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## **Between Federation and Confederation: the EU's 'Accountability Deficit' as the Result of Structural Hybridity**

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### A) Abstract

The European Union is increasingly a model for other organisations around the world, from ASEAN to the Eurasian Economic Union. This paper analyses the EU as a partly-federal and partly-confederal body, and argues that its hybrid nature and corresponding lack of governmental and institutional clarity lead to an accountability deficit. This deficit may be exploited by Eurosceptic parties, causing the EU to be held accountable at an institutional level.<sup>1</sup>

### B) Introduction

The European Union (EU) is a unique body in many ways. It is simultaneously geographical, political, and economic, and is notable for the fact it peacefully contains multiple nationalities and countries with an otherwise long history of warfare and conflict. The model of the EU has been intentionally copied in the constitution of the new Eurasian (Economic) Union (EEU), which features similar institutions and structure, albeit in nascent forms. Likewise, the Association of Southeast Asian Nations (ASEAN) was founded to help promote regional stability and economic cooperation.

However, there are differences between the EU and these other two organisations. The EEU is at this point primarily an economic organisation, though further integration is envisaged in future. The political and other facets featured in the EU are largely lacking.

Countries attending ASEAN meetings are represented by state leaders, and decisions are made on the basis of consensus. In contrast, the EU features representation at multiple levels. The Parliament

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<sup>1</sup> This paper draws from the author's previously-produced work on EU-blaming by the pro-Brexit campaign 'Leave.EU' (Skillen, 2016).

is directly elected by the populace of the EU, and nationally elected leaders and ministers are represented in the Council of the European Union and European Council. The EU permits decision-making on the basis of majority and supermajority, rather than purely by consensus. This is because rather than being an organisation of states which make decisions on an ad hoc or purely intergovernmental basis, the EU is a body with certain limited ‘supranational’ powers. It is neither a confederal nor a federal body, but has features of each.

This constitution has repercussions for the EU and its ongoing existence and development, as it can be analysed neither as a confederal organisation, nor as a purely federal system such as the governments of Australia or the United States. The complications of its power-sharing and power-implementing arrangements means that it has deficiencies in terms of accountability which may be attacked and exploited by Eurosceptic groups.

This paper will address the question, “how does the partly-federal, partly-confederal nature of the European Union lead to an accountability deficit?”. It will do this by firstly defining the relevant terms and establishing that the EU is partly-federal and partly-confederal, and will consider associated distribution of power and institutions. It will illustrate the accountability deficit, contrasting the EU system with state federal systems, and show that it is more difficult for the public to hold the EU accountable as a result of its hybrid structure.

This topic is important against the background of the Brexit debate, where EU-blaming in the context of the accountability deficit is used to support the ‘leave’ movement. It is also relevant given the EU as model for the EEU and potentially for similar organisations in future. It has implications for education and responsibility-accordance within the EU itself.

This research uses the theoretical concepts of Watts and Elazar in relation to power-sharing relationships, Hobolt and Tilley regarding the relationship between accountability and responsibility, and rests upon notions of governmental legitimacy as propounded by authors such as Scharpf, Schmidt and Majone.<sup>2</sup> In this way it links together the theory underlying the structure of the EU as partly-federal and partly-confederal, with current concerns relating to the accountability of the organisation.

## **C) Theoretical Framework**

This paper utilises Elazar’s and Watts’ definitions of federal and confederal, as well as Elazar’s non-hierarchical illustration of power distribution. Elazar points out that under modern definitions, states are supposedly exclusive in their sovereign powers, but in the case of the EU there are multiple ‘sovereigns’ in some legislative areas, which share the same geographical territory. Elazar’s conception of power distribution allows this issue to be more ably explored.<sup>3</sup>

This section additionally outlines a theory of institutional versus governmental clarity in relation to power distribution, and links these concepts to the assignment of responsibility and accountability.

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<sup>2</sup> (Elazar, 1979; Majone, 1999, 2014; Scharpf, 1999; Watts, 2008a; Schmidt, 2010, 2015; Hobolt, Tilley and Banducci, 2012; Hobolt and Tilley, 2014; Wilson and Hobolt, 2015).

<sup>3</sup> See (Elazar, 1979; Watts, 2008a).

## 1. Definitions

### 1.1 Federation

Elazar interprets a federation as being “self rule plus shared rule”<sup>4</sup>. It is “a system of political organisation uniting separate states or other units in such a way as to allow each other to remain a political entity”, based on “a contractual agreement by separate governments to share power among themselves”.<sup>5</sup> Whereas authors such as Watts identify dual sovereignty as the essential feature of a federal body, Elazar claims that five things must be present – a written constitution, non-centralisation, methods for maintaining non-centralisation, a real division of power, and a ‘federal principle’. This latter is essentially the popular will to form a federal system.<sup>6</sup>

### 1.2 Confederation

Elazar describes a union as “a compound polity in which the constituent units find primary constitutional expression through the common institutions rather than through their own.”<sup>7</sup> He gives the example of the United Kingdom, which despite devolution of powers, still achieves primary legislative and constitutional expression on the world stage as the United Kingdom rather than a constituent part thereof.

Elazar describes the EU – at that time the European Community – as a ‘community’ rather than a ‘union’.<sup>8</sup> It features federal principles, though may not wish to “go all the way...into a federal relationship”. He claims it is *confederal*, rather than *federal* – the chief expression of its constituent parts is on a national, Member-State basis, rather than through the EU and its institutions.

Watts makes a clearer distinction between a federal and confederal body.<sup>9</sup> He describes a confederation as occurring “where several pre-existing politics join together to form a common government for certain limited purposes...but the common government is dependent upon the will of the constituent governments, being composed of delegates from the constituent governments, and therefore having only an indirect electoral and fiscal base”.<sup>10</sup> The EU is included as a confederation under Watts’ definition, though allowance is made for plausibly federal components.

## 2. Visualising Power Distribution

Elazar suggests that typical illustrations of power-sharing arrangements as hierarchical are misleading, instead focusing on the notion of *non-centralisation* of power. This in turn is to be viewed as a matrix, rather than a pyramid, as shown in Figure 1:

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<sup>4</sup> (Ogu, 2011).

<sup>5</sup> (Elazar, 1979).

<sup>6</sup> (Elazar, 1979; Watts, 2008a, 2008b).

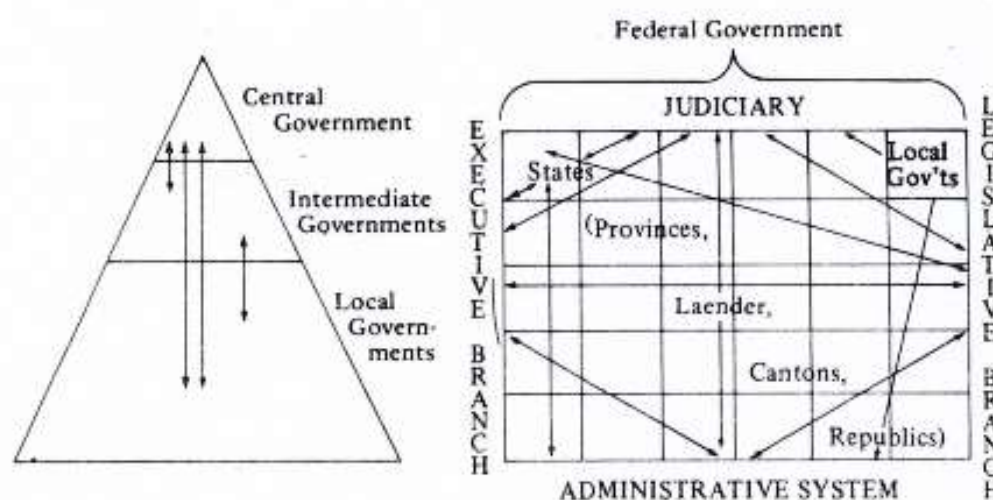
<sup>7</sup> (Elazar, 1979).

<sup>8</sup> Note that this is as a result of the then-EC and now-EU’s structure, not because of its respective name.

<sup>9</sup> (Watts, 2008a).

<sup>10</sup> Emphasis added.

Figure 1  
*Matrix and Pyramid Models of Political Organization*



**Figure 1: Elazar's models of political organisation<sup>11</sup>**

Viewing power distribution as a matrix rather than hierarchical is useful in the instance of the EU, as it allows for discussion of the body as either confederal or as federal – as intergovernmental as well as supranational. In a confederation, only those powers agreed upon are referred ‘upwards’ in a pyramid, but lacking the ‘federal principle’ of a federation means that in a confederation these powers are able to be recovered through (partial) dissolution. Viewing a confederation in particular as having power distributed over a matrix, whereby weight may be gained or lost from any given area of legislature, is therefore more capably equipped than a hierarchical power pyramid to illustrate power distribution between the EU as a set of institutions and its Member States. Clarity in relation to power distribution is important in assigning responsibility and accountability.

### 3. Clarity and Accountability

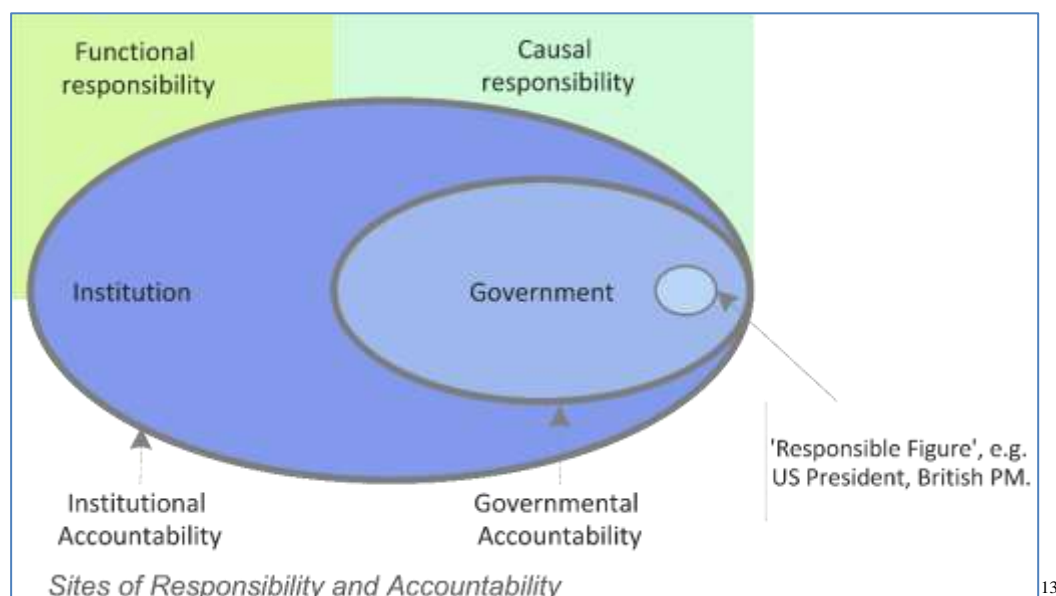
There is a difference between governmental and institutional clarity, and this becomes important when assigning blame and accountability in governmental systems<sup>12</sup>. Institutional clarity is where constituents are able to identify which institution has caused an outcome – which institution is at ‘fault’ or has credit due. Governmental clarity is knowing which body within that institution is responsible for a given outcome. In Australia, the Australian Taxation Office (ATO) as a federal institution is responsible for tax collection and reimbursements. However, tax rates are proposed by the party in power within the Federal Government. Thus in the event of a tax hike, the Government is held responsible and accountable, rather than the institution of the ATO, or the system of federal institutions as a whole. Governmental and institutional clarity are both clear in this event: constitu-

<sup>11</sup> Taken from (Elazar, 1979, p. 15).

<sup>12</sup> (Hobolt and Tilley, 2014).

ents know which institution is the site of responsibility (the institutions of federal governance), and which body within that institution is responsible (the governing party).

If Australian citizens disagree with a tax decision, they can hold the party responsible accountable, by voting the governing party in or out of office. This means that clarity of responsibility and accountability are linked in democratic systems (see Figure 2).



**Figure 2: Sites of responsibility and accountability within a national political system.**

In Figure 2, ‘functional’ responsibility is associated with the political system (institution), and ‘causal’ responsibility with the government (parties in power). A ‘responsible figure’ has been added as a sub-item within the ‘government’, allowing for the increased visibility of a head of state when assigning blame or responsibility.

Clarity of responsibility is indicated in the figure by the thickness of the lines surrounding ‘responsible figure’, ‘government’ and ‘institution’. Sites of accountability are also indicated: as above, the government may be held accountable through processes such as voting. An institution may be held ‘accountable’ by replacement, as in a change in political system or coup d’état. Clarity of responsibility is vital to ensure that the correct body is held accountable for a given outcome.

According to Wilson and Hobolt, identifying who is ‘responsible’ for a given measure becomes complicated in multi-party systems, or where there are multiple levels of governance.<sup>14</sup> In federal systems where different levels of government have clearly differentiated responsibilities, constituents have less difficulty in ascertaining which party is responsible for a given action. Meanwhile, overlapping competences are associated with poor clarity of culpability.<sup>15</sup>

<sup>13</sup> Diagram from (Skillen, 2016).

<sup>14</sup> (Wilson and Hobolt, 2015).

<sup>15</sup> (Hobolt and Tilley, 2014).

## D) Application

### 1. Federal, Confederal, or Hybrid?

The EU fills several of the criteria for a ‘federation’ under Elazar’s quintuple typology. Firstly, it has a ‘written constitution’ in the form of overlapping treaties (1). While the ‘Constitutional Treaty’ failed ratification, the Lisbon Treaty captures most of its tenets and fulfils the role of a constitution. This treaty outlines non-centralisation of power, distributing different powers to the EU and to Member States (2); a court (the Court of Justice for the European Union, CJEU) which is capable of interpreting the location of power, maintaining non-centralisation (3)<sup>16</sup>; and a ‘federal principle’ in the statement seeking an ‘ever-closer union’ (4).<sup>17</sup> However, the ‘real division of power’ is less clear: unlike in a typical state-based federal system, some powers within the EU are shared (5). In fact, there are three different types of power distribution: exclusive, shared, and supporting.<sup>18</sup> An argument can also be made that the ‘federal principle’ is not a strong one: while an ever-closer union may have been envisaged by different parties at different times, in fact there is division over the EU’s future.<sup>19</sup> Will it become a supranational power, definitively legislating in a broad array of areas; remain the same; or revert to a strictly intergovernmental government consensus-based forum more akin to ASEAN?

Elazar highlights that the “will to be a federacy” may be restricted by other factors, including cultural, political and social factors, which “interfere with the implementation of federal principles.” Such limitations seem evident in the current Eurosceptic climate.<sup>20</sup>

While the EU does not fulfil Elazar’s requirements to be a federation, it is clear that it is more than a confederation. Under the definitions above, a confederation is essentially an intergovernmental, consensus-based body. In accordance with Elazar’s definition, the EU is a compound polity – though is not typically understood as the primary institution for the constitutional expression of states. Likewise, the EU is designed for governance over ‘certain limited purposes’ as per Watts, though given the increased role of the European Parliament following the Lisbon Treaty, it is clear that the EU is not composed simply of delegates from constituent governments.

Furthermore, the EU does have certain supranational powers, rather than being strictly intergovernmental. The European Parliament uses varying forms of majority voting in legislative procedure, and while in practice consensus is the norm in the Council of the European Union, qualified majority voting is an option.

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<sup>16</sup> Notably, the CJEU tends to make judgments in line with the principle of an ever-closer union. The CJEU therefore acts towards further integration and federalisation. See (*C-307/97 Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt, Opinion*, 1999, *C-55/00 Elide Gottardo v Istituto nazionale della previdenza sociale (INPS), Opinion*, 2001).

<sup>17</sup> (European Union, 2007). See also (Nugent, 2010).

<sup>18</sup> See ‘Power Distribution in the EU’, below.

<sup>19</sup> See for example (Nugent, 2010).

<sup>20</sup> The ‘will to federacy’ in the form of a popular commitment to the EU becomes apparent in relation to debates over Turkey’s accession. Here, Turkey is variously described as not democratic enough, not culturally or religiously appropriate. This discourse suggests an internal EU culture of expectations in relation to participation.

Thus the EU does not fit the definition of ‘federation’, lacking a clear and real division of power or a strong federal principle. It also does not fit the definition of ‘confederation’, having supranational elements and directly-elected representatives of EU constituents. It instead hovers between these two ideas, having elements of both – partly-federal, and partly-confederal. What are the implications of this status for clarity and accountability?

## 2. EU Institutions and Government

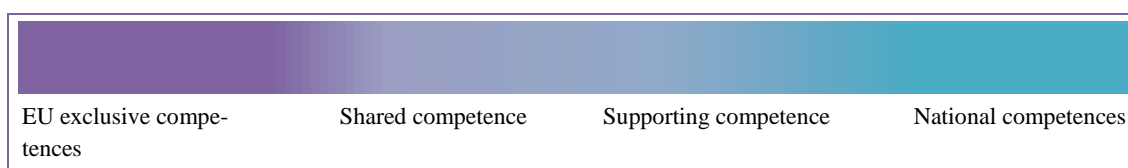
Within the EU, the European Parliament is voted upon directly by citizens. The Council of the European Union is comprised of Member States’ politicians, so that the Foreign Affairs Council consists of Member States’ foreign ministers.<sup>21</sup> The European Council consists of Member States’ Heads of State, which have been directly elected by citizens. Lastly, Commission staff are composed of civil servants and experts, while the College of Commissioners is nominated by Member States and approved by the elected Parliament<sup>22</sup>.

Executive power is shared between the Commission and European Council, and the former may also propose legislation. Legislative power is shared between the Parliament and Council of the EU.

The outcome of this structure is that the two principles are represented within the EU – citizens as in a federation, and Member States as in a confederation – and legislative and executive functions are divided across the institutions, detracting from governmental clarity.

## 3. Power Distribution in the EU

Powers, or ‘competences’, are distributed within the EU between the EU and its Member States. The EU is exclusively responsible for some items (‘exclusive competences’); other responsibilities are shared between the EU and Member States (‘shared competences’); in other areas, the EU may support or supplement the actions of national governments (‘supporting competences’); and there are also areas of strict national competence in which the EU has no culpability (see Figure 3).



**Figure 3: Power distribution in the EU. A gradient is used to show the lack of clear distinction in ‘shared’ and ‘supporting’ competences between the EU and Member States.**

Note that Figure 3 reflects the concept of non-hierarchical power distribution envisaged by Elazar. Powers in the EU are not distributed downwards, or strictly on the principle of subsidiarity as is more common in a state government system. In Australia, items such as foreign and security policy are managed at federal level; stamp duties and education at state level; and utilities and garbage collection at municipal or local level. Each ‘level’ does what it is best placed to do, and division of

<sup>21</sup> In some cases, political representatives may have been appointed rather than elected, as in the French system.

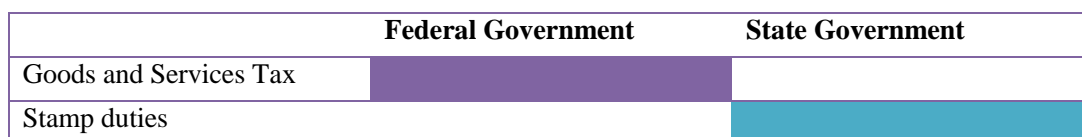
<sup>22</sup> (Nugent, 2010).



powers is clear (See Figure 4 and Figure 5). In the EU this is not necessarily the case: for example, foreign policy is largely managed at Member State level, with limited initiatives at ‘federal’ EU level. For this reason, it is important to view power as distributed – albeit perhaps not clearly in the case of supporting or shared competences – rather than hierarchical, as suggested by the use of coloured gradients in Figure 3.



**Figure 4: Clear division of powers in a state-based federal system.**



**Figure 5: Clear division of roles in a federal system, in the same general area of legislation (taxation). This figure shows that the institutions of the Australian Federal Government are clearly and exclusively responsible for managing Goods and Services Tax, while State Government institutions are clearly and exclusively responsible for collecting stamp duties.**

The overlapping division of competences in the EU makes it more difficult for constituents to establish which body or power is responsible for a given outcome, detracting from both governmental and institutional clarity.<sup>2324</sup> This is important, because without clarity, constituents are not able to identify who is *accountable* for an outcome.

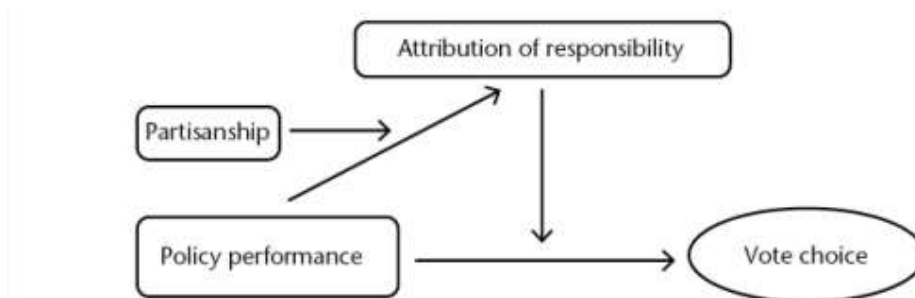
#### 4. Holding the EU Accountability

In a domestic democratic system, where governmental clarity is typically stronger than it is in the EU, citizens are able to hold individual representatives or parties accountable by voting them out at the polls (see Figure 6). Where there is a single figure that is clearly identifiable as representative of the ‘government’, such as the British Prime Minister or American President, they can be used as an individual recipient of responsibility, helping to increase governmental clarity.<sup>25</sup> Such a distinct figure is popularly lacking in the EU, despite the existence of a Commission President.

<sup>23</sup> (Usherwood and Startin, 2012) point to the lack of clear competence division as a ‘failure’ of the EU, which allows for the growth of Euroscepticism.

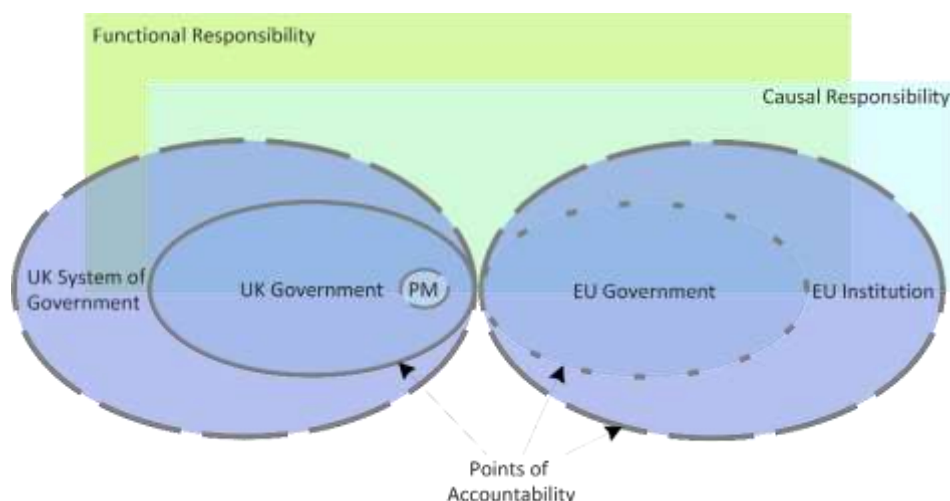
<sup>24</sup> Citizens are more likely to punish European initiatives at national level, in national elections (de Vries, 2007; Hobolt and Tilley, 2014). Lack of clarity thereby affects both the EU and national governments. See also (Kumlin, 2009).

<sup>25</sup> (Weaver, 1986, pp. 373–4).



**Figure 6: This model of accountability shows the relationship between policy performance, partisanship, attribution of responsibility, and voter choice<sup>26</sup>.**

Because the EU lacks governmental clarity as a function of its partly-federal and partly-confederal structure, citizens find it difficult to identify responsible parties.<sup>27</sup> As such they cannot simply ‘vote out’ the party responsible for a measure, and there are few other options for holding the EU accountable.<sup>28</sup> They can hold their national government accountable for apparent ‘EU’ or shared/supported initiatives at the polls, or hold the EU accountable at an *institutional* level. This could be via attempting to alter the EU itself, or by voting in or out of it. That is, the accountability deficit created as a result of the EU’s mixed structure could lead to institutional crisis (see Figure 7).



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**Figure 7: Lack of clarity, overlapping responsibilities, and multiple points of accountability within the EU system.**

Figure 7 shows that causal and functional responsibility can be assigned across both the EU and Member States (the UK in this example). Clarity is again shown using lines, and the weakness of

<sup>26</sup> (Hobolt and Tilley, 2014, chap. 2).

<sup>27</sup> In addition, European elections results reflect the popularity of the current *national* government (Majone, 2014). See also (Hobolt, Tilley and Banducci, 2012).

<sup>28</sup> (Weiler, 2012, p. 830) suggests that the EU’s lack of a ‘meaningful mechanism’ for democratic accountability relates to its non-partisan nature – constituents identify with the institution, rather than a constitutive party. This exacerbates clarity issues.

<sup>29</sup> Image from (Skillen, 2016).

the EU's governmental and institutional clarity is illustrated using dotted lines. Three points of accountability for EU outcomes are shown – at the levels of a Member State government, the EU government, and the EU as an institution. Note that the EU as an institution has greater clarity than the 'government' of the EU.

The structure in Figure 7 is borne out by discourse. Hobolt and Tilley<sup>30</sup> found that the EU is rarely 'scapegoated' by heads of state. Additionally, in the discourse of UK-based pro-Brexit group Leave.EU, David Cameron as 'responsible figure' is often held accountable, while named EU government officials rarely appear; and on most occasions, the EU as an institution is blamed for outcomes.<sup>31</sup> This reflects the fact that the UK has both governmental and institutional clarity, while the lines of accountability within the EU are much less clear. This supports Leave.EU's campaign, as presenting the EU as an institution as responsible for negative outcomes means that the EU as an institution should be held accountable via voting 'out' of the EU.<sup>32</sup> Similar strategies could be employed by other Eurosceptic groups.

## E) Conclusion

It has been demonstrated that the EU is not a federal nor a confederal organisation, but features elements of each type. This leads to a lack of institutional and governmental clarity within and between the EU and its Member States. This is partly due to mixed responsibilities and power distribution, with some tasks completed on an intergovernmental basis, some on the basis of supranational decisions, and others in the realm of 'shared' and 'supported' competences completed *across* the EU and Member States. Additionally, the EU's structure incorporates directly-elected representatives – as in a federal system – as well as national representatives – as in a confederal system. This helps to blur chains of responsibility.

Each of these features is the direct result of the EU's hybrid nature. It becomes difficult for citizens to establish chains of responsibility, and thereby, accountability. The EU's partly-federal and partly-confederal nature therefore leads to an accountability deficit.

As suggested above, this accountability deficit can be exploited by Eurosceptic groups such as Brexiters, who may use blaming strategies in order to promote leaving or dissolving the European Union. However, with states guarding some powers, dissent and EU-blaming from populations, and leaders torn between viewing the EU as intergovernmental or, ultimately, federal, the issue is not likely to be resolved in the short term. Instead, the EU is likely to remain partly-federal and partly-confederal, and the accountability deficit may continue to be exploited by anti-EU groups. As such, research should be conducted into education policies in relation to the EU, as improving constituents' understanding of who their representatives are, how and where they are represented, and how to assign responsibility, could help to abrogate the possibility of accountability at the level of the EU as an institution. Lessons learned may additionally be applied to similarly hybrid bodies such as the EEU.

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<sup>30</sup> (Hobolt and Tilley, 2014, chap. 7).

<sup>31</sup> (Skillen, 2016).

<sup>32</sup> (Leave.EU, 2016).

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