has emerged comparatively recently (Bovens [2007: 448 et seq]; Scott [2000: 40 et seq]). For a long time, "responsibility" was the dominant term used to characterise the relationship between public powers, notably "a framework for the exercise of state power in a liberal-democratic system, within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable term" (Oliver 1991: 28). Hence, accountability appeals to the idea of representation as a legitimising force of public power, as it exposes public power to democratic control and to public censure through elected institutions.

This article's objective is to offer an explanation for how accountability has been leveraged as part of the crisis, and for how accountability regimes can interact and replace each other. To this end, I broaden the analytical scope in order to consider accountability regimes more generally and to move beyond rooting accountability solely in legitimacy concerns. Specifically, I argue that accountability relationships can be established through the legal order of the EU Treaties when member states and private actors are made accountable via market mechanisms.

At its core, accountability can be conceived as the acknowledgement of responsibility for one's actions to an authority that is empowered to impose sanctions. According to *Schedler's* (1999: 17) definition, "A is accountable to B when A is obliged to inform B about A's (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct". This definition thus involves a "liability to reveal, to explain, and to justify what one does" (Normaton 1971: 311) as well as a "duty to give account for one's action to some other person or body" (Scott 2000: 40). Similarly, *Bovens* characterises accountability as "a relationship between an actor or a forum, in which the *actor* has an obligation to explain and to justify his or her conduct, the *forum* can pose questions and pass judgement, and the actor may face consequences" (Bovens 2007: 447). *Bovens* further concretized the relationship between the actor and the forum by identifying three elements or stages characterizing the accountability relationship. First, the actor would somehow inform the forum about his or her conduct (*information*). Second, there is a possibility of the forum to question the adequacy of the information (*debating* or *justification*). Third, the forum may pass judgment on the conduct of the actor, notably by imposing sanctions of offering rewards (*sanctions* or *consequences*) (Bovens 2010: 952).

On the basis of this definition, we can thus conceptualise accountability as an expression of normative dependencies established through norms or rules, where such dependency is characterised by relationships in which one actor is subject to justification and sanction by a forum. Hence, normative choice of accountability is not limited to accountability based on the democratic principle giving raise to political accountability in the conventional sense. Rather, constitutions may stipulate normative dependencies of accountability nature which can – as argued in this paper – be a (partial) substitute to political accountability. In other words, legal orders may stipulate multiple kinds of checks-and-balances or control mechanisms, which can be understood as normative dependencies.[1]

The EU's economic accountability regime and its dissolution during the crisis

This article is concerned with the form of economic accountability incorporated into the EU Treaties in which markets are empowered to discipline states and private actors. The argument is that the EU's constitutional setting institutes an economic accountability relationship in the way that states and private actors submit their economic viability to the judgment of the market for the purpose of meeting their financing needs, and the market's assessment produces rewards or sanctions of their conduct.

1. The EU's economic accountability regime

In general, the application of economic accountability to public authorities such that public authorities are held accountable to markets is not alien to the design of public policy. Public administration theory is largely influenced by the ideas of public choice based on market theory (Lewis 1996). Private-sector management and market-led managerial systems of accountability have been an aspect of public sector for quite some time (Harlow 2002: 24). This section sets out the constitutional choice of the EU Treaties stipulating an economic accountability regime for both private parties and states. Regarding private parties, the EU legal order subjects financing transactions to market mechanisms, acknowledging the market as an institutionalised forum to which private parties must justify the viability of their desired transactions. The price yielded on the market is the instrument through which individual parties are held accountable. Similarly, regarding states, the market price of a sovereign debt obligation transmits liability

[1] Typically, legal order subject public bodies to external or internal audit. Since 1977 the European Court of Auditors has been supervising EU finances (Desmond 1996). In other cases, compliance with safety standards can be subjected to an external party's accreditation.

for the economic performance of a state and imposes sanctions or rewards through higher or lower financing prices. By tracing the metric of this accountability type in the EU constitutional order, the argument connects to the literature discussing both elements and evolution of constitutional characteristics of EU economic governance (Joerges [2016]; Hatje [2011]). Hence, market-orientation as *leitmotif* in EU economic governance (Blanke 2012) can be specified such that it posits market-led accountability by requiring subordination of public and private financing needs to the judgment of markets.

Specifically, the EU Treaties foresee the use of market mechanisms to supervise and discipline market actors, including states. The constitutional basis for instituting the market as an accountability forum can be found in the EU Treaties' commitment to a "free market economy", which is referenced several times in the EU Treaties[2], and is guided by the general objective of establishing a "highly competitive social market economy". This commitment forms the constitutional basis for exposing both states and private market actors to market forces, and specific mention is made of private-sector actors and states. Regarding actors in the private sector, the Treaties' commitments to "free competition" presupposes that any state intervention in the market-based process of evaluation and sanction would disturb the accountability relationship foreseen by the Treaties. A rigid set of EU State Aid rules has been one core element of economic governance since the inception of the EU, even though there are exceptions to the general rule that private companies should be subjected to market accountability, as the granting of financial support by the government is permissible in limited cases. However, these exceptions are informed by the notion that subjecting all companies to market rules is necessary to ensure a level-playing field across the EU. Moreover, the EU Treaties posit the principle of market-based allocation of financial resources imposing restraints

[2] Article 3 para.3 TEU; Articles 119 para. 1, para. 2, 120, 127 para. 1 TFEU.

for EU and Member States to interfere with the normative dependency relationship between market parties (Menéndez 2017: 58). In line with the above definition of accountability, markets are thus conceived as the forum in which the actor is held accountable. The constitutional commitment to free market conditions implies the individual responsibility of private actors for achieving their desired market outcomes on the basis of their performance as perceived by other market participants. The primacy of free market rules, as enshrined in the EU Treaties, inherently implies the absence of state intervention in the market-based price determination process, particularly as its relates to bias in how the market evaluates the individual party's position in economic terms.

Likewise, the accountability of states vis-à-vis markets implies subjecting the state to market expectations concerning the economic viability of a given state. There is widely shared acknowledgement that the principal rules under EU law – the no-bailout principle and the ban on monetary state financing – aim to maintain budgetary pressure on states and subject them to market discipline. Both the literature and jurisprudence in this area echo these norms' objectives (CJEU [2012: Case C-62/14]; FCC [2014: Case 2 BvR 2728/13]; Borger [2016]; Palmstorfer [2012]). Through the market-based clearing of financing needs, states are incentivised to design their public policy in a manner that increases the chances of favourable appreciation by markets. Commonly, markets are considered to value policies that improve a state's economic competitiveness and EU constitutional rules appreciate the effect of governments held accountable by markets for their fiscal conduct.

The strict ban on state intervention implemented by EU Treaties both on private and public sector actors cannot be seen as mere legal devices to attain certain public policy goals (free competition and avoiding moral hazard). Rather, free competition, market-orientation, no-bailout and fiscal discipline have been constitutional elements of European Treaties since Maastricht (Lechevalier 2017: 42). While initially rooted in German ordoliberalism (Pühringer 2017), these economic elements have now become cornerstones of the EU economic order. This does not preclude a pragmatic blend of both economic and political accountability when it comes to debt financing by states. In fact, the accountability of Member States to the disciplinary judgment of the market finds a clear parallel in the political accountability regimes established by EU policies that implement non-market-based support facilities (of which the European Stability Mechanism (ESM) is only the most drastic). One example at the EU level is the envisaged Reform Delivery Tool, which will channel financial resources while ensuring political accountability. The tool foresees three interactive moments to enable accountability, which can be subsumed under categories "informing," "justifying," and "sanctioning." A Member State wishing to receive support first submits a proposal for reform commitments to the Commission.[3] This proposal must be duly reasoned and substantiated with a view how it addresses the challenges identified in the European Semester (i.e. "informing"). The Commission may seek additional information and require the Member State to revise the proposal if needed. Once approved, the Member State must report within the European Semester process on the progress made in the achievement of the reform commitments (i.e. "justifying"). However, if the Commission considers that the milestones and targets have not been satisfactorily implemented, the payment can be suspended (i.e. "sanctioning).[4] Similarly, in federal systems, regional governments receiving financial grants from the federal government are held politically accountable, as they are typically obliged to demonstrate their financial need ("informing"), while accounting for how they have spent this funding in the past or will do so in future ("justifying"). Furthermore, they may also suffer financial cuts or the

[3] Article 11 of Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme, COM(2018) 391 final.
[4] Ibid, Article 15.5.

imposition of conditions on their use of financial resources (“sanctioning”). Accountability in these cases is political, as it is channelled through decision-making processes in line with democratic standards and decisions are adopted by (more or less) legitimized institutions.

Importantly, economic and political accountability can be substitutes to the extent that state borrowing can either be implemented through disbursements from public coffers (thus entailing political accountability) or, alternatively, can depend on market mechanisms, with Member States raising funding through bond markets (thus entailing economic accountability). In this connection, the EU’s current system for enabling state borrowing depends predominantly on market mechanisms, but is complemented by some public-sector lending facilities.

The primacy of economic accountability as a constitutional choice for Member States’ debt financing operations is not called into question by the design of EU governance, which is characterized by fiscal rules and political bodies such as the Council, which plays a role in fiscal governance. Fiscal rules are intended to minimize the negative spillovers that can result in a monetary union from one country’s fiscal misconduct, particularly when markets do not sufficiently prevent behaviour that can lead to spillover effects (e.g. because of the moral hazard engendered by bailout guarantees). The existence of fiscal rules to limit unsound borrowing behaviour has given rise to various tools for enforcing political accountability (between Member States and EU), but this has not called into question the general accountability of Member States to the market.

2. *Constitutive elements in economic accountability*

The foregoing discussion has shown that the EU Treaties’ economic accountability regime rests on establishing a relationship between the forum (i.e. market) and actor (i.e. public or private sector actors). However, the substitution argument put forward here requires further alignment with the elements constituting accountability relationships. Drawing on *Bovens* seminal work on accountability, we should verify the relevance of *informing, justifying, sanctioning* for economic accountability.

Political accountability rests on the notion of a clearly designed institutional setting. In its most basic sense, there is the parliament (forum) where the government (actor) provides information about its actions (i.e. informing), the parliament then discusses these actions (e.g. debating), and gives or denies approval for government proposals (e.g. approval/sanction). Similarly, under legal accountability, a court (forum) may ask parties to give information, ask questions and pass judgment (Bovens, 2010). Under economic accountability, some of these institutional steps are less explicit, but they remain inherent in the relationship between states and markets.

Information is provided by public and private sector actors in the sense that both types of actors provide data concerning their economic performance (whether in the form of annual statements or macroeconomic statistics). An absence of data or its misrepresentation can result in negative effects (*sanctions*). Essentially, the market (as a forum) uses the information provided by the actors (whether public or private) to assess economic viability and solvency.

The *debating* element is less explicit, as states are not literally interrogated by markets in the same way that political authorities are. However, state actors do provide justification for their actions vis-à-vis markets at various levels: First, the act of providing information has an element of justification, for a state's economic track record is a testament to its pursuit of sound fiscal policy. Second, public-sector emitters of bonds must comply with certain regulations that ensure transparency in order to protect investors. Third, rating agencies act as institutional device that not only furthers transparency but also imposes on countries a duty to disclose information and pursue sound fiscal conduct. Although rating agencies are subject to criticism and not formally institutionalized through public law, they are an essential institution in the sovereign bond market as they assess the creditworthiness of nation states on an ongoing basis (in part based on information received via informal government channels). Furthermore, credit rating agencies encourage states to justify their actions and disclose information, as a downgrade may result if the country hides, distorts, or suppresses information. Hence, the justification process does not take place in a defined space and time (as with parliamentary meetings or court sessions) but rather through a web of more or less formalized interactions between actors and market institutions, which nevertheless serve the purpose of justification and transparency.

Finally, *sanctionability* is an implicit element to the relationship between actor and forum, occurring formally or informally, but presupposing the ability of the forum to reward or punish the accountable actor for his or her performance (Fearon [1999: 55]; Strøm [2000: 267]). In the present case, sanctions are imposed through unfavourable lending conditions, depending on the quality of performance revealed during the justification stage. The bond rate determined by the market is the instrument by which states are held liable for their economic performance, with sanctions or rewards taking the form of higher or lower risk premiums.

3. *The dissolution of EU's economic accountability during the crisis*

The crisis has fundamentally shaken this ideal world of market-based accountability. Throughout the crisis, the economic accountability regime subjecting both private as well as public entities to market forces has been manifestly impaired. With a view to private parties, turbulence in financial markets led to massive injections of liquidity at fixed interest rates, giving rise to incompatibilities with a system of capital allocation based on competitive markets (Menéndez [2017: 59]; Steinbach [2016: 368]). On various occasions, the European Central Bank (ECB) has performed market maker functions by assuming tasks typically performed by markets. This intervention was carried out through unconventional financing operations, with the result that the ECB largely determined the capital allocation mechanisms in the Eurozone (Menéndez 2017: 58 et seq.).

The application of EU state aid rules provides another example of the decline of market accountability standards. State aid practice by the European Commission has led the ban on state aid to be modified, severely impairing the word and spirit of the prohibition on state aid enshrined in Article 107 TFEU (Steinbach 2016: 375 et seq.). The plethora of public-sector interventions that have been undertaken by way of non-conventional financing operations and massive state aid can hardly be seen compatible with the regulatory ideal of free markets as enshrined in the Treaties (Menéndez 2017: 59).

Similar considerations apply to the accountability regime governing state responsibility for public finances. Without prejudice to a more detailed analysis on the lawfulness of the various bailout measures (Steinbach [2013: 15]; Tuori and Tuori [2014: chapter 5]), it is obvious that both fiscal and monetary support for crisis-racked countries creates tensions with these principles of state responsibility and market accountability. Market orientation in state financing and its corollary, strict national responsibility for national debt, have been practically invalidated. Irrespective of the debate on whether this substantially comes close to mutualisation, this kind of financial support relaxes the strict economic accountability rule enshrined in EU rules by undermining the principle of self-justification and sanctionability required in the no-bailout principle.

Substitution of equivalent accountability regimes?

In light of the foregoing, I argue the following in this section: There has been a shift from economic to political accountability with an associated weakening of market mechanisms as a driving force in the formulation of national policy by public authorities. The new mechanisms of political accountability seek to leverage the logic of market pressure and discretional conditionality as developed in relevant jurisprudence. In any event, since the economic accountability regime required by EU Treaties has lost effect and was replaced by a political accountability regime of undemocratic design, this shift should only be temporary in order to return to the desired state set forth by EU Treaties.

4. Shift from economic to (insufficient) political accountability

Throughout the crisis, the accountability regime has undergone fundamental changes, experiencing a shift away from the regime based on market discipline as stipulated under EU Treaties toward collective governance under the auspices of creditor institutions (Joerges and Kreuder-Sonnen 2017: 135). Creditor states and institutions have stepped in, imitating markets with the objective of safeguarding the EU as order of stability and performing the market function of allocating financial resources while also crafting structural reform obligations to promote return to fiscal solidity.

This shift has led to what in the literature has been identified as derogations from democratic governance in several regards: First, the assumption of initially market-based functions by some creditor institutions has been perceived as a politicised trend which, from a democratic governance perspective, should have been mirrored by stronger role for the European Parliament (Dawson 2015: 998 et seq.), particularly in light of the distributive conflicts necessarily associated with a financial allocation mechanism such as the ESM (Chalmers 2012: 962) as well as given the expansion of economic policy coordination through the European Semester (Crum 2018). Connected to this is the observation that power is accumulating in non-representative institutions – specifically, rather than expanding the European Parliament's authority, most new powers have accrued to the ECB, EU Commission and CJEU (Menéndez 2017: 72).

Second, political accountability standards vary under post-crisis economic decision-making with regard to national parliaments' ability to influence economic policy decisions. While there is evidence suggesting disempowerment of some national parliaments under new EU economic governance, other parliaments have been able to determine and monitor their executives' positions in EU decision-making (Hoïng 2015). This variability in national parliaments' involvement in decision-making processes underscores the ambivalent effects of crisis policy on political accountability. On the one hand, several judgments rendered by the German constitutional court have been in defence of national parliamentary prerogatives and revolved around the basic question of the bailout measures' compatibility with the democratic principle, given the associated risk of an uncontrollable burden for the German taxpayer and the entailing dissolution of the legitimacy chain (Miller 2013). On the other hand, as prominently expressed in the judgments of the Portuguese constitutional court, which dismissed several conditionality-induced policy measures for constitutional reasons, the democratic principle has been brought into position against intrusive and alien policy orders (Menéndez 2017: 62). Seen together, the shift from economic to political accountability has become an issue, although from different perspectives and viewed through national lenses. Considering that the theoretical benchmark of accountability presupposes a frictionless chain of legitimacy between national parliaments and actual decision-makers (Böckenförde 2005), this chain has become fragile both for those constituencies taking up a financial burden (creditor states) and those accepting intrusive policy regimes (debtor states). That is, the collapse of economic accountability and the emergence of public authorities imitating markets through discretionary political conditionality lies at the heart of democratic tensions and opposing national constitutional prerogatives.

Third, power imbalances between creditor and debtor states have been observed, whereby the former (particularly Germany) have dominated the agenda on financial aid and the design of conditionality, while the latter have seen foreign powers decide on their domestic reform programmes (Steinberg and Vermeiren 2016). What looks at first sight like a new transmission of democratic legitimacy through the intergovernmental method acting outside the Community method has thus proved a process on unequal footing that actually favours creditor over debtor states. (Menéndez 2017: 72)

Yet regardless of whether the new governance regime is perceived as satisfying democratic standards or not, it seems clear that functions previously performed by markets have migrated into the sphere of political decision-making, thus raising expectations for accountability to comply with democratic standards.

The equivalence doctrine in policy and jurisprudence

The ostensibly undemocratic shift in governance that has resulted with the movement from economic to political accountability has been accompanied and partially enabled by a line of jurisprudence that accepts political conditionality as substitute for market-based accountability. In this line of argumentation, political conditionality is seen as a mechanism for structuring financial assistance programmes that is functionally equivalent to pressure through bond prices as a mechanism for market-based accountability. In other words, political conditionality can ensure fiscal aid is administered in a way that transmits the kind of pressure on policy reforms that would prevail if the country would regularly seek finance on bond markets.

The violation of the no-bailout prohibition dominated public discourse throughout the debt crisis. The spectre of moral hazard has regularly been invoked in Germany and other creditor states, as many saw the bailouts as disincentivizing governments on the eurozone's periphery from engaging in sound spending behaviour. From this perspective, bailouts entail the risk of making continued overspending possible even after financial markets have imposed higher bond rates as punishment for irresponsible behaviour (Steinbach 2015: 1116). The policy narrative associated with this logic asserts that fiscal retrenchment as well as labour market liberalisation and welfare state reforms are indispensable. Hence, from early on in the negotiations with debtor countries, major donors including Germany made it clear that any bailout assistance would only be provided together with strict conditions for structural reform (International Herald Tribune 2012). The ascendant conditionality and austerity doctrine was largely attributable to German influence (Dullien and Guerot 2012: 4). The inherent implication drawn in public discourse was that creditor states' insistence on reforms embedded in conditionality would serve as a proper equivalent to what market forces should normally do – the reciprocity in the deal between creditor und debtor states was conceived of as serving an equivalence between market pressure and political conditionality.

This narrative entered into the jurisprudence of both the CJEU and the German Constitutional Court (FCC). Both courts relied on a notion of "functional equivalence" between market-induced and discretion-based conditionality tied to financial aid. From a legal perspective, functional equivalence was seen as indispensable to ensure compliance with the objectives of the no-bailout clause, which is that states should be subject to market pressure. More specifically, in its ESM judgment, the CJEU found that "conditionality prescribed […] is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125

TFEU [i.e. the no-bailout clause]."[5] Further, the CJEU specified that the purpose of "strict conditionality" is "to ensure that the Member States pursue a sound budgetary policy."[6] Accordingly, financial aid is only in conformity with the objective of Article 125 TFEU if it does not lead to an impairment of the incentives for a recipient Member State to pursue a solid budgetary policy. This prerequisite replaces the market logic behind Article 125 TFEU. The conclusion was essentially echoed by the FCC. Despite the effect of financial aid with a view to relaxing market pressure, the FCC found that conditionality would further the obligation of budgetary discipline and to promote country's responsibility through market orientation of national budgets.[7] The CJEU's and the FCC's line of argument thus suggests that they acted on the assumption of precisely this equivalence between the disciplining effect of market mechanisms, on the one hand, and the steering effect of conditionality, on the other hand.

Indeed, the equivalence doctrine informing EU financial assistance may explain some of the observed trends with a view to seemingly undemocratic crisis governance. First, as mentioned, under economic accountability markets act as a forum that passes price-based judgements on whether national policies are considered satisfactory from an economic solvency perspective. Through its de facto suspension of market mechanisms, the EU has transferred the competency of market assessment to those creditor states who supply financial resources. Power imbalances are accordingly inevitable, and the shift from economic to political accountability thus intuitively appears undemocratic, because states obliging other states to adopt certain policies is at odds with sovereignty principle (White 2015a: 588 et seq.).

[5] CJEU (2012) Case C-370/12, para. 111.
[6] CJEU (2012) Case C-370/12, para. 143.
[7] FCC (2012) Case 2 BvR 1390/12, para. 129-130.

The equivalence argument does not suggest that both market pressure and political conditionality are the same or lead to the same adaptations in fiscal behaviour. One obvious difference is that market forces do not specifically prescribe a detailed set of policy tools comparable to those enshrined in Memoranda of Understanding (and thus appear less intrusive). Furthermore, one could ask whether the austerity measures tied to political conditionality are precisely the same as those which markets would have required. However, these differences notwithstanding, there is structural similarity between economic and political conditionality, not only regarding objectives, but also regarding the relationship between forum and actor, for this relationship is characterized in both regimes by the interactive aspects of informing, justifying, and sanctioning. As illustrated by case law, ensuring (by imitating) the proper function of markets is a principal objective of the political conditionality that is enshrined in the no-bailout clause, which is a constitutional norm in EU economic governance. Both markets and political conditionality require policy changes that will bring about greater economic viability and creditworthiness. EU Treaties explicitly stress fiscal discipline as a pivotal component to the EU's economic resilience on the whole, and the Treaties leverage market pressure to ensure Member States' honour this objective. Developments surrounding political conditionality represent an outgrowth of this focus on fiscal responsibility. Moreover, both forms of accountability incorporate the logic of reciprocity in that rewards are granted in return for economic policy reforms (or, alternatively, in the granting of sanctions for failure to act).

Notwithstanding the analytical value of functional equivalence as underpinning the factual shift in accountability, this outcome of legal reasoning is subject to criticism itself. The equivalence logic developed in the jurisprudence of CJEU can be characterized as accommodation of political necessities and thus legalisation of discretionary politics (Joerges and Kreuder-Sonnen, 2017). The effect of functional equivalence is that debtor countries have to accept conditionality designed by foreign powers, while creditor countries face the issue of redistributing significant sums of taxpayers' contributions to foreign states (Murswiek 2014: 147 et seq.). Challenges to democratic surveillance are inevitable on both sides, with creditor states struggling to ensure national parliaments involvement in channelling national funds abroad and debtor states parliaments being asked to accept conditionality imposed by creditor states encroaching with democratic prerogatives as a substitute for market conditionality. This conflict lies at the heart of the observation that creditors states are favoured over debtor states (Menéndez 2017: 72). Moreover, the equivalence logic produces constitutionally asymmetric effects, as the insistence of creditor states on limiting their own liability by demanding conditionality causes debtor states' public authorities to observe the creditors' constitutional order (Deters [2014]; Joerges and Eversion [2013]). It is precisely the asymmetric effects on creditor and debtor countries that cast doubts on the constitutional and democratic sustainability of the equivalence logic.

Hence, in order to avoid that national rules of democratic control in creditor states trump basic democratic prerogatives in debtor states, the shift in accountability does not merit perpetuation. Rather, respect for national parliaments prerogatives on equal footing requires restoration of the normatively demanded market-led accountability regime, implying that the shift in accountability can only be accepted on a temporary basis. This claim for returning to market-led accountability aligns with the literature identifying authoritarianism at work, with the crisis-induced measures based upon the autocratic constitution of authority and the arbitrary exercise of authority (Kreuder-Sonnern and B. Zangl [2015]; White (2015b)]. Since the substitution in accountability mode unfolded in quasi-authoritarian fashion hampering democratic processes, one should exit from the authoritarian state under political accountability signs to return to the market-based accountability type stripped from political dependencies.

Conclusion and outlook

This analysis chose a widely observed (and lamented) phenomenon – the undemocratic fashion of crisis management – and sought to offer an explanatory category that captures the metric driving this evolution. Moving beyond the application of familiar concepts of integration theory to patterns of supranationalism/intergovernmentalism (Joerges and Kreuder-Sonnen 2017: 126), accountability – defined as a legally determined relationship that creates obligations on an actor justify actions to a forum – offers an analytical category for appraising the alterations that have been witnessed to the EU's economic governance regime. The term "economic accountability" reflects the EU Treaties' choice of free market rules that subject the financing needs of private actors and states to the judgment of markets. The crisis has undermined this normative accountability regime and shifted the forum of accountability from markets to public creditors, thus yielding a shift from economic to political accountability.

Substitution of economic with political accountability is further reflected in a central premise of debt jurisprudence, according to which a functional equivalence exists between policy outputs determined by market pressure and policy reforms tied to conditionality for financial aid. The substitution effect is responsible for what has been perceived as undemocratic governance in EU economic policy. The forum of accountability has shifted from the market to creditor states, who have taken over market functions in providing financial resources, demanding justification of economic viability and imposing sanctions. Hence, the debtor states are no longer held accountable vis-à-vis abstract market forces but rather individual states and institutions. The parallelism between forum and actor then necessarily implies an imbalance on the level of sovereign states and a bias towards creditor states and institutions, because they represent the new accountability forum. This finding aligns with liberal intergovernmentalism (Schimmelpfennig [2015]; Moravcsik [1998]) in finding that the collapse of market accountability created an asymmetric financial and fiscal interdependence with the Euro area which shifted bargaining power to creditor states.

In any event, constitutional and political tensions result from political conditionality being more detailed (and thus seemingly intrusive) than abstract market pressure sparing governments' prerogative. The shift from economic to political accountability is the source of multiple tensions, particularly because of the asymmetry between creditor states' and debtor states' constitutional requirements. It stands in contrast to market-based allocation of financial resources as the preferred accountability of the EU legal order regime implying that permanent replacement of market functions by public discretion is not politically desirable nor in conformity with the EU Treaties. On this basis, the analytical focus of this paper allows to identify a way out from the quasi-authoritarian emergency politics undermining democratic processes (Joerges and Kreuder-Sonnen 2017) by taking seriously the choice of the EU economic constitution. Market-based modes of accountability are less intrusive and less democratically biased than the emergency architecture of political accountability which is responsible for persistent asymmetry in governance.

Hence, unlike neo-functionalist approaches to crisis management would suggest, efforts must be directed toward returning to the desired accountability standard under which markets, not foreign states or institutions, may exert pressure on legitimate national institutions to modify public policy. This does not imply a complete relegation of supranational architecture in the sense of striving for constitutional sovereigntism as one form of disintegration (Kreuder-Sonnen 2018). It does however emphasize national autonomy and responsibility in fiscal affairs and turns against forms of mutualisation undermining economic accountability. An appropriate institutional setup on supranational level would allow market forces to work credibly: Stringent insolvency rules as well as a lender of last resort in times of liquidity dry-up should be core institutional elements (De Grauwe et al. 2017).

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