

## EU Experimentalist Governance in Times of Crisis

Jonathan Zeitlin (University of Amsterdam), [j.h.zeitlin@uva.nl](mailto:j.h.zeitlin@uva.nl)

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*This paper analyzes the evolution of EU governance since the financial and eurozone crisis from an experimentalist perspective. It argues that EU governance in many key policy domains continues to take the form of an experimentalist decision-making architecture, based on a recursive process of framework goal-setting and revision through comparative review of implementation experience in diverse local contexts, which is well adapted to the Union's turbulent and polyarchic environment. The first part of the paper presents a synoptic theoretical account of the characteristics of experimentalist governance, and summarises the empirical evidence on its incidence and operation within the EU before the crisis. The second part of the paper examines two 'hard cases' from an experimentalist perspective, namely, financial regulation and the European Semester of socio-economic policy coordination. The paper concludes that both cases illustrate the limits of centralised hierarchical governance under the diverse and polyarchic conditions of the EU, together with the continuing attraction of experimentalist approaches for tackling complex, uncertain problems like financial regulation and reform of national employment and welfare systems.*

**Keywords:** experimentalist governance, financial regulation, socio-economic policy coordination, European Union, hierarchy

### Experimentalist Governance in the EU

Over the decade prior to the onset of the global financial crisis in 2008, governance in the EU came increasingly to be characterised by a new experimentalist architecture, as a growing body of empirical research has documented (Sabel and Zeitlin 2008, 2010, 2012a; Zeitlin 2015). In this iterative, multi-level architecture, open-ended framework goals and metrics for assessing their achievement are established jointly by the EU institutions and the Member States, typically following consultation with relevant civil society stakeholders. 'Lower-level' units (like national ministries and regulatory authorities) are then given substantial discretion to advance these goals

in ways adapted to their local contexts. But in return for this autonomy, such units must report regularly on their performance and participate in a peer review in which their results are compared with those of others following different means towards the same ends. Where lower-level units are not making good progress, they are expected to take corrective measures, based on a plausible plan for improvement informed by the experience of their peers. The goals, metrics, and decision-making procedures are then periodically revised in response to the problems and possibilities revealed by the review process, and the cycle repeats (for a diagram, see Zeitlin 2015: 2).

Such governance architectures have a number of fundamental advantages. First, they accommodate diversity by adapting common goals to varied local contexts, rather than seeking to impose one-size-fits-all solutions. Second, they provide a mechanism for coordinated learning from local experimentation through disciplined comparison of different approaches to advancing the same general ends. Third, because both the goals themselves and the means for achieving them are explicitly conceived as provisional and subject to revision in light of experience, problems identified in one phase of implementation can be corrected in the next iteration. For each of these reasons, experimentalist governance architectures have emerged as a widespread response to turbulent, polyarchic environments, where pervasive uncertainty about the nature of current and emerging problems means that policy makers cannot define *ex ante* their precise goals or how best to achieve them, while a multi-polar distribution of power means that no single actor can impose her preferred solution without taking into account the views of others. These scope conditions and the governance architectures they encourage are by no means confined to the EU. But because the Union has had to face problems of rising strategic uncertainty under conditions of deep internal diversity and firm polyarchic constraints, it appears to have found its way more quickly and consistently than other polities to experimentalist solutions (Sabel and Zeitlin 2012a, 2012b).

Experimentalist architectures of this type have become pervasively institutionalised in the EU across a broad range of policy domains. Well-documented examples include: regulation of competition, energy, telecommunications, and finance; food, drug, chemicals, and maritime safety; environmental protection; employment promotion and social inclusion; justice, security, and crisis management; data privacy, anti-discrimination, and fundamental rights (Sabel and

Zeitlin 2008, 2010; Zeitlin 2015). These architectures also play a growing part in EU external governance, where the revisable framework rules they generate are frequently extended through a variety of channels to third-country actors, both public and private, many of whom also participate in the Union's governance processes (Zeitlin 2015).

Such experimentalist architectures encompass a variety of organizational forms, including European agencies, networks of national regulators, open methods of coordination (OMCs), and operational cooperation among front-line officials, often in combination with one another. A typical pattern in many domains in the years preceding the crisis was the progressive formalisation and reinforcement of European regulatory networks while avoiding supranational centralisation, as in the case of the Third Energy Package (2009), which empowered a new Agency for Cooperation of Energy Regulators (ACER) to co-design framework guidelines and binding network codes for European gas and electricity markets in collaboration with transmission system operators and the Commission (Anderson and Sitter 2015).

Such governance architectures are neither ubiquitous nor universal across the EU.<sup>1</sup> In some domains, like Justice and Home Affairs, experimentalist practices such as revisable framework goals, multi-annual programme targetting, and mutual evaluation by front-line national officials coexist with hierarchical enforcement of detailed rules on certain sensitive issues (Monar 2010). In others, like chemicals, concern for the integrity of the internal market has led to the creation of a single set of harmonised rules which Member States at any given moment have limited discretion to alter. But as in the experimentalist architectures described above, to accommodate the strategic uncertainty facing decision-makers in complex and rapidly changing environments, these harmonised rules are explicitly defined as provisional and contestable, subject to revision on the basis of new information and implementation experience, through review processes involving not only national and European officials, but also business and civil society actors from within and beyond the EU (Biedenkopf 2015).

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<sup>1</sup> For a skeptical view of their extensiveness, see Börzel (2012).

Analogous governance architectures combining synchronic uniformity of rules and procedures with rapid diachronic revisability based on learning from their implementation in different contexts can be found in a variety of settings beyond the EU, from public service provision in the US (Sabel and Simon 2015) to production systems in multinational firms (Herrigel 2015). As with their EU counterparts, the crucial point that distinguishes these experimentalist architectures from conventional hierarchical governance is their contestability, whereby local actors have the autonomy to report problems with existing rules and explore alternatives, while the organizational center is obliged to take account of such local experience in reconsidering and revising the rules (cf. de Búrca et al. 2013: 772-3).

As the examples cited above indicate, experimentalist governance is not confined to fields where the EU has weak competences and produces mainly non-binding guidelines, action plans, scoreboards, and recommendations. It is also well-developed in domains where the Union has extensive legislative and regulatory powers. In many such cases, EU experimentalist architectures regularly result in the elaboration of revisable standards mandated by law and new principles which may eventually be given binding force. A noteworthy example is the revision of the EU procedures for integrated pollution permitting and control introduced by the 2010 Industrial Emissions Directive, which requires Member States to adopt ‘Best Available Techniques’ (BAT) standards developed by multi-stakeholder working groups in defining permissible emissions levels, or justify departures from them according to agreed criteria (Koutoulakis et al. 2010). Often, too, these experimentalist architectures are underpinned by ‘penalty defaults’: destabilisation mechanisms that induce reluctant parties to cooperate in framework rule-making and respect its outcomes, while stimulating them to propose plausible and superior alternatives, typically by threatening to reduce the actors’ control over their own fate. In the EU context, such penalty defaults frequently involve judgments by the European Courts or (threats of) Commission decisions, which oblige Member States and/or private actors to explore how to pursue their own preferred goals in ways compatible with fundamental principles of EU law, without imposing a specific hierarchical solution (Sabel and Zeitlin 2008: 305-8; 2010b: 13-16; 2012b: 413-14).

## **The Eurozone Crisis as a Break Point in EU Governance?**

If experimentalist architectures had become increasingly characteristic of EU governance during the first decade of the 21st century, the Union's responses to the financial and eurozone crises might appear as a break point, inflecting its trajectory towards more centralised and hierarchical forms. A number of developments could be adduced in support of this view, at least on the surface. Many crucial decisions during the eurozone crisis were taken on an emergency basis by the European Council, the Eurogroup, and the European Central Bank (ECB), stretching the powers of these institutions under the EU Treaties and creating new bodies outside their formal framework, such as the Troika and the European Stability Mechanism (ESM). EU financial regulation has arguably become significantly more centralised, through the creation of new European Supervisory Authorities (ESAs) and especially the Single Supervisory Mechanism (SSM) for eurozone banks. The hierarchical character of EU economic governance has likewise been deliberately strengthened through a succession of crisis-inspired measures such as the Six-Pack, Fiscal Treaty, and Two-Pack, which subject Member States's fiscal, budgetary, and macroeconomic policies to increasingly close scrutiny by the Commission and the Council through the new 'European Semester' of policy coordination, backed up by stronger and putatively more 'automatic' sanctions for persistent failures to correct excessive deficits and imbalances. Such developments have been widely viewed as a substantial increase in executive power within the EU (Curtin 2014; Crum 2013; Chalmers 2012), whether understood as the ascendancy of intergovernmentalism (Bickerton et al. 2015), the reinforcement of supranationalism (Bauer and Becker 2014), or a combination of the two (Dawson 2015).

There is much to be said for this interpretation, which overlaps with the perspectives of some of the key players in EU decision-making during the crisis (cf. van Middelaar 2015). But it does not capture the full story. In most policy domains, EU experimentalist governance remains highly resilient, and continues to function much as it did before the crisis, demonstrating a robust capacity to revise and improve existing regulatory frameworks, as for example in the cases of energy and industrial emissions discussed above. In other policy fields, such as trade, experimentalist principles serve as the basis for new initiatives like the Transatlantic Trade and Investment Partnership, where practices of 'regulatory equivalence assessment' developed in

domains such as food safety and data privacy underpin the Commission's proposals for regulatory cooperation with the US (Zeitlin 2015: 7-8, 352-4; European Commission, 2013-15).

But even in the policy fields within the EU most strongly affected by the crisis, it is essential to analyze carefully not only the institutional design of the revised governance arrangements but also their practical operation, in order to understand to what extent they mark a genuine shift towards hierarchical centralisation, and how far the persistence of polyarchy and strategic uncertainty may instead foster the (re)emergence and elaboration of more experimentalist approaches. The next sections of this paper accordingly examine through this lens two of the most important cases: financial regulation and the European Semester.

### **Financial Regulation**

In the early 2000s, the EU introduced an ambitious new governance architecture for financial regulation, known as the 'Lamfalussy Process'. At its heart was a networked, multi-level structure of decision-making, based on collaboration between EU institutions and Member State administrations on the one hand and between national financial supervisors on the other. In this design, framework principles for financial regulation would be defined in EU legislation, following wide consultations (level 1); detailed rules for their implementation would be developed by the Commission under comitology procedures (level 2); new sectoral committees of national supervisors (for banking, securities markets, and insurance and occupational pensions respectively) would develop interpretative guidelines and standards, monitor and review implementation, and advise the Commission on new and revised rules (level 3); while the Commission, in cooperation with national supervisors, would be responsible for enforcement of EU law (level 4). The affinities of this process with a classic experimentalist governance architecture were evident (Sabel and Zeitlin 2008: 296-8; Posner 2010).

The Lamfalussy Process produced a number of positive results, including from an experimentalist perspective. Its novel approach to regulatory governance facilitated the rapid adoption of a large body of directives aimed at integrating EU financial markets, which had previously been blocked by inter-institutional conflicts and disputes between Member States, even if the sharp distinction between framework legislation and detailed rule-making turned out

to be difficult to sustain in practice. The new Level 3 committees quickly proved able to feed front-line technical expertise into the rule-making process, to elaborate an extensive body of standards and guidelines for national implementation, and to develop original practices of consultation, benchmarking, and peer review. They also demonstrated significant capacity to revise their decision-making procedures and working methods in response to problems and criticism; to identify areas for necessary revision of EU rules; and to develop innovative cross-border governance arrangements, such as colleges of supervisors for multinational firms (Moloney 2014a: 866-80, 952-8; Ferran 2012: 116-30; Posner 2010, 2015).

But there were also fundamental flaws in the Lamfalussy architecture, which the onset of the global financial crisis threw into sharp relief. Foremost was the imbalance between the ‘single passport’ for financial institutions and the relative weakness of European arrangements for supervisory cooperation, information sharing, and crisis management (above all in banking). But the crisis also underscored the risks of regulatory arbitrage arising from the incomplete harmonisation of financial rules and supervisory practices across EU Member States, which the guidance and peer review activities of the Level 3 committees had failed to overcome. A further weakness exposed by the crisis, in common with other jurisdictions around the world, was the limited capacity of both European and national supervisory bodies to effectively monitor and assess the risk-management strategies of large, systemically important firms in rapidly changing financial markets (Black 2012; Moloney 2014a: 880-82; 956, 958-60; Ferran 2012: 122-5, 128-9).

Based on this diagnosis, articulated by the influential de Larosière report (2009), the EU undertook a far-reaching set of reforms to its financial regulatory governance. Foremost was the transformation of the Lamfalussy Level 3 committees into ESAs with enhanced powers as part of a new European System of Financial Supervision (ESFS) alongside National Competent Authorities (NCAs). These ESAs were designed to help create a ‘single rulebook’ for each area of financial regulation, as well as to promote stronger convergence of national supervisory practices and improve coordination among NCAs, especially at moments of crisis. The ESAs were empowered to propose Binding Technical Standards (BTS) for the elaboration and implementation of EU financial regulation, which the Commission must endorse or present compelling reasons not to do so. They were likewise empowered to develop a body of non-

binding guidelines, opinions, and recommendations on the implementation of EU financial regulation, with which both NCAs and market participants are required to ‘make every effort’ to comply, or explain why they do not, subject to intensive peer review of national practice. Under a tightly specified set of conditions, ESAs may issue instructions to NCAs and market participants to tackle breaches of EU law and emergency situations, for example as regards short selling, as well as to resolve disputes between NCAs through binding mediation. Finally, the new European Securities and Markets Authority (ESMA) has been given direct supervisory powers over pan-European credit rating agencies and trade repositories (Moloney 2014a: chs. X-XI; Ferran 2012: 132-55).

These new powers of the ESAs to formulate uniform binding rules, override NCAs, and issue direct instructions to market actors have been widely seen as a ‘great leap forward’ towards centralised hierarchical authority in EU financial governance (e.g. Grossman and Leblond 2012). But a closer look at these authorities’ governance and operation reveals a more nuanced picture. The ESA’s supervisory boards are composed of the heads of the NCAs themselves, who collectively take all key decisions by majority vote. Thus as Eilís Ferran observes, the European Banking Authority (EBA) ‘does not, and cannot, impose “its” view against the collective view of the national competent authorities. Rather, their (majority) view is its view’ (Ferran 2016: 8-9, 23; on ESMA cf. Moloney 2015: 556-7). Such collective decision-making is subject to extensive requirements for prior consultation with other EU institutions and external stakeholders, as well as to formal procedures for challenge and appeal as it affects third parties (Ferran 2016: 26-7; Moloney 2014a: 898-939, 973-86). The ESAs’ powers to impose decisions on NCAs are designed for use in exceptional circumstances, and are hedged round with conditions, constraints, and appeal procedures, especially where they may have fiscal consequences for Member States. So far these powers have scarcely been used, with both ESAs and NCAs preferring to tackle problematic issues through peer review, comply-or-explain, and voluntary mediation procedures (Ferran 2016: 31-6, 41-3; Moloney 2015: 15-19, 31-3; 2014a: 973-86, 1004-9).

Examining the practical operation of the ESAs reveals not only the persistence of experimentalist features of the Lamfalussy Process, but also their deepening and extension in some areas. The ESAs have proved adept not only at mobilising the expertise of front-line

supervisors to develop BTSs and interpretative guidelines for the huge raft of new financial legislation enacted in response to the crisis, but also at deploying their experience of these ‘rules in action’ to propose revisions addressing unintended consequences of measures adopted under conditions of high uncertainty (Ferran 2016: 14-23; Moloney 2014a: 897-8, 920-9). Compared to the Lamfalussy Level 3 committees, the ESAs have stepped up their capacity for surveillance of both NCAs and financial institutions, ‘drilling down’ more deeply into national practices through benchmarking and peer review procedures aimed at ensuring supervisors’ capacity to achieve high-quality outcomes, while also developing a battery of tools for monitoring, assessing, and reporting on micro-prudential and systemic risks (Moloney 2014a: 987-92; Ferran 2016: 38-40). While the ESA’s production of ‘Single Supervisory Handbooks’ is undoubtedly intended to promote convergence of practices and culture across NCAs (Moloney 2014a: 974, 989-90), the EBA, which is furthest along in this process, emphasises that ‘the aim is to “assist” supervisors and to “support” the practical application of technical standards and guidelines and not to “restrict judgment-led supervision”’ (Ferran 2016: 38). In securities markets, where the complexity of the regulatory environment and the pace of innovation are greater than in banking, while the focus on conduct ‘requires close proximity to market actors’, there is little sign that ESMA’s efforts to promote supervisory convergence have reduced the NCAs’ capacity for local experimentation (Moloney 2014a: 989-92, 1003-5; Moloney 2015: 535-7). A striking example is consumer protection, where recent research shows that national authorities are pursuing a variety of novel approaches to overseeing and intervening in firms’ internal processes for developing and marketing new financial products (Svetiev and Ottow 2014).

Summing up these developments, one highly knowledgeable observer concludes that the emerging post-crisis system of EU financial regulation may be regarded ‘as a broadly functional combination of an open-textured approach with experimentalist traits (in particular participative decision-making in which actors responsible for implementation at the local level have a central role, and a dynamic regulatory framework in which periodic review and adjustment in the light of “on the ground” experience is embedded)...with the disciplines and efficiencies of an administrative agency operating within an established EU framework’ (Ferran 2016: 27). In this view, both the Commission’s ability to adopt binding technical standards if their production by the ESAs deadlocks, and the reserve powers of the ESAs to override NCA decisions can be

understood as penalty default mechanisms for ensuring ongoing participation by reluctant parties in cooperative rule-making and implementation, rather than a decisive step towards hierarchical centralisation (Ferran 2016: 27-8, 32). In this sense, the ESAs form part of a broader trend towards the progressive formalisation and reinforcement of EU networked regulation, as in the case of energy discussed earlier (cf. Moloney 2014a: 997).

The same cannot be said of the SSM, created in 2012-14 as an authoritative supranational supervisor for eurozone banks attached to the ECB. The SSM was explicitly designed to break up the ‘cozy relationships’ between banks and national supervisors, which were deemed to have contributed through lax oversight to the financial crisis, as well as to cut the ‘doom loop’ between bank and sovereign debt, which had become a key source of negative contagion in the eurozone crisis (Veron 2015: 14-16; Moloney 2014b: 1622-5). It was likewise a response to the failure of the initial stress tests conducted by the EBA to flag the parlous state of Irish and Spanish banks, which had to be bailed out soon thereafter, even if the sources of this failure lay primarily in the Authority’s limited powers to extract information from individual financial institutions, which have since been reinforced (Ferran 2016: 43-4).

The SSM is designed as a more centralised and hierarchical institution than the ESAs. Foremost among its powers is the final authority to grant and withdraw banking licences in the eurozone. The SSM supervises directly the 123 largest and most systemically important eurozone banks, accounting for some 85 percent of total banking assets. The SSM can also take over supervision of the remaining 3500 or so less significant institutions (LSIs) from national authorities where it deems this necessary to ensure consistent application of high prudential standards, and can demand any information it requires from these institutions via their supervisors. To carry out these tasks, the SSM has rapidly built up a substantial central organisation employing some 1000 staff, mostly recruited from national supervisors and the ECB (Veron 2015: 10-13, 23-4; Moloney 2014b: 1630-3; ECB 2015: 38-9).

By its own account, the SSM is committed not only to implement the single banking rulebook ‘diligently and assertively’ through ‘intrusive and hands-on supervision’ of significant financial institutions, but also to promote further harmonisation of EU regulation and convergence of supervisory approaches (ECB 2015: 5, 8, 23). Thus, for example, the SSM is

reviewing the numerous options and discretions available to national authorities under EU capital adequacy requirements legislation with the aim of reducing variations across the eurozone which could dilute banks' loss-absorbing capacity (ECB 2015: 7, 51; Veron 2015: 26-7). It has already developed a harmonised Supervisory Manual describing 'common processes, procedures and methodologies' for overseeing both significant and less significant institutions, as well as for cooperation with NCAs (ECB 2015: 33-4, 66). At the heart of this Manual are the methodologies for the annual Supervisory Review and Evaluation Process (SREP), which assesses the adequacy not only of the capital and liquidity of directly supervised banks, 'but also their internal governance, strategies and processes', and prescribes corrective actions to be undertaken; together with the Supervisory Examination Programme (SEP), which defines for each bank 'the main supervisory activities [to be] carried out to monitor risks and address identified weaknesses' over the coming year (ECB 2015: 34, 36-7, 51-54; Veron 2015: 26).

To ensure close interaction with regulated entities throughout this process, ongoing oversight of each significant bank is carried out by a Joint Supervisory Team (JST), including staff from the relevant NCAs as well as the SSM. Each JST is coordinated by an ECB employee, who is normally 'a national of a different member state from that in which the bank is headquartered, and who has the final say in making proposals for decisions to the Supervisory Board, [though] any dissenting opinions from national supervisors are reported' (ECB 2015: 5, 6-7, 22, 34-7; Veron: 24-5 [quotation]; Das 2014: 34-5). The JSTs are supported in carrying out these tasks by the SSM's horizontal services, which benchmark individual banks' capital, liquidity, and use of internal models against common standards. These horizontal services are likewise responsible for monitoring and reviewing NCA supervisory practices and developing methodologies for identifying high-priority LSIs requiring more intensive supervision (ECB 2015: 23, 37, 44, 52-3, 59-60, 67-70).

Despite this emphasis on harmonisation, the SSM is not seeking to impose a single 'one-size-fits-all' approach to supervision of banks across the eurozone or to homogenise their business models. The aim instead, as Supervisory Board Chair Danièle Nouy explains, is to 'ensure consistency across institutions and supervision tailored to [their] specificities...by balancing uniform supervisory anchor points with constrained supervisory judgement', thereby accommodating banking diversity, which remains 'very desirable for financial stability' (Nouy

2015b). To achieve this goal, the SSM oversight model is explicitly designed to combine the ‘deep specific knowledge of national supervisors’ with ‘common methodologies’ and the ‘broad-ranging experience of the ECB’, not only for the wide variety of LSIs, but also for significant banks, where the JSTs are mandated to ‘drill...down from the governance structures into the business units’ (ECB 2015: 5, 8, 35; Das 2014: 36-7).

Interviews with participating officials as well as SSM reports reveal that the formation of the JSTs has involved an intensive process of cross-fertilisation and mutual learning between supervisors from different national systems, who ‘look with different eyes and different perspectives’ on each other’s entrenched practices, while simultaneously ensuring that the SREPs and SEPs are enriched by ‘bottom-up information’ from local contextual knowledge about each institution’s specific risk profile (Das 2014: 39-40; ECB 2015: 52-3). The SSM Supervisory Manual, which has been ‘developed by the ECB and the national supervisors together’, similarly seeks to build on and combine the ‘best practices’ of all participating Member States, rather than adopting a single off-the-peg model, e.g. for onsite inspections or banks’ remuneration practices. As with the annual risk assessment and oversight programmes for individual institutions, there is a strongly recursive dimension to this Manual, which both EU and national officials understand as ‘a living document’, ‘subject to continuous review and improvements on the basis of internal evaluations, internationally accepted benchmarks and international regulatory developments’ as well as ‘new market developments and supervisory practices’. The Manual has already been comprehensively revised once, after field tests covering half the significant banks in the eurozone, aimed at identifying and correcting problems in the SREP methodology, promoting ‘learning by testing’ on the part of the JSTs, and identifying further supervisory best practices (ECB 2015: 33-4, 36-7, 52-7; Nouy 2015a; Das 2014: 39-42).

This remarkable combination of uniform rules and processes, contextually adapted to banks’ individual risk profiles by mixed teams of European and national supervisors, and regularly revised on the basis of central benchmarking and comparative review, supports the conclusion that, at least for now, experimentalist practices are flourishing beneath the SSM’s hierarchical veneer (cf. Das 2014). In this respect, there are close analogies to recent developments in other domains where concern for the integrity of the internal market under conditions of strategic uncertainty has given rise to uniform but rapidly updatable rules, such as

the harmonized but contestable procedures for chemical authorization in the REACH regulation discussed earlier.

But the SSM leadership remains ambivalent about the diversity of approaches among national supervisors, even when the outcomes they produce are very similar, looking forward to the development of a ‘common supervisory culture’. On the one hand, as its Chair observes, such diversity ‘can be an advantage, because it opens up different options for getting something done.’ But it can also be a source of conflicts and delays, ‘as when the coordinator of a Joint Supervisory Team has to reconcile the views of nine ECB staff, 20 national supervisors from a bank’s home country and a few dozen other supervisors from other countries in which the bank operates’ (Nouy 2015b). Hence it is conceivable that after the initial phase of innovation and cross-fertilisation, the SSM’s hierarchical constitution and powers could gradually lead to an ossification of rules and routinisation of supervisory practices, through the socialisation of staff into a homogeneous organisational culture and the reduction of space for ‘learning from difference’ through comparison of alternative approaches.

A potential bulwark against such developments, above and beyond strategic uncertainty generated by turbulent financial markets, is the polyarchic setting of the SSM, which obliges the ECB to take account of the views of a wide range of other actors. National supervisors comprise 19 of 25 members of the SSM Supervisory Board, a majority of whose votes is needed for all decisions, while consumer protection, anti-money laundering, and macro-prudential regulation, as well day-to-day supervision of LSIs, remain in their hands. Decisions about the wind-up or restructuring of failing institutions will be taken together with the Single Resolution Board (SRB), a separate EU agency dominated by the national resolution authorities of participating Member States, which makes recommendations for adoption by the Commission and the Council, with expedited procedures for use in crisis conditions. The EBA remains responsible for developing both the single EU banking rulebook and Supervisory Handbook, including the stress test procedures, while a double majority procedure has been introduced to ensure that the interests of non-euro Member States are not overridden by SSM countries voting as a bloc. The ECB/SSM must also reckon with the views of the other ESAs within the EFSF and the European Systemic Risk Board, as well as those of foreign regulators within international standard-setting bodies like the Basel Committee (Veron 2015: 10-11, 27, 32-3, 45-8; Ferran 2015: 62-3, 68-85;

Ferran 2016: 14-23, 38; Nouy 2015b). Taken together, these polyarchic features of the SSM's internal and external decision-making environment seem likely to serve as a powerful mechanism for destabilising emergent tendencies towards regulatory monoculture and bureaucratic routinisation.

## **The European Semester<sup>2</sup>**

Since the onset of the eurozone crisis, the EU has introduced a series of far-reaching changes to its institutional architecture for socio-economic governance. At its centre is the 'European Semester' of policy coordination, through which the Commission, the Council, and the European Council set priorities for the Union in the Annual Growth Survey (AGS), review Commission Country Reports and National Reform Programmes (NRPs), and issue Country-Specific Recommendations (CSRs) to Member States, backed up in some cases by the possibility of financial sanctions. The European Semester brings together within a single annual cycle a wide range of EU governance instruments with different legal bases and sanctioning authority, from the Stability and Growth Pact (SGP), the Macroeconomic Imbalance Procedure (MIP), and the Fiscal Treaty to the Europe 2020 Strategy and the Integrated Economic and Employment Policy Guidelines. This process in turn gives the EU institutions a more visible and intrusive role than ever before in scrutinising and guiding national economic, fiscal, and social policies, especially within the eurozone.

The rapid evolution of the European Semester since its inception in 2010 raises important questions about its nature as a governance process. Should it be understood as a more effective framework for enforcing national compliance with EU rules and policy recommendations, aimed at redressing the pervasive implementation deficits that had undermined the SGP and the Lisbon

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<sup>2</sup> This section draws on Zeitlin and Vanhercke (2014) and Vanhercke and Zeitlin (2015), which provide fuller references to EU documents and interviews with key participants in the Semester process. The analysis is based on five rounds of interviews conducted between 2010 and 2015 with more than 50 high-level policy makers within the EU institutions and Member States (Commission, Council, advisory committees, Parliament, NGOs, social partners) concerned with economic, social, and employment issues, as well as on near-complete access to the papers of the EU Social Protection and Employment Committees during this period.

Strategy before the crisis, as many economic policy makers claimed (e.g. Ioannou and Stracca 2011)? Or does the Semester's new governance architecture offer opportunities for joint exploration and recursive learning among Member States about how to pursue multi-dimensional objectives and provisional solutions to uncertain problems in diverse national contexts, as an experimentalist approach would recommend? The remainder of this section approaches these questions by examining the social dimension of the European Semester, both for reasons of tractability and because debates about the scope for national policy autonomy and learning within the Semester have been particularly salient in this field.<sup>3</sup>

Initial experiences under the European Semester seemed to confirm fears that the new policy coordination framework would result in the subordination of social objectives to fiscal discipline, budgetary austerity, and welfare retrenchment imposed by economic policy actors, buttressed by legally binding CSRs and threatened financial sanctions (cf. Pochet and Degryse 2012). Thus the AGS and CSRs for 2011 focused primarily on fiscal consolidation, while emphasising the need for financial reform of pensions and healthcare systems to relieve pressure on national budgets, together with increased benefit conditionality to 'make work pay' and boost employment rates.<sup>4</sup> More generally, the first European Semester followed a prescriptive 'one-size-fits-all' approach, with limited adaptation of the CSRs to the specific situation of individual Member States. The Commission explicitly sought to use multilateral surveillance by national officials in EU economic and employment policy committees as a mechanism for peer pressure towards implementation of top-down structural reforms. Social policy actors at both EU and national level found themselves largely excluded from preparation and review of the NRPs and CSRs (Zeitlin and Vanhercke 2014: 27-30).

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<sup>3</sup> Detailed consideration of the evolution of EU fiscal governance, which has never been characterisable as experimentalist, is beyond the scope of this paper. On the pre-crisis limitations of the rules-based approach of the Stability and Growth Pact, and its dependence on 'soft law' surveillance processes, see Schelkle (2007); for an analysis of post-crisis fiscal governance as a 'hybrid' combination of rules- and coordination-based forms, see Armstrong (2013).

<sup>4</sup> Commission Annual Growth Surveys, proposed CSRs, and CSRs as adopted by the Council are available online at [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm).

But as the sovereign debt crisis within the eurozone morphed into a broader economic and employment crisis, a significant rebalancing between social, economic, and employment objectives became visible in the policy orientation of successive European Semesters. The 2011 AGS had set three overarching priorities for the EU: ‘rigorous fiscal consolidation for enhancing macroeconomic stability’, ‘labour market reforms for higher employment’, and ‘growth-enhancing measures’. The 2012 AGS replaced these with a broader and more socially balanced set of priorities, including ‘tackling unemployment and the social consequences of the crisis’, which were reaffirmed in subsequent years. Similar developments occurred in the CSRs, whose social scope and content expanded progressively from year to year, placing increasing stress on the need for Member States to ensure the adequacy, accessibility, and effectiveness of their social security, pension and healthcare systems; to combat poverty and social exclusion on a variety of dimensions; and to improve their education, training, and activation services (Zeitlin and Vanhercke 2014: 19-20).

The substantive reorientation of the European Semester towards a more socially balanced policy stance from 2011 to 2014 was accompanied by organisational and procedural developments which have reinforced the role of social and employment policy actors in its governance, while at the same time expanding the scope for deliberation and mutual learning about how to adapt common European objectives to diverse national contexts. Both the Social Protection Committee (SPC) and the Employment Committee (EMCO) of national officials advising the EPSCO Council have established themselves as key players in monitoring, reviewing, and assessing national reforms within the European Semester. Together, they have developed a Joint Assessment Framework for the implementation of the Employment Guidelines, whose results feed into separate Employment and Social Protection Performance Monitors for identifying and comparing emerging challenges and outcomes across Member States. Both committees are committed to using these indicator-based monitoring tools to underpin multilateral surveillance and support Member States in establishing their reform priorities, identifying good practices, and stimulating mutual learning, as well as feeding into the broader EU policy debate. (Zeitlin and Vanhercke 2014: 37-8).

This extended social and employment policy monitoring has gone hand-in-hand with an intensification of multilateral surveillance and peer review in both committees. This includes

thematic as well as country-specific reviews of CSR implementation and reform plans to facilitate horizontal debate and comparison across Member States. The SPC's thematic reviews are particularly aimed at fostering mutual learning and stimulating multilateral discussion on how to tackle specific policy challenges identified as common negative 'trends to watch' in its performance monitor. Commission officials as well as committee members see this review process as a 'game changer', making exchanges within the committees less 'cozy' and more incisive than in the past, while transforming 'the bilateral discussion on the CSRs between Member States and the Commission into a multilateral decision making process' (Zeitlin and Vanhercke 2014: 39-43).

Such intensified monitoring, multilateral surveillance, and peer review in turn forms the basis for enhanced input by EMCO and the SPC into the adoption of the CSRs, the culmination of the Semester. In the first European Semester of 2011, the SPC (and Ministers of Social Affairs more generally) were largely excluded from the review and adoption of the CSRs. Beginning in 2012, however, the social players began to acquire a more influential place in the CSR process, drawing on the expertise gained through the monitoring, surveillance, and review activities described above, as well as through explicit political challenges by the EPSCO Council to the jurisdiction of economic policy actors over social and employment issues. The 2012 European Semester catalyzed a vigorous push back by Member States against the Commission's increasingly prescriptive approach to the CSRs, along with its reluctance to deliberate over proposed amendments with national representatives (Zeitlin and Vanhercke: 44-5).

These conflicts over the organisation of the European Semester gave rise to a substantially revised procedural framework beginning with the 2013 cycle, based on a clearer allocation of responsibilities and cooperation in reviewing and amending the CSRs in areas of overlapping competences between the various committees and Council formations involved. Underlying this revised procedural framework were new decision-making processes and working methods within as well as between the participating committees. In each case, amendments to the CSRs were supported by qualified majority voting (QMV) to test the support among Member States for changes to the Commission's proposals. Multilateral surveillance within the committees is likewise crucial to the review and amendment of the CSRs. Only issues that have been extensively discussed by Member States during the multilateral surveillance process stand a

chance of securing the needed qualified majority within the committees. Both EMCO and SPC draw extensively on evidence from their multilateral surveillance in negotiating with the committees advising the ECOFIN Council and the Commission over amendments to the CSRs. Since under the ‘comply or explain’ rules of the European Semester, the Council is expected to provide a written explanation of its reasons for modifying the Commission’s recommendations, both committees also refer explicitly to these multilateral reviews in the formal reports justifying their amendments (Zeitlin and Vanhercke 2014: 46-9).

The revised procedural arrangements for reviewing and adopting the CSRs had a significant impact on the frequency of amendments. Most of these amendments concerned points of detail, focusing on better contextualisation of individual CSRs in relation to national challenges and reform measures. But it was also sometimes possible to obtain ‘horizontal’ amendments to multiple CSRs addressing broader issues, as notably in the case of pension reform, where the comply-or-explain text emphasised the importance of allowing Member States to choose among alternative paths to reaching the underlying objective of raising the effective retirement age. This broader message was endorsed by the rotating Council Presidency, which urged the Commission to ‘ensure that its CSR proposals are sufficiently precise as regards policy outcomes but not overly prescriptive as regards policy measures so as to leave sufficient space for ... national ownership....’ (Lithuanian Presidency 2013; Zeitlin and Vanhercke 2014: 49-51).

Thus over the life of the second Barroso Commission, a progressive ‘socialisation’ of the European Semester took place. This shift was visible at the level of substantive policy orientations, in terms of a growing emphasis on social objectives in the AGS and especially the CSRs. It was equally visible at the level of governance procedures, in terms of an enhanced role for social and employment policy actors in monitoring, reviewing, and amending the CSRs.

Through this process, Member State representatives were also able to push back against what they perceived as ‘over-prescriptive’, ‘one-size-fits-all’ recommendations from the Commission, which sought to lay down not only reform objectives, but also the specific way of reaching them, without taking sufficient account of national contexts and competences. By demonstrating their ability to amend the Commission’s draft CSRs through QMV, these

committees were also able to force the latter to engage more deliberatively with Member States in both multilateral and bilateral fora.

Many prominent actors within both the Commission and the Council still view the European Semester first and foremost as a framework for enforcing national compliance with EU rules and recommendations. The Semester has undoubtedly been used by the EU institutions to put pressure on Member States to address the specific policy challenges flagged by the CSRs, especially under the SGP and MIP. But no sanctions have yet been imposed on any Member State within the Semester, including under the MIP, and given the political and legal hurdles involved this seems likely to occur if at all only under very exceptional circumstances. While recommendations under the European Semester typically receive greater national political and media attention than those of previous EU policy coordination processes, interview evidence suggests that there are still wide differences between Member States in how seriously they take the CSRs, depending on a variety of domestic considerations, including public attitudes towards European integration, the political sensitivity of the issues at stake, the national fiscal and macroeconomic situation, and the weight of the structural funds, as well as the quality and persuasiveness of the analysis behind them (Zeitlin and Vanhercke: 56-8).

If there is little consensus on the effectiveness of the European Semester as a top-down compliance mechanism, EU-level interviewees were remarkably positive about the extent of joint exploration and mutual learning developing through the Semester process, especially within EMCO and the SPC. Participants in the review process emphasise that its iterative character has produced a strong learning and consensus-building effect within the committees. An added impetus to mutual learning in recent years has come from the innovative *ex ante* reviews piloted by both committees, where Member States present planned reforms before their enactment and receive ‘experience-based feedback’ from other countries ‘who had implemented similar reforms in the past’, together with ‘concrete advice on how to improve the[ir] policy design’ (SPC 2014; Zeitlin and Vanhercke 2014: 58-60).

In contrast to the post-crisis evolution of EU financial regulation, it would be exaggerated to claim that these developments have transformed the European Semester into an experimentalist governance process. But at least in the social and employment policy fields,

there are clear signs of a growing focus on joint exploration and recursive learning about how to address common European objectives and challenges in diverse contexts through monitoring, surveillance, and peer review of national reforms. The intensification of these ‘learning by monitoring’ activities between 2011 and 2014 was accompanied by a vigorous pushback by Member States against the Commission’s perceived efforts to impose uniform, over-prescriptive recommendations insufficiently adapted to national circumstances, which gave rise not only to successful amendments of the CSRs, but also to revisions of the broader governance procedures of the Semester itself that have made it less hierarchical and more interactive.

The new Juncker Commission, which took office in November 2014, introduced a further round of procedural revisions to the 2015 European Semester. Building on plans initiated by its predecessor and responding to Member State demands, the new Commission sought to ‘streamline’ the Semester process by integrating the In-Depth Reports prepared as part of the MIP with the Staff Working Documents supporting the CSRs into a single Country Report, setting out its analysis of the main national reform challenges and measures taken to address them. These Country Reports were the subject of intensive bilateral discussions with Member States both before and after publication, giving the latter an opportunity to challenge and in some cases correct the Commission’s assessment. The Commission also released both the Country Reports and CSRs earlier in the cycle, in order to leave more time for review and debate within the EU committees. But the most fundamental change was the Juncker Commission’s own decision to reduce drastically the number and scope of the CSRs, concentrating on key priority issues identified as actionable and monitorable within a 12-18 month timescale. In most cases, this new generation of CSRs focused more on challenges and outcomes than on specific policy measures – ‘the what rather than the how’, as one high Commission official put it (European Commission 2015; Vanhercke and Zeitlin 2015).

These changes in the organisation of the European Semester, which the Commission presented as a means of increasing ‘national ownership’ of the reform process, were broadly welcomed by Member States as well as other EU institutions. But the dramatic reduction in the number, detail, and scope of the CSRs meant that many significant policy challenges flagged in the Country Reports did not figure in the recommendations. The selection among these issues, which was decided at the highest levels within the Commission, thus appeared less transparent

and more self-consciously ‘political’ than in previous years. The amendment process likewise appears seems to have been more politicised and less evidence-based than in preceding years, with Member States in similar situations obtaining different results on the same issues (e.g. pensions) depending on lobbying and coalitional voting. It remains uncertain how these revised features of the Semester process will develop in subsequent years, particularly as regards how challenges identified in the Country Reports but not addressed by the CSRs would be monitored and reviewed. Both EMCO and the SPC are currently revising their multilateral surveillance arrangements to ensure ongoing coverage of the full range of social and employment policy issues reviewed in past years, along with new trends to watch flagged by their monitoring instruments (EMCO 2015; SPC 2015; Vanhercke and Zeitlin 2015).

The future of the European Semester likewise remains open in the longer term. The ‘Five Presidents’ Report’ on Completing Europe’s Economic and Monetary Union (Juncker et al. 2015) has proposed using a stronger and more integrated European Semester to promote convergence of economic, social, and employment performance among eurozone Member States, based on ‘common high level standards’ eventually defined in EU legislation, including a ‘social protection floor’. In some areas, this would involve ‘further harmonisation’, while in others, ‘where different policies can lead to similarly good performance’, it would mean ‘finding country-specific solutions’. Progress towards these standards would be monitored and followed up through the CSRs and an expanded version of the MIP. In the first stage of this process, eurozone Member States would continue to receive ‘concrete and ambitious’ CSRs focused on priority reforms, especially as regards expected outcomes and timeframe, but would retain ‘a degree of freedom concerning the exact measures to be implemented’, subject to more systematic reporting, peer review, and ‘comply or explain’ requirements. The Eurogroup could already play ‘a coordinating role in cross-examining performance, with increased focus on benchmarking and pursuing best practice’, accompanied by a fuller use of the MIP, including in dealing with necessary reforms ‘in countries accumulating large and sustained current account surpluses’ (Juncker et al. 2015: 7-9, 22).

It remains far from clear for now how these proposals might work in detail, and still less how far eurozone Member States would be prepared to embrace them. But the experience of the European Semester to date strongly suggests that centralised efforts to impose one-size-fits-all

policy templates are unlikely to prove effective in the diverse and polyarchic conditions of the EU, as the Five Presidents' Report itself acknowledges. This experience likewise suggests that a more intensive process of joint exploration and experimental learning would be required to support convergence of performance among eurozone Member States by discovering contextually appropriate solutions to complex, uncertain challenges such as those involved in reforming national employment and welfare systems.

## **Conclusion**

Tested by the crisis like the Union itself, EU experimentalist governance has proved remarkably resilient. In most policy domains, it continues to function much as before the crisis, displaying a robust capacity to revise and improve existing regulatory frameworks, as for example in fields like energy and industrial emissions. In others, like trade, experimentalist principles and practices have served as the basis for ambitious new initiatives, such as the regulatory equivalence assessment proposals in the TTIP negotiations. Even where the EU's responses to the crisis have appeared to move decisively towards centralised hierarchical authority, as in financial regulation, front-line supervisors retain a key role in the new ESAs, with responsibilities for drafting binding European rules, monitoring and reviewing national implementation, and proposing revisions in light of on-the-ground experience. In the SSM, whose institutional design is more explicitly centralised, experimentalist practices of 'learning from difference' in joint teams of European and national supervisors, contextual adaptation of common rules and processes to banks' individual risk profiles, and recursive revision of supervisory methods on the basis of comparative benchmarking and review appear to be flourishing, at least for now, under a hierarchical veneer. The case of the European Semester is more ambiguous and its future more open. But at least in the social and employment policy fields, there are clear signs of a growing emphasis on joint exploration and mutual learning about how to address common European objectives and challenges in diverse national contexts, coupled with a vigorous pushback by Member States against the Commission's perceived efforts to impose uniform, over-prescriptive recommendations that has made the Semester's governance procedures less hierarchical and more interactive.

These developments underline the limits of centralised hierarchical governance in the EU's turbulent and polyarchic environment, where strategic uncertainty about how best to achieve common goals recommends joint exploration and recursive learning from implementation experience, while the heterogeneity of national institutions and preferences discourages one-size-fits-all solutions. At any given moment, it may be desirable to move towards greater uniformity in the rules governing tightly integrated markets (as in finance), provided that these can be rapidly updated and revised, as well as to push for increased convergence of economic, social, and employment performance across EU Member States, especially within the eurozone. But under conditions of deep uncertainty, diversity – of business models, institutions, and policies – remains a vital adaptive resource, both for stability (as in finance) and for learning. Since strategic uncertainty depends on policymakers' perceptions of their environment, there can be no guarantee that the EU will eschew centralised hierarchical solutions as its leaders pursue further integration in a variety of domains in response to the crisis. A powerful bulwark against this possibility, however, as the cases of financial regulation and the European Semester each in different ways suggest, is the abiding polyarchic structure of the EU, whereby the Member States participate directly in its decision-making processes, and no single actor can impose her preferred approach without taking into account the views of others.

### **Note on Contributor**

Jonathan Zeitlin is Professor of Public Policy and Governance, and Distinguished Faculty Professor in the Department of Political Science and the Faculty of Social and Behavioral Sciences (FMG) at the University of Amsterdam. Professor Zeitlin holds a Jean Monnet Chair in European and Transnational Governance from the European Commission (2011-14). He is also a member of the steering committee of the Political Economy and Transnational Governance (PETGOV) research programme of the Amsterdam Institute for Social Science Research (AISSR).

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