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Summary
The aim of this Article is to explore the challenges posed for conventional accountability mechanisms by new governance understood as the wide range of processes with a normative dimension that do not operate through the formal mechanism of traditional legal institutions. It examines at what level of government and to what extent there should be accountability mechanisms and what those mechanisms should be, taking economic (meaning fiscal) governance as a case study. Economic governance in European Economic and Monetary Union is hybrid in form in many senses, including the way it combines ‘old’ and ‘new’ governance. This binary classification is examined as a starting point for the analysis of the framing function of law in governance before turning to an outline of the original and revised economic governance structures under Economic and Monetary Union (EMU), in particular the Stability and Growth Pact (SGP). The Article then asks what forms of accountability are to be found or should be found within this governance structure where there are clear legal frameworks in the Treaty and legislation with procedures supported by case law and yet where the emphasis is on soft law governance designed to push strict procedures, time limits and sanctions into the background. Having reviewed current debates about the nature of accountability, the article engages in a largely functional exercise using Mashaw’s questions to ask: (1) who is accountable? (2) To whom? (3) According to what standards? (4) About what? (5) Through what processes? (6) With what effects? The nature of the accountability regime—public, market or community—in economic governance is also addressed. The article concludes that in economic governance we see both a hybridity of governance processes and of accountability regimes— this is to be expected given the mix of hard and soft norms and their re-balancing following reforms. What is not articulated by the legal provisions and is emerging organically is the extent to which law can or cannot wholly identify standards, roles, responsibilities and accountability mechanisms that underpin the values and goals articulated in economic governance.

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I. Introduction*

Accountability remains a critical issue in the EU which has laboured for so long under a legitimacy deficit defined primarily in terms of limited parliamentary accountability at the Union level. With each treaty revision, formal accountability has improved with law-making processes incrementally increasing the role of the European Parliament to the position of co-legislator with the Council of Ministers, as representatives of the national governments. There has however been a recent turn in EU governance that could be – but need not be - seen as retrograde in ensuring appropriate accountability. The archetypical but not the only representation of this governance turn is the now highly variegated but simply described open method of co-ordination with its emphasis on guidelines, benchmarking, mutual learning and peer pressure which is most closely associated with the troubled Lisbon agenda and is heavily resonant of governance structures in the OECD.\(^1\) The extent to which law frames, constrains and enables this new form of governance can be unclear and depends very much on which particular policy sector as one of the defining characteristics of new governance is its variety. Adopting the hybridity thesis of de Búrca and Scott, the article acknowledges the co-existence and engagement of law and new governance as descriptive and normative.\(^2\) The framing function of law and the extent to which it can demarcate roles, responsibilities and concomitant accountability mechanisms that are underpinned by (un)articulated values and goals, as well as its limitations in this regard, is central to an understanding of how governance does and should work. The aim of this paper is to explore the challenges posed for conventional accountability mechanisms by new governance and drawing on the work of Mashaw, explores a set of questions designed to clarify roles and responsibilities within an accountability framework taking fiscal governance as a case study.

‘New’ governance has been described by de Búrca and Scott as the wide range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions.\(^3\) The paper does not seek to challenge the binary distinctions drawn between traditional and new governance methods, such distinctions being largely unhelpful in the context of EU fiscal governance which in any event is hybrid in nature. It can be viewed through the lens of what Walker terms intense reflexivity – a characteristic he suggests is (or perhaps more realistically, could be) common to both EU constitutionalism and New Governance viz. ‘close and persistent attention to the conditions in which and purposes for which the very idea of the responsible self-government of a collectivity may be justified’.\(^4\) In the EU context the question of what is

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* UCD Law School, Dublin. Imelda.maher@ucd.ie. Earlier versions of this paper were presented at the conference Law in New Governance, University College, London; the European Policy Research Unit, Manchester University; at the Conference Shifting Boundaries of Sovereignty: Governance and Legitimacy in the European Union and Australasia, National Europe Centre, Australian National University; the CONNEX Workshop The Open Method of Co-ordination: Extending the Policy Coverage and Multi-level Governance University of Sussex, and at the European Institute, London School of Economics. Thanks to participants and to Carol Harlow, Dermot Hodson, Ioannis Lianos and Colin Scott for their comments. The usual disclaimer applies.


3 De Búrca, Gráinne and Joanne Scott ibid. at 2.

the ‘self’ is important and complex especially in a governance field where co-ordination is to the fore both between states and between states and the EU. In this context responsible self-governance necessarily involves a dynamic accountability that consciously and repeatedly addresses the roles, level and scope of accountability as the structures and forms of governance shift and develops. The paper is divided into four sections. First, I explore the hybridity of the governance of Economic and Monetary Union (EMU), and then briefly outline the current framework on economic governance in EMU. The article then turns to accountability examining how it is classically framed in public law; more recent taxonomies of accountability types; as well as analytical (if not mechanistic) attempts at mapping accountability; and finally, the instrumental framing of questions to allow for a normative assessment of economic governance before concluding.

In adopting this approach, the paper to some extent falls squarely within the type of new governance scholarship criticised by Walker in that my pre-occupation is with one widely affirmed regulatory desideratum – accountability – as one aspect of institutional design for which I aim to provide a checklist. My defence is three fold: first, there is no attempt to prioritise accountability over other values – in fact the paper seeks to add to the fairly limited literature in economic governance on this issue where substantive concerns of the effectiveness or otherwise of the fiscal rules is the main pre-occupation with accountability debates dominated by discussion of the ECB. Second, the very hybridity of economic governance as between the old and the new, governance and law, avoids some of the criticisms offered of new governance scholarship in general and by Walker. This hybridity is evident even on the level of durability: fiscal governance has been in the Treaty since 1958 and thus embodies – to some degree - ‘old’ values such as stability and predictability (and the universalism that underpins them) while also subject to reform, uncertainty and change following the early experience of fiscal governance after the introduction of the euro in 1999. Formally, it combines hard law with learning processes characteristic of the open method – so closely associated with new European governance. Third, the proposed checklist addresses the questions at what level of government and to what extent should there be accountability mechanisms and what should those mechanisms be, with such meso-level analysis providing the space within which to consider what Walker suggests is often left unclear in New Governance analysis: the level of government and the extent to which values are articulated.

II. Hybridity and EMU

EMU constitutes a classic form of hybrid governance in the EU along at least four axes. First, monetary union is a highly integrated and lies at the pinnacle of ‘old’ EU governance as a completely integrated policy field. This uniform system of governance is unevenly paired with a fragmented system of economic governance where responsibility lies predominantly at the level of the Member State. Second, on an institutional level monetary policy is controlled by the European Central Bank, an independent agency within the EU, the creation of which marked a major departure for the EU with an important and core policy given to an institution.

[7] Article 98 EC requires Member States to conduct their economic policies with a view to contributing to the achievement of the objectives of the Community and in the context of the Community’s broad economic policy guidelines.
independent of the Commission.\(^8\) By contrast, there is no single institution responsible for European economic governance.\(^9\) Instead roles are shared between the European Council, the Council (and related committees), the Eurogroup\(^10\) and the Commission with Member States having an obligation to co-ordinate their national policies at the EU level. The obligation to coordinate economic policies formally dates from 1958\(^11\) but was moribund\(^12\) until the launch of the euro in 1999 when it was given a greater legal and institutional framework. Third, economic governance itself is a hybrid as it combines treaty and statute-based norms with soft norms – generally called the Stability and Growth Pact (SGP).\(^13\) The Treaty stipulates how diffuse national economic policies are to be co-ordinated through the use of peer review and guidelines.\(^14\) This system of review is backed up by more formal procedures and sanctions that can be imposed for failure to meet certain thresholds in relation to fiscal policy for those states within the euro zone.\(^15\) The reforms of the SGP discussed below are indicative of the interdependence between these two forms of governance. This inter-dependence reflects the view of hard and soft law as a continuum without a strict binary opposition. Hard law has been characterised in the International Relations literature as having legally binding obligations, which are precise and authority is delegated for interpretation and implementation, the intensity of each element determining where a law is placed on the spectrum.\(^16\) Soft law has been defined by Snyder as rules of conduct which in principle have no legally binding force but nevertheless can have practical effects.\(^17\) While soft law may become hard law, it is not an inevitable trajectory. Finally, economic governance is also a hybrid in relation to its territorial

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\(^11\) Article 105 EEC.


\(^13\) For a discussion of he hybrid nature of economic governance and the use of hard and soft law see

\(^14\) Article 99 EC sets out how the Broad Economic Policy Guidelines form the basis of a system of multilateral surveillance - essentially Commission and fellow Member State review of national economic policies.

\(^15\) Article 104 EC. This is known as the excessive deficit procedure.


scope with multilateral surveillance applicable to all Member States and non-eurozone states having derogation from the imposition of sanctions under the excessive deficit.

Economic governance – is also hybrid in another sense viz. how it relates to the Lisbon strategy. This has two dimensions. In relation to goals: the Lisbon strategy has the objective of making the EU the most competitive and dynamic knowledge-based economy in the world by 2010 in the context of sustainable economic growth, more and better jobs, greater social cohesion and environmental protection. In effect, the Lisbon agenda is concerned with structural reform. Viable public finances are necessary for the Lisbon strategy to work as the maintenance of a stable macroeconomic framework facilitates growth. Thus compliance with the SGP can be seen as a precondition for the operation of the Lisbon strategy with the Pact and Lisbon a necessarily combined agenda. Second, there is some debate as to whether or not the Pact can be seen as one form of the open method. Historically, the method can be seen as a codification of earlier economic processes. Formally, the Pact characterised by a complex legal framework and at the very end of a long procedural road under the Pact, it is possible for a State to be sanctioned for carrying an excessive deficit. This has led de Haan and Amtenbrink to characterise it a closed rather than open method of governance. Wincott on the other hand suggests looking at the operation of the Pact rather than its form: the sanctions are not seen as credible, the time lines have not operated strictly, the larger states have successfully flouted the rules and the amount of discretion available has increased following reforms – which suggest Wincott has a point. What this debate suggests is that the Pact and the open method are both necessary for Lisbon albeit with different but mutually re-enforcing ends: the open method is explicitly linked to the Lisbon goal while the Pact is linked to the complementary goal most succinctly described as ‘sound money, sound finance’ and that – like the debate about ‘old’ and ‘new’ governance - a binary classification does not necessarily shed much light and it is more fruitful for the purposes of this article at least to focus on governance and the framing function of law within it in particular in relation to accountability.

Using the typology developed by de Búrca and Scott, baseline hybridity is a useful starting point for an analysis of the emergence of the SGP in 1999. Baseline hybridity conceives of new governance as complementary to traditional forms of law with softer norms constrained by harder obligations and processes. Thus economic governance was characterised by an increased formalisation through the enactment of supporting regulations. The limiting and limited nature of the Pact soon emerged. Germany, France and Portugal among others found it difficult to comply with the threshold of a budget deficit of 3% of GDP set out in the Pact.

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21 Amtenbrink, Fabian and Jakob de Haan, above n. * at 1079.
23 de Búrca, Gráinne and Joanne Scott, n. * at 7.
24 See Regulation 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and co-ordination of economic policies, OJ 1997 L 209/1; Regulation 1467/97 of 6 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 1997 L 209/6. These have now been amended see below.
An attempt by the Council to evade the time limits and procedures of the Pact was challenged by the Commission before the European Court, with the Court delivering a carefully balanced judgment which firmly located the exercise of discretion within the legal framework of the treaty while also acknowledging that de facto it was possible to suspend the procedures in issue. This judgment and the stand-off between France, Germany and the Commission promoted reform of the SGP.

The first SGP also contained a contradiction. While the aim was to render more binding the obligations and sanctions of the EDP, there was also an emphasis on the soft law system of multilateral surveillance – the idea being that this governance method was to act as an early warning system. This conception of the way economic governance was to work can be seen as a form of instrumental hybridity where new governance techniques were a means for developing existing legal norms. Multilateral surveillance constitutes tools of elaborating, developing and applying norms to avoid triggering the more formalised sanctioning procedure of the EDP. Reform of the SGP has underlined this approach. This design is as Trubek and Trubek suggest a form of ‘complementarity by design’ of old and new governance. Nonetheless, rivalry between the two modes is also apparent with new governance leading to displacement of law as the prospect of triggering the EDP and its sanctioning mechanisms is more remote following reform. With an increasing emphasis on soft law, we may have reached what Trubek and Trubek identify as the largely speculative but most interesting category of their typology: transformative rivalry (2005: 10). This arises where the rivalry between law and new governance leads to transformation of one or both and hence to a hybrid. This transformative potential opens up the possibility that new forms of accountability for example may be devised to address concerns about opacity of roles and responsibilities in a particular sphere. With the reform of the SGP and Lisbon there is the capacity for transformation of the new governance process of multilateral surveillance through the addition inter alia of more effective forms of accountability. As the discussion below shows, reform does show some promise of improved accountability although the confusion of roles particular for the Council remains an issue.

III. Economic Governance

III.1 SGP

Member States are required to co-ordinate their economic policies under Article 4 EC. The impetus for co-ordination is recognition of the growing inter-dependencies between national economies in the single market and within the eurozone where all states have a common interest rate fixed by the ECB. This general obligation is developed through the twin pillars of the exclusively soft law mechanism of the early warning system of multilateral surveillance (article 99) and the excessive deficit procedure (article 104). The Treaty was supplemented by the Stability and Growth Pact in 1997 mainly at the instigation of Germany which was concerned about the capacity and willingness of some eurozone members to comply with the

27 de Búrca, Gráinne and Joanne Scott, n. at 8.
sound money, sound finance paradigm of low government deficits (not more than 3%) and public debt (below 60% of GDP). The Pact consisted of a mix of soft law measures and two Regulations. It sought to do two contradictory things. First, to emphasis the early warning system which is an instrument of soft law relying on negotiation, advice and peer pressure to secure compliance with a medium term goal of a budget close to balance or in surplus. There are no deadlines for the achievement of what is a relatively vague target. Second, to further formalise the EDP by setting a tight 10 month time frame from the finding of an EDP to a sanction thus hardening both the obligations and procedures within it. This contradiction between discretion and deadlines, flexibility and rules, hard law and soft law was exacerbated by the confusion of roles with the Council acting as both policy maker and reviewer and the Pact soon ran into problems when faced with a down turn in the German economy in particular. It also reflected some political ambivalence towards the Pact with the larger states – France, Germany, and Italy - failing to meet the key target of a budget deficit less than 3% of GDP. This culminated in the EDP being put into abeyance when the Council failed to secure the necessary majorities to set a time limit for both states during which they were to remedy their deficits. This was challenged by the Commission before the ECJ. In a finely balanced judgment, the European Court held that the Council could not depart from the substantive and procedural constraints of the EDP while simultaneously acknowledging the limitations of those legal constraints by noting that the procedure could be held in de facto abeyance if the relevant voting majority is not secured. By underlying the legal nature of the procedure and thereby potentially limiting Council discretion, the judgment provided the impetus for review leading to SGPII where there is greater emphasis on multilateral surveillance and additional discretion has been built into the EDP. This reform took place in 2005 at the same time as the relaunch of the Lisbon strategy.

III.2 Reform

The revision of the SGP moved away from more rigid procedures towards greater discretion and a greater emphasis on economic assessment. This was achieved without amending the Treaty itself but by amending the 1997 Regulations and moving further towards softer norms. In Pisani-Ferry’s view, the Pact now operates as a form of ‘constrained discretion’

30 Article 104EC in fact is referred to as the German clause see Pisani-ferry, Jean supra n. * at 826-7.
32 Sapir et al op cit. N. * at 172.
as the Council and Commission now must exercise economic judgment rather than the procedure being focused on strict rule (non-)compliance which was inappropriate and rendered the Pact dysfunctional culminating in the circumstances seen in the European Court case. The reforms place greater emphasis on multilateral surveillance and in particular on cyclically adjusted budget balances. They move the Pact away from its former ‘one-size-fits-all’ character as the medium-term budgetary objective of close to balance or in surplus is now differentiated for individual States to take more account of the diversity of economic and budgetary positions and prospects. This loosening of the strait-jacket of a single test for all states to be applied in a mechanistic fashion has been welcomed but the further extension of discretion has been criticised. For example, the Commission is now required to take all relevant factors into account before reporting the risk of an excessive deficit to the Council and thereby triggering the EDP. The exceptional circumstances where a state can exceed the 3% threshold have also been expanded. The criticism is that this discretion so waters down the obligations and even the risk of a soft sanction of naming and shaming, that the Pact is rendered useless. Whatever about the substantive merits of the Pact, greater emphasis on economic judgment, a softening of the time-frames and sanctions and the extension of the factors that can be taken into account by the Commission when evaluating the budgetary position of a state, render all the more important the creation of appropriate accountability mechanisms to compliment the increase in discretion.

The reform of the Pact took place at the same time as the re-launch of the Lisbon process which streamlined governance and focused more on growth and employment. The re-launch was as result in part of the mid-term review which confirmed that Lisbon could not meet its goals within the time frame set. The governance changes focused on the Broad Economic Policy Guidelines which lie at the heart of multilateral surveillance and are the key reference for economic policy consensus at the EU level. The guidelines are now integrated with the employment guidelines which are drawn up in parallel under Article 127 EC and have moved from an annual to a three year cycle. The process is as follows: the Commission draws up the guidelines which are endorsed by the European Council and adopted by the Economic

39 Buiter, ibid. For a less damning assessment see Pisani-Ferry supra n. * at 839.
40 The Council emphasised that the purpose of the EDP is to assist rather than to punish and to provide incentives for budgetary discipline through enhanced surveillance, peer support and peer pressure see ECOFIN, Improving the implementation of the Stability and Growth Pact: Council Report to the European Council’ in European Council, (2005) Presidency Conclusions, Brussels, 22 and 23 March 2005 at 31.
41 Buiter, ibid. He describes the pact as ‘dead’ at 705. See also Lars Calfors supra n. * at 61.
42 The time frame has been extended from 10 months under the EDP to 16 months.
and Finance Ministers. The Member States then draw up their own National Reform Programs indicating how they are to meet the guidelines. They report annually on progress to the Council while the Commission reports annually to the spring Economic Council. The emphasis is on peer review which increases the importance of ownership by the states both in relation to ex ante policy formation in the light of the guidelines and ex post responses to peer review. The increase in discretion under the Pact shifts the balance in economic governance towards the peer review mechanisms of the integrated guidelines raising the question of what form accountability does and should take under this regime.

IV. Accountability

What forms of accountability are to be found or should be found within this governance structure where there are clear legal frameworks in the Treaty and legislation with precise procedures supported by case law and yet where the emphasis is on soft law governance designed to push strict procedures, time limits and sanctions into the background such that there is displacement by design with soft governance methods emphasised? Before discussing accountability in the specific context of fiscal governance, it is useful to describe what I mean by accountability in the light of recent academic debates.

Normanton offers a basic definition of what accountability means: it is the giving of reasons for what one does. Davies refined this by identifying different elements to accountability. She identifies four elements: standard setting, the obtaining of an account, the judging of the account and a decision as to consequences. This is similar to Bovens who describes accountability as governing the relationship between actor and forum, where the actor is obliged to explain and justify conduct. The forum can pose questions and pass judgment and the actor may face consequences. The main difference between these two descriptions is the absence of standard setting. Harlow saw standard setting as important but she has refined that position in her more recent work with Rawlings where they reject the idea that it could provide an adequate substitute for ex post facto legal and political accountability. However this does not mean that standard setting is not part of accountability merely that it is not an ade-

quate substitute in itself for ex post review. Fraser sees the standards issue as critical in relation to accountability.\textsuperscript{54}

One thorny conceptual issue is what is the relationship between control and accountability. Bovens sees a fine line between them but rejects the idea that control mechanisms can be seen as mechanisms of accountability because they do not operate through procedures where actors explain their conduct to a forum.\textsuperscript{55} Harlow\textsuperscript{56} on the other hand notes Hood’s definition of control as “periodic checking and examining of the activities of public officials by external actors possessed of moral or constitutional authority to investigate, to grant quietus or to censure, and in some cases even to punish”.\textsuperscript{57} It is not clear that this differs from accountability and in fact in 2004, Hood et al use the terms interchangeably.\textsuperscript{58} Scott suggests that control and accountability are linked concepts best seen as a continuum.\textsuperscript{59} Mulgan on the other hand offers a robust defence of the distinction that control is ex ante in nature and accountability ex poste.\textsuperscript{60} He distinguishes accountability from forward looking controls found in law such as the founding statutes for agencies stipulating their powers. For him, accountability is but one aspect of control concerned with reporting, investigating, justifying and rectifying after an event. If it is just one aspect, then his position is not so far from Scott’s continuum. Harlow however argues that Mulgan’s analysis only works if the legal system (as in the machinery by which the law is enforced) is distinct from ‘law’.\textsuperscript{61} She rejects such a sharp distinction as a narrowing of the classic rule of law concept which would include a standard-setting role for courts. The common ground between them is that control and accountability are not seen as synonymous. Mulgan attempts a firm demarcation which Harlow rejects while also agreeing they are not synonymous and Scott leaves the issue open. For all of them, the notion of explanation, reporting and engagement go to accountability. This is also implicit in Mashaw’s typology discussed below.

Control is more easily exercised where there is hierarchy but that is not essential e.g. peer approval can constitute a form of control. Control and accountability both depend on having sanctioning powers which are credible and to be credible, they must be appropriate. Bovens sees the possibility of sanction as part of accountability although he qualifies this by replacing the word ‘sanction’ with ‘consequence’ to avoid the formal legal connotations of sanction.\textsuperscript{62} Harlow and Rawlings would also extend sanctions to include publicity or apology.\textsuperscript{63} They argue that a sanction may often prove illusory and, more importantly, rather than facilitating accountability it can impede it as it creates incentives to deny responsibility – both of these

\textsuperscript{55} Bovens, Mark supra n. * at 14.
\textsuperscript{56} Harlow, Carol supra n. * at 9.
\textsuperscript{57} Hood, Christopher, ‘The Hidden Public Sector: The “Quangocratization” of the World’ in F.-X. Kaufmann, G. Majone and V. Ostram, Guidance, Control and evaluation in the Public Sector (Berlin, de Gruyter, 1986) at 64.
\textsuperscript{58} Hood, Christopher, Oliver James, B. Guy Peters and Colin Scott (eds.) Controlling Modern Government: variety Commonality and Change Edward Elgar, Chichester, 2004 at 5.
\textsuperscript{60} Mulgan, Richard, Holding Power to Account: Accountability in Modern Democracies (Palgrave Macmillan, Basingstoke, 2003) at 18.
\textsuperscript{61} Harlow, Carole, supra n * at 174.
\textsuperscript{62} Bovens, Mark supra n. * at 11.
\textsuperscript{63} Harlow, Carol and Richard Rawlings, supra n * at 4.
claims are born out in the case of the operation of the SGP and the debate surrounding its reform. For Harlow and Rawlings what matters is not so much the possibility of sanction as reparation and effective redress in providing legitimation through accountability. In other words, it is not the external, institutional attribute of sanction that matters but in fact the internal mechanism of conduct correction. Such a focus on the internal places an emphasis on responsibility. The debate underlines the need to go beyond the existence of formal sanctions to the impact their existence and the likelihood of them being applied has on behaviour and on achieving desired goals. Thus in the specific context of the SGP, Scheckle has argued that the rule- and sanction-based original Pact entrenched the view that national governments could not be trusted and needed the ‘stick’ of rules and sanctions to make sure they towed the sound money, sound finance paradigm at the heart of EMU – thus undermining the credibility of the system and, I would argue, diminishing a sense of responsibility and ownership and internalising of the rules and objectives behind them.

Harlow and Arnult both note that there are many different kinds of accountability (financial, democratic, legal, external, internal, direct, and indirect). Fisher identifies four distinct types of accountability: democratic, transparency (an adjunct to other forms of accountability also); legal and checks and balances between institutions (i.e. the control of delegated power in particular). Accountability can follow traditional hierarchical forms of democratic and legal accountability where there are reporting obligations to Parliament and judicial review. Recent scholarship has however noted that traditional forms of accountability have been extended in the light of new governance methods such as that found in economic co-ordination. Governance is fragmented, presenting new challenges for evaluating accountability or identifying where it occurs. Majone, discussing non-majoritarian institutions, notes that accountability has many dimensions referring to both accountability vectors (various institutions and groups which have a legitimate claim to receive explanations and accounts), and accountability spaces (multi-level governance). Accountability is multi-dimensional and hence the same criteria may not apply to different levels of governance. In Majone’s view, ultimately a good accountability framework is a matter of institutional design with suitably designed procedures as unobtrusive, indirect but powerful means of enforcing accountability. The issue then is what approach is to be adopted in determining the appropriate design.

Whatever the debates about the nature of accountability, it is possible – indeed necessary - to conduct a functional exercise to identify the right type of accountability in what Fisher suggests is largely a mechanical process. Mashaw provides a set of questions to evaluate the extent to which there is accountability or what form that accountability should take: (1) who

65 Harlow, Carol, supra n. * ch. 1.
68 Scott, Colin, supra n. * at 40.
is accountable? (2) To whom? (3) According to what standards? (4) About what? (5) Through what processes? (6) With what effects? He also identifies three kinds of accountability regime: public, market and community where the criteria applied in each differ. Thus public accountability regimes are set in a constitutional culture devoted to limited governance and elaborate ideas of official accountability (this is perhaps closest to classic understandings of accountability). Market regimes operate accountability through competition and results (output legitimacy is emphasised) while community based accountability is concerned with networks, peer esteem and reciprocal obligations internally generated. Mashaw argues that the making of decisions in one regime by reference to the criteria in another is capable of being seen as corrupt, where corruption is understood as the (inappropriate) use of rules of behaviour in one realm of human action that should apply only in another. At the same time, the boundaries between these different regimes are at best fuzzy. The aim is to have an institutional design that can be made accountable while achieving articulated outcomes – not to have an ideal-type accountability regime and to fit the substantive institutional design around that. In other words, as in the context of EU governance, institutional design is necessarily hybrid and the issue which Mashaw’s questions should help us answer is what form of accountability will strengthen the goals of fiscal governance – where fiscal governance is a hybrid as it is in the realm of public governance but has characteristics of a community regime with some market accountability.

As a form of governance carried out by public officials fiscal governance can best be characterised as having political accountability – this form of accountability has two forms: elections and the accountability of top bureaucrats to their ministers – in this context working closely with them in the Eurogroup. To some extent the aim of public accountability is to ensure that government does not exceed its powers, the assumption being at one level, to limit the scope of government. There is also an element of market accountability given the anxiety that the money markets will respond to what is happening in the euro area by selling off their euros and favouring the dollar. The risk of a negative market response creates an external pressure and an incentive for Member States to co-ordinate to control budget deficits and to make the euro work. The fact that all Member States are not members of the zone accentuates this as the euro members in particular will want to make the euro a success. Market accountability is fundamentally different from public accountability in that the basic premise is that activity is to be encouraged with the decentralised market actors effecting those who do not live up to the market’s expectations. In the field of fiscal policy, markets will eventually discipline profligate states but it remains an open question as to whether they will react in time for meaningful change to be effected.

Social accountability however is much more central given the non-hierarchical nature of fiscal policy co-ordination and is predicated on networks that can become narrowly purposive in nature. Hodson identifies a number of characteristics relying on Olsen’s work on group action as instructive. Thus there are members with a shared objective and agreed standards.

72 Ibid. at 18.
73 Ibid. at 30.
74 Ibid. at 35.
Mashaw suggests that the standards are internally generated but in the fiscal policy field even though all the Member States signed up for the SGP the concerns about entry to and creation of EMU were powerful external factors which played a large role thus weakening the commitment to those standards and rules once EMU was up and running. The network as flat structure relies on peer pressure for compliance – but this pressure only works where Member States have internalised and accepted the standards applied and one of the problems for fiscal policy is the qualified acceptance of the 3% threshold for budgetary deficits. At the same time, while it lacks any formal decision-making powers or treaty status, the Eurogroup and its informal working methods have facilitated consensus-building among eurozone states.\(^\text{77}\) The governance of fiscal policy is in other words a hybrid containing elements of all three accountability regimes. What is not clear – and needs to be carefully considered – is the answers to each of Mashaw’s question – then the hybridity of the regime will not matter as the lines of accountability should be clarified.

V. Accountability in EU Fiscal Governance

V.1 Who is accountable?

In the sphere of fiscal policies, Member States are under an obligation to co-ordinate their economic policies in Council and to meet the thresholds set in the SGP. This is unambiguously set out in the treaty – a duty underpinned by the duty of loyalty set out in Article 10EC. This begs the question of who is the State. Formally, EC law is of little use here as there is a well established body of EC case law which makes it clear that it is not important which aspect of the state is responsible, it is the state that is found wanting – it is not disaggregated for the purposes of legal accountability.\(^\text{78}\) Yet to leave it at that belies both the multilevel nature of governance in this field – especially for federal states – and the fragmented nature of governance with responsibility for different aspects of the economy – structural policy, pension reform, employment policy – lying with different government departments. In addition, sub national government can have considerable impact on national budgets. Thus, when Portugal was found to have an excessive deficit one factor that led to it was the fact local government was given control over expenditure but did not have any power to generate revenue, leading to a deficit bias in local government finance.\(^\text{79}\) To ensure domestic co-ordination horizontally across departments and vertically at various levels of government, the authority of a Finance Minister over formation and implementation of national budgets is important in ensuring compliance with the SGP - strong Treasury controls other government departments leading to internal coordination ensuring greater consistency between departments and better budgetary discipline. It is a necessary but not a sufficient condition however as even those Ministers can face incentives to run budget deficits for the sake of short term economic and political gain, raising the stakes for peer pressure at the EU level.\(^\text{80}\)

\(^{77}\) Puetter, Uwe supra n. * at 866. See also Pisani-Ferry supra n. * at 837.


\(^{79}\) Hodson, Dermot supra n. * at 241.

Within the Council, the states review each other’s economic policies and can issue recommendations on the recommendation of the Commission – which can be amended without the need for a qualified majority vote, giving the Council and its member’s greater control over the process. Meeting qua the European Council in spring each year, they offer an assessment of the economic performance of the Union and outline priorities for the next and matters of concern.® Entirely informally but with increasing significance in the policy-making process, the members of the eurozone meet as the Eurogroup. This body has no formal standing – although it would have been given it by the draft constitution. Nonetheless, it is seen as an important consensus-building forum.® A major weakness is that the States have multiple and most importantly, conflicting roles as they are both reporting and evaluating within the context of the now-integrated guidelines and the Pact. These conflicting roles remain following reform. The Commission has primarily a facilitative role with its statistics authoritative in discussions - which is important in the context of economics. That it has a role for ensuring the process as articulated in the Treaty and the SGP are adhered to was underlined by the ECJ in 2004.® At the same time, its desire to improve its agenda-setting function has not been realized in the reforms of the Pact. Instead it will have to wait for the draft constitution to be adopted before it is given the power to issue early warnings of budgetary problems to Member States without having to resort to the Council.® Even then, it is not clear what the significance or status of a warning will be. While the Commission does trigger the more formal EDP, the 2005 reforms give it greater discretion in deciding when to do so.

V.2  To Whom?

V.2.1 Parliamentary Accountability

Classic forms of accountability render actors accountable to Parliament and the courts. Given the fragmented nature of the governance of fiscal policy, both these forms are weak or non-existent at the EU level. Parliament was not involved in setting up the Lisbon agenda and its ex post role is limited to receipt of information with very limited scrutiny. Thus it receives information in the form of reports and copies of the broad economic policy guidelines. It exercises more active oversight where its Economic and Monetary Affairs Committee (ECON) calls in the Council president where a Member State has been found to have an excessive deficit.® Lord sees the Parliament’s role as little more than publicity with it providing a public place where the warnings, recommendations and reviews can be collated and compared and there is the possibility of awkward questions being asked.® The Commission in its Governance White Paper expressed concern about the exclusion of Parliament from the open method.® Deroose et al. believe that peer pressure would be strengthened if the EP had more of a role to play under the BEPGs.® They propose an economic dialogue similar to that found between the ECB President and ECON. The Commissioner for Economic Affairs and the

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81 See e.g. European Council, Presidency Conclusions 23/24 March 2006, Press Release 7775/06 where there is a review of how the revised Pact and Lisbon Strategy are working.
82 Pisani-Ferry, Jean, supra n. * at 840 ; Puetter, Uwe, supra n. *.
83 Case C-27/04 Commission v. Council supra n. *.
84 Article III-179(4) Draft Constitution.
85 Article 104(11).
88 Deroose, Servas, Dermot Hodson and Joost Kuhlmann, supra n. * at 12.
President of the Council of Economic and Finance (ECOFIN) would go before ECON to discuss preparation and implementation under the BEPGs. They see this as having the normative effect of improving democratic accountability but also instrumentally they see it as raising awareness and profile of the BEPGs. The reforms of the SGP make no reference at all to the EP instead seeking to involve national parliaments more closely in the process, emphasizing the national dimension of co-ordination. In the context of the open method, Zeitlin does not see an increased role for the EP as solving democratic accountability problems given the wider democratic accountability issues in the EU. Instead, he sees the answer resting on issues such as transparency, openness and broader participation where such participation, extending to NGOs/civil society is important not only for legitimation but also for effectiveness. The EP would be included but the sort of experimentalism in new governance would demand a redefinition of the traditional role of Parliament in accountability regimes. Zeitlin proposes that it would frame objectives and procedures, monitor progress towards agreed goals and revise the process in light of results achieved.

Accountability to national parliaments is primarily a matter for national law, with minor suggestions proposed in the SGP reforms but greater emphasis on ownership through wider consultation to be seen in the Lisbon reforms. Prior to the reforms a TEPSA report found that there was uneven interest in economic policy coordination amongst national parliaments ranging from one reference to the guidelines found in Austrian Parliamentary debates in 2001; to the limited review of the UK in the form of a House of Commons committee report which largely summarized the guidelines and the government’s response to them. At the other end of the spectrum the Dutch parliament were fully engaged with the BEPGs discussed in a parliamentary session with detailed discussions also taking place in a domestic standing Parliamentary committee on finance.

Better scrutiny at national level could improve co-ordination between government departments as turf wars would be more transparent providing an incentive for resolution and, more fundamentally, the extent to which there is co-ordination between national employment, structural and fiscal policy could also be rendered more conspicuous. Improved co-ordination at the national level creates a stronger base for co-ordination at the Union level. The transparency engendered by some scrutiny also reduces the risk of lip service to the Lisbon strategy and the SGP. The proposed constitution contains a protocol on the role of national parliaments with the aim of encouraging their greater involvement in the activities of the Union. Under paragraph five the agendas and outcomes of Council of Ministers meetings will be sent to national parliaments as well as national governments. Given the primary role the Council plays in economic policy coordination this has the potential to alert national parliaments as to the nature and scope of co-ordination at the EU level.

Under the Lisbon reforms, all Member States have appointed national Lisbon co-ordinators to facilitate co-operation and better transparency. In addition, the Commission notes that most States in their first National Programmes attempted to involve national parliaments, stakeholders and regional and local representatives and reference is made to this in the national programmes. However, it is not clear what ‘involvement’ means and the Commission in its


Report goes onto remind States that Lisbon is a medium to long term strategy so sustained involvement by all stakeholders remains essential to ensure public acceptance and ownership. Such involvement goes to policy formation rather than ex ante accountability which may or may not facilitate better accountability. 92

In adopting reforms to the SGP proposed by ECOFIN, the European Council invited national governments to present stability programmes and the Council opinions on them to their national Parliaments. It also notes that National Parliaments may wish to discuss the follow-up to recommendations in the context of multilateral surveillance and the EDP. 93 The softness of the language used – governments are ‘invited’ and national Parliaments ‘may wish to’ points to necessary protocol in dealing with democratically elected national Parliaments. It also points to the weakness of obligation here in keeping with subsidiarity mentioned earlier in the report. Nonetheless, in discussing how to improve ownership of economic governance the Council notes that domestic governance arrangements should complement the EU framework seeing national institutions (which could include national parliaments though this is not expressly mentioned), as playing a more prominent role in budgetary surveillance in order to strengthen inter alia enforcement through national public opinion and complement economic and policy analysis at the EU level. Some states are reforming their parliamentary practices to bring them more in line with the European cycle. For example the Irish government is revising the way it prepares its budget to improve parliamentary scrutiny with economic and budgetary projections for each of the three years of the SGP brought by the Minister before the Economic and Finance Parliamentary committee in the autumn of each year. 94

V.2.2 Other accountability mechanisms

An alternative to Parliamentary accountability is increased participation in the policy formation phase. Participation is seen as important in the iterative processes surrounding the Lisbon Strategy. This can be seen in the limited impact of the Cologne Process – also called the macroeconomic dialogue. This is a process that emerges out of the European Employment Strategy and is designed to be inclusive of the social partners at which Council, Commission and ECB representatives meet them to discuss economic policy. 95 The limited impact of the Dialogue reflects the far greater importance of participation and policy formation at the national level. In relation to the drafting of the BEPGs, Deroose et al. note that the preparation of the BEPGs and its implementation report entails frequent interactions between national and EU policy makers in an intense process of review, consultation and discussion. The list of those involved is long: the Commission, the Economic and Finance Committee, the European Economic and Social Committee, The Economic Policy Committee, the Employment Committee, the European Parliament, COREPER, ECOFIN, the Employment, Social policy, Health and Consumer Affairs Council the Competitiveness Council and the European Council. 96 Harlow and Rawlings take a sceptical line on participation in the policy-making process seeing it as something that may fundamentally undercut accountability by internalising what should be an

92 See below at *.
95 European Council, Presidency Conclusions Cologne 3-4 June, 1999 especially Annex 1 and Hodson, Dermot and Imelda Maher, supra n. * at 724.
96 Deroose, Servas, Dermot Hodson and Joost Kuhlmann, supra n. * at 7.
Participation also lies in the ex ante rather than the ex poste phase of policy formation though in the context of economic governance in particular and new governance more generally, the highly iterative processes make these distinctions difficult if not meaningless. Zeitlin, looking at the open method, sees broad participation as an ideal that the open method is failing to realise. He proposes that to improve participation, the similar benchmarking, peer review, monitoring and evaluation criteria used for substantive purposes under the OMC also be applied to participation and transparency within this form of governance. Improved participation by NGOs and civil society in relation to the drafting of the BEPGs and greater discussion by national parliaments should improve the elusive quality of ownership of fiscal governance – the absence of which is underlined by the Commission. Whether the European Parliament should also have additional involvement even along the lines suggested by Zeitlin, depends on careful consideration of the balance between the national and EU levels of governance with the national clearly to the fore.

The Commission exercises some control over fiscal governance through its central role in the collection of information and the use of its statistics in analysing economic performance though the absence of hierarchy between it and the Council makes it difficult to claim there are accountability mechanisms between the two institutions. The Council does not have to follow Commission advice to publish a warning under multilateral surveillance. The fine balance between the two institutions was underlined in the 2004 case where the Court made it clear that under the EDP the Council cannot side-track negative recommendations from the Commission but nonetheless such recommendations can be suspended de facto although for how long is not clear. Individual Member States report to the Commission which in turn can suggest action – it cannot back up its suggestions with any form of sanction other than naming and shaming.

Given co-ordination in this sphere is best seen as a form of intensive transgovernmentalism, the emphasis is on peer pressure and peer review with horizontal accountability mechanisms to the fore. This renders fiscal governance closer to that found in ‘true’ international organisations rather than classic law-making processes under the EC treaty – often referred to as the Monnet method. It is arguable that the whole point of co-ordination is that it has a flat structure and while this may be the position formally, the capacity of some states to exert greater influence than others or at least their greater capacity to withstand peer pressure is problematic and undermines the notion of peer pressure as a form of control. Thus where the absence of formal hierarchy in fiscal policy coordination could be construed as a lack of control, there is in fact a hierarchy of sorts in that larger states can withstand peer pressure and the benchmarks set for them without fear of sanction. In that sense there is control but only for the small and medium sized states - at least that is the perception.

Accountability may also lie to others – notably the money markets. They can be seen as the environment within which fiscal policy is developed or as a form of control capable of sanctioning the euro-zone for failing to rein in borrowing. This is perhaps the more credible threat.

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97 Harlow, Carol and Richard Rawlings, supra n. * at 6.
98 Zeitlin, Jonathan, supra n. * at 12.
100 Hodson, Dermot and Imelda Maher, (2001) supra n. *.
101 Schäfer, Armin supra n. *.
than that of a fine under the EDP and is certainly an important rhetorical device – but is one exercised only in extremis and arguably is such a chaotic and unpredictable response to policy that is cannot be seen as a control mechanism although Buiter – in his trenchant critique of the Pact has gone so far as to suggest that the only external sticks and carrots for the Member States are the financial markets and the credit ratings agencies.\textsuperscript{103} With commentators suggesting that the 3% figure used in the SGP is irrelevant and little response in the money markets when France and Germany failed repeatedly to meet that figure, this does not imply that the markets cannot exercise control but rather that they were less concerned with compliance with the 3% figure than with other indicators.\textsuperscript{104} Mulgan, discussing consumer markets, suggests that they are about efficiency rather than accountability – given the absence of authority relations in the market.\textsuperscript{105} This analysis Mashaw suggests needs to be more nuanced given the fragmentation of governance and the lack of obvious hierarchy and authority in other contexts.\textsuperscript{106} Of course, the money markets are not the same as consumer markets although they share the characteristic of a lack of authority which suggests an element of unpredictability in response but that does not automatically allow the markets to be discounted. The ECB does place some importance on the markets, pointing to the need to reassure them in the OLAF case where it sought to argue that it could not allow OLAF to review its procedures in case the markets perceived this as undermining its independence (an argument given short shrift by the ECJ)\textsuperscript{107} and in discussions with ECON the ECB President has noted their role e.g. as means of accumulating and expressing tensions in relation to SGP reform.\textsuperscript{108}

V.2.3 Judicial Review

Judicial review of fiscal policy is severely limited. The BEPGs and multilateral surveillance are not sufficiently juridified to provide a legal basis for judicial review, save where there is a failure to follow procedures, for example, by failing to consult the EFC or the Parliament.\textsuperscript{109} In the excessive deficit procedure judicial review is expressly excluded until the Council has set down a time limit for the introduction of measures to reduce the budget deficit following the failure of the recalcitrant state to meet earlier recommendations. This ban on review was successfully overcome in the 2004 case brought by the Commission against the Council for its attempt to side step the procedures set down in the EDP. Arguably judicial review is of limited value in this type of governance which is fragmented and based on ‘repeat games’ allowing for policy learning (and change) over time. This is because judicial review tends to focus on the end decision rather than the strategies and whole process behind it.\textsuperscript{110}


\textsuperscript{104} Leblond, Patrick supra n. *

\textsuperscript{105} Mulgan, Richard, ‘Contracting Out and Accountability’ (1997) Australian Journal of Public Administration at 106 discussed in Mashaw supra n. * at 23. Mashaw notes that Mulgan does seem to see a role for stock markets as a form of accountability for companies.

\textsuperscript{106} Supra n. * at 23.

\textsuperscript{107} Case C-11/00 Commission v. ECB [2003] ECR I-7147 at para. 144.

\textsuperscript{108} Economic and Monetary Affairs Committee (ECON), Monetary Dialogue with the ECB President, Mr. Claude Trichet, 14 March 2005 at 9 http://www.europarl.europa.eu/comparl/econ/emu/20050314/md_en.pdf

\textsuperscript{109} Supra n. * at 1083.

V.3 According to What Standards and for What?

One of the criticisms of the pre-reform BEPGs was that the proliferation of guidelines and objectives rendered them meaningless and one of the consequences of reform has been a more limited set of guidelines with implementation evaluated by the Commission and the Council. Moving to a tri-annual cycle also gives some time for policies to be developed. The BEPGs focused on the medium term goal of a budget that is close to balance or in surplus and after reform this single standard is now individuated for each Member State. Compliance with a medium term target is problematic as it cannot be observed directly since the economy is almost always in a state of economic upswing or downswing. This makes it difficult to codify the medium term target and hence it remains in the realm of soft law with naming and shaming the only sanction in the public realm – the markets of course could react. This is supported by the harder measure of a 3% figure for budgetary deficits under the Pact. Measurement errors and the possibility of deception aside, compliance with a short-term budgetary target should be a discretely observable phenomenon and hence easy to apply. This threshold figure proved to be a simple if misconceived tool for ensuring clarity and ease of reference that was meant to be triggered rarely but in practice in the early years because of the poor economic performance of the euro-zone was often breached undermining credibility as the Council sought to avoid moving to more formal parts of the procedure. Reform has thus softened the 3% figure not by changing it but by requiring a wider economic analysis taking into account additional factors which, as noted earlier are seen as watering down the standard such that it is meaningless.

While this paper does not evaluate the effectiveness of the rules or the appropriateness of the standards that they set, it is necessary to acknowledge that there is a wide literature that is critical of the SGP. Its operation in particular shows the extent to which the rules have lacked credibility for the Member States with repeated claims of ownership flaunted in practice. Ownership of rules is critical to their effective enforcement – both substantively and in relation to accountability. For accountability, there is a presumption that the rules being applied are credible and the values contained with them acceptable. Thus accountability mechanisms are only effective where the rules being applied are seen as credible. Credibility in this context refers to two dimensions both encapsulated within the notion of the rule of law: first, that the rules are applied equally, without prejudice and in a consistent manner to all (including the state) – this essentially goes to procedural fairness and equality before the law. Second that the substantive content of the rules reflect values accepted and adhered to by those subject to the law and the general public. What these values are depends on multiple factors including the time at which the society is being viewed and the substantive area under consideration. In relation to fiscal policy two factors undermined the credibility of the original rules. First, the episteme of economists widely condemned the thresholds used as arbitrary, lacking necessary flexibility and capable of triggering a punitive procedure (the EDP) even when the relevant economy was in good shape, leading to efforts to avoid the letter of the law so as not to trigger the sanctioning process. Second, the larger Member States had failed to comply with the rules repeatedly such that litigation and the reform of the rules followed. Public bodies (and states themselves) subject to rules can break them with some impunity whatever the accountability systems where the rules are seen as lacking credibility. Reform becomes critical in such circumstances as the rule of law becomes undermined. In other words, there is a

crucial link between the quality of the rule being applied and the procedures used for its application. Fraser suggests that accountability is a mechanism through which debate and change can occur and the calling to account of the Council before the ECJ can be seen as an accountability exercise which accelerated reform.

V.4 Through what processes?

Co-ordination is a long way from the Monnet method – the standard law-making technique in the EU. Thus the Treaty itself set out how co-ordination was to occur in Articles 99 and 104 EC. The Lisbon strategy with its emphasis on macroeconomic policy involves the BEPGs, now integrated with the employment guidelines, and National reports. The SGP works in parallel with national stability and convergence programmes presented and discussed by Council which receives opinions on them from the Economic and Finance Committee and the Commission. The Council may then issue a decision to start the excessive deficit procedure. Despite claims that the Pact is dead, it is clear from the 2006 Commission report that the more flexible criteria have not led to the suspected demise of the Pact with 12 states currently subject to the EDP: 5 eurozone states, the UK and six other Member States.

As in the international context, influence is crucial with Member States interdependent on each other (due to EMU and the internal market) for information, authority, expertise and legitimacy. The need for information goes to the heart of co-ordination and the need for transparency and consistency in statistics has now been largely resolved with the Commission responsible and procedures articulated through a code. Peer pressure is the key with influence exercised more through dialogue in the light of common objectives rather than coercion and reward. There were no explicit rewards for good housekeeping under the SGP – something for which it was rightly criticised -while coercion is meant to be resorted to exceptionally although that did not happen. The fiscal policy regime is not straightforward because there has not been a transfer of policy responsibility to the supranational level but at the same time, the EU provides a framework within which coordination and accountability to peers arises. Because of this quality, focusing on accountability mechanisms at one level or the other misses the point. What is required is transparency particularly when fiscal policy is located within the wider Lisbon strategy. The strategy is characterised by a web of different networks of officials and social partners. The Commission proposes greater transparency through it reporting more often to the EP and national parliaments having a greater role specifically for the SGP as well as Lisbon. The similarity of these recommendations in both spheres is indicative of the interdependence of fiscal policy and Lisbon. This interdependence may not be strong enough to constitute a form of accountability but it may develop into a functional equivalent to it provided there is sufficient interaction between the networks at the supranational and national level.

112 Fraser, Elizabeth, supra n. * at 513.
116 See Ardy, Brian, Iain Begg, Dermot Hodson, Imelda Maher and David Mayes, Adjusting to EMU Macmillan Basingstoke, 2006 ch. 4.
V.5 Consequences

Punishment in the fiscal sphere takes two forms: that arising out of the controls triggered by fellow Member States and those found elsewhere. The Member States can be subject to a number of sanctions ranging from loss of face to fines. If the states are members of a “club” with multiple iterative processes across many policy fields as in the case of the EU, performance/compliance league tables can have some impact with states unwilling to be at the bottom. The Commission has used this to great effect in the Single Market Scoreboard and in its recent communication is doing the same in relation to Lisbon. The BEPGs also allow for comparison across Member States. Further along the continuum, a collective statement can be issued noting a state has failed to meet particular standards and/or suggesting corrective action (specifying particular measures to be taken to correct the defect would mark a further degree of precision and hence a stronger sanction as the amount of peer pressure being imposed is increasing). Finally, fines as a sanction require a precise obligation. Interpretation of the obligation would have to be delegated to the courts at some stage in the process to ensure due process, and by imposing hierarchy (of interpretation at least), imposes greater control. At the same time, no matter who imposes the sanction it will only remain credible if imposed appropriately meaning that there must remain some form of discretion but with a sanction still a possibility otherwise its significance may be no more than symbolic.117

VI. Conclusion

In fiscal governance we see both a hybridity of governance process and of accountability regimes. This is perhaps no surprise. What the mix of hard and soft norms and their re-balancing following reform causes us to question is whether economic co-ordination is new at all. In a politically sensitive field of this nature and with a radical and unprecedented political and economic experiment, it is unlikely that formal norms would provide adequate nuance in the unknown waters EMU represents or that it would be sufficient to leave economic co-ordination to the entirely political domain. The challenge for public actors, on an instrumental level, is to ensure the balance between the two forms of norms is effective in securing a credible policy mix which translates into growth and jobs and advances the sound money sound finance as the twin objectives of European economic governance. This leaves us with the perhaps unanswerable normative question of what exactly should be the framing function of law in this sphere. That it has such a function is accepted given the way co-ordination is constructed in the Treaty. What is not articulated by those provisions and is emerging organically is the extent to which law can or cannot wholly identify standards, roles, responsibilities and accountability mechanisms that underpin the values and goals articulated in economic governance. The mapping exercise and the instrumental framing undertaken here is indicative of the limits of conventional accountability mechanisms and the emergence of relatively flat structures that straddle supra- and national levels of government. This exercise can help to identify and clarify what are currently confused and inappropriate roles with the Council as its own prosecutor and judge; the balance as between the national and supra-national levels of governance; the need for appropriate and meaningful economic standards; the dubiousness, relevance and appropriateness of tough sanctions; the centrality of states owning the processes and objectives of economic governance; the importance of greater vertical as well as horizontal co-ordination within states and across policy fields and the need for dynamic accountability mechanisms to build on reforms to ensure greater ownership, credibility and legitimacy

thereby improving effectiveness. New-ness implies a change at a particular moment. What the experience of economic governance shows is that it is evolutionary by virtue of its iterative nature and as such, continuing transformation should be expected both in relation to the substantive rules and in accountability where dynamism and novelty are desirable if not essential characteristics.