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AEL 2015/01
Academy of European Law

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EUI Working Paper **AEL** 2015/01

ISSN 1831-4066

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

This working paper discusses the future of the EU's 'new governance' paradigm, as a particular category of the EU's legal acts in light of developments in EU economic governance following the Euro crisis. It advances both an empirical and a normative argument. While EU economic governance 'after' the euro crisis would seem to carry 'hard law' elements, the paper's key empirical claim is that 'post' euro-crisis economic governance has generalized central elements of the new governance paradigm into an increasingly central domain of EU policy-making. Policy-makers have turned to an enhanced form of new governance as a way of managing complex, multi-level problems which traditional command and control regulation could not solve. Normatively, however, some of the more promising aspects of the new governance legacy – its experimental focus on policy innovation and mutual learning between states – is precisely the aspect of the new governance paradigm post-crisis economic decision-making seems to have left behind. New governance is used in the economic field not to promote learning or experimentation between states but to foster greater harmonization and convergence in fiscal performance. Learning the lessons of new governance's past may be vital in securing a central (and positive) place for new governance instruments within the EU's future constitutional landscape.

Keywords

New Governance; Euro Crisis; EU Economic Governance; Open Coordination; Experimentalism

Introduction – New Governance in 2015

At the dawn of the 21st Century, 'new governance' (NG) was at the forefront of academic debates about the transformation of EU legal acts.[1] The ambitious goals of the EU's central Lisbon Strategy – and the choice of a novel, non-binding instrument, the Open Method of Coordination (OMC) – to deliver it, suggested a new pivot in the legal and political machinery through which EU integration was to advance. If the 60s and 70s had been the era of 'integration through law', with the 80s and 90s using 'mutual recognition' to further the legal liberalization of a single European market, Lisbon heralded a new era. Integration to achieve central EU objectives – a 'knowledge-based' economy, or a renewed 'European social model' – was no longer to be delivered through binding rules but through the soft coordination of 'new governance'. These instruments were posited not only as supplementing, but as 'transforming' EU law, questioning the centrality of institutions like the CJEU to the EU's future political and legal order.[2]

Some 15 years on, it is worth considering how premature the heralding of a 'new governance' era was. On the one hand, many of the original hopes of those most optimistic about new governance's advance have been dashed. The EU's central 'Lisbon Strategy' failed to achieve its economic and social targets with its 'Lisbon 2020' successor on course to fair even worse.[3] Policy processes delivered via the OMC – such as the once heralded OMC for Social Inclusion and Social Protection – are withering, with academic prophecies of their limited effectiveness backed-up by an increasingly poor national compliance record.[4] At the same time, the CJEU seem to yield more substantive influence than ever, with ambitious rulings in areas from social policy to EU citizenship to consumer protection demonstrating the Court's obstinate ability to frame EU policy-making. If the 2000s seemed the era of 'soft law', the last 5 years have seen a seeming re-assertion of the EU legal order's 'harder' edge.

In spite of this, there are recent developments that seem to forward rather than challenge the idea of a continued 'new governance era'. The key development doing so – and the policy area that will be the primary focus of this chapter – is changes in EU economic governance. While EU economic governance 'after' the euro crisis would seem to carry 'hard law' elements[5], a key empirical claim of this chapter is that 'post' euro-crisis economic governance has generalized central elements of the new governance paradigm into an increasingly central domain of EU policy-making. While economic governance post-crisis has been designed to significantly centralize national fiscal policy[6], its attachment to 'rolling' and revisable regulation and its strong 'proceduralization' of EU and national policy-making bind it closely to the new governance model. Policy-makers have turned to an enhanced form of new governance as a way of managing complex, multi-level problems which traditional command and control regulation could not solve.

Finally, the chapter will advance a more contested, and explicitly normative, argument. As well as tracing the similarities and differences between economic governance and the new governance paradigm, the paper will also seek to consider the suitability of new governance instruments to achieve the goals desired by policy-makers seeking to respond to the crisis. As the chapter will argue, the EU

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1 G. de Burca and J. Scott, *Law and New Governance in the EU and the US* (2006).

2 See the special issue, 'New Governance and the Transformation of Law', 2 *Wisconsin Law Review* (2010) 227; M. Dawson, *New Governance and the Transformation of European Law* (2011).

3 Dawson, 'Learning from Past Failures? New Governance in the European Union from Lisbon 2000 to Lisbon 2020', 17 *Maastricht Journal of European & Comparative Law* (2010) 2.

4 Daly and Copeland, 'Poverty and Social Policy in Europe 2020: Ungovernable and Ungoverned', 42 *Policy and Politics* (2014) 351.

5 See more generally on constituent features of post-crisis economic governance, Dawson, 'Legal and Political Accountability in Post-Crisis EU Economic Governance', *Journal of Common Market Studies* (forthcoming, 2015).

6 On the impact of the crisis on the EU's institutional and decision-making structure, see Dawson, *ibid.*

may be using new governance tools to achieve tasks to which they are wholly unsuited. While the lessons of previous experience with new governance suggests that these methods work poorly in achieving harmonization and policy convergence, particularly in costly, distributive areas of policy, these are precisely the tasks new forms of economic governance are being asked to achieve. At the same time, some of the more promising aspects of the new governance legacy – its experimental focus on policy innovation and mutual learning between states – is precisely the aspect of the NG paradigm post-crisis economic decision-making seems to have left behind. Learning the lessons of new governance's past may be vital in securing a central (and positive) place for new governance instruments among the EU's future legal acts.

What Was 'New Governance'?

One of the core difficulties in determining whether 'post-crisis' economic governance should be conceptualized under the rubric of new governance is the high level of doubt and contestation surrounding new governance itself.[7] 'Governance' suggests a de-centering of the state as the primary means of exercising public authority. Its 'newness' suggests a departure from traditional forms of regulation. Beyond this, however, the term seems to beg as many questions as it answers, potentially bringing together disparate processes of European policy-making from the binding directives of the social dialogue to the soft steering of voluntary standards or codes of conduct.

The core consensus of the new governance literature seems to be negative rather than positive: academics are much clearer about what new governance is not than what it is.[8] What it clearly precludes is 'command and control' regulation, guided by central institutions, and epitomized by the 'Classical Community Method' (CCM) of directives, regulations and decisions.[9] While there are many ways to characterize the CCM, three features stand-out – i) the importance of review institutions (like Courts and Parliaments) in ensuring norms are supervised and obeyed, ii) the presence of norms as binding law, and iii) the divide under the CCM between rule formation and rule application.[10] In the latter case, CCM rules carry a lengthy process of institutional deliberation but are not to be politically contested once they are formed. The primary duty of national institutions is to 'apply' CCM rules domestically (such that significant deviance from given norms, even under directives, is categorized as 'non-compliance', resulting in suitable penalties and enforcement mechanisms).

NG procedures, in their various guises, seem to depart from these central tenants, and in diverging ways. To take a central example – the process of 'Open Coordination' used by Lisbon to coordinate social and education policies – it significantly relegates traditional review institutions like Courts and Parliaments.[11] Neither playing a significant role in the formulation or review of OMC guidelines and recommendations. As a result, norms under the OMC are not adopted as binding law, with persuasion rather than legal coercion seen as the primary instruments of inducing policy change. Finally, the CCM's bright line between the formation and application of norms is thoroughly eroded in most NG

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[7] See Möllers, 'European Governance: Meaning and Value of a Concept', 46 *Common Market Law Review* (2006) 43, at 314.

[8] Dawson, *supra* note 2, at 72-77; Dawson, 'Three Waves of New Governance in the European Union', 36 *European Law Review* (2011) 2, at 211-213.

[9] Scott and Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *European Law Journal* (2002) 1; de Burca, 'The Constitutional Challenge of New Governance in the European Union', 28 *European Law Review* (2003) 6.

[10] Deakin and de Schutter, 'Reflexive Governance and the Dilemmas of Social Regulation', in *Id*. (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (2005).

[11] Dawson, *supra* note 2, at 203-206.

processes.[12] In the case of the OMC for example, objectives and guidelines are formed as a policy cycle, with domestic experience of what 'works', or of new regulatory issues and problems, feeding into central norms later in the policy cycle. Deviance from norms is not seen as 'non-compliance' but either as 'experimentation' or as evidence that the original norms were not adequately framed in the first place. Under this account, if the CCM is from Mars; NG is from Venus.

The main problem with this 'negative' definition of NG is that, in practice, the binary distinction is not so clear.[13] If one takes any of these three variables, new governance processes often seem to inter-relate with hard law alternatives.[14] To take the economic governance example this chapter will focus on, the pre-cursor to the current regime of fiscal policy coordination – the Broad Economic Policy Guidelines – operated as an OMC process.[15] At the same time, it was embedded in a series of directives and regulations and included the possibility of 'hard' fiscal penalties if states deviated from the famous Maastricht deficit criteria. Many 'hard' law directives carry soft law elements, particularly in the social policy field from which new governance sprang, such as optional articles or provisions whose content is to be elaborated by social partners, or other non-conventional bodies. If new governance was whatever hard law was not, how could this be reconciled with hard law's very 'softness', or the continuities between new governance and more traditional modes of regulation?[16]

An alternative approach is to seek a more 'positive' definition of new governance or to see new governance as embodying particular concepts or modes of rule.[17] Two schools of thinking are important in considering this second alternative (and indeed both are useful when analyzing whether present economic decision-making can be seen as a category of new governance). The first of these emerges from the US context. In an influential essay from 2008 (building from earlier work) Jonathan Zeitlin and Charles Sabel have associated the development of NG with a shift in the EU towards 'democratic experimentalism'.[18]

The experimentalist model is based on skepticism that contemporary regulatory problems can be solved by central actors. New governance mechanisms seek to solve problems of limited or 'bounded' rationality on the part of policy-makers by delegating policy-making responsibilities to lower-level actors within relatively wide mandates.[19] Within these mandates, local actors are encouraged to experiment with policy solutions but on the premise that they will report to the central level on their performance. By so doing, 'central' policy-making may benefit from experience of which policy options are successful, which are not, and which may be generalized to other policy or territorial contexts.

In this sense, experimentalism combines two first crucial elements of what I will term the 'new governance paradigm'.

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[12] Deakin and de Schutter, *supra* note 10.

[13] This point is evident in the significant literature on 'hybridity' between hard and soft law. See Kilpatrick, 'New EU Employment Governance and Constitutionalism', in de G. Burca and Scott, *supra* note 1, at 124; Armstrong, 'The New Governance of EU Fiscal Discipline', 38 *European Law Review* (2013) 5.

[14] See Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law', 21 *European Law Journal* (2014) 1, at 7-9.

[15] See Hodson and Maher, 'The Open Method of Coordination as a New Mode of Governance: The Case of Soft Economic Policy Coordination', 39 *Journal of Common Market Studies* (2001) 4.

[16] D. Trubek and L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination', 11 *European Law Journal* (2005) 3, at 355-361.

[17] Dawson, *supra* note 6, at 214.

[18] Sabel and Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', in *Id.* (eds), *Experimentalist Governance in the European Union* (2010) 1.

[19] *Ibid.*, at 6.

a) The first of these is revisability. New governance in this sense is associated with the erosion of the application/formation distinction mentioned above. Rules are not formed 'once and for all' but are to be revised according to practical experience, and on an ongoing iterative basis. Normally, this revision is to be conducted by executive actors (e.g. in the OMC case, committees made-up of governmental officials, but other actors such as civil society or technical agencies may also be tasked with revision). One shifts from universal rules to revisable 'decisions' (a category that section 4 of this chapter will return to).

b) The second is differentiation. Experimentalism rejects the idea of 'one size fits all' policy-making, or the notion that the primary goal of EU legal acts should be to harmonize national rules in order to establish a unitary European standard. Substantive difference is not only permitted under the experimental model but seen as a useful policy tool: an opportunity to use the diversity of different national contexts to 'experiment' and thereby build more innovative and effective policies.

While democratic experimentalism has had significant influence on the academic and institutional debate about new governance, it is a framework that has been questioned[20], and that should be complemented by other approaches. A second potential conceptual basis for a 'positive' definition of new governance comes from procedural theory.

The common starting point between proceduralism and experimentalism is a shared interest in the de-centering of public authority. For architects of the procedural approach, such as Jürgen Habermas, one can no longer in a democratic polity see the authority of the law as emerging from its formal pedigree, nor from its ability to achieve particular material public goods. Rather, the validity of the law emerges from the ability of addressees of the legal order to carry a say in the law's formation.[21] This implies a strong role for law, less in the elaboration of substantive goals for citizens, than in creating a procedure within which goals can be deliberated and determined. Law in this sense must play a secondary role, addressing disparities of power between participants, ensuring the free flow of information and executing the norms thereby produced.

While Habermas' account is not directly tied to the multi-level context of the EU – and contains a strongly normative dimension - some scholars have connected procedural ideas to the notion of EU law as a 'reflexive' procedural device.[22] EU law does not only proscribe substantive outcomes, but may play a role in encouraging Member States, and domestic institutions, to consider the impact of their policies on neighboring states, and seek out commonly agreed upon solutions to collective problems. EU law need not always 'replace' or harmonize national standards but may guide national policy-making, encouraging it to internalize the preferences and view-points of outsiders.[23]

Proceduralism in this sense speaks to two further elements of the new governance paradigm that have been influential in existing academic literature.[24]

c) The third of these is procedural constraint. While many approaches to new governance seem to place it outside of 'classical' EU law, new governance in fact provides the law with a crucial but different role. Law is designed to bind participants in a common *process* of decision-making without thereby presupposing that processes' substantive outcomes.

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[20] See in particular Scheuerman, 'Democratic Experimentalism or Capitalist Synchronization: Critical Reflections on Directly-Deliberative Polyarchy', 17 *Canadian Journal of Law and Jurisprudence* (2004) 17.

[21] See Habermas, 'Paradigms of Law', 17 *Cardozo Law Review* (1996) 4.

[22] Deakin and de Schutter, *supra* note 10; Smismans, 'Reflexive Law in Support of Directly-Deliberative Polyarchy', in Deakin and de Schutter, *supra* note 10.

[23] This idea of EU law as compensating for the external democratic deficits of national democracies is also a key insight in the work of Christian Joerges. See Joerges, 'Deliberative Supra-nationalism: Two Defences', 8 *European Law Journal* (2002) 1.

[24] For more detail on NG's theoretical origins, see Dawson, *supra* note 2, at 103-162.

d) The fourth element is domesticization of EU policy. Whereas classical EU law often saw domestic institutions primarily as actors who could 'implement' EU policy under a formal hierarchy of norms, a procedural approach to new governance sees domestic institutions as themselves engaged in the process of EU policy-making. New governance in this sense both seeks to devolve to domestic and 'local' institutions significant decision-making power and encourages those institutions themselves to adopt 'other-regarding' or (in the common political science vernacular) 'Europeanized' norms and procedures.[25]

It is of course a generalization to talk of a single 'new governance' paradigm. These 4 (inter-related) features of an 'ideal type' in new governance may, however, be helpful in considering to what extent post-crisis governance has adopted the new governance framework. It is to that subject which we must now turn.

New Governance and the Euro Crisis

While this section of the chapter will argue that 'post crisis' economic governance has carried-over much of the new governance paradigm, the crisis response can also be seen as an explicit critique of new governance instruments, or at least a central perception of them. The key perception is the 'weakness' of new governance or their perceived inability to affect meaningful policy change.[26]

This perception is closely related to the evolution of the Maastricht settlement for the governance of the Euro area. The Post-Maastricht EMU carried certain hierarchical 'command and control' elements. The central example was the decision to centralize monetary policy within the monopoly power of the European system of Central Banks. Famously, however, this monetary centralization was accompanied by a de-centralization of responsibility for fiscal policy. Member States were primarily themselves responsible for their budgets subject to two over-arching conditions: that deficits and debt were restricted to 3 and 60% of GDP respectively.

To enforce these targets, two main instruments of supervision were intended. The first was the 'invisible hand' of market discipline. The fierce current debate about Article 126 TFEU's no bail-out clause reflects the idea that the Maastricht settlement prohibited states from free-riding on the fiscal performance of others. As neither the EU nor other governments could assume government debt from other states, national governments would thereby (in theory at least) be incentivized to manage their debt and deficits responsibly. Better debt and deficit ratios would lead to lower rates of interest on government bonds and thereby better national fiscal performance (and more money to spend on popular social and other programmes).[27]

The second instrument was the Stability and Growth Pact. Its two main elements were a preventive arm, established via Regulation 1466/97 and a dissuasive arm (Regulation 1467/97).[28] The preventive arm was designed as a process of budgetary surveillance *ex ante*. It obliged Member States to submit annual Stability and Convergence programmes with the possibility of warnings and recommendations

[25] Olsen, 'The Many Faces of Europeanization', 40 *Journal of Common Market Studies* (2002) 5.

[26] See, on this critique at an institutional level, the 2004 Kok Report, 'Facing the Challenge: The Lisbon Strategy for Growth and Employment' (2004).

[27] Dawson, 'Economic and Monetary Union: Maastricht's Great Failure', in M. de Visser and A.P. van der Mei (eds), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (2014) 475.

[28] Council Regulation 1466/97/EC of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, since amended and Council Regulation 1467/97/EC of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, since amended, OJ 1997 L 209/1.

from ECOFIN where national budgets were clearly likely to exceed the 3% deficit limit. This also included annual recommendations in the areas of fiscal and employment policy, monitored both by the Commission and the Member States.

The SGP's dissuasive arm was more coercive, permitting sanctions against Member States with excessive deficits, with a qualified majority vote needed in the Council to determine that an excessive deficit existed, to issue a formal warning and, finally, to impose a non-interest bearing deposit or fine. The SGP was in this sense formed as a series of instruments that mixed traditional regulation with 'new governance' elements, in which fiscal policies would be flexibly coordinated.[29]

The principal critique of new governance from political science literature has often centered on the limited evidence for its effectiveness.[30] Without binding force, instruments of 'soft' policy coordination were likely to be manipulated: obeyed by states when it suited them and flouted where the costs of compliance were too high. The experience of the SGP in the 2000s bears out some of this critique. While the decision to leave the 'dissuasive arm' in the hands of the Council clearly reflected the political salience of penalizing excessive deficits, it also left sanctioning decisions open to political bargaining between the Member States. Only two years after the first Euro notes were issued, France and Germany were themselves the subject in 2003 of Commission recommendations for sanction under the SGP but used their political influence to place the procedure in abeyance (a procedural irregularity that was later questioned by the Court of Justice).[31] The inability of the Commission to enforce and pursue sanctions against the Union's larger Member States – in the face of a QMV requirement – was seen by many as making a mockery of the SGP's credibility in withstanding political pressure.[32]

By early 2008, the inability of fiscal policy coordination to either promote economic convergence among the Member States or to limit public debt and deficits was already apparent. By 2008, Greece already carried a public debt standing at 99.2% of its GDP, a full 40% above the Maastricht criteria and a public deficit of 7.7%.[33]

While the SGP could hardly be blamed as the sole culprit for the euro crisis (other states affected by the crisis such as Spain carried positive budgetary conditions in 2008), the immediate crisis response was full of rhetoric of 'strength', and of the need to create more robust and automatic fiscal rules.[34] Elements of the '6' and '2' pack legislation designed to 'strengthen' EMU can in this sense be seen as an explicit critique of new governance's reliance on non-binding or persuasive norms.

A central example is the set of reforms undertaken to the Excessive Deficit Procedure (EDP). To address the debacle of 2003, the revised EDP now includes a novel 'Reversed' QMV system, whereby Council recommendations, including those involving fiscal penalties, shall be adopted unless

[29] Schelkle, 'EU Fiscal Governance: Hard Law in the Shadow of Soft Law?', 13 *Columbia Journal of European Law* (2007) 705.

[30] See e.g. Eckhardt, 'The Open Method of Coordination on Pensions: An Economic Analysis of Its Effects on Pension Reforms', 15 *Journal of European Social Policy* (2005) 3; Dawson, *supra* note 2, at 175-183.

[31] Case C-27/04, *Commission v. Council* [2004] ECR I-6649 (ECLI:EU:C:2004:436). While the Court agreed with the Commission that the deficit procedure could not be placed in abeyance, it rejected another, equally important, Commission argument, i.e. that the Council's failure to adopt the Commission's recommendations under the procedure was a decision capable of review under then Art. 230 EC.

[32] Heipertz and Verdun, 'The Dog That Would Never Bite? What We Can Learn from the Origins of the Stability and Growth Pact', 11 *European Journal of Public Policy* (2004) 5.

[33] Eurostat News Release/Euro Indicators no. 149/2009 of 22 October 2009.

[34] See e.g. the report of the 'Four Presidents', 'Towards a *Genuine* Economic and Monetary Union', available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf (last visited 6 July 2015).

explicitly overturned via a qualified majority.[35] This has been coupled with further centralizing provisions, from the possibility to adopt sanctions earlier in the procedure, to the provisions, under the 'two-pack' to supervise and provide recommendations for the national budget prior to its domestic adoption.[36]The heightened review powers of both the Commission and ECOFIN over national budgets 'post-crisis' seems to suggest a move away from 'flexibility' towards more traditional 'command and control' regulation.

Before coming to such a conclusion, we should take pause. There is much in the post-crisis economic governance framework that fits well within the new governance paradigm. This begins at the explanatory level. The 'rise' of new governance has often been explained in terms of a 'constitutional compromise'.[37] According to this account, processes such as the OMC were forwarded as a compromise between national leaders who recognized the need for greater supra-national action in particular domains, but feared the sovereignty loss implied by regulation through the normal CCM. Desiring greater EU steering, but recognizing legal and political limitations on traditional EU law in the social field, the OMC was adopted as an alternative solution.

Fast-forwarding to the post-crisis landscape, we see related pressures. Once the crisis struck, a strong (albeit not uniform) academic consensus emerged that the divide between a centralized monetary policy and de-centralized fiscal policy had to be addressed.[38] A credible euro-zone required far greater centralization and stronger safeguards against beggar-thy-neighbor fiscal decisions, which could de-stabilize the common currency area.

Against this consensus, however, was ranged a myriad of legal and political obstacles. Legally, the Treaty structure not only seemingly prohibited the assumption of national debt but also limited the EU's ability to harmonize national fiscal policies, or to create new institutions for that purpose.[39] Politically, the common obligations and arduous decision-making process of the CCM seemed unsuitable for governing a euro area with both divergent economic difficulties between participating states and a need for rapid and changing fiscal intervention.

The outcome of these conflicting demands was once again a form of constitutional compromise, in which many of the features of the 'new governance' paradigm were maintained or even embellished (albeit with some significant departures thrown in).[40] Once again, NG models acted as a 'lowest common denominator' allowing supra-national steering without overriding entirely national prerogatives (particularly those of more debt-free Member States). This can be seen by returning to the 4 features of the new governance paradigm described in section 2 above.

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[35] On its legality, see Palmstorfer, 'The Reverse Majority Voting under the Six Pack: A Bad Turn for the Union?', 20 *European Law Journal* (2014) 2.

[36] Regulation 473/2013/EU, , of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ 2013 L 140/11, Arts 6-7.

[37] Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?', in G. de Burca (ed.), *EU Law and the Welfare State: in Search of Solidarity* (2005) 213.

[38] See e.g. H. Enderlein *et al.*, 'Completing the Euro: A Roadmap Towards Fiscal Union in Europe' (2012), available at http://www.henrik-enderlein.de/TPS_GROUP_REPORT.pdf (last visited 6 July 2015).

[39] De Witte and Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle', 50 *Common Market Law Review* (2013) 805.

[40] A related argument, based on the 'hybridity' of soft and hard law under new economic governance has been developed by Kenneth Armstrong, see Armstrong, 'The New Governance of EU Fiscal Discipline', 38 *European Law Review* (2013) 5.

The EU's 'New' Economic Governance

Revisability

The link between 'post-crisis' economic governance and the revisability aspect of the NG paradigm should be seen in light of debates regarding conflicts between NG and classical notions of the 'rule of law'. The rule of law has often been associated with the need for stable, general and universal rules that can guide official and individual conduct alike and be used to judge conformity with the law ex post.[41] The corollary of this is that the law must remain relatively static, with complex legislative procedures required for its revision. Where executives are given discretion to apply legal standards, their discretion is limited – in the EU case for example, executive rule-making power has been seen to extend only to 'non-essential' elements of the legislative act.[42]

Part of NG's advance has been due to the ability of its norms to adapt much faster to changing regulatory demands and perceptions. The OMC's appeal lay partly in the ability of its norms to change as pressing new issues came to the political table. These norms could also be interpreted flexibly, including within their ambit structures (such as collective bargaining, contributory insurance, single-payer health systems and a hundred other national peculiarities) from a variety of European welfare states.[43] EU norms could in this sense accommodate significant differences in the means by which EU states delivered social and employment goals, without one method of delivery being seen as automatically superior to another.

Inevitably, with this flexibility came significant discretion. The decision, under the OMC for employment for example, whether to issue a country-specific recommendation was a genuine 'decision': clear and universal criteria were not available to guide the executive on when a decision should or should not be issued. This flexibility allowed executive actors like the Council significant lee-way to adapt their norms to different national environments.

In doing so, however, these decisions created a significant 'discretionary space' in EU politics. New Governance's emphasis on revisability seemed in direct conflict with the notion of a stable and independent 'rule of law'.[44] To paraphrase John Adam's famous definition, NG seemed to be built on a government 'of men, not laws', with few clear expectations as when and how particular rules would be applied.

Post-crisis economic governance's preference for 'decisions' over 'rules' may be the key element joining its procedures to the NG paradigm.[45] One must not confuse 'rules' here with 'legislation'. Legislation under post-crisis economic governance abounds, from the Regulations revising the EDP to those establishing the EU's new Macro-Economic Imbalances Procedure (MIP). Crucially, however, these two sets of legislative frameworks create procedures within which important budgetary decisions are made. In both cases (the EDP and MIP), the Commission and Council (in the form of ECOFIN) is vested with decision-making authority at numerous stages of the policy-making process.

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[41] L. Fuller, *The Morality of Law* (1969).

[42] Art. 290 TFEU.

[43] See Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', 40 *Journal of Common Market Studies* (2002) 2.

[44] See on this question, Dawson, 'Soft Law and the Rule of Law in the European Union', in A. Vauchez and B. de Witte (eds), *Lawyering Europe: European Law as a Trans-national Social Field* (2013) 221,at 224-228.

[45] Chalmers, 'The European Redistributive State and a European Law of Struggle', 18 *European Law Journal* (2014) 5, at 682-684; Menendez, 'Editorial: A European Union in Constitutional Mutation', 2 *European Law Journal* (2014) 127, at 136-137.

As explained recently by the Commission, this discretion is seen by policy-makers as necessary to effectively apply fiscal rules in a diverse economic area:

'Equal treatment does not mean "one-size-fits-all" and must be combined with the economic assessment that is required by every situation. It is on purpose that the [Stability and Growth] Pact envisages flexibility in the way its rules should be applied, both over time and across countries. It is also on purpose that some discretion is left, within the agreed rules, for the Commission and the Council to assess the soundness of public finances in the light of country-specific circumstances, in order to recommend the best course of action based on the latest developments and information.'[46]

In the MIP, for example, the Commission and Council make at least 8 such 'decisions'. They must decide i) whether to conduct an in-depth review of an 'at-risk' Member State[47]; ii) whether to adopt preventative recommendations[48]; iii) whether to declare the opening of an 'excessive imbalances procedure' (EIP)[49]; iv) whether to accept or demand revision to any corrective plan issued by a Member States under an EIP[50]; v) whether a Member State has adequately implemented its corrective plan[51]; vi) whether to apply an interest-bearing deposit where that plan is not adequately implemented[52]; vii) whether to vary the fine 'on grounds of exceptional economic circumstances'[53] and viii) whether to close the procedure[54]. The sheer length of this procedure already tells us something significant – norms under the MIP and EDP never seem to crystallize into a 'once and for all' agreement but are based on repeated and rolling 'micro-assessments' by the EU institutions of national fiscal performance.

While the legislation gives the Commission and Council some guidance, the level of precision in the legislative text is highly variable. For many of the decisions above, the Commission and Council have near total decision-making discretion. This begins with the Directive's very material scope. A macro-economic imbalance is defined as:

'Any trend giving rise to macroeconomic developments which are adversely affecting, or have the potential adversely to affect, the proper functioning of the economy of a Member State or of the economic and monetary union, or of the Union as a whole.'[55]

It is difficult to perceive of any national measure that would be excluded from the ambit of this definition. In essence, the definition rests, as others have argued[56], on a contentious economic definition of which policies and spending decisions are or are not likely to adversely affect the functioning of either national economies *or* the EU economy as a whole.

This imprecision also extends to the temporal scope of the procedure. A particularly significant example may be the decision whether to dis-apply sanctions in times of 'exceptional circumstance'. This is defined as circumstances 'resulting from an unusual event outside the control of the Member State concerned and which has a major impact on the financial position of the general government, or

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[46] Commission Communication, 'Making the best use of the flexibility within the existing rules of the stability and growth pact', COM (2015) 12 final, 13 January 2015.

[47] Regulation 1175/2011/EU, OJ 2011 L 306/12, Art. 5(1).

[48] *Ibid.*, Art. 6(1).

[49] *Ibid.*, Art. 7(1)-(2).

[50] *Ibid.*, Art. 8(2)-(3).

[51] *Ibid.*, Art. 10(1)-(4).

[52] Regulation 1174/2011/EU, OJ 2011 L 306/8,Art. 3(1).

[53] *Ibid.*, Art. 3(6).

[54] Regulation 1175/2011/EU, *supra* note 47, Art. 11.

[55] *Ibid.*, Art. 2(1).

[56] See Menendez, *supra* note 45.

when resulting from a severe economic downturn.'[57] This is further specified to require an unforeseeable GDP loss of at least 2% per annum. If we attempt to apply this definition to recent events, one can see the high level of discretion and ambiguity involved. In the case of Spain for example, was the collapse in that state's housing market (which had a significant bearing on its financial crisis) a 'usual' and 'foreseeable' event or was it instead something entirely out of the government's control (given that extensive housing devaluation occurred during the crisis in a number of Member States)?

While no sanctioning decisions have yet been made under the MIP, the capacity for un-even decision-making has already been demonstrated with reference to the operation of its sister procedure, the EDP.[58] France's government deficit, for example, has been subject to an EDP since 2013. In spite of its failure to reduce its deficit, the Commission has consistently placed the EDP against France in abeyance, delaying until March 2015 a sanctioning decision.[59] Notable are possible disparities in treatment vis-à-vis other, smaller Member States: as Chalmers and Chivas have pointed out, Belgium was asked in 2013 to rectify its excessive deficit immediately whereas France was given an extended deadline to address its own (in spite of the fact that the Belgian budget deficit stood at 2.9% in 2012, compared to a French deficit of 4.8%).

This aspect of EU economic governance illustrates well how economic governance procedures share new governance's emphasis on discretionary and revisable rules and standards. In place of universal and relatively clear legal standards, decisions under economic governance are adaptable depending on a range of political, social and economic factors.

Differentiation

The presence of revisability under post-crisis economic governance already implies the importance of a second aspect of the NG paradigm – the differentiation of legal and political standards.[60] This too was an important point of departure between NG and the CCM. The CCM carried the possibility in some cases of national opt-outs or 'optional' elements of legislation. The norm, however, was a legislative regime that produced relatively uniform obligations between European states. This uniformity reflected both the sovereign equality of states i.e. that they were equally subject to both the benefits and duties of EU integration, and the functional need to promote the single market through the application of common regulatory conditions.[61] If new governance's emphasis on flexibility in rule-making and 'country-specific recommendations' was a break from this, post-crisis economic governance goes far further.

The most obvious type of differentiation is between euro and non-eurozone states. The 'six-pack' legislation establishing the revised EDP and new MIP procedure applies to all EU states; its sanctioning regime, however, only applies to the Eurozone.[62] Similarly, the two-pack legislation creates a regime for domestic budgetary surveillance that applies only to eurozone states. This division is further complicated by new instruments such as the Fiscal Compact and the newly enacted

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[57] Regulation 1467/97, OJ 1997 L 209/6, Art. 1.

[58] See on this, the excellent paper by Chalmers and Chivas, 'Union Democratic Overload and the Unloading of European Democracy', in O. Cramme and S. Hobolt (eds), *Democratic Politics in an EU Under Stress* (2014) 155.

[59] See Euractiv article, available at http://www.euractiv.com/sections/euro-finance/commission-delays-french-deficit-procedure-310395 (last visited 6 July 2015).

[60] On the desirability of differentiation, see J.C. Piris, *The Future of Europe: Towards a 2-speed EU?* (2012); Craig, 'Two-speed, Multi-speed and Europe's Future', 37 *European Law Review* (2012) 800.

[61] R. Dehousse, *The Community Method: Obstinate or Obsolete?* (2011).

[62] See Regulation 1173/2011/EU of the European Parliament and the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the Euro area, OJ 2011 L 306/1.

provisions for banking regulation. All Member States, barring the UK, are committed to ratification of the compact. Similarly, the EU's new Single Supervisory Mechanism (SSM) for banking regulation applies formally only to euro-zone states. At the same time, a number of other EU states have indicated their preference to come within the SSM's ambit under a 'close cooperation' agreement with the ECB.[63] In this sense, while differentiation between euro and non-eurozone is real, the preference of most Member States has been to gravitate towards the regulatory regime of the eurozone.

Even *within* the eurozone, however, a second type of differentiation is at play. In place of the CCM's idea of a relatively uniform set of procedural and substantive obligations under EU law, post-crisis economic governance offers a highly un-even regime. The level of EU supervision to which states are subject, and the extent of their reporting and procedural obligations, is heavily dependent on their fiscal status. In this sense, we see differentiation in the form of un-even sovereignty loss.[64] States with positive fiscal conditions can expect relatively light review of domestic policies; states with higher debt and deficits (and arguably those with less political bargaining power too) can expect increasingly cumbersome EU-level supervision.

One way of seeing the EDP process is thus as a series of stages of EU-level review.[65] The first level is the experience of states with positive budgetary conditions – such states already have significant reporting obligations under the EDP's 'preventative' arm, but are not subject to significant EU correction. The second level concerns states deemed to have an excessive deficit. These states still retain significant sovereignty in the sense that they themselves must establish a corrective plan for alleviating their deficit; at the same time, this plan is subject to EU-level monitoring and recommendations. The third level concerns those states repeatedly in breach of EU deficit rules, or those states whose budgetary plans are unlikely to lead to exit from the procedure. For these states, the 'two-pack' legislation[66] envisages the co-agreement between the Member State and Council of a far more detailed 'economic partnership programme'. The Council's 2013 opinion on Spain's programme indicates the level of detail obligations under such programmes entail:

'Even though the Economic Partnership Programme stops short of presenting plans for a comprehensive systematic review of major spending items, measures to rationalize spending on health, employment policy (see also recital 14 on fighting tax fraud) and on public administration give information on some key expenditure items. Regarding health expenditure, the revision of the basket of benefits and of reference prices of pharmaceutical products and the introduction of a centralized purchasing platform for health supplies, could result in a more efficient use of public resources. Regarding public administration, reforms are expected to generate savings over a three-year period from increasing overall efficiency, notably by eliminating duplicated administrative structures, streamlining overheads, rationalizing the so-called "institutional" administration, as well as reforming local entities. Strict monitoring and enforcement of all these measures will be required to realize expected savings.'[67]

While such 'programmes' already evidence significant EU-level steering, the final and fourth level of EU supervision involves much greater sovereignty loss. This level concerns those states subject to economic adjustment programmes as a result of EU/IMF financial assistance. While at the time of writing, Greece has resisted a number of its obligations under this programme, financial assistance

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[63] See e.g. Konstantinova and Groendahl, 'Bulgaria Asks ECB to Supervise Banks as Crisis Festers', *Bloomberg* (15 July 2014), available at http://www.bloomberg.com/news/articles/2014-07-15/bulgaria-asks-ecb-to-supervise-banks-as-crisis-festers (last visited 6 July 2015).

[64] On the association of the crisis with 'asymmetrical sovereignty transfer', see Dawson,*supra* note 5.

[65] Applying this analysis to the Fiscal Compact regime, see Chalmers, *supra* note 45, at 677-682.

[66] Art. 9, Regulation 473/2013/EU, *supra* note 36.

[67] See Proposal for a Council Opinion on the Economic Partnership Programme for Spain, COM(2013) 902 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0902:FIN:EN:PDF, indent (9) (last visited 6 July 2015).

states, as well documented by other work[68], face 'co-government' with the Troika, with that institution carrying an effective veto over the most significant elements of the national budget.

Differentiation in this example, as will be explored in section 5 below, is utilized for a very different purpose under EU economic governance than it was used for older new governance procedures. By contrast with the OMC, one differentiates less to truly accommodate structural differences between Member States – what Fritz Scharpf once termed 'legitimate diversity'[69] - than to produce more *convergent* economic outcomes, in particular vis-à-vis the government deficit. In terms of substantive policy outcomes, differentiation is (somewhat ironically) used under the EDP to foster policy convergence (around austerity principles) across a diverse eurozone.[70]

When considered from the perspective of legal acts, however, economic governance shares with the new governance paradigm a rejection of the *form* of universal legal standards. As put by an influential group of economists, in the post-crisis EU, 'sovereignty runs out with solvency'.[71] The very obligation to apply particular rules and procedures has become increasingly differentiated between EU states.

Domesticization and Procedural Constraint

If 'differentiation' is the order of the day under post-crisis economic governance, what 'unity' in the legal framework is left? To find this unity, we may have to look at a further 'procedural' element of the new governance paradigm. This procedural element speaks to the idea of law not simply as a set of substantive and behavioural norms, but rather as a device within which substantive deliberation is conducted. Procedural law in this sense seeks to guide the institutions and procedures through which policies are made.

In the EU context, while post-crisis economic governance contains plenty of 'substantive' policy steering – see section 5 below – it also displays a heightened attention to procedural norms. Economic governance shares with the NG paradigm a focus on seeking to influence domestic processes, encouraging them to internalize and reflect upon EU-level targets and objectives. In this sense, it makes sense to consider the NG 'features' of domesticization and procedural constraint together. Primarily here, we are discussing the steering, via EU economic governance, of domestic rules and institutions (with EU law acting as a procedural 'umbrella' within which such steering takes place).

Economic governance's procedural turn begins with the unusual[72] legal sources through which post-crisis reform has been advanced. One of these is the Fiscal Compact's 'golden' balanced budget rule. As an international Treaty, the framers of the Compact operated within significant institutional constraints as to how the golden rule could be domestically applied and enforced. While, on the one hand, the Treaty's framers were keen to ensure that national signatories complied with its standards; on the other, this Treaty – operating outside of normal EU law – would not necessarily enjoy the benefit of EU law's traditional enforcement mechanisms.

An example of the compromise produced by this is the empowerment of the ECJ under article 8 of the Compact. That article provides the Court with jurisdiction to determine whether Member States have

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[68] See e.g. the special issue of the Industrial Law Journal edited by Deakin, 'The Sovereign Debt Crisis and European Labour Law', 41 *Industrial Law Journal* (2012) 3; Pisani-Ferry, Wolff and Sapir, 'EU-IMF Assistance to Euro Area Countries: An Early Assessment', *Bruegel Blueprint* (2013) 19.

[69] Scharpf, 'Legitimate Diversity: The New Challenge of European Integration', *Les Cahiers Europeens de Sciences Po* (2002) 1.

[70] On this substantive convergence, see Dawson, *supra* note 5.

[71] Enderlein *et al*., *supra* note 38.

[72] Kilpatrick, 'On the Rule of Law and Economic Emergency : The Degradation of Basic Legal Values in Europe's Bailouts', 35 *Oxford Journal of Legal Studies* (2015) 325.

implemented the golden rule but provides that standing to bring such an action is restricted to the contracting parties i.e. the Member States. As a non EU Treaty, the framers were in this sense unsure of the legality of the Commission taking on its traditional guardian role in ensuring that EU standards are domestically complied with.[73]

The main focus of the Compact is therefore on domestic rather than EU institutions. The domestic government is given three primary duties under the Compact: to establish a balanced budget rule within the national legal order (preferably one of a constitutional nature)[74]; to establish a domestic 'corrective' mechanism to ensure the rule is domestically complied with[75]; and to support Commission recommendations for the application of EU fiscal rules.[76] Clearly, the first two of these at least speak to a desire to domesticize existing goals under both EU primary and secondary law within the domestic legal order. Reflecting the fear that EU intervention may be 'too late' to rectify economic imbalances, the national order itself is encouraged to induce its domestic policy-making process to consider the impact of spending decisions on the viability of the euro-zone (as a prior step to the possibility of EU intervention under the SGP later on where fiscal rules are not effectively complied with).

This domesticization impulse is also reflected in overlapping secondary legislation. We have already discussed above the reforms established by the 6 and 2 pack legislative frameworks to fiscal coordination. A more neglected aspect of those legislative packages is Directive 2011/85 and Regulation 473/2013, which seek to establish budgetary frameworks for the Member States. Just as an important element of the NG paradigm, as already discussed, was its focus on creating a procedural framework within which substantive policies can be equitably elaborated and determined, so these pieces of legislation mandate an elaborate common EU procedural frame for national budgeting.

The overriding goal of the Directive is to ensure that national budgetary planning is based on accurate and independently verifiable data. For the Regulation, the principal goal is to connect national and EU budgetary processes. To achieve these ends, the legislation demands that states: i) make national fiscal data, and its underlying methodology, publicly available[77]; ii) establish Medium Term Budgetary Frameworks projecting major items of expenditure 3 years in advance[78]; iii) establish a common budgetary timeline synchronized to the European Semester (the EU cycle for budgetary monitoring)[79]; and iv) establish independent bodies to monitor compliance with national and EU fiscal standards, including the 'occurrence of circumstances leading to the activation of the correction mechanism' laid down in the Fiscal Compact.[80]

The latter element speaks to a tendency evidenced in other areas of EU secondary law (such as equality[81] and data protection[82] law) to mandate specific domestic bodies tasked with ensuring respect

[73] Nonetheless, the use of the EU institutions seems frequent under both the ESM and the Fiscal Compact Treaties. See on this, Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and Its Impact on EU Institutional Integrity', in F. Fabbrini, M. Adams and P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (2013) 41, at 43-47.

[74] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (2012), Art. 3(2).

[75] *Ibid*., Art. 3(1)(e).

[76] *Ibid*., Art. 7.

[77] Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ 2011 L 306/41, Art. 3(2).

[78] *Ibid*., Art. 9.

[79] Regulation 473/2013/EU, *supra* note 36, Art. 4.

[80] *Ibid*., Art. 5(2). The remaining aspects of this Regulation (relating to the monitoring of budgetary plans) have already been discussed in the section on 'Revisability' above.

[81] See Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective or racial or ethnic origin, OJ 2000 L 180/22, Art. 13.

for EU standards. These particular mandated bodies are independent Fiscal Councils; bodies which were on the rise in the Member States independently of EU action, yet have been further promoted in the wake of the crisis.[83] While the Regulation does not specify the structure of Fiscal Councils in detail, the requirement that they are operationally independent – and therefore able to credibly monitor and supervise state fiscal performance – is specified.

Examining other EU legislative instruments which mandate specific domestic institutions, the Commission has been willing to play an active role in policing the independence of such institutions. The Commission successfully, for example, brought an infringement action against Hungary, beginning in January 2012, for failing to adequately protect the independence of both the national central bank and the national data supervisor.[84] This could be seen as a peculiarly 'procedural' aspect of EU law, and of the Commission's infringement power. The goal of EU action here is not to enforce particular substantive EU policies per se but rather to guarantee a domestic policy-making or monitoring framework that is itself mandated by EU law. In this case, EU law acts to ensure that functioning independent institutions can be maintained in the national sphere that may serve to domestically foster EU goals and concerns.

While national Fiscal Councils may not be the most obvious host for the kind of thick normative and substantive discourse that Jürgen Habermas had in mind when he penned his procedural account of modern law, they speak to New Governance's embrace of procedural and institution building norms, and its view of EU governance as a medium to link European and national policy-making. To this extent, economic governance may carry more commonality with the NG paradigm than first thought.

New Economic Governance's Normative Core: Experimentalism or Harmonization?

How are we to view these empirical developments in EU governance from a more normative perspective? New governance was never merely a descriptive project. While part of its academic agenda was to empirically describe the directions into which the EU's legal and political framework was moving, new governance also produced an intense normative debate.[85] While on one side of this debate were those who saw new governance as part of a 'managerial' turn away from democratic and law-mediated rule[86], others saw new governance as heralding an experimental, or even participatory turn in EU decision-making.[87] While, for example, processes like the OMC rejected EU-level parliamentary scrutiny of their activities, they also provided new structural opportunities for civil society actors, increasingly organizing at a trans-national level, to enter policy discussions previously closed-off to them, at both the EU and national levels.[88]

(Contd.)

[82] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, Art. 28.

[83] See (particularly on the pre-crisis rise of fiscal councils and fiscal rules), M. Hallerberg, R.R. Strauch and J. von Hagen, *Fiscal Governance in Europe* (2010).

[84] See Commission Press Release of 17 January 2012, available at http://europa.eu/rapid/press-release_IP-12-24_en.htm (last visited 6 July 2015).

[85] See e.g. Magnett, 'European Governance and Civic Participation: Beyond Elisits Citizenship?', 51 *Political Studies* (2003) 1; Buechs, 'How Legitimate Is the Open Method of Coordination', 46 *Journal of Common Market Studies* (2008) 4.

[86] See e.g. Joerges, 'Integration Through De-Legalisation?', 33 *European Law Review* (2008); Dawson, 'New Governance and the Managerial Sensibility in Modern Law', 2 *Wisconsin Law Review* (2010) 389.

[87] Sabel and Zeitlin, *supra* note 18; de la Porte and Pochet, 'Participation in the Open Method of Coordination: The Cases of Employment and Social Exclusion', in P. Pochet and J. Zeitlin, *infra* note 100.

[88] Dawson, *supra* note 2, at 192-195.

At the same time, the differentiation of new governance carried the possibility for states to 'experiment' with different policy solutions to seemingly intractable public policy problems.[89] To give one example, while the poverty and social exclusion of the late 90s seems tame by the standards of today, the OMC SPSI allowed states to compare best practice on a number of novel schemes to re-integrate the socially excluded from minimum income schemes to 'sure-start' programmes for disadvantaged children.[90] The ideal of mutual learning and national 'scoreboarding' under the OMC was designed to provide EU policy-makers with a better sense of how EU level policy-making was domestically applied, and to encourage states to learn from the good practices of their neighbours (while avoiding the pitfalls of poor performers). Under such an experimental model, the EU's significant diversity could be seen not as an obstacle to 'harmonized' EU standards but as an opportunity to test (and later perhaps generalize) different policy solutions.[91]

If we return to the present day, 'experimentalism' still has much to commend itself, particularly when considering the outlook for the European economy. While Europe's economic downturn has not been evenly shared between states, there are a number of common problems. One in particular is spiralling youth unemployment; reaching endemic levels in Greece, Spain, Portugal and Italy, and seemingly immune to EU-level initiatives to tackle the problem.[92] Another is growing income inequality.[93] In the face of these problems, there may be some advantage to an experimental model, which encourages states to try-out novel policy solutions. While no state is likely to find a magic bullet to tackle the EU's anaemic growth and employment outlook, successful schemes in particular states, such as on youth unemployment, could prove useful models for adoption (and adaptation) in other national contexts.

It is on this point that the differences, rather than similarities, between the 'new economic governance' and the NG paradigm become important. While, as highlighted above, the EU has heavily relied on elements of NG following the crisis, it has been to achieve a different ultimate goal. The purpose of flexible governance processes, like the European Semester, has not been to experiment with policy solutions but to achieve a particular pre-defined goal: fiscal prudence and balanced budgets. In this sense, even if economic governance entails significant differentiation and flexibility in how specific norms are framed, this flexibility is (as already discussed) used to foster policy *convergence* around a particular social and economic model.

This point can be demonstrated by examining the operation of the European Semester since the establishment of the 'six-pack' in 2011. Analyzing, the set of 'country-specific recommendations' (CSRs) and in-depth reviews issued to Member States in the 2011-2014 round of economic coordination, one can begin to identify the degree of uniformity present in EU-level recommendations.[94] One can consistently identify in the CSRs a strong focus on budgetary consolidation as an anchor point for recommendations across a wide range of policy areas. While this

[89] See Kerber and Eckardt, 'Policy Learning in Europe: The Open Method of Coordination and Laboratory Federalism', 14 *Journal of European Public Policy* (2007) 2.

[90] Heidenreich and Bischoff, 'The Open Method of Co-ordination: A Way to the Europeanization of Social and Employment Policies?', 46 *Journal of Common Market Studies* (2008) 3.

[91] Sabel and Zeitlin, *supra* note 18.

[92] See e.g. the limited impact of the EU's much heralded 2012 employment package, available at http://ec.europa.eu/social/main.jsp?catId=1039 (last visited 6 July 2015).

[93] See e.g. the OECD Report on 'Income Inequality in the European Union', *OECD Economics Department Working Paper Series* 952, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP%282012%2929&docLanguage=En (last visited 6 July 2015).

[94] This element of the paper drawn on empirical research from Dawson, *supra* note 5.

policy focus is to be expected in recommendations relating to fiscal policy, it is also apparent in other areas.[95]

One example is pensions policy. Of the 24 countries for which the Commission compiled specific recommendations from 2011-2013, 17 receive recommendations on pensions reform; 15 of them detailed, and all of them remarkably uniform in their substantive prescriptions. While systems of pension delivery vary significantly between the states to which recommendations are made, recommendations aimed at all 15 Member States from 2011 to 2013 recommend increasing the statutory retirement age and linking retirement age to life expectancy. At the same time, aspects of the national pension regime, which could inhibit long-term fiscal sustainability, were rejected. Recommendations on invalidity pension schemes (a regular way to take into account different capabilities especially when increasing the pension age) emphasize their possible abuse, and call for their restriction (Austria, Bulgaria). Where differentiated retirement ages for men and women (Bulgaria, Slovenia, Poland) exist, their abandonment is demanded. Finally, countries which carry income indexation of pensions, designed to ensure that they rise along with general incomes (Slovakia and Slovenia), are criticized.

The demand for convergence is also apparent in other areas of policy covered by the CSRs. 23 Member States received recommendations on tax and social security between 2011 and 2013. Of these states, 19 were asked to change their tax system in order to boost its 'growth friendliness' and ability to contribute to fiscal consolidation. The Commission's favoured method of doing so is to alter the burden of taxation – Member States consistently received recommendations on shifting tax from labour to consumption (e.g. of energy, property and other goods).[96] Little mention is made of the distributional impact of this choice (consumption taxes, which typically do not take into account a person's income, tend of course to fall far harder on the poor than labour taxes). In the place of the OMC's emphasis on diversity and flexible implementation, recommendations under the European Semester seem to advance a uniform policy agenda.[97] While states are subject to different degrees of scrutiny and intervention, they are asked to *substantively* converge around a highly particular economic and social model.

The difficulty with using 'new governance' methods for this purpose is the significant gap between this goal and the record of new governance mechanisms to date. While political scientists now have 15 years of experience cataloguing the trials and tribulations of open coordination in social policy, there is no real evidence that new governance processes in that domain have led to significant policy convergence between EU states (or even that convergence was a significant policy goal in the first place).[98] This is unsurprising – when states are faced with conflicts between the 'recommendations' of new governance and policies supported by entrenched domestic interests, their incentives to follow those recommendations are limited.[99] Incentives to engage in non-compliance may be even greater in the fiscal field, where budgetary recommendations carry significant financial and political costs. These costs may outweigh the burden of EU-level penalties (which, as we will see, have rarely been applied).

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[95] European Commission, 'Annual Growth Survey 2013', 28 November 2012, COM(2012) 750 final.

[96] *Ibid*., at 10.

[97] The final element worthy of mention here is the increasing level of prescriptiveness in CSR's. This is well documented in Bekker, 'The EU's Stricter Economic Governance: A Step Towards a More Binding Coordination of Social Policies?', 501*WZB Discussion Paper* (2013).

[98] See e.g. Visser, 'Neither Convergence nor Frozen Paths: Bounded Learning, International Diffusion of Reforms, and the Open Method of Coordination', in M. Heidenreich and J. Zeitlin (eds), *Changing European Employment and Welfare Regimes : The Influence of the Open Method of Coordination on National Reforms* (2009); Kerber and Eckardt, *supra* note 89.

[99] Lodge, 'Comparing Non-Hierarchical Governance in Action: The Open Method of Coordination in Pensions and Information Society', 45 *Journal of Common Market Studies* (2007) 2.

At most, the experience of new governance in social policy suggests, as discussed above, a 'mutual learning' effect. Even mutual learning, however, has tended to be selective; a tool for 'nudging' policy change, rather than for harmonization.[100] Unsurprisingly, practices and models adopted for one state can never be completely transported to another without significant modification. The more cynical interpretation of this effect is that states 'learn' selectively, adopting those elements of EU policy that fit within existing domestic programmes and rejecting those that do not.

While there are important differences between both social and economic policy; as well as between the OMC and the more intrusive form of new governance seen in the fiscal field; EU leaders would be wise to heed some of these lessons. The experience of fiscal coordination since the crisis began bears out the need for caution in predicting the ability of NG to transform national fiscal structures. One can observe this for example in the experience of the European Semester since its inception.[101] Tracking the operation of the Semester in the 2011 and 2012 rounds, Hallerberg, Marzinotto and Wolff also detect elements of a 'selective' convergence effect:

'The evidence for a sample of six EU countries indicates that there is a problem in domestic implementation. More precisely, EU recommendations were found to have not altered dramatically the national process of policy formulation, especially when the suggested reforms are likely to erode rents and dominant positions in product and service markets. The German case demonstrates that Member State governments generally 'implement' recommendations they were already doing anyway and ignore recommendations that would involve truly new reforms.'[102]

The point Hallerberg, Marzinotto and Wolff make illustrates an important paradox in the use to which EU policy-makers are trying to put NG procedures. The very design of NG is designed to accommodate structural diversity i.e. to allow EU goals to be 'filtered' through diverse national systems of policy delivery, whether that diversity comes from 'varieties of welfare' or 'varieties of capitalism'.[103] For that very reason, however, the same instruments should not be expected to erode economic diversity or to create convergence around a shared European economic or fiscal model.

To this more structural point could be added other political difficulties in using NG instruments to affect economic change. One, for example, is the use of fiscal penalties as an inducement for governments to take recommendations under EU economic governance seriously. In effect, there are a number of inter-related problems likely to prevent fiscal penalties from being applied.

Firstly, penalties may only be applied to states facing significant economic distress – it is unclear how a further financial sanction is likely to improve the state's fiscal performance; indeed, the opposite may be the case (i.e. that such states require greater investment). Second, there are no guarantees that applying a fiscal penalty will affect meaningful change. A state, facing the powerful 'rent-seeking' domestic constituencies referred to by Hallerberg, Marzinotto and Wolff, may find it politically more advantageous to accept a penalty than to affect the desired structural change.[104] Finally, the

[100] See Visser, 'The OMC as a Selective Amplifier for National Strategies of Reform. What The Netherlands Wants to Learn from Europe', in P. Pochet and J. Zeitlin (eds), *The Open Method of Coordination in Action* (2005) 173.

[101] Hallerberg *et al*., 'An Assessment of the European Semester', European Parliament Directorate General for Internal Policies Study (2012), available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/econ/dv/studybruegel_/studybruegel_en.pdf (last visited 6 July 2015).

[102] Hallerberg *et al*., 'On the Effectiveness and Legitimacy of EU Economic Policies', 4 *Bruegel Policy Brief* (2014), at 5.

[103] On the importance of structural diversity – an insight from varieties of capitalism literature - to understanding the possibilities for an effective crisis response, see Scharpf, 'No Exit from the Euro-rescuing Trap?', 14/4 *MPIfG Discussion Paper* (2004).

[104] The need, and obstacles, facing structural change in the EU economy is a theme of Dariusz Adamski's work. See Adamski, 'The Evolving Constitutional Relationship Between Economic Competitiveness and the Euro Area', unpublished manuscript, on file with the author.

Commission, as initiator of such a penalty, must weigh up the costs to itself of levying such a fine. Alienating, for example, a large and powerful Member State, may produce costs later on when such a state is needed for the purposes of advancing the Commission's political agenda (arguably the shift towards a more politicized Commission re-enforces this dynamic, by giving 'Spitzenkandidaten' an incentive to court large domestic constituencies).[105]

The result of these factors is that fiscal penalties are the dog that barks but does not bite in recent EU integration. While the post-crisis period has seen more states than ever placed under an EDP, fiscal penalties are yet to be applied in *any* such procedure post-crisis. In this sense, the 'hardness' of the EU's post-crisis economic governance may be less effective than assumed.

In the face of these limits, the best chance of achieving policy change may yet lie in bargaining and negotiation; seeking to *persuade* Member States of the long-term benefits of structural and fiscal reform; rather than upon 'strengthened' fiscal rule-making. The OMC's development of tools for information sharing, benchmarking and mutual learning may yet be instructive in this regard. For all the talk of 'strength', new governance was not designed to produce substantive centralization and convergence. We should not expect it to do so.

The Future of New Governance among the EU's Legal Acts

What place is new governance likely to carry among the EU's future legal acts? Tying EU economic governance to the general new governance paradigm raises the question of whether 'rules' under EU economic governance deserve the label of legal acts at all. If we are to take seriously the 'decision-like' nature of the EDP and MIP procedures, for example, perhaps we ought not to consider these procedures as belonging within legal categories at all. Returning to the earlier new governance debate, if NG departs so far from rule of law standards, what does it mean to talk of NG as 'law'? Alternatively, is EU economic governance simply 'against the law'; a clear breach of legal standards; as other contributors to this collection have argued?

While such a conclusion is tempting, there remain important reasons to maintain a place for new governance-like instruments within the field of EU legal acts themselves. The first reason is a conceptual one. Arguing that NG is something outside of the law necessarily presumes a particular conceptual account of law itself. Our very definition of what constitutes law, particularly in a post-national setting, is contested and evolving. As earlier NG literature has pointed out, one should not preclude the ability of functional evolution and institutional change to transform our very understanding of what is meant by 'EU law' in the first place.[106]

The second reason is more practical. Excluding NG from legal categories could also mean excluding it from the EU's existing mechanisms of legal and political review. Returning to a theme brought up by other contributors to this volume, the EU Courts have been reluctant to conduct full judicial review of new economic governance measures, often on the grounds that they 'fall outside of the scope of EU law' (and in spite of their clear coercive effects).[107] Seeing NG as outside of the EU's legal acts also

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[105] On this problem in the context of human rights law, see Dawson, Muir and Claes, 'Enforcing the EU's Rights Revolution: The Case of Equality', 3 *European Human Rights Law Review* (2012) 276, at 285.

[106] Walker, 'Constitutionalism and New Governance in the European Union: Rethinking the Boundaries', in de Burca and Scott (eds), *supra* note 1.

[107] See Case C-370/12, *Thomas Pringle v. Government of Ireland,* Judgment of 27 November 2012 (ECLI:EU:C:2012:756). See also Barnard, 'The Charter, the Court and the Crisis', 18 *Cambridge Legal Studies Research Paper Series* (2013).

carries a considerable capacity to dilute the ability of individuals to contest economic governance measures that deeply affect their lives.[108]

As this chapter has argued, it may be preferable to see ‘new’ economic governance as within (or at least in relation to) legal categories. This requires, however, a keen sense of its recent past. It is one thing to use new governance instruments – insulated from the democratic input of the European Parliament, and operating parallel to the official division of competences between the EU and its Member States – as a mechanism of mutual learning and cooperation. It is quite another to use these instruments to forcibly converge national budgets around a particular economic, and arguably social, model. As this chapter has highlighted, quite apart from these normative queries, the record of NG processes in achieving such harmonization goals is limited at best. Recognizing the creation of ‘new’ economic governance should not be equated with celebrating its re-birth.

[108] See also Dawson, *supra* note 64.