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Accountability in the EU's para-regulatory state: The case of the Economic and Monetary Union

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Abstract

This article revisits Majone's famous argument about accountability in the regulatory state in reference to the European Union's (EU) Economic and Monetary Union. We show that the EU has entered the stage of a "para-regulatory state" marked by increasing EU regulation in areas linked to core state powers. Despite the redistributive and politicized nature of these policy areas, the EU's "para-regulatory state" has continued to rely on its regulatory model of accountability, focused on decisionmaking processes, and interest mediation. In line with Majone, we describe the model as procedural and contrast it to substantive accountability – which is necessary when regulation has clear redistributive implications. Using two case studies from fiscal policy and monetary affairs, we illustrate the predominance of procedural accountability as exercised by the European Parliament and EU Courts. We complement the empirical analysis with a normative discussion of how substantive accountability could potentially be rendered in both fields.

Keywords: accountability, European Union, Economic and Monetary Union, "para-regulatory state", regulatory state.

1. Introduction

For Giandomenico Majone, the question of democratic accountability in the European Union (EU) was a non-problem. In his view, the EU was nothing more than a "regulatory state" that relied extensively on the adoption and enforcement of rules designed to improve market efficiency (Majone 1994, 1999). Following a Pareto-improving logic, the delegation of regulatory powers to EU institutions was expected to correct market failures without leaving anyone worse off. In fact, regulatory powers were more efficiently exercised by non-majoritarian institutions with the time and expertise for "fact finding, rulemaking, and enforcement" in specific policy fields (Majone 1994, p. 81). Such "efficiency-oriented policies" posed different accountability challenges than traditional Keynesian policies associated with the "interventionist" or "positive state" of the post-war period (Majone 1999, p. 1). Unlike its predecessor, the regulatory state did not imply redistribution, which in turn required decisions by electorally accountable institutions. Consequently, as long as redistribution was not involved, delegation to EU institutions was democratically unproblematic.

In practice, the distinction between efficiency-oriented and redistributive policies was blurred, as many EU regulatory policies had "significant redistributive consequences" (Føllesdal & Hix 2006, p. 543). Moreover, the evolution of European integration since the Maastricht Treaty (1992) has brought additional problems. The last three decades have seen the development of what we will describe as the EU's "para-regulatory state": a term we use to denote increasing regulation by the EU in areas classically linked to core state powers (Genschel & Jachtenfuchs 2016, 2018). "Core state powers" entail key constitutive functions of states such as the capacity for coercive force (through military, police, and border control), the ability to tax and spend using an individual "coin" (fiscal and monetary policy), and the establishment of a centralized system of public administration (Genschel & Jachtenfuchs 2018, p. 179).

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In contrast to market regulation, para-regulation presupposes a difference in the entities that are being controlled. It is not market participants that are the target of regulatory intervention, but the state itself (Scott 2004, p. 166). In this respect, the "para-regulatory state" can be seen as a subcategory of the "post-regulatory state" (Black 2001; Scott 2004) or "regulatory capitalism" (Braithwaite 2008; Levi-Faur 2017) – a broader phenomenon capturing the diversification of actors and instruments in the regulatory world. In respect to *accountability*, the "para-regulatory state" presents two key difficulties when compared to the traditional regulatory state. The first is a problem of redistribution: the regulation of core state powers is inherently prone to zero-sum conflict because "every euro of public revenue can only be spent once; every border guard can only be in one place at one time" (Genschel & Jachtenfuchs 2018, p. 181). The second is a problem of disagreement: core state powers often raise questions of identity and values where there is no consensus on the goals the EU ought to pursue and the suitable division of powers between the national and supranational levels (Hooghe *et al.* 2019, p. 2).

In this article, we argue that that the EU's current approach to accountability largely ignores these features, reflecting a regulatory bias toward the process of policymaking and interest-mediation that is not appropriate for policy decisions in areas of core state powers. To show the mismatch, we propose a conceptual distinction between procedural and substantive accountability. Procedural accountability requires actors to justify and potentially make amends for the process through which they took and/or executed a policy decision. By contrast, substantive accountability requires actors to justify and potentially make amends for the substantive worth of the policy decision itself. We contend that the EU has transferred its procedural approach to accountability from the "regulatory" to the "para-regulatory state," although the latter's redistributive and contested character would demand *substantive* accountability.

To illustrate the problem, we use two examples from the Economic and Monetary Union (EMU) – a policy field that represents a "pathway" case for the EU's "para-regulatory state" (Gerring 2007, p. 238). EMU includes both fiscal and monetary policy issues and is thus a prime example of the European integration of core state powers (Genschel & Jachtenfuchs 2018). At the same time, the euro crisis demonstrated the increasingly redistributive and contested nature of EMU policies (Börzel 2016; Hutter & Kriesi 2019), which subsequently creates specific accountability problems. Empirically, we focus on the accountability potential of parliaments and courts in EMU at the expense of other forums for administrative accountability, such as the European Ombudsman or the European Court of Auditors. While we acknowledge the prospective contribution of different institutions to substantive accountability in EMU (including from the national level), we believe that the transnational character of EMU decisions and their redistributive implications warrants initial attention to EU-level accountability forums that have either the political capital or the jurisdiction to assess the impact of fiscal and monetary instruments. Accordingly, we discuss the European Parliament's (EP) oversight of fiscal coordination through the European Semester and judicial review by the Court of Justice of the European Union (CJEU) in monetary policy.

We begin by explaining accountability in the EU's regulatory state and outline the challenges of "para-regulatory" policymaking, a category that can apply to other regional and international organizations (Section 2). Next, we introduce the distinction between procedural and substantive accountability, emphasizing the prevalence of the former in EU fiscal and monetary affairs (Section 3). Drawing on lessons from the EP and the CJEU, we show how political and legal forums could deliver on substantive accountability at the EU level (Section 4). While improvements in democratic accountability in the EU system have typically focused on strengthening representative institutions, we suggest an alternative. In the absence of broader institutional changes, the EU's *existing* institutions could better cope with disagreement and redistribution by re-focusing their accountability efforts on scrutinizing EU decisions against substantive rather than procedural standards. In the conclusion, we reflect on the broader implications of our argument for the EU and the regulatory world.

2. Accountability in and beyond the regulatory state

The nexus between regulation and accountability is a broad topic in political science, law, and public administration (Braithwaite 1999; Majone 1999; Scott 2000; Black 2008; Maggetti 2010). Attention to the subject resulted from the general trend toward the delegation of regulatory tasks to non-majoritarian institutions in representative democracies. To ensure policy credibility over time and impartiality from interest groups, non-majoritarian institutions were often granted a wide margin of independence from political actors and electoral cycles

(Majone 1998, p. 16). But while political "principals" (governments or legislatures) could delegate specific powers to independent regulatory "agents," they could not transfer their [electoral] legitimacy through the act of delegation; instead, regulatory institutions had to establish legitimacy on their own (Majone 2005, p. 74).

The academic literature has identified two main ways in which independent regulatory institutions can achieve legitimacy: one grounded in the effectiveness of their policy outputs, the other emphasizing the correctness of their decisionmaking processes (Maggetti 2010, p. 3). Independent regulatory institutions have output legitimacy owing to their expertise and non-partisanship in a given field (Scharpf 1999, Chapter 6), which facilitates "accountability by results" (Majone 1998, p. 22). On the other hand, the idea of "procedural legitimacy" is about the clarity, legality, openness, and justifiability of decisionmaking processes within independent regulatory institutions. According to Majone, such institutions meet the standards of procedural legitimacy if they have: (i) a narrowly-defined, precise democratic mandate, (ii) leadership appointed by elected officials, (iii) a clear decisionmaking process that stipulates the involvement of various interest groups, (iv) the obligation to defend policy decisions in courts of law, and (v) the requirement to be monitored regularly by political principals (Majone 1998, p. 20).

The institutional framework of the EU's "regulatory state" reflects the procedural approach to legitimacy and accountability very closely. The ECB has been discussed at length from this perspective, as have other EU agencies that are less independent (e.g. Magnette 2000; Elgie 2002; Busuioc 2013). Even the Commission fulfills the procedural standards set by Majone because: (i) its actions are limited by the division of competences set by the Treaties, (ii) the College of Commissioners is appointed by the EP, (iii) the consultation procedure for legislative initiatives requires the Commission to involve various interest groups in the negotiations, (iv) Commission decisions are subject to judicial review by the CJEU, while (v) the EP exercises ongoing legislative oversight over the Commission through regular reporting and parliamentary questions (Tallberg 2009, pp. 116–119).

The question is whether the same procedural approach to accountability is sufficient beyond regulatory decisionmaking – to what we term the "para-regulatory state." Since the Maastricht Treaty, the scope of EU authority has expanded to areas at the heart of national sovereignty and thus not easily subject to supranational regulation, for example socio-economic governance, foreign and security policy, or justice and home affairs (Bickerton *et al.* 2015). These policy areas included core state functions that were earlier considered possible only within the national realm (Genschel & Jachtenfuchs 2016). However, the EU did not integrate core state powers by building supranational capacities, for example military and police forces or a large administrative apparatus (Genschel & Jachtenfuchs 2016, p. 43). Instead, the EU relied on its "go-to" instrument from the past, namely regulation through rulemaking, rule monitoring, and sanctions for breaking the rules, in order to mobilize national capacities for common purposes (Genschel & Jachtenfuchs 2016, p. 45). Examples include the coordination of defense capabilities and fiscal policy through "soft law" or the use of "hard law" to require public administrators to implement EU decisions.

The regulation of core state powers, and hence the "para-regulatory state," is substantively different from market regulation for three main reasons (Genschel & Jachtenfuchs 2018, pp. 181–182). First, the material resources behind core state powers have clear [re-]distributive implications: in the short-term, every decision implies that some Member States gain while others incur losses (in terms of euros, police forces, or border guards). Second, the costs for regulatory compliance in areas of core state powers are borne by Member States instead of market participants. That means governments have to be not only willing but also able to invest coercive, administrative, and fiscal capacities into complying with EU regulation, for example guarding external borders during refugee inflows. Third, and very importantly for accountability, the material and ideational costs for integrating core state powers attract the attention of mass publics, who are likely to reject redistributive measures across Member States or oppose the integration of policy fields linked to national identity (Hutter & Kriesi 2019). In other words, "the regulatory state is not enough for the integration of core state powers" (Genschel & Jachtenfuchs 2018, p. 182).

2.1. The concept of the "para-regulatory state"

While the "para-regulatory state" emerged from the political context of European integration, we argue that the term has conceptual value outside the EU. Para-regulation denotes the exercise of regulatory functions in areas

"derived from the state's twin monopoly of legitimate coercion and taxation," including the military, police forces, border patrols, public administration, and fiscal institutions (Bremer *et al.* 2020, p. 58). Traditionally, these were seen as domains of sovereign statehood which required material capacities (money, personnel, and administrative apparatus) to physically implement laws within national borders (Genschel & Jachtenfuchs 2016, p. 43). Having the resources and coercive ability to enforce compliance with laws meant that sovereign states had little use for para-regulatory instruments. This is still valid today: for instance, in multi-level polities similar to the EU – such as the US or Switzerland – there is a clear division of tasks and resources between the federal and the state levels in areas like external and internal security, taxation, or public administration (Kelemen 2014).

Against this background, we expect that para-regulation is more likely to occur in international or regional organizations that bring together sovereign states with the objective to ensure horizontal coordination across units located at the same level of governance. Potential examples include regulatory measures set by the Organization for Economic Co-operation and Development on harmful tax practices or the Financial Action Task Force on money laundering. In addition to setting standards, such organizations run blacklists that restrict and even prohibit member states to make transactions with countries on the list (Eggenberger 2018). A prominent recent example is also the US-led effort to agree a minimum corporate tax rate between advanced economies (a measure that targets a core element of state sovereignty in the name of limiting a race to the bottom in corporate taxation).

Following this line of thought, the difference between the "regulatory" and the "para-regulatory state" lies in the political character of the policy area *and* the type of entities subject to regulation. Instead of targeting market participants, para-regulation affects states themselves and their so-called "action resources" (Genschel & Jachtenfuchs 2018, p. 181), namely the material capacities constitutive of their identity (currency, taxes, army, police, etc.). The emphasis on state actors as the subject of regulation and the inherent redistributive implications at play link the "para-regulatory state" to other key concepts in the regulatory literature. Specifically, para-regulation can be placed in-between the "regulatory-welfare state," which denotes the pursuit of welfare objectives through regulation rather than fiscal transfers (Mabbett 2011), and the "post-regulatory state" (Black 2001) or "regulatory capitalism" (Braithwaite 2008; Levi-Faur 2017), which capture a broader trend toward "decentering" regulation from the state or blurring the distinction "between states and markets and between the public and the private" in regulation (Scott 2004, pp. 146–147). On the one hand, the "para-regulatory state" is a larger category than the "regulatory-welfare state" because it entails a wider range of policy areas beyond social regulation (Levi-Faur 2014, p. 609). On the other hand, para-regulation is narrower than the "post-regulatory state" because it refers to a change in the target but not the source of regulatory instruments. Markets and private actors do not feature in para-regulation; conversely, this is the realm of state-like entities (e.g. the EU) or international organizations producing regulation and subjecting public actors to it. Additionally, para-regulation in areas of core state powers does not replace traditional forms of regulation but exists alongside market regulation (as suggested by the Greek prefix "para-" as opposed to "post-").

Having established the parameters of the "para-regulatory state," what are its *accountability* implications? In the EU context, we argue that the regulation of core state powers has institutionalized the procedural paradigm of accountability advanced by Majone. In the next section, we illustrate this phenomenon with reference to recent developments in EU fiscal and monetary affairs.

3. The "para-regulatory state": Beyond procedural accountability

For conceptual simplicity, our definition of procedural accountability is broader and more straightforward than Majone's notion of procedural legitimacy. In our view, procedural accountability captures any public accountability relationship focused on the process through which a particular policy decision was taken or implemented. By contrast, substantive accountability shifts the object of accountability relationships from the process of adopting a decision to the merit of its provisions *per se* and their likely impact. Following the convention in the literature, accountability is the relationship between two parties – an account-giver (the actor) and an account-holder (the forum) – that involves specific obligations for transparency, justification, and potential rectification of an actor's conduct in political, legal, administrative, professional, or social settings (Bovens 2007, pp. 455–457). Accountability is procedural when parliaments, courts, auditors, professional peers, or civil society call different actors to

account for the procedural steps they undertook in forming or executing a policy decision. Conversely, accountability is substantive when actors are being called to account for the substantive worth of the decision itself.

Originating in public law (Harvey 2017), the distinction between procedural and substantive accountability is useful to denote not only how employees justify their conduct in a public organization but also the grounds on which accountability forums can contest such conduct. In the EU institutional framework, the emphasis on procedural accountability reflects several advantages embedded in the goals of the traditional regulatory state. As Majone understood it, a key danger the regulatory state had to avoid in a transnational setting was factionalism, that is the capture of EU policy by particular states or dominant industrial or other interests (Majone 1994, p. 94). While traditional political control would endanger the regulatory mission by subjecting it to short-termism and majority rule, accountability (understood in procedural terms) offered the ability to limit regulatory institutions, involve relevant stakeholders and, as a result, increase the credibility of the policies thereby produced.

This explains the special significance of Courts in regulatory accountability. Judicial review helps ensure regulatory institutions "stick" to their original missions while respecting the rights of "directly affected" parties. From this perspective, courts (as non-majoritarian institutions) should not "second-guess the appropriateness of policy choices made by the EU legislator" but instead exercise a strict form of "process-oriented review" (Lenaerts 2012, pp. 3–4). This has been accompanied by the deep anchoring of the regulatory state in techniques such as impact assessments, stakeholder consultations, and cost–benefit analyses, which seek to improve the efficiency and "buy-in" of affected parties to EU policies – separate from the political preferences of majority groups (Dawson 2016). In simple terms, if the goal of accountability in the regulatory state is control and interest-mediation *without overt politicization*, procedural accountability fits the bill perfectly. It offers a means of checking the policymaking *process* without opening to political revision the substantive goals regulatory decision-makers pursue.

Furthermore, the distinction between process and substance reflects Rawls' method of reflective equilibrium, that is in a political system where there are multiple actors with different values and interests, procedural accountability has "the highest degree of acceptability or credibility" (cf. Daniels 2016). The logic is straightforward: even if Member States and EU institutions disagree about the specific goals they seek to pursue in common, they all agree on the importance of (i) an open and deliberative decisionmaking process that respects fundamental values (i.e. those elaborated in Artcle 2 TEU); and (ii) an implementing process that efficiently "delivers" the goals agreed upon politically. The regulation of the internal market was consistent with the Rawlsian equilibrium because of the efficiency orientation of regulatory decisions (Majone 1998). To put it simply, since decisions were not (visibly) redistributive, reviewing their appropriateness on procedural grounds was considered sufficient to fulfill democratic accountability criteria.

However, the integration of core state powers in the EU has rendered the preference for procedural accountability increasingly unsustainable. The first problem concerns *disagreement*. The Rawlsian equilibrium relies on the notion that substantive disagreement can be mediated by a more essential "second-order" agreement on the procedures and rules through which substantive disagreement will be mediated. In the EU's regulatory state, this agreement is well captured by the current preference for "Better Regulation": a signifier that implies a common agreement on what "good" regulation entails (Dawson 2016). The problem is that such a second-order agreement is increasingly unlikely in highly salient policy fields that touch on questions of identity and shared values (Hooghe *et al.* 2019, p. 2). Issues like border management, fiscal policy, justice, or the rule of law affect national and European perceptions of community, and are thus bound to attract contestation from mass publics (Hutter & Kriesi 2019). In this context, the substantive values and priorities guiding EU action – and not just the procedural means by which policymaking is organized – are at the center of the political process and hence become a crucial element of accountability. To use the example above, when deciding how to integrate migrants, evaluate national budgets, or design the regulation of state media, it is not obvious what "better" regulation entails.

This difficulty is exacerbated by a related second problem: the openly *redistributive* nature of the EU's "para-regulatory state". As Majone argued, while market regulation could plausibly be seen as "Pareto-optimizing," regulation in areas of core state powers inevitably entails redistribution both within and between EU states. In such a setting, political accountability is likely to concern distributive justice and the actual *merit* of EU decisions. The intense media scrutiny of negotiations on the EU's pandemic recovery fund illustrates well this focus on distributive conflict between the so-called "frugal four" nations and other Member States (Khan & Fleming 2020).

In such circumstances, procedural accountability creates a "replacement effect" of procedures for substance (Heidelberg 2017), creating the impression that actors are substantively held accountable when in fact they are not. As we show below, EU accountability in the "para-regulatory state" both copies the procedural accountability model of regulatory policy areas and is increasingly challenged as a result. In the following pages, we illustrate the argument in two different areas of EMU – the regulation of fiscal policy in the European Semester (with a focus on the Commission) and the monetary policy activities of the ECB.

3.1. Parliamentary accountability in the European Semester

Introduced in 2010 in response to the euro crisis, the European Semester ("the Semester") is an umbrella framework for the coordination of Member States' economic, budgetary, and social policies. In the core state powers framework, the Semester is a prime example of fiscal regulation replacing the creation of autonomous fiscal powers at the EU level: since Member States retain the power "to tax and spend," the EU can only use regulation in order to "prevent spillover effects from unsustainable national deficits and debt" (Genschel & Jachtenfuchs 2016, p. 45). There are several ways in which the Semester fits the description of "para-regulatory" policymaking. First, like typical regulation (Scott 2004, p. 147), the Semester involves mechanisms for goal setting (through legal rules or standards), feedback on the attainment of goals (obtained through monitoring), and a realignment component (resulting from the imposition of sanctions when failing to reach goals). Accordingly, the Semester entails a myriad of fiscal and budgetary rules captured in legislative instruments like the Stability and Growth Pact (SGP), the Six-Pack, the Two-Pack, or the Fiscal Compact. The Commission is responsible for monitoring Member States' performance and drafting Country-Specific Recommendations (CSRs), which create new goals every year. Finally, in cases when governments deviate from the key budgetary rules, the Commission can propose sanctions through the Excessive Deficit Procedure (European Commission 2020).

Moreover, like in typical regulation, rules and goals are set through legislative processes or come at the recommendation of a public agency, a "regulator" (Black 2001, p. 129) – in this case, the Commission. When the Semester was established, the Commission expanded its expert staff in several Directorates-General and Eurostat in order to accommodate the expansion of competences entailed in monitoring compliance with EU rules (Savage & Verdun 2016). Simultaneously, the Commission maintained its traditional focus on "evidence-based" policymaking as seen in yearly growth projections and assessments of national budgetary plans, as well as stakeholder consultation with relevant government actors and social partners in the compilation of CSRs (Maricut & Puetter 2018; Zeitlin & Vanhercke 2018). While final decisions on sanctions in the Semester are subject to political disagreement, the Commission's role was enhanced through changes to voting rules, meaning that Commission proposals for fines could only be overturned by qualified majority in the Council (Sacher 2021).

Last but not least, the European Semester is an example of "para-regulatory" policymaking because the target of regulation is not market participants but state actors themselves (see Section 2 above). National governments bear the costs of implementing fiscal rules, which have clear redistributive implications (Efsthatiou & Wolff 2018). For instance, when the Commission favors one set of CSRs or policy orientation over another, Member States face redistributive consequences depending on the characteristics of their political economy, which makes the implementation of CSRs more or less costly. Since the Semester is dominated by executive actors and is exempt from CJEU jurisdiction, the "burden" of accountability falls on national parliaments and the EP (Crum 2018). However, the potential of national parliaments to exercise political accountability in the Semester is structurally limited, keeping in mind that national parliaments can hold their own governments accountable but not the Commission or the Council as a whole (Brandsma *et al.* 2016, p. 624). Consequently, in this section, we focus on the EP as a key political accountability forum that has both the institutional capacity (due to its relationship with the Commission) and the transnational perspective (due to its direct election by EU citizens) to assess the Semester's redistributive consequences.

In the logic of parliamentary oversight of regulators, the EP is one of the principals of the Commission in the Semester (cf. Strøm 2000). Alongside the Council, the EP contributed to the legislative packages that created the Semester – the Six-Pack (2011) and the Two-Pack (2013) – and hence gained powers to scrutinize the Commission's activities in the field through committee hearings known as "Economic Dialogues" (de la Parra 2017). In addition to the possibility of asking parliamentary questions to the Commission, the EP submits annual

resolutions on the Semester, which show cross-party support on the reforms considered important by MEPs for the next year(s) (European Parliament 2011, 2014). Beyond the Semester, the EP serves as a political principal of the Commission through the election of the Commission President (Article 14[1] TEU) and the vote on the College every five years (Article 17[7] TEU). This allows MEPs to negotiate political priorities of the next Commission and influence the agenda in different policy areas, including the Semester. Below we provide an illustration of the political accountability dynamic between the EP and the Commission in relation to the social dimension of the Semester – one of the most contested aspects of the field (Maricut & Puetter 2018; Zeitlin & Vanhercke 2018).

3.1.1. The social dimension of the Semester

Since the Semester's inception, the EP used all its accountability channels to push for a stronger Commission focus on the social policy consequences of fiscal rules. In its annual resolutions on the implementation of the Semester, the EP repeatedly argued that "social and employment policies should not be looked at merely from a cost perspective," but be a goal in themselves (European Parliament 2014). More generally, the EP was a vocal critic of the subordination of social objectives under economic targets by prioritizing, for example, budgetary austerity and the increase of productivity at the expense of social and employment concerns (European Parliament 2011). Alongside plenary resolutions that gathered cross-party support, the interest in the social dimension is reflected in the use of parliamentary questions on the Semester. For instance, in the Economic Dialogues with the Commission between 2012 and 2019, social aspects constituted the top subject of parliamentary questions, including a variety of issues such as employment, pensions, labor market reforms, poverty, or social inclusion (Akbik 2022, Chapter 5).

Furthermore, the EP used the opportunity of the Spitzenkandidat process in the 2014 electoral cycle to demand a stronger commitment from the incoming Commission President to the social dimension of the Semester. This was because the candidate of the European People's Party (EPP) – Jean-Claude Juncker – required the support of the social democrats (S&D) in order to form a parliamentary majority (Vesan *et al.* 2021, p. 282). Accordingly, at the beginning of his mandate, Juncker promised the EP to "streamline" the social dimension into the Semester and subsequently achieve a "Social Triple A rating" (Juncker 2014). In 2019, the Commission listed an impressive list of 25 measures that have been adopted during Juncker's mandate in the employment and social field (European Commission 2019, p. 2). The most notable measures concerned increasing the number of social priorities in the CSRs and including more social actors in decisionmaking (Zeitlin & Vanhercke 2018; Clauwaert 2019). Moreover, the "mainstreaming" of social priorities into the Semester involved the creation of a European Pillar for Social Rights in 2017 (European Commission 2019, p. 4). On the surface, it appears the EP's substantive accountability claims to consider the social – and hence redistributive – implications of the Semester were met by the Commission.

But while the political rhetoric around the Commission's social priorities is strong, its substantive achievements are more questionable. As argued by Dawson, there is a difference between mentioning poverty and other social goals in the Semester as opposed to giving them a "useful, autonomous meaning" (Dawson 2018, p. 200). Examining the content of 290 CSRs during 2011–2015, Copeland and Daly demonstrate how social priorities follow the logic of the market, being mentioned in relation to market development, promoting competition, or encouraging labor market participation and flexibilization (Copeland & Daly 2018, p. 1014). From an ideational perspective, several scholars underlined the Semester's persisting neoliberal core (Crespy & Vanheuverzwijn 2019), which continues to promote, for instance, the commodification of labor (Jordan *et al.* 2020). In terms of governance procedures, critics question the underlying assumption behind the involvement of social actors in the Semester, that is if social actors participate in the decisionmaking process, then the policy output will naturally become socially-oriented (see Zeitlin & Vanhercke 2018). The problem is that the inclusion of social actors in the Semester does not guarantee that they will substantively influence the content of CSRs. This was found, for instance, in relation to the increased participation in the Semester of the EPSCO Council (covering Employment, Social Policy, Health, and Consumer Affairs) and the Commission's Directorate-General for Employment (Maricut & Puetter 2018).

In our view, the debate around the social dimension of the Semester demonstrates how demands for substantive accountability in areas of core state powers can be addressed in form but not in substance. The formal

integration of employment and social policy indicators into the Semester – or the presence of social actors in its decisionmaking process – does not automatically bring a substantively different policy orientation. The regulatory focus on policymaking processes and interest mediation is insufficient in the EU's "para-regulatory state": a problem also reflected in legal accountability, as shown below.

3.2. Judicial review and the European Central Bank

The exercise of monetary policy by a central bank is a clear core state power, albeit affected by Treaty limits on the ECB's role in macroeconomic and fiscal affairs (Genschel & Jachtenfuchs 2016, p. 44). While the ability to print money and set interests rates is not a regulatory process, contemporary monetary policy includes regulatory instruments: for example, the ECB regulates the minimum reserves for credit institutions in the Eurozone and also oversees the provision of liquidity assistance to national central banks.

The ECB's accountability structure has evolved since its formation some two decades ago but without radical change, with accountability restricted to three main channels. The first is parliamentary scrutiny: the ECB conducts regular hearings with the EP, including answers to written questions. The second is transparency, as the Bank holds regular press conferences, produces redacted minutes for the meetings of its Governing Council, and also regularly publishes statistical information, expert analyses, speeches, and media interviews (European Central Bank 2020). The final channel is legal accountability through the CJEU and national constitutional courts (the focus of this section).

All these channels operate in the shadow of high operational independence, protected via the Treaty (Article 130 TFEU), and designed precisely to give the ECB a high degree of discretion in fulfilling its mandate. The ECB is thus an archetype for procedural accountability (Dawson *et al.* 2019). Within particular limits, parliamentarians and the general public are permitted to see into certain elements of the ECB's decisionmaking process. Yet, the substance of policy – both the *nature* of the Bank's mandate and how the ECB goes about pursuing it – is largely beyond the realm of accountability and contestation. This development fits with Majone's expectations perfectly. ECB independence was premised precisely on the perceived credibility of an independent central bank expected to overcome political short-termism to reach long-term economic goods for all Eurozone members (Majone 2001). ECB independence is thus based on the two factors of agreement and non-redistribution discussed under the Rawlsian equilibrium, that is the notion both that Member States and citizens largely agree on what the Bank should do and that the fulfillment of this mandate carries only minor distributive effects.

These assumptions explain the role of legal actors within the Bank's activities. If securing both the ECB's functions and its political legitimacy relies on agreement and non-distribution, an important function of the EU Courts is thereby to ensure that the ECB remains within its politically defined mandate and does not stray into more openly distributive fields (such as fiscal policy). The CJEU was therefore given full jurisdiction over ECB acts from the beginning (Article 263(2) TFEU). In its very first case on the matter, the Court declared that the ECB enjoyed only "operational" and not "constitutional" independence, that is it was independent only in the operation of its functions and not from the Treaty itself, including the role given in the Treaty to financial oversight institutions such as the European Anti-Fraud Office.[1] Over time, operational independence has translated into a highly deferential *standard* of judicial review. The Court has thus insisted that – in both its monetary and supervisory activities – the Bank is entitled to a significant margin of discretion given the complexity of its tasks (Goldmann 2014; Markakis 2020).

In monetary policy, the Court's deferential approach has led to low levels of litigation and high levels of success for the ECB, that is the CJEU has yet to annul an ECB decision in monetary policy. This is closely related to the procedural way of conducting judicial review, focused heavily on the ECB's duty to state reasons as specified in Article 296 TFEU. While the CJEU has subjected ECB decisions to proportionality analysis over time (requiring it to balance particular interests), this analysis has been deemed satisfactory whenever the ECB has given reasons connecting its programs with the monetary transmission mechanism and therefore price stability.[2] The normal need – under proportionality – to demonstrate an objective evidentiary basis for decisions or demonstrate the necessity of programs vis-à-vis alternatives has not been demanded by the Court, which is consistent with the "process-oriented" approach to judicial review discussed above (Dawson & Bobić 2019).

While this approach may have gone relatively uncontested in a time of "conventional" monetary policy, the effects of the euro and now Covid-19 crises have brought renewed scrutiny of the CJEU's standard of review. In response to both crises, the ECB has used extensively "non-conventional" monetary policy instruments, such as

various forms of quantitative easing (QE), to fight deflationary pressures (European Central Bank 2018). By creating general liquidity in the economy, these instruments blur the boundaries between fiscal and monetary policy. They also have significant distributive effects, leading several Member States to question whether their main effect is to lower borrowing costs in some Eurozone countries, thereby threatening the overall Treaty-based goal of sound budgetary policy (Reisenbichler 2020, pp. 477–478). The ECB's foray into QE, therefore, indicates both of the above factors of disagreement and redistribution – with many economists and political actors even arguing for a changed ECB mandate given new economic realities (e.g. Fratzscher 2020).

Akin to the story of the European Semester, the evolution of ECB activity indicates a procedural accountability structure that is increasingly contested on substantive grounds. It is little surprise that these factors should place pressure on the CJEU to alter its standard of review. This pressure was brought to the forefront of public debate in a series of preliminary references submitted by the German Federal Constitutional Court (FCC) regarding the compatibility with EU law of various QE programs, culminating in the dramatic finding that the Bank's Public Sector Purchase Program (PSPP) was ultra vires.[3] The basis for this finding was precisely the limited procedural standard of review conducted by the CJEU. In the opinion of the FCC, subjecting the ECB to a minimal form of proportionality focused on the duty to state reasons overlooks the significant fiscal effects of PSPP. The German Court was particularly critical of the formalistic manner in which the CJEU examined the effects of QE, which failed to take into account the program's distributive consequences (on savers, pensioners, and other affected groups).

The basis of the dispute between the two Courts was their contrasting interpretation of the Bank's political independence. In the CJEU's opinion, this entailed a lowered standard of scrutiny. In the FCC's opinion, it conversely entailed a *higher* standard because independence departed from democratic principles. The preference for procedural accountability in new ECB functions has thus had dramatic consequences for EU law, leading to an *ultra vires* finding by one of Europe's most prominent Courts. This type of conflict creates demands for a new approach to both political and legal accountability – as the next section will now discuss.

4. Toward substantive accountability

If the procedural model of accountability has important limitations, what would substantive accountability in the "para-regulatory state" entail? In their criticism of Majone, Føllesdal and Hix defend the classic electoral solution: in their view, what the EU needs to overcome the democratic deficit is increased contestation of political leadership through democratic elections that allow voting majorities to influence the policy agenda (Føllesdal & Hix 2006, p. 547). This solution, however, is predicated on two necessary conditions: first, that citizens understand the dynamics of political competition in an election and vote accordingly; second, that any majority winning the election has the actual means to control the policy agenda. Given structural problems in the EU political system, the EP fulfills neither of these conditions – as it lacks both the necessary electoral connection to citizens and the means to dictate the EU policy agenda (Hix & Høyland 2013).

Against this background, we propose a shift in perspective: what the EU needs is to prioritize substantive accountability in existing forums. Only via substantive accountability, that is a type of accountability focused on the merit of policy decisions, can the EU address, rather than avoid, the problems of disagreement and redistribution brought by its "para-regulatory" functions. To mirror the discussion above, in the next section we focus on the EP and the CJEU as key political and legal forums in EMU.

4.1. Substantive accountability through the EP

How can parliaments ensure substantive accountability? As the linchpin of the delegation chain in democratic systems, parliaments are generally seen as crucial for political accountability (Bovens 2007, p. 455). On the one hand, Members of Parliaments (MPs) act as account-givers toward citizens, who can vote them in or out of office at regular intervals; on the other hand, MPs act as account-holders or political forums of executive actors, over whom they exercise various degrees of control depending if the system of government is parliamentary, presidential, or semi-presidential (Strøm 2000). The accountability potential of parliaments thus relates to two of their key functions: the representative or "expressive" function (Bagehot 1873, pp. 118–119) and the oversight or scrutiny function (McCubbins & Schwartz 1984; Rockman 1984).

Due to the multi-level nature of the EU political system, the EP faces structural obstacles in the exercise of its parliamentary functions. Earlier we noted its weak electoral links to voters and lack of control over agenda-setting, which limit its representative function (Føllesdal & Hix 2006; Hix & Høyland 2011, pp. 131–133). Under the circumstances, MEPs fought for decades to gain legislative and budgetary competences, and succeeded in many policy areas (Hix & Høyland 2013). The empowerment of the EP has thus become synonymous with strengthening its legislative function, drawing on the logic of representation: since the EP is the only EU body that is directly elected, it is uniquely legitimized to participate in decisionmaking.

However, as mentioned above, legislation is not the only function parliaments can have in a democratic system. In this light, we argue that the EP would benefit from redirecting its attention toward substantive accountability by strengthening its oversight and "expressive" functions in areas of core state powers (where it often lacks a formal role in decisionmaking). For instance, in the context of the European Semester, the EP could make better use of oversight hearings such as the Economic Dialogues with the Commission (or the Council), which offer ample opportunity to call executive actors to account for EMU decisions (de la Parra 2017). In this respect, parliamentary questions can contribute to substantive accountability by allowing MEPs to "press for action," "demand an explanation," "test" or "attack" executive actors on controversial issues, or simply "demonstrate [the] fault" of a decision (Wiberg & Koura 1994, pp. 30–31).

To exercise substantive accountability in areas of core state powers, the EP needs to act as a transnational legislature able to question executive decisions from the perspective of the EU as a whole rather than on behalf of one or several national constituencies. Currently, EP accountability hearings are undermined by the diversity of political groups and nationalities of MEPs. In an assembly with 7–9 political groups and 27 national constituencies, it is difficult to maintain a coherence of topics or guarantee the time for MEPs to follow up on poor answers or evaded questions (cf. Maricut-Akbik 2020). Accordingly, we recommend as a first step to institutionalize a division of labor within political groups, allowing different MEPs to take the lead in different oversight interactions with EU executive actors. In the same way that political groups decide to appoint rapporteurs for legislative files, they can create a procedure for allocating MEPs to different accountability hearings. In the ECON Committee, each MEP could focus on the Commission, the Eurogroup, or the ECOFIN Council in the Economic Dialogues – effectively becoming the spokesperson of her group vis-à-vis one executive actor. This would allow MEPs to familiarize themselves with the activities of one or two EU executive actors, and subsequently raise substantive objections to their decisions. Moreover, MEPs would be encouraged to gain transnational expertise on specific topics and seek to articulate broader societal interests than the ones voiced by national constituencies. Simultaneously, the reform would reduce the number of people who take the floor during a committee meeting, keeping in mind that a high number of speakers is bound to disrupt the coherence of EP accountability hearings (Claeys & Domínguez-Jiménez 2020).

Second, the EP could develop in-house expertise tasked with evaluating the redistributive implications of executive decisions in areas of core state powers. For example, the EP's internal departments could create a "Redistribution Scoreboard" and provide MEPs with a list of questions relevant for an executive actor in a given quarter/year. In EMU, questions could be compiled by research-oriented departments such as the Economic Governance Support Unit or the economic branch of the Directorate-General for Internal Policies of the Union. While this would increase the workload of the departments, the solution would take advantage of existing in-house knowledge regarding institutional competences and policy problems in EMU. Moreover, redistributive questions have the potential to bridge the gap between Northern and Southern or between Western and Eastern Member States – as each side can question the direction of transfers or the equal treatment of citizens across countries. By linking their oversight functions with assessments of redistribution across the EU, MEPs can exercise substantive accountability and assume clear political roles.

4.2. Substantive accountability through judicial review

If political forums have a clear way of delivering substantive accountability, what place do courts have in this discussion? On its face, the ability of courts to contribute to substantive accountability is limited by their non-majoritarian nature. Courts are not representative institutions and largely derive their legitimacy from faithfully executing rules produced by political bodies. Their lack of economic expertise drives their reliance on procedural devices to guide judicial review. To return to the ECB example, the CJEU restricts its proportionality analysis to

whether the ECB has given reasons to orient its decisions precisely because – as lawyers – judges are ill-placed to rule on the substantive worth, and relation between economic and other policies. This restricted standard of review also resonates with the EU's wider institutional balance – namely that it is the job of political not legal institutions to make policy decisions, and to be accountable for them.

Even if courts can never supplant the crucial role of political institutions, this narrow reading of their judicial role downplays their contribution to accountability in EMU. The strong operational independence of the ECB weakens accountability to political institutions, leaving courts as one of the few actors able to demand substantive changes to the way EMU decisionmaking operates. Given the absence of strong links between citizens and political institutions, EU law has always played an important historical role in improving the legitimacy of EU policy by "entering" the individual into EU integration, that is providing citizens with rights to challenge national law on the grounds that it excludes certain interests, particularly non-national "outsiders" (Weiler 2014). The bilateral nature of EMU – as an exercise largely involving EU institutions and Member States rather than individuals in the manner of the internal market – has often led this use of the law to be marginalized.

Consequently, a first element in fostering substantive accountability through EU Courts would be to open up the CJEU's infamously restrictive standing rules, which currently require individuals to demonstrate that they are "directly and individually" concerned by an EU measure to raise a direct action.[4] This highly restrictive test presents a meaningful hurdle in regulatory areas of EU policy (where a limited number of stakeholders may be affected) but not in EMU, where measures are by definition of sufficiently general application that no one person is ever "uniquely" affected by EU policy. This hurdle has meant that challenges to monetary policy measures inevitably must run via national courts (which carry different standing rules, meaning that access to judicial review in EMU is inevitably fragmented according to the state from which a challenge emerges). If one of the functions of legal accountability is to allow individuals to challenge arbitrary policies, the current legal structure in EMU inhibits this significantly. In other newer areas of EU policy, such as environmental policy, a similar clash presents itself – under the existing *Plaumann* formula, neither the intended beneficiaries of EU environmental rules (natural habitats) nor groups acting on their behalf (such as environmental NGOs) can make a legal claim given the need to show that a legal claimant was "directly and individually affected."[5] While the CJEU has therefore been reluctant to revisit its standing regime, it is under increasing pressure to do so, including from Advocates-General of the Court itself.[6]

A second element of reform concerns shifting the focus of judicial review of ECB acts from purely procedural to more substantive review. Substantive rules orienting the judicial review of EU decisionmaking can be found in the parts of the EU Treaties relevant for economic governance. While the chapter on economic policy establishes several procedural rules, it also includes strong substantive parameters. Article 119(3) TFEU demands that economic policy is guided by principles, namely "stable prices, sound public finances and monetary conditions and a sustainable balance of payments." Article 5(4) TEU demands that EU policies not go beyond "what is necessary to achieve the objectives of the Treaties," whereas Articles 8 to 12 TFEU demand that policy-makers integrate substantive commitments in policymaking, such as gender equality, environmental protection, and social inclusion. Although the values found in Article 2 (including the principle of solidarity) have not yet been seen by the CJEU as directly justiciable, they have been used to give greater force to other Treaty rules (most notably judicial independence).[7] The Treaties therefore elaborate substantive principles that EU economic institutions must take into account. The function of "substantive" judicial review would be to ensure that institutions such as the ECB make efforts to balance these principles, incorporating them into policymaking.

Nevertheless, substantive judicial review of ECB action cannot be limitless. It must ultimately respect the operational independence of the ECB as an outer limit. The relevant question is whether the requirement of the ECB to *substantively justify* its policies in light of substantive principles elaborated in the EU Treaties is consistent with this independence. While controversial, the German FCC's use of proportionality in the *Weiss* ruling provides a roadmap for how this might be conducted. The main finding was that proportionality required from the ECB a more robust explanation of how particular interests were balanced in decisionmaking.[8] This includes information on the distributive effects of EU policy and the merit of QE in achieving price stability targets versus alternatives. The effects of the ruling were not to render QE illegal *per se* but instead to demand more robust substantive justifications from the ECB that would then allow the FCC and German Parliament to assess the costs and benefits of German participation from a constitutional perspective (German Parliament 2020).

While the FCC's decision was criticized as representing a unilateral national act (Marzal 2020), it could also be read as an invitation both to the CJEU to "upgrade" the level of proportionality review conducted under EU law and to the ECB to revisit how it balances different substantive interests in its decisionmaking. In other areas of EU law, the CJEU has regularly critiqued the EU policymaking process, demanding for example that the Commission demonstrate a robust evidentiary basis for its policies and take fundamental rights and negative impacts on particular stakeholders into account (Scott & Sturm 2007). Substantive accountability would therefore entail aligning more closely judicial review in EMU with other policy fields.

In the legal literature, such "substantive" judicial review has received mixed responses. While some see the CJEU as "over-constitutionalizing" EU politics (Grimm 2017; Schmidt 2018), others observe a "constitutional dialogue" (Rasnača 2017) in which the purpose of substantive review is not to reject EU policies but rather to send them back to the political realm (so that substantive principles such as the respect for fundamental rights or equality between states can be better integrated in future policymaking). While the critique of "over-constitutionalization" rests on the difficulties, in a complex legislative process, of constructing political responses to CJEU rulings – ironically it is the ECB's independence that makes this argument less compelling in EMU. As an institution with a veto-light internal decisionmaking process, the ECB is better placed to engage in a substantive dialogue with courts regarding the scope of its Treaty mandate.

If the CJEU has not yet indicated its willingness to alter its existing standard of review for ECB acts, the ECB has reacted to the FCC's critique of how it incorporates proportionality. In a recent decision, the FCC rejected a further judicial challenge against the PSPP program on the grounds that the ECB had improved its decisionmaking process on QE since the *Weiss* ruling, conducting a comprehensive appraisal of recent asset purchases and sharing with the Bundesbank a distributive assessment of the impact of QE on different groups.[9] The FCC therefore now deems PSPP constitutional precisely because the substantive balancing of interests it demanded in its original *Weiss* ruling is finally being conducted. While this is but one episode, it illustrates the capacity of national courts (or at least *particularly powerful* national courts) to nudge EU institutions toward substantive accountability. Opening up access to the EU Courts and subjecting ECB acts to fuller proportionality analysis can provide the means to add another layer of substantive accountability alongside the scrutiny role of the EP.

5. Conclusion

Majone's argument about accountability in the EU was directed at EU studies but also had a more general target. His arguments regarding the nature of the regulatory state and the proper role of accountability within it referred to a broader trend of the period, namely the increasing delegation of regulatory functions to independent agencies with technical mandates. Today, changes in the actors and form of delegation are found not only in the EU but across the world. In the global shift toward the "post-regulatory state" (Black 2001; Scott 2004) or "regulatory capitalism" (Braithwaite 2008; Levi-Faur 2017), the EU developed its own variant – what we termed here "para-regulation" or the regulation of core state functions. While this article focused on EMU, the EU's "para-regulatory" model is present in other policy areas that affect the core competences of Member States. In asylum policy, for instance, the EU response to the 2015–2016 refugee crisis demonstrated a clear orientation toward "re-regulation" despite the strong redistributive impact of maintaining the "first-country-of-entry" principle in a territory without border controls (Genschel & Jachtenfuchs 2018). Outside the EU, para-regulation is likely to emerge in other international or regional organizations focused on rule-creation and rule-enforcement in areas targeting the military (e.g. rules prohibiting nuclear proliferation), tax practices, or police activities. Further research is needed to evaluate the presence of the "para-regulatory model" in such contexts and their comparability to the EU.

In this article, we argued that new shifts in regulatory trends go hand in hand with renewed accountability pressures on regulators and the forums to whom they must respond. In the absence of a broad "second-order" agreement on the overarching principles that should guide the regulatory process, and where regulators may be forced to determine openly distributive questions, the stakes of accountability simply change. Majone was therefore correct: while accountability in the regulatory state might be legitimately grounded in procedural devices, accountability in the "para-regulatory state" inevitably concerns the *substance* of policy. The analysis above focused on the role of parliaments and courts in delivering substantive accountability, but we acknowledge the

contribution of other forums that prioritize substance over process in their assessment of para-regulation. For example, specialized bodies such as ombudsmen and courts of auditors can also question the substantive openness and effectiveness of para-regulatory instruments. In the end, substantive accountability will be rendered by different bodies in different ways. Political forums might the most likely venue to debate redistributive and contentious issues, but they are by no means the only one.

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DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analyzed in this study.

Endnotes

1 Case C-11/00 *Commission of the European Communities v. the European Central Bank*, ECLI:EU:C:2003:395.

2 See for example, case C-62/14, *Peter Gauweiler et al. v. Deutscher Bundestag*, EU:C:2015:400.

3 German *Bundesverfassungsgericht*, Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, Judgment of 5 May 2020.

4 Case C-25/62, *Plaumann v. Commission*, ECLI:EU:C:1963:17.

5 Case C-565/19 P *Carvalho and Others v. Parliament and Council*, Judgment of 25 March 2021.

6 Case C-352/19 P *Région de Bruxelles-Capitale v. Commission*, Opinion of Advocate-General Bobek of 16 July 2020; Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, Opinion of Advocate-General Sharpston of 12 October 2017.

7 Case C-619/18 *Commission v. Poland*, ECLI:EU:C:2019:531.

8 See endnote 3.

9 German *Bundesverfassungsgericht*, Case 2 BvR 1651/15, Order of 29 April 2021.

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