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Building bridges: central banking law in an interconnected world

ECB Legal Conference 2019

December 2019

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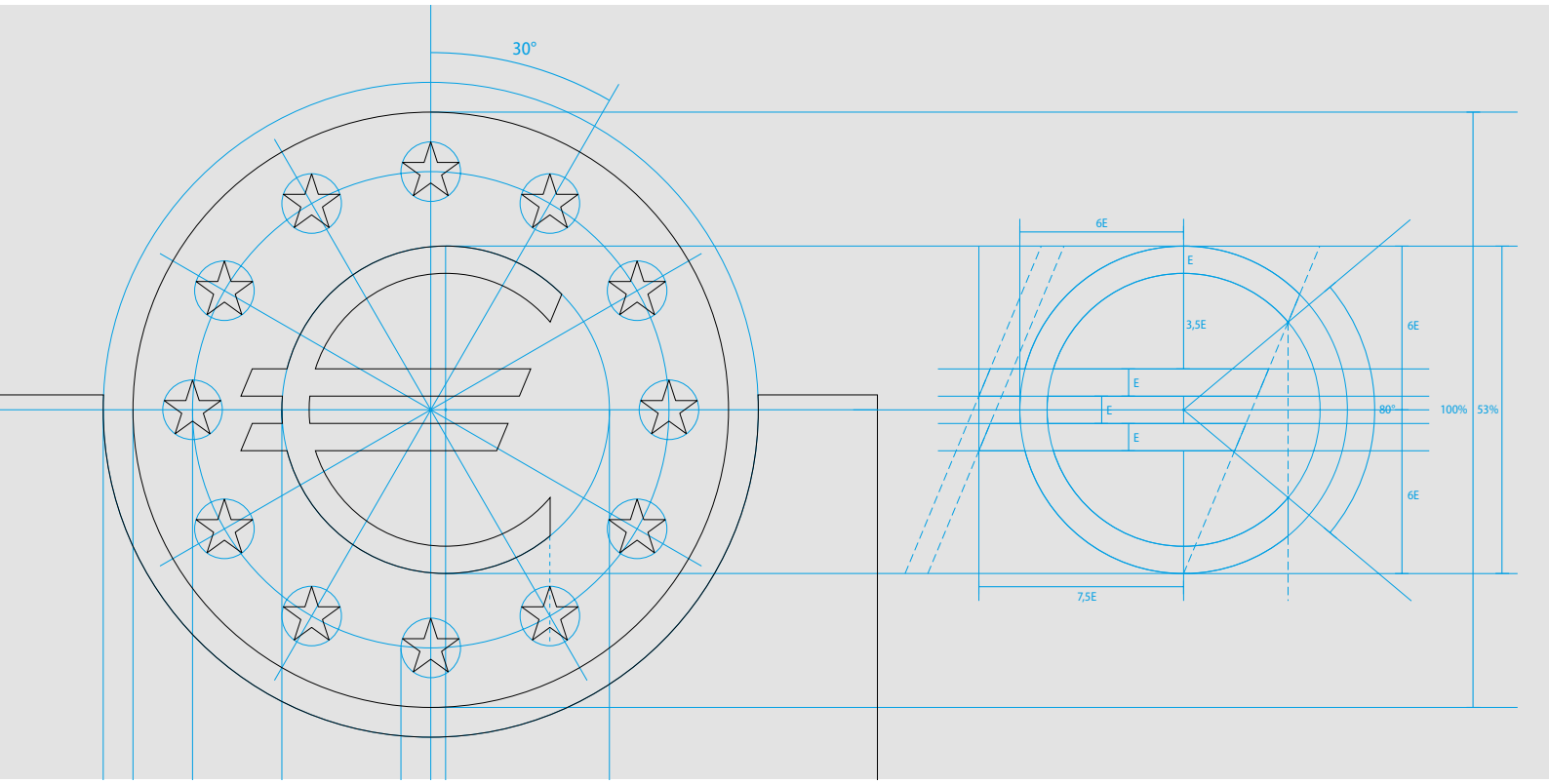

Contents


Michael Ioannidis

Twenty years of building bridges: the process of legalisation of European central banking

Chiara Zilioli[1]

On 1 January 1999, eleven European Union Member States fixed their exchange rates, transferred their monetary policy competence to the European System of Central Banks (ESCB) and launched the euro as their single currency. Today the European Central Bank (ECB) celebrates the 20th birthday of our single currency – the euro.

Many bridges were built between national traditions to establish the Eurosystem and a single monetary policy. Twenty years later, 340 million citizens in 19 countries use the euro every day. It is a tangible reminder of the opportunities and freedom that the European Union brings and that we now often take for granted. Behind the success of this tangible medium of exchange, there is a tremendous amount of intangible effort, thinking and innovation. Economic, but also legal.

One of the most notable features of twenty years of effort, thinking and innovation is what I would define as the **process of legalisation of European central banking**. Already the Maastricht Treaty set a much more detailed legal framework around the ECB compared with those applying to other central banks in the world. But since then, and over these last twenty years, many actors have contributed to a dynamic process that has gradually developed the framework set out in the Treaties, fleshed out its basic principles and, ultimately, given law an ever greater importance in the organisation and conduct of European monetary policy and, when it came to it, prudential supervision.

Who are these actors who have contributed to the process of legalisation of European central banking? First and foremost, the *Union legislator*, who has debated new rules and further developed the framework set out in the Treaties, especially by conferring competence for prudential supervision on the ECB. Then, the *highest constitutional courts in Europe and the Court of Justice* – they have had to address difficult questions regarding the competences of the ECB, its independence, the prohibition of monetary financing, or public access to documents. *Legal scholars* have critically assessed these issues and published their thoughts and findings. *Practitioners* have carefully analysed the new and often unexpected questions raised by economic and political developments. Importantly, the *Legal Committee of the ESCB*, composed of the lawyers of the ECB and all the national central banks (NCBs) and national competent authorities, has combined its collective wisdom to advise on the proper interpretation and development of central banking law. And the

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media have given a prominent place to legal arguments, especially in the aftermath of the financial crisis, thus helping to raise awareness that European central banking is also a matter of law.

It is, of course, impossible to even sketch the process of legalisation of European central banking in a short introduction. Allow me, however, to bring forward three themes which, in my view, stand out in this process of developing and giving greater importance to legal rules and which are further explored in this book – following the discussions at the 2019 ECB Legal Conference.

1 The rule of law

That the Union is based on the **rule of law** was one of the early fundamental EU constitutional principles, stated by the Court of Justice in the *Les Verts* case[2]. It means that the Union cannot act outside the law; nowhere escapes the discipline of rules and judicial scrutiny.

This basic principle applies also to the ECB, both in its monetary and supervisory functions. In 2003 the *OLAF* judgment[3] reiterated that the ECB is subject to the Court of Justice's power of review. It is the responsibility of the Court of Justice to ensure the respect of this complex legal framework, which, since the establishment of the Single Supervisory Mechanism (SSM), also includes national rules, as will be discussed in the fourth Part of this book. This happens following either direct actions, or referrals for preliminary rulings where national courts also participate in the process of judicial review.

Indeed, especially since the crisis, courts have been particularly active in scrutinising that the ECB complies with the law, thereby creating a rich body of case-law which clarifies our legal framework and guides our actions. In fact, some of the most celebrated recent cases before the Court of Justice, such as *Gauweiler*,[4] *Ledra*[5] and *Weiss*[6], were directly focused on ECB actions. In another milestone case, *Rimšēvičs*,[7] the law protecting the independence of the Eurosystem was invoked against a breach by a Member State. This judicial scrutiny brought into the limelight the difficulty of calibrating the intensity of judicial review of central bank decisions. This theme will be approached in the second Part of this book.

In addition to the judicially guaranteed respect of the rules, the rule of law encompasses two more elements: the substantive principles of accountability and respect for fundamental rights. There have been significant developments also in these fields over the past twenty years.

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2 Case C-294/83, Parti écologiste "Les Verts" v European Parliament, EU:C:1986:166.
To access hyperlinked titles in full, please consult the digital version of this publication.

3 Case C-11/00, Commission v ECB, EU:C:2003:395.

4 Case C-62/14, Gauweiler and Others, EU:C:2015:400.

5 Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising v Commission and ECB, EU:C:2016:701.

6 Case C-493/17, Weiss and Others, EU:C:2018:1000.

7 Joined Cases C-202/18 and C-238/18, Rimšēvičs v Latvia, EU:C:2019:139.

First, new rules on accountability have accompanied the establishment of the SSM, reinforcing the links not only between the ECB and the European Parliament but also between the ECB and national parliaments.[8] Accountability can also be exercised through auditing. The ECB and the European Court of Auditors recently agreed a Memorandum of Understanding[9] that sets down practical information-sharing arrangements between the two institutions to further support the auditing of the SSM – a development that will be discussed in the sixth Part.

When it comes to fundamental rights, in *Ledra* and *Steinhoff*[10], the Court of Justice stated the self-evident fact that the ECB has to apply the Charter of Fundamental Rights[11] and abide by it. However, two decades ago very few legal scholars would have paid much attention to any relationship between fundamental rights and central banking or seen a role for a central bank in this respect.

Let me conclude: in the last twenty years, the rule of law as applied to central banking has benefited from a process of further clarification, better definition and careful scrutiny.

2 Transparency

Transparency is a second major theme in this twenty-year process of legalisation of European central banking. It has been observed that the focus of central banks on transparency is one of the most dramatic differences between central banking today and central banking in earlier historical periods[12]. The ECB is probably one of the places where this is easier to observe. As most central banking lawyers would certainly remember, initially the ECB followed an old central bank tradition of strict confidentiality with regard to publication, even in the case of legal acts, albeit with a constant effort of public communication in its role as a new central bank. This has evolved over time. In 2004 the ECB adopted a decision[13] that allows an even wider access to its documents, going beyond that legally required under Article 15 of the Treaty on the Functioning of the European Union. And the ECB has responded to multiple public access requests over the last ten years.

To enhance transparency, the ECB has developed several channels of communication, from its website hosting a vast store of information, including the

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8 See Article 20 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63); and the Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU) (OJ L 320, 30.11.2013, p. 1).

9 Memorandum of Understanding between the ECA and the ECB regarding audits on the ECB's supervisory tasks, 9 October 2019.

10 *Ledra*, op. cit.; and Case T-107/17, Steinhoff and Others v ECB, EU:T:2019:353.

11 Charter of Fundamental Rights of the European Union (OJ C 364, 18.12.2000, p. 1).

12 Dincer and Eichengreen (2008).

13 Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ L 80, 18.3.2004, p. 42).

calendars (or diaries) of the ECB's Executive Board members, to holding press conferences every six weeks after each monetary policy meeting.

Most importantly, in December 2014, the Governing Council decided to increase transparency even further by publishing accounts of its monetary policy discussions[14]. The accounts provide a fair and balanced reflection of policy deliberations, while confidentiality is protected, as required by the Treaties, in order to ensure independence of decision-making. The sixth Part of this book will cover some of the issues surrounding access to information and how transparency is balanced with the need to protect confidentiality.

3 The Eurosystem as a model of integration

The third element that I would like to highlight is the gradual emergence of the Eurosystem as a **model of integration** that brings together a Union institution, the ECB, and national institutions, the NCBs, to further the common Union interest.

The Treaties set out the novel legal framework for the Eurosystem, comprising the central banks of the Member States that have adopted the euro and the ECB. In the words of Tommaso Padoa-Schioppa, they constitute, together, the "central bank of the euro"[15]. The novelty of this legal framework was not immediately recognised by all,[16] but it was gradually consolidated through experience and successive legal refinements. Recently the Court of Justice in the *Rimšēvičs* case recognised the Eurosystem's unique character and the corresponding far-reaching effects, namely the power of the Court of Justice to directly annul national measures that interfere with the independence of the System. The Court referred to a "highly integrated system" representing "a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails."[17]

The SSM construction, while different in the sense that competences are conferred exclusively on the ECB rather than the Mechanism, nevertheless shares the basic elements of the Eurosystem structure.[18] The eighth Part of this book will discuss further developments in the integrated system of the SSM, namely with regard to the concept of "close cooperation" through which Member States whose currency is not the euro have an opportunity to participate in the SSM.

In the case of both the System and the Mechanism, the entities of which they are comprised retain their organisational autonomy: they are creatures of different legal

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14 See ECB press release of 18 December 2014.

15 Padoa-Schioppa (2004).

16 See, however, Zilioli and Selmayr (1999).

17 *Rimšēvičs,* para. 69, op. cit.

18 On the differences, see Pizzolla (2018).

orders, national and Union. However, they work together, under the guidance of the ECB, on the basis of legal principles set out in the Treaties and developed over time, towards the common Union interest. This model of integration has functioned very well and has served as a template in other cases, such as the European Public Prosecutor's Office. It could be one of the keys to the future of European integration.

4 Conclusion

Just as the euro is a tangible reminder of the opportunities and freedom that the European Union brings, the success of the Eurosystem model is evidence of the importance of building and preserving bridges. This brings me to the title of the ECB Legal Conference 2019 and of this book.

It is no accident that we chose bridges as the overall theme of our Conference, twenty years after launching the euro. Bridges were an important symbol when the euro was physically introduced as cash; this is why they feature on the banknotes we all carry in our pockets. And bridges are still important today, maybe more than ever.

Unilateralism – the perception that one-sided action is better than international collaboration and institution-building – is on the rise. Faced with this global challenge, building and sustaining bridges of communication, trust and cooperation between the people of Europe and between Europe and the world is even more crucial.

We, lawyers, have an important role in this task. We need to keep reminding everybody that, with all its weaknesses and problems, the rule of law is a far preferable condition than a collective retreat to the Hobbesian "state of nature", where only power sets the rules of the game. We need to stand and point to breaches of the rules, wherever they come from. We need to provide advice that strengthens the bridges between our jurisdictions and between our legal traditions rather than severing them.

For all of us, lawyers dealing with central banking law, the past twenty years have been an exciting time. We look forward to the opportunities that the next twenty years bring to address our weaknesses and build on our achievements.

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Part 1
Money and private currencies

Money and private currencies: reflections on Libra

Yves Mersch[1]

In 1787, during the debates on adopting the US Constitution, James Madison stated that "[t]he circulation of confidence is better than the circulation of money".[2] It is telling that Madison chose to use public trust in money as the yardstick for trust in public institutions – money and trust are as inextricably intertwined as money and the state. Money is an "indispensable social convention"[3] that can only work if the public trusts in its stability and acceptability[4] and, no less importantly, if the public has confidence in the resolve of its issuing authorities to stand behind it, in bad times as well as in good.

Madison's 18th century remark on the link between money and trust has lost none of its relevance in the 21st century. The issue of trust in money has resurfaced in the public debate on privately issued, stateless currencies, such as bitcoin, and their promise to serve as reliable substitutes for public money. This conference is neither the place nor the time for me to repeat my past statements on the shortcomings of cryptocurrencies[5] and why they do not fulfil the basic tests of what constitutes "money".

Instead, I will use this opportunity to address Libra, Facebook's newly announced private currency. It is scheduled for release in the first half of 2020 by the very same people who had to explain themselves in front of legislators in the United States and the European Union on the threats to our democracies resulting from their handling of personal data on their social media platform.

There are three key questions here. First, how does Libra differ from other private currencies and from public money? Second, what legal and regulatory challenges does it pose? And third, in the light of its mandate, what position should a central bank like the European Central Bank (ECB) take towards Libra?

The remainder of my contribution will be dedicated to these three questions, not with a view to conclusively answering them, but merely to raise awareness of some of the risks of Libra, to question its main premises and, in the process, to highlight the perils of entrusting the smooth processing of payments, the savings of citizens and the stability of the global monetary and financial systems to unaccountable private entities with a questionable track record in matters of trust.

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1 Member of the Executive Board of the European Central Bank and Vice-Chair of the Supervisory Board of the European Central Bank.

2 Elliot, J. (1836).

3 Carstens, A. (2018).

4 It is telling that the term "credit" is etymologically derived from the Latin "credere", meaning "to believe" or "to trust".

5 Mersch, Y. (2018).

So let me turn to my three questions.

First, how is Libra different from other private currencies and from public money?

Despite the hype surrounding it, Libra is, in some respects, no different from other, established private currencies. Similar to cryptocurrencies, Libra will be issued through a public ledger running on a form of blockchain technology. And similar to e-money, Libra will be distributed to end users electronically in exchange for funds denominated in fiat currencies.

But there are some notable differences that are extremely concerning. Libra's ecosystem is not only complex, it is actually cartel-like. To begin with, Libra coins will be issued by the Libra Association – a group of global players in the fields of payments, technology, e-commerce and telecommunications.[6] The Libra Association will control the Libra blockchain[7] and collect the digital money equivalent of seignorage income on Libra.[8] The Libra Association Council will take decisions on the Libra network's governance and on the Libra Reserve,[9] which will consist of a basket of bank deposits and short-term government securities backing Libra coins. Libra-based payment services will be managed by a fully owned subsidiary of Facebook, called Calibra.[10] Finally, Libra coins will be exclusively distributed through a network of authorised resellers,[11] centralising control over public access to Libra. With such a set-up, it is difficult to discern the foundational promises of decentralisation and disintermediation normally associated with cryptocurrencies and other digital currencies. On the contrary, similarly to public money, Libra will actually be highly centralised, with Facebook and its partners acting as quasi-sovereign issuers of currency.

You may be wondering what the problem is with Libra's centralisation. If public money is also centralised, why should Libra be any different?

What the advocates of Libra and other private currencies conveniently gloss over is that, because of its nature as a public good, money has traditionally been an expression of state sovereignty. It is no coincidence that, throughout history, sovereign actors have underpinned all credible and durable currencies.[12] This historical fact, affirmed in G.F. Knapp's state theory of money[13] and in the Chartalist school of economic thought,[14] has had a lasting impact on orthodox perceptions of

6 Libra Association (2019).

7 The Libra Association members will serve as validator nodes on the Libra blockchain.

8 Zetzsche, D., Buckley, R. and Arner, D. (2019).

9 Reserve management tasks will include deciding on the payment of fees and dividends from the Libra Reserve, deciding on the Libra Reserve's investment policy, and managing the interest paid to Libra Association members on the cash on deposit and the low-volatility assets that jointly make up the Libra Reserve. Users of Libra will receive no return from the Libra Reserve (Libra Association (2019)).

10 Calibra is registered as a "money services business" with the US Treasury Department's Financial Crimes Enforcement Network, and has applied for a licence as a money transmitter in several US states.

11 Libra Association (2019).

12 James, H. (2018) and Borio, C. (2019).

13 Knapp, F.G. (1924).

14 The Chartalist school of economic thought traces its intellectual origins to the work of Adam Smith (Smith, A. (1814)).

the concept of money as a public good and has found its way into statutory definitions of legal tender.

When it comes to money, centralisation is only a virtue in the right institutional environment, which is that of a sovereign entity and a central issuance authority.[15] Conglomerates of corporate entities, on the other hand, are only accountable to their shareholders and members. They have privileged access to private data that they can abusively monetise. And they have complete control over the currency distribution network. They can hardly be seen as repositories of public trust or legitimate issuers of instruments with the attributes of "money".

The high degree of centralisation that is Libra's hallmark, and the concentration of its issuance and distribution networks, are not the only features inhibiting trust. Despite its audacious global currency aspirations, Libra lacks a global lender of last resort. Who will stand behind it in a liquidity crisis situation? Libra is also devoid of the equivalent of a deposit guarantee scheme to protect its holders' interests during a crisis. Moreover, the limited liability of the Libra Association members raises serious questions about their resolve to satisfy the claims of Libra holders with their full faith and credit, as central banks do with public money.[16] Finally, the fact that Libra is backed by a basket of sovereign currency-denominated assets appears to defeat the very purpose of its issuance as a private currency. Why bank on a proxy when one can put one's trust in the genuine article? And how will the potential volume of payment transactions settled in Libra affect the monetary aggregates of its underlying currencies, their objectives and intermediate targets?

Let me now turn to my second question, on some of Libra's legal and regulatory challenges.

By straddling the divide separating currencies from commodities and payment systems, digitalised private currencies inevitably raise legal and regulatory questions. Libra is no exception. To keep my contribution short, I will only address three of these challenges, but rest assured that there are many more.

The first challenge concerns Libra's fundamental legal nature. The choice is, essentially, whether to treat Libra as e-money, as a financial instrument or as a virtual currency. Libra does not appear to qualify as e-money, as it does not embody a claim of its holders[17] against the Libra Association. If Libra were to be treated as a transferable security or a different type of financial instrument, both the Libra Association and any other entities engaged in providing investment services through Libra coins would fall within the remit of the Markets in Financial Instruments

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15 The euro is no exception here, as it represents the expression of the pooled sovereignty of the euro area countries, and its issuer is the ECB, a dedicated, supranational institution, mandated by the EU Treaties with the task of defining and implementing the monetary policy of the Union.

16 No less importantly, the Libra Association members' limited liability for Libra calls into question its claims to be a form of money. An instrument can only properly be considered money if it is a liability of its issuer, so any form of currency that fails this test cannot be treated as money (Borio, C. (2019)).

17 For the EU law definition of e-money, see Article 2(2) of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).

Directive (MiFID II).[18] Alternatively, if Libra were to qualify as a virtual currency then, under the Fourth Anti-Money Laundering Directive,[19] both Calibra and its authorised resellers would become subject to the Directive's anti-money laundering and counter-terrorism financing obligations, and to its registration requirement.[20] Given the different regulatory implications of Libra's legal characterisation, regulatory intervention is essential, to either confirm Libra's classification under one of the existing legal and regulatory frameworks, or to create a dedicated regime adjusted to its specificities.

A second challenge is to ensure that the relevant EU and Member State regulatory and supervisory authorities can assert jurisdiction over Libra and its network. But how can this be done when the entities behind Libra are located outside the EU? One way would be to require national custody of a share of the Libra Reserve funds equivalent to the amount of Libra in circulation in any given EU Member State.[21] But there may be other ways to ensure effective public control over Libra and its network, and these are worth exploring. Ensuring that payment systems are safe and accessible and exercising control over the financial market infrastructures that underpin our economies will remain public good objectives. And the conditions under which collateral or settlement finality are accepted will remain prerogatives of the regulatory or legislative authorities.

The third challenge is the need for cross-border cooperation and coordination. Because Libra will be used across borders, it is a matter of international interest. Its global nature would also call for a global regulatory and supervisory response to avoid regulatory arbitrage, ensure consistency of outcomes and guarantee the efficiency of public policy responses to Libra. There are welcome signs that the global community is already working together to mitigate Libra's risks. Both the G7 and the Committee on Payments and Market Infrastructures have evaluated Libra, with an emphasis on its potential use in money laundering and terrorist financing.[22] Further work is expected by the G20, the Financial Stability Board and other fora with a stake in the stability of the global monetary and financial system.

Finally, I would like to offer a few words about the ECB's general stance towards financial innovations such as Libra.

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18 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

19 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

20 The above is without prejudice to Calibra or any third-party entity providing payment services as part of the Libra network having to register as payment institutions, within the meaning of the revised Payment Services Directive (Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35)).

21 For a similar proposal, but motivated by different (monetary policy) considerations, see Zetzsche, D., Buckley, R. and Arner, D. (2019).

22 G7 (2019).

The ECB's Treaty-based tasks include defining and implementing the single monetary policy and promoting the smooth operation of payment systems. In the context of monetary policy, the ECB takes a close interest in market innovations that could directly or indirectly affect the Eurosystem's control over the euro or shift some of its monetary policy to third parties. Depending on Libra's level of acceptance and on the referencing of the euro in its reserve basket, it could reduce the ECB's control over the euro, impair the monetary policy transmission mechanism by affecting the liquidity position of euro area banks, and undermine the single currency's international role, for instance by reducing demand for it.

In the context of the smooth operation of payment systems, the ECB takes a close interest in market innovations that seek to replace the euro with alternative settlement currencies or create new and autonomous payment channels. Although some of Libra's aims are legitimate, reductions in cross-border fund transfer costs and other efficiency gains can also be obtained through established instant payment solutions. The Eurosystem recently launched the TARGET Instant Payment Settlement service, or TIPS – a pan-European, 24/7 settlement service for instant payments. By operating in central bank money, and by being embedded in TARGET2, TIPS provides a high-performance payment solution that is safer and more economical than questionable, market-based retail payment innovations.

Let me conclude here.

In the field of money, history bears testament to two basic truths. The first is that, because money is a public good, money and state sovereignty are inexorably linked. So the notion of stateless money is an aberration with no solid foundation in human experience. The second truth is that money can only inspire trust and fulfil its key socioeconomic functions if it is backed by an independent but accountable public institution which itself enjoys public trust and is not faced with the inevitable conflicts of interest of private institutions.

Of the various forms that money has taken throughout history, those that have best fulfilled their purpose and proven the most credible have invariably benefited from strong institutional backing. This backing guarantees that they are reliably available, that their value is stable and that they are widely accepted. Only an independent central bank with a strong mandate can provide the institutional backing necessary to issue reliable forms of money and rigorously preserve public trust in them. So private currencies have little or no prospect of establishing themselves as viable alternatives to centrally issued money that is accepted as legal tender.

The stance of central banks towards modern forms of money is bound to evolve with time, and central bankers have embraced technological developments in the field of money and will continue to explore helpful new innovations. But the rise of cryptocurrencies and other forms of privately issued instruments that can only fulfil some, but not all, of the functions of money is unlikely to fundamentally upset the two truths I just described. If anything, it will serve as a useful reminder of central banks' pivotal role as responsible stewards of public trust in money, and stress the need for vigilance towards phenomena capable of undermining public trust in the financial system.

I sincerely hope that the people of Europe will not be tempted to leave behind the safety and soundness of established payment solutions and channels in favour of the beguiling but treacherous promises of Facebook's siren call.

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Part 2
Standard of review of central bank decisions


Peter Huber
Lars Bay Larsen
Stefanie Egidy

Standard of review of central bank decisions: an introduction

Chiara Zilioli[1]

When analysing the relationship between courts and other public authorities the standard of review is certainly the central legal concept. Its exact meaning and use depends on the jurisdiction, but it generally indicates the willingness (or unwillingness) of a court to substitute the assessments of other public authorities, such as the legislature, the public administration, or a central bank, with its own assessment.

An **intrusive standard of review** means that the court is willing to reassess the merits of the reviewed decision; a **deferential standard of review** means that the court will instead limit itself and defer to the assessment made by the authority that made the original decision[2]. Even when a deferential standard is applied, the court will check, of course, that no manifest error has been committed and that procedural rules, fundamental rights, and fundamental principles, such as proportionality, have been respected. The word "deferential" does not indicate an absence of review; it simply describes how intensively the court will double-check the decision reviewed.

The standard of review may relate to the intensity of review of factual findings, such as whether an event has occurred, but the most crucial questions are the review of the legal assessment of a certain set of facts and of the exercise of discretion[3]. Is the qualification of a certain set of facts by the public administration (or the central bank) correct or has it erred in law? For example, have the competition authorities correctly qualified certain behaviour by a dominant undertaking as abusive? Or, has the ECB exercised its conferred discretion to design and implement monetary policy correctly or overstepped the limits of the competence set out in the Treaty?

In essence, the standard of review is the legal way to say: **who has the final word on a certain matter, the court or the authority under review?** It requires little imagination to see why this question is of fundamental constitutional importance in any polity and why the answer often transcends the limits of legal debates and

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1 Director General Legal Services, European Central Bank.

2 See Eskridge Jr, W.N. and Baer, L.E. (2007 – 2008) "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan", 96 *The Georgetown Law Journal* 1083; Davis, M.S. (1988) "Basic Guide to Standards of Judicial Review", 33 *South Dakota Law Review* 469.

3 See the Opinion of Advocate General Bot in Case C-530/12 P, *OHIM* v *National Lottery Commission*, EU:C:2013:782, para. 84: "Finally, it may be stated that the Court extended its review in the context of an appeal beyond the distortion of the evidence presented to the General Court, by acknowledging the existence of a review of manifest errors of assessment. Although it is not easy to determine the possible extent of a judicial examination of legality in the context of that review, the view may be taken that the review of the distortion of facts and that of manifest errors of assessment will probably differ from one another not only by their intensity but also in terms of their subject-matter, with the former focussing on the actual content of the national law and the latter potentially covering the interpretation and analysis of that law."

becomes also a central political, philosophical and public issue. In essence, the question of the standard of review is all about the balance of power between courts, on the one hand, and the public administration, legislature and central banks, on the other.

Because of the important link of this issue with the institutional principles on which each legal system is built, different courts may apply different standards of review. Concepts and terminology are often very different[4]. German doctrine mainly addresses the question of intensity of judicial review using the concepts of "Beurteilungsspielraum" and "Ermessen"[5]. Sometimes, even courts of the same jurisdiction will develop more than one standard of review, depending on the issue before them. The palette can thus be very colourful indeed – we have, amongst others, the "manifest error" test, the "reasonableness" test or the "hard look" standard of judicial review in the United States.

Although these labels give a general impression of the stance of a court, **the exact scope of each of these standards** is not always clear and the lines between them are often notoriously blurred. It has been argued that the manifest error test can easily slide into substituting a court's assessment for the decision of the public administration[6]. The same holds true for the standard focusing on the reasoning of the decision under review. In theory, the review of whether the reasoning of a decision is appropriate sounds less intrusive than a review of the merits of the decision. In practice, however, courts may use this seemingly procedural standard to double-check whether the reasons given are also good reasons. This has the effect of transforming "a mild, essentially procedural requirement into a draconian, substantive one"[7].

Most importantly, the intensity of scrutiny reflects deep-rooted traditions on the balance of power between courts and other decision-makers. For example, in general, German courts scrutinise much more closely the decisions of the public administration[8] compared to other jurisdictions, such as the United States. This stance goes back a long way in German thinking, and is also associated with the philosophical conviction that there is "one right answer" to legal questions, an approach itself related to German idealism. On this basis, German courts are much more willing to replace the assessment of the public administration regarding the facts and legal situation with their own assessment, compared, for example, to their US counterparts, who focus more on checking the procedural propriety of the decision under review and not its substance.

Part 2 of this book discusses the standard of review applied by some of the most important courts, when reviewing decisions of central banks. The standard of review

4 For example, the German Federal Constitutional Court uses the terms "Prüfungsansatz" and "Prüfungsmaßstab", which it translates to "standard of review".

5 Which both translate into "discretion".

6 See Chiti, M., Macchia, M. and Magliari, A. (forthcoming 2020) *The Principle of Proportionality and the ECB*.

7 Shapiro, M. and Sweet, A.S. (2002) *On Law, Politics, and Judicialization* (Oxford: Oxford University Press), p. 235.

8 However, there is no precedent on reviewing actions of the Bundesbank.

of central bank decisions has some important peculiarities that require a different discussion from that amongst legal scholars and courts on the standard of review for legislative or administrative decisions, which are not covered here.

Indeed, central banks are a special type of public authority. They have specific technical knowledge and competence; their primary objective, to pursue price stability, is often in conflict with politicians' short-term objectives. For these two reasons, and especially in order to be able to achieve their objective, central banks are typically endowed with independence from the political power. Sometimes this independence has even the rank of constitutional law, as is the case with the European Central Bank (ECB). Nevertheless, independence does not make central banks immune from judicial review and their actions remain subject to the rule of law. In the case of the ECB, this was confirmed by the CJEU in the European Anti-Fraud Office (OLAF) case[9]. While this is the case, and central banks like all other authorities are under the jurisdiction of the courts, the standard of judicial review applied to central banks decisions becomes an all the more important question, as it needs to balance central bank expertise and independence with effective judicial scrutiny, an essential element of the rule of law. As there is no general theory on the proper standard of review of central bank decisions, this is a new and challenging topic, which requires a comparative approach.

Perhaps one of the most interesting issues when it comes to the standard of review is to look behind the labels describing the standard of review, such as "manifest error" and "reasonableness", to focus on the criteria used by courts when they grant deference[10]. What motivates a court to defer more on one occasion and less on another? Are there considerations related to the central bank's expertise, independence, or accountability that play a decisive role? Experience shows that there is a discrepancy not only in the degree of deference but also in the reasons on the basis of which it is granted. On some occasions, it is expertise that plays the most prominent role, while in others the basic criterion is the procedure followed, or the reasoning for the decision. Where the correct, open and discursive procedure has been followed, courts are more willing to accept the decision. This raises another, related, question: should courts opt for a procedural or a substantive standard of review? Should they go into the merits of the decision under review or are they perhaps better placed to assess its procedural propriety, such as the adequacy of its justification and the extensiveness of the research and analysis leading to the decision?

Another interesting issue is whether the standard of review should be different when a decision belongs to the monetary or supervisory function of a central bank. Should courts be more deferential when they assess decisions of monetary policy, where central banks typically enjoy broad discretion, and less in the field of prudential

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9 Judgment of 10 July 2003, *Commission of the European Communities* v *European Central Bank*, C-11/00, EU:C:2003:395.

10 Ioannidis, M. "Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach", in Lukasz Gruszczynski and Wouter Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford: Oxford University Press), pp. 94-96.

supervision, where central banks are not setting the policy and are called to implement the rules adopted by the legislature? Could there be differences even with regard to different supervisory decisions?[11]

In this short introductory text, I cannot answer these fundamental questions, but I would like to engage with them through reflecting on the three complementary contributions of this part. All three offer a very interesting account of different practices informed by different constitutional traditions and underlying ideologies and provide material for many discussions. One particular dimension deserves however special attention: namely, the criteria used by courts, explicitly or implicitly, when they are called to decide whether they will grant deference to central bank decisions.

In his contribution, Judge Huber analyses in detail the jurisprudence of the German Federal Constitutional Court when it comes to issues of European integration. The review of actions (or inactions) of domestic institutions on the basis of the German Constitution sometimes requires the incidental analysis of ECB acts and, ultimately, a request for a preliminary ruling from the CJEU, where doubts exists on the legality of the ECB acts. Although the Federal Constitutional Court does not have the power to review the legality of ECB acts itself, it has developed a set of criteria for addressing those issues. In particular, the notion of ultra vires review is only applied if it is manifest to the Federal Constitutional Court that acts of EU bodies and institutions have been effected outside their competences. A breach of the principle of conferral is only manifest if it is sufficiently qualified. This means that the act of the EU institution at stake must be manifestly in violation of competences and that the impugned act is significant in the structure of the allocation of competences between the Member States and the Union in terms of the principle of conferral. This seems to me a standard of review that is, in principle, open enough to account for the mandate and expertise of the ECB. In implementing this standard, the Federal Constitutional Court seems sometimes to adopt a restrictive stance, based on a reading of democracy that focuses exclusively on the protection of German parliamentary prerogatives. I wonder, however, whether this criterion is an appropriate one when tackling EU-wide issues, where legitimacy should be measured on a European and not simply a national scale.

Judge Bay Larsen sets out with clarity the position of the CJEU. In principle, the intensity of the judicial scrutiny is not limited and the scrutiny that the EU Courts exercise is a full control one. Limited control should be regarded as an exception. However, these exceptions do not fit neat scientific categories in which individual cases can be “boxed”. Nonetheless, Judge Bay Larsen identifies some criteria that may induce the Court of Justice (or the General Court) to exercise some judicial restraint: the intent of the EU legislature or the drafters of the Treaties to assign some scope for discretion to a certain (independent) institution; the particular technical complexity of factual circumstances; and the involvement of political, economic and social choices. On the other hand, the more a private party is affected

[11] Zilioli, C. “Justiciability of central banks’ decisions and the imperative to respect fundamental rights”, in ECB Legal Conference 2017, pp. 91-103, https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf?b452

by an administrative decision, the more intense the judicial scrutiny should be. With regard to the ECB, the practice of the CJEU in *Gauweiler*[12] and *Weiss*[13], in particular, shows the relevance of the criteria of expertise and of exercising the discretion granted by the legislature in making economically-relevant choices. According to Judge Bay Larsen, the application of these criteria to the ECB has essentially been based on criteria established in other domains of EU law, without giving specific privileges or disadvantages to the ECB. Independence does not seem to offer an additional argument for deference.

The overview provided by Stefanie Egidy on US law offers a very interesting picture. The Federal Reserve's monetary policy decisions have been largely exempt from judicial review. Irrespective of the doctrinal explanations for this limited control, which may be denial of justiciability or denial of standing, the underlying reason for deference may be seen as respect for central bank independence, expertise and institutional balance. When it comes to the establishment of the rules governing the appointment and decision-making processes, deference is owed due to the priority of the political process in these contexts. In relation to the supervisory and regulatory role of the Fed, the US courts apply a deferential standard of review with regard to the substance of the decisions and focus on checking the decision-making process, following the general doctrine of US administrative law. Central bank independence or rights beyond due process play no role in this context.

In my view, expertise and the respect for the discretion assigned by the legislature to the central bank in its field of competence are the most important criteria for calibrating the standard of review. Independence from the political power does not protect a central bank from judicial review. At the same time, it cannot be the reason for a more intense judicial review, as the latter cannot be a substitute for political accountability: judges themselves are not accountable to the electorate. The intensity of judicial review can only derive from the respect for the institutional balance and the competences established in the Treaty or the relevant constitution. In reality, procedural standards and the proportionality principle are generally capable of striking the right balance: courts, by requiring decision-makers to keep to their decision-making procedures that allow for a broad exchange of views, ensure that these decisions are subject to in-depth review, without substituting their own assessment. On the other hand, such procedural checks need to remain genuinely procedural and not implicitly divert into other matters, going into as much depth as strict substantive checks.

[12] Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400.

[13] Judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000.

The ECB under the scrutiny of the *Bundesverfassungsgericht*

Peter M. Huber[1]

The Federal Constitutional Court of Germany – the *Bundesverfassungsgericht* – already started to deal with European integration in the 1970s.[2] Over the last 45 years it has produced quite a long line of decisions dealing with different aspects of European integration and the Europeanisation of the national legal order. The most famous decisions are the *Solange I* (1974)[3] and the *Solange II* decision (1986),[4] the *Maastricht* judgment (1993),[5] the *Banana market* decision (2000),[6] the decision on the European arrest warrant (2005), the *Lisbon* judgment (2009),[7] the *Honeywell* decision[8] and the 8 orders and judgments dealing with the financial crisis: the judgment on the European Financial Stability Facility (EFSF) and state aids for Greece (2011),[9] the judgment on the special committee for EFSF measures (2012),[10] the judgment on the Parliament's rights to be informed in European affairs (2012),[11] the judgment on the plea for a temporary injunction against the Treaty on the European Stability Mechanism (ESM) and the Treaty on the Fiscal Compact (2012),[12] the request for a preliminary ruling on the Outright Monetary Transactions (OMT) programme of the European Central Bank (ECB) (2014),[13] the final judgment on the Treaty establishing the ESM and on the Treaty on the Fiscal Compact (2014),[14] the judgment on the OMT programme (2016),[15] the request for a preliminary ruling on the Expanded Asset Purchase Programme (EAPP) of the ECB (2017),[16] and, finally, the judgment on the banking union (2019).[17]

Although its focus has shifted from the protection of human rights towards the protection of the democratic institutions of the nation state as well as the observance of the Union's legal order, and, although there may have been a certain change in

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2 Before 1974 see BVerfGE 22, 293 <296>; 31, 145 <173 f.>.

3 BVerfGE 37, 271 ff. – Solange I.

4 BVerfGE 73, 339 ff. – Solange II.

5 BVerfGE 89, 155 ff. – Maastricht.

6 BVerfGE 102, 147 ff. – Banana market.

7 BVerfGE 123, 267 ff. – Lissabon.

8 BVerfGE 126, 286 ff. – Honeywell.

9 BVerfGE 129, 124 ff. – Guarantees for Greece and EFSF.

10 BVerfGE 130, 318 ff. – Special committee.

11 BVerfGE 131, 152 ff. – *Bundestag*'s rights to be informed.

12 BVerfGE 132, 195 ff. – Temporary injunction against ESM and Fiscal Compact.

13 BVerfGE 134, 366 ff. – OMT (request for a preliminary ruling).

14 BVerfGE 135, 317 ff. – ESM and Fiscal Compact (final judgment).

15 BVerfGE 142, 123 ff. – OMT (final judgment).

16 BVerfGE 146, 216 ff. – EAPP (request for a preliminary ruling).

17 BVerfG, Judgment of 30 July 2019 – 2 BvR 1685/14 – Banking Union.

tone over the last 40 years, the cornerstones of the Court's approach to European integration have remained unaltered: national legislation as a basis for European integration, the principle of conferral as an emanation of national sovereignty and the preservation of the national constitutional identity.

I Three decisive pillars of the "constitutional approach" to European law

1 National legislation and the responsibility of national institutions

a) National legislation as the basis for European integration

In its *Lisbon* judgment the court stated that, despite all the utopias surrounding the term "multi-level-constitutionalism", the European Union (EU) remains an association of sovereign states based on public international law. It is therefore steered by the Member States, which, as former judgments had put it, are and continue to be the "Masters of the Treaties".[18] They cannot be deprived of this role but by their explicit assent (in accordance with the constitutional requirements of each Member State). Against this background EU measures can only be recognised within a national jurisdiction if they have been authorised and legitimised by the respective Member State. The European Treaties (Treaties) have to be applied because and insofar as national parliaments have approved and ratified them (*Rechtsanwendungsbefehl*). This is considered the democratic basis of the integration programme (*Integrationsprogramm)*.

By empowering the Federation to transfer certain sovereign powers under Article 23 section 1 sentence 2, the German constitution (the Basic Law) opens national sovereignty and thus also accepts a precedence of application of EU law (*Anwendungsvorrang*).[19] Such transfer of powers through the federal act approving the EU Treaties and their amendments may not only exempt EU institutions, bodies, offices and agencies but also German entities that implement EU law from the strict obligation to observe the guarantees of the Basic Law. However, the precedence of application of EU law only is limited to the extent that the Basic Law and the relevant act of approval permit or envisage the transfer of competences.

Be it the *Bundesverfassungsgericht* with its *Solange* and *Maastricht* doctrine, the Italian *Corte Costituzionale* with its "*controlimiti*" doctrine[20] or the jurisprudence of the

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18 BVerfGE 123, 267 <381> – Lissabon; BVerfGE 75, 223 <242> – 6th VAT Directive; 89, 155 <190> – Maastricht; *Peter M. Huber*, Recht der Europäischen Integration, 2002, § 5 para. 13 ff.

19 Not "primacy" as this term entails a hierarchical connotation.

20 *Carlo Panara*, Offene Staatlichkeit: Italien, in: v. Bogdandy/Cruz Villalón/Huber (ed.), IPE II, § 18 para. 20 ff., 34, referring to the decisions in *Frontini, Granital* und *Fragd v. Amministrazione delle Finanze Nr. 232*.

Conseil Constitutionnel,[21] the Greek Council of State, the UK Supreme Court,[22] the Polish Constitutional Court[23] or the majority of the other Member States' constitutional and supreme courts[24] – almost all Member States share a similar concept – though their constitutional orders may differ in their concrete design.[25]

b) Democratic legitimation by conferral

Given that national legislation is the basis for the applicability of EU law, the EU can only make use of those competences conferred upon it by the Member States. Therefore, in order to comply with the requirement of democratic legitimacy any activity of the EU and its institutions must remain within the limits set for the integration programme in the Treaties and be approved by national parliaments. Against this background, it seems self-evident that there can be no EU activities and no application of EU measures if those lack a sufficient empowerment by the Member States, i.e. by the Treaties.

c) Responsibility for European integration

The constitutional institutions, being entitled to transfer competences to the EU, on the one hand, are accorded a special responsibility with respect to European integration (*Integrationsverantwortung*), on the other hand.[26] This means that, if institutions, bodies, offices and agencies of the EU exceed their competences or violate the constitutional identity of the Member States in other ways, the constitutional institutions must actively work towards adherence to the limits of the European integration programme.

They may – within the scope of their competences – be required to use legal or political means to work towards a revocation of measures that are not covered by the European integration programme as well as – as long as those measures continue to have effect – to take suitable measures to restrict the national effects of such measures as far as possible. Just like the state's duties to protect that are inherent in fundamental rights (*grundrechtliche Schutzpflichten*), the *Integrationsverantwortung* may in certain legal and factual circumstances be concretised in a way that a specific duty results from it.

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21 *Catherine Haguenau-Moizard*, Offene Staatlichkeit: Frankreich, in: v. Bogdandy/Cruz Villalón/Huber (ed.), IPE II, § 15 para. 28.

22 *Patrick Birkinshaw/Martina Künnecke*, Offene Staatlichkeit: Großbritannien, in: v. Bogdandy/Cruz Villalón/Huber (ed.), IPE II, § 17 para. 17.

23 PolnVerfGH, K 18/04, EuR 41 (2006), S. 236; *Stanislaw Biernat*, Offene Staatlichkeit; Polen, in: v. Bogdandy/Cruz Villalón/Huber (ed.), IPE II, § 21 para. 45.

24 *Franz C. Mayer*, Europäische Verfassungsgerichtsbarkeit, in: v. Bogdandy/Bast (ed.), Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge, 2. Aufl. 2009, S. 559 (578 ff.); *Karl Peter Sommermann*, Offene Staatlichkeit: Deutschland, in: v. Bogdandy/Cruz Villalón/Huber (ed.), IPE II, § 14 para. 61.

25 *Peter M. Huber*, Offene Staatlichkeit: Vergleich, in: v. Bogdandy/Cruz Villalón/Huber (ed.), IPE II, § 26 para. 34.

26 *Peter M. Huber,* Die Integrationsverantwortung von Bundestag und Bundesregierung, in: ZSE 15 (2017), 286 ff.

2 Constitutional identity as a limit to European integration

a) On the merits

Since the 1970s the *Bundesverfassungsgericht* has emphasised in a long line of case law[27] that there are limits to the constitutional empowerment for a transfer of sovereign powers to the European institutions. With regard to Article 24 section 1 Basic Law, which originally was the relevant provision for the transfer of powers to the European Economic Community, it held that the said provision does not grant the power to transfer sovereign rights to supranational institutions to the extent that such transfer affects the identity of the constitutional order by modifying the basic principles of the constitution.[28] When amending the constitution in 1992, the legislator codified this case law in Article 23 section 1 sentence 3 Basic Law. In other words, the limits the legislator has to respect when amending the constitution also apply to the advancement of European integration. The *Bundestag* (Parliament), the *Bundesrat* (Federal Council) and the *Bundesregierung* (Federal Government), the so-called *pouvoirs constitués*, do not possess the power to touch this constitutional identity. If this should become necessary, an act of the constituent power would be required: the *pouvoir constituant* (Article 79 section 3, Article 146 Basic Law), i.e. a national referendum.[29]

In the *Lisbon* judgment, the *Bundesverfassungsgericht* tried to further sort out what the constitutional identity set out in Article 79 section 3 Basic Law means, and elaborated that the Basic Law also guarantees the sovereign statehood of the Federal Republic of Germany.[30] It stated that the principle of democracy (Article 20 section 1 and 2 Basic Law) entails a special responsibility for parliament when it comes to European integration (*Integrationsverantwortung*) and that it requires the *Bundestag* and the *Bundesrat* to play an active role in European matters. These constitutional requirements, laid down in Article 23 section 2 to 6 Basic Law resemble very much what Article 12 TEU and the Protocols on the Role of National Parliaments in the EU and on the Application of the Principles of Subsidiarity and Proportionality require from an EU perspective.[31]

As far as the allocation of competences between the EU and the Member States is concerned, this means that the latter have to retain the right to unilaterally withdraw

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27 BVerfGE 37, 271 ff. – Solange I; 73, 339 ff. – Solange II; 75, 223 ff. – 6th VAT Directive; 80, 74 ff. – e. A. Fernsehrichtlinie; 89, 155 ff. – Maastricht; 123, 267 ff. – Lissabon.

28 Stressed in BVerfGE 73, 339 (375 ff.) – Solange II.

29 BVerfGE 123, 267 <348 f.> – Lissabon; *Herbert Bethge,* in: HStR VIII, 1992, § 199 para. 26; *Horst Dreier*, Gilt das Grundgesetz ewig?, 2008, S. 95 f.; *Peter M. Huber*, AöR 116 (1991), 210 <250>; *Peter M. Huber*, Die Anforderungen der Europäischen Union an die Reform des Grundgesetzes, ThürVBl 1994, 1 <7 f.>; *Hans Dieter Jarass,* in: Jarass/Pieroth, GG, 15th ed., 2018, Art. 146 para. 5; *Michael Kirn,* in: v. Münch/Kunig, GG II, 6th ed., 2012, Art. 146 para. 9 ff.; *Lothar Michael*, in: BK (2013), Art. 146 para. 671 ff.; *Wolfgang Schäuble,* Das Grundgesetz zwischen Bestand und Veränderung, in: Huber (ed.), Das Grundgesetz zwischen Stabilität und Veränderung, 2007, S. 65 (71 f.); *Ewald Wiederin*, AöR 117 (1992), 410 <447>.

30 BVerfGE 123, 267 <346 ff.> – Lissabon; earlier *Peter M. Huber*, Maastricht – ein Staatsstreich?, 1993, p. 22 ff.

31 BVerfGE 131, 152 <198> – *Bundestag*'s rights to be informed.

from the EU – which is expressly established in Article 50 TEU –, that the EU cannot be granted the "*Kompetenz-Kompetenz*", but rather that the allocation of competences is based on the principle of conferral,[32] and that the "majority of functions and powers" must remain with the Member States.[33]

During the Euro crisis the *Bundesverfassungsgericht* had the opportunity to further shape the budgetary dimension of the constitutional identity. In its judgment concerning the EFSF and state aids for Greece,[34] as well as in the judgments dealing with the ESM,[35] it has identified the **budget autonomy** of the German parliament as a fundamental part of the constitutional identity and declared the *Bundestag*'s overall fiscal autonomy to be inalienable. It stated specifically:

"Against this background, the German Bundestag must not transfer its budget autonomy to other participants by granting indefinite authorisations concerning fiscal policy. In particular, it may not – not even by statute – subject itself to mechanisms of financial importance which – be it because of the general concept or the result of an overall evaluation of individual measures – could lead to incalculable burdens on the budget (expenditure or loss of revenue) without the necessary prior approval. Prohibiting the Bundestag from relinquishing its budget autonomy in this way is not an inadmissible restriction of the legislator's budgetary competence, but is in fact aimed at its protection."[36]

b) Identity review

When conducting its identity review, the *Bundesverfassungsgericht* examines whether the principles declared inviolable by Article 79 section 3 Basic Law are affected by transfers of competences by the legislature or by acts of institutions, bodies, offices and agencies of the EU. This concerns the protection of the fundamental rights' core of human dignity (Article 1 Basic Law)[37] as well as the fundamental guarantees laid down in Article 20 Basic Law such as the principles of democracy, the rule of law, the republic, the social and the federal state.

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32 BVerfGE 75, 223 <242> – 6th VAT Directive.

33 BVerfGE 89, 155 <186> – Maastricht.

34 BVerfGE 129, 124 <179 ff.> – Aid for Greece and EFSF.

35 BVerfGE 132, 195 ff. – Temporary injunction against ESM and Fiscal Compact; 135, 317 ff. – ESM and Fiscal Compact (final judgment).

36 BVerfGE 129, 124 <179 ff.> – Aid for Greece and EFSF.

37 BVerfGE 140, 317 ff. – Identity review I.

3 The ultra vires review

a) National match of the principle of conferral

The sovereignty of the people (*Volkssouveränität*), a democratic principle laid down in Article 20 section 2 sentence 1 Basic Law, is violated if EU institutions, bodies, offices and agencies are not adequately democratically legitimised by the European integration agenda laid down in the respective act of approval to exercise public authority.[38] Therefore, if EU measures – including decisions of the ECJ and other European courts – violate the principle of conferral they are considered to be *ultra vires* and not applicable within the national jurisdiction.[39]

This was enunciated for the first time in the *Maastricht* judgment of 1993,[40] has since been confirmed in the *Lisbon* judgment of 2009[41] and was outlined in more detail in the *Honeywell* ruling of 2010[42] and especially in the *OMT* judgment of 2016.[43] Although the Court rejected *ultra vires* claims in the *Honeywell* case by the majority,[44] this does not mean that the Court's control is ineffective. The effectiveness is proven by its requests for preliminary rulings in the OMT[45] and in the EAPP[46] case. In both cases the *Bundesverfassungsgericht* has (tentatively) held programmes of the ECB to be *ultra vires*.

The idea that the Member States as masters of the Treaties must maintain a say in the way how the allocation of competences between the EU and the Member States is put into practice and that they are insofar obliged or entitled to exercise at least a remote control over it seems to be convincing as it has gained followers among other Member States' Constitutional and Supreme Courts.[47]

b) Loyal cooperation

National courts deciding on the limits of competences conferred on EU institutions is inevitably a recurring source of conflict. It is the ECJ which possesses, inter alia, the competence to adjudicate on whether the EU institutions keep within their

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38 BVerfGE 142, 123 <174 para. 82 > – OMT (final judgment).

39 See for the Czech Republic: Ústavni Soud, judgment of 31 January 2012 - Pl. ÚS 5/12 -, Sec. VII (*Holoubec*); for the UK: UK Supreme Court - *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another (Respondents)* - [2014] UKSC 3.

40 BVerfGE 89, 155 <188, 195, 210> – Maastricht.

41 BVerfGE 123, 267 <398 ff.> – Lissabon.

42 BVerfGE 126, 286 ff. – Honeywell; on this see *Alexander Proelß*, Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen der Europäischen Union: Der „ausbrechende Rechtsakt" in der Praxis des BVerfG, EuR 46 (2011), 241 ff.

43 BVerfGE 142, 123 ff. – OMT (final judgment).

44 BVerfGE 126, 286 <308 ff.>; see dissenting opinion of *Landau* p. 318 ff.

45 BVerfGE 134, 366 ff. – OMT (request for a preliminary ruling).

46 BVerfGE 146, 216 ff. – EAPP (request for a preliminary ruling).

47 See Czech Constitutional Court Pl. ÚS 5/12 – Slovak Pensions; Højesteret, 6 December 2016, Case no. 15/2014 DI acting for Ajos A/S vs. The estate left by A.

competences (Article 19 paragraph 1 sentence 2 TEU). If it approves acts that exceed the competences conferred, it thus acts *ultra vires* itself. It is therefore not only a question of common sense, but a duty under European law (Article 4 paragraph 3 TEU) and under (German) constitutional law (Article 23 section 1 Basic Law) to avoid such conflicts wherever possible (*Grundsatz der Europarechtsfreundlichkeit*).[48] In its *Honeywell* decision the *Bundesverfassungsgericht* therefore stated:

"This means for the ultra vires review at hand that the Federal Constitutional Court must comply with the rulings of the Court of Justice in principle as a binding interpretation of Union law. Prior to the acceptance of an ultra vires act on the part of the European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU. As long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany."[49]

This conveys, on the one hand, respect for the EU's own methods to which the ECJ considers itself to be bound and which do justice to the "uniqueness" of the Treaties and goals that are inherent to them.[50] It also means that the ECJ has a right to a tolerance of error (*Fehlertoleranz*).[51] It is hence not up to the *Bundesverfassungsgericht* to supplant the interpretation of the ECJ with an interpretation of its own.[52] Against this background, the *Bundesverfassungsgericht*'s request for a preliminary ruling in the OMT case suggesting a more limited interpretation of the European Central Bank's mandate was a – successful – attempt to bridge or reduce divergences in the interpretation of Article 119 ff. TFEU and to avoid a conflict between EU law and the requirements of the Basic Law, which does not allow "carte blanche" to be conferred on EU institutions and bodies.[53]

c) Standards of the ultra vires review

Ultra vires review by the *Bundesverfassungsgericht* can only be considered if it is manifest that acts of EU bodies and institutions have exceeded the competences conferred. A breach of the principle of conferral is only manifest if they have

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48 BVerfGE 123, 267 <354>; 126, 286 <303 f.>; 134, 366 <382 f.>; previously *Peter M. Huber*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), 194 <231 f.>.

49 BVerfGE 123, 267 <353>.

50 ECJ, Opinion 1/91, *European Economic Area*, EU:C:1991:490, para. 51.

51 BVerfGE 126, 286 <307>; 142, 123 <201 para. 149>.

52 BVerfGE 126, 286 <304 ff.>; on the "tolerance of error" see *Peter M. Huber*, Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der gemeinschaftsrechtlichen Kompetenzordnung, AöR 116 (1991), 210 <219>.

53 The UK Supreme Court's attempt in the HS2 case to reinterpret the ECJ's jurisprudence concerning the directive on strategic environmental planning could be understood in a similar way, UK Supreme Court - *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another (Respondents)* [2014] UKSC 3.

transgressed their competences in a manner specifically violating the principle of conferral (Article 23 section 1 Basic Law), and if the breach of competences is sufficiently qualified.[54] This means that the act of the EU must be **manifestly in violation of competences** and that the impugned act is **significant in the structure of competences** between the Member States and the EU with regard to the principle of conferral and to the binding nature of the statute under the rule of law.[55]

II The key role of the democratic principle

Until the 1990s the main constitutional concern in Germany was that European integration would endanger the level of protection for fundamental rights laid down in the Basic Law. This has become a lesser concern in the past 28 years whereas the democratic issue has turned out to be the key question of European integration – at least from the German perspective.

1 Democratic principle and human dignity

Behind this line of adjudication lies a specific concept – critics might also say exaggeration – of democracy. Its origins can be traced back to the *Bundesverfassungsgericht's* KPD judgment of 1954[56], but it did not emerge clearly until after reunification. If the approach of other Member States to the democratic principles is doctrinally less elaborated,[57] this does not mean that those states were less democratic in practice. Europe's "most democratic" state, Switzerland, does not even recognise any *principle* of democracy.[58] Democracy is simply realised by the application of the procedures provided for the forming of the political will.

The German concept, however, substantially amounts to the proposition that the principle of democracy and the sovereignty of the people (Article 20 sections 1 and 2 Basic Law) are based on an individual right to political self-determination which itself is rooted in the guarantee of human dignity (Article 1 section 1 Basic Law). Like all fundamental rights, this right to democracy has a tendency to strive for an expansion of the range of opportunities that it involves.[59] Therefore, democracy is not merely an abstract principle that is given effect to by elections of some kind; it requires that the individual is taken seriously as a voter and as a citizen, that he or she has a real say

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54 On the notion of "sufficiently qualified" as an element of non-contractual liability under Union law, see, for instance, ECJ, judgment of 10 July 2003, *Commission v Fresh Marine*, C-472/00 P, EU:C:2003:399, paras. 26 and 27.

55 BVerfGE 142, 123 ff. – OMT (final judgment).

56 BVerfGE 5, 85 (204 f.) – KPD.

57 *Peter M. Huber*, in: Streinz (ed.), EUV/AEUV, 3rd ed. 2018, Art. 10 EUV para. 9 ff.

58 *Karl Peter Sommermann,* Demokratiekonzepte im Vergleich, in: Bauer/Huber/ders. (ed.), Demokratie in Europa (ed.), S. 191 ff.

59 Fundamental in this regard BVerfGE 107, 59 (91 f.) – Wasserverbände NRW; 123, 267 (342 ff.) – Lissabon; *Peter M. Huber*, Demokratie in Europa – Zusammenfassung und Ausblick, in: Bauer/ders./Sommermann (ed.), Demokratie in Europa, 2005, S. 491 (495 f.); *Sebastian Unger*, Das Verfassungsprinzip der Demokratie, 2008, passim.

in the nation's political issues or that he or she must not be controlled and patronised by the state, the EU or any other political institution.

2 Parliament and the right to vote

Democratic legitimation – seen from the point of view of the Basic Law – is realised primarily through decisions of parliament (*Wesentlichkeitsdoktrin*) and through the involvement of the *Bundestag* in the decision making process on national and supranational level. The national Parliament is considered the centre of democracy and an essential part of our constitutional identity.[60] If the *Bundestag*, therefore, loses competences, the right to vote guaranteed in Article 38 section 1 sentence 1 Basic Law loses substance. The capacity of the individual to political self-determination is diminished and he or she must therefore be entitled to make a constitutional complaint arguing that the treaty or the measure at stake would go too far and violate the constitutional identity of the Basic Law and their right to political self-determination.

This concept of democracy is a cornerstone of the *Bundesverfassungsgericht*'s jurisprudence since reunification, and underlies the court's approach to Monetary Union, ESM and ECB.

III The ECB related jurisprudence

1 Order of 14 January 2014 – OMT Request for a Preliminary Ruling[61]

a) The case

On 6 September 2012 the Governing Council of the European Central Bank decided on a programme concerning the purchase of government bonds of financially weak Member States (OMT programme). The OMT Decision envisages that the ECB could purchase government bonds of selected Member States up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the EFSF or the ESM. The stated aim of the OMT programme was to safeguard an appropriate monetary policy transmission and the consistency or "singleness" of the monetary policy.

More than 40,000 citizens and the parliamentary group "Die Linke" challenged this decision before the *Bundesverfassungsgericht,* contending that the OMT programme

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60 *Peter M. Huber*, Offene Staatlichkeit: Vergleich, in: v. Bogdandy/Cruz Villalón/Huber (ed.), IPE II, § 26 para. 83 ff.

61 BVerfGE 134, 366 – OMT (request for a preliminary ruling).

would go beyond the empowerment of the ECB and that the ECB would, therefore, act *ultra vires*. In a reasonable assessment of their applications, the complainants challenged the participation of the *Bundesbank* in the implementation of the OMT and, secondly, that the Federal Government and the *Bundestag* had failed to act regarding the OMT Decision.

b) The first request for a preliminary ruling

In course of these proceedings, the *Bundesverfassungsgericht*, for the first time in its history, referred questions to the ECJ for a preliminary ruling pursuant to Article 19 paragraph 3 (b) TEU and Article 267 paragraph 1 (a) and (b) TFEU. The *Bundesverfassungsgericht* considered the OMT Decision to be incompatible with Article 119 and Article 127 paragraph 1 and 2 TFEU and Article 17 et seq. of the ESCB Statute because it exceeded the mandate of the ECB and encroached upon the Member States' competence for economic policy. It also appeared to be incompatible with the prohibition of monetary financing of the budget enshrined in Article 123 TFEU. Another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law.

(i) The independence which the ECB and the national central banks enjoy in the exercise of the powers conferred upon them (Article 130, Article 282 paragraph 3 sentences 3 and 4 TFEU) diverges from the requirements the Basic Law states with regard to the democratic legitimation of political decisions. For Germany, the *Bundesverfassungsgericht* has expressly held that democratic legitimation is reduced by the transfer of monetary policy powers to an independent ECB, and that this affects the principle of democracy. It is only compatible with democratic requirements because it is based on the tested and scientifically documented insight that the special character of monetary policy and monetary stability are better safeguarded by an independent central bank. The constitutional justification of the independence of the ECB is, however, limited to a primarily stability-oriented monetary policy *strictu sensu* and cannot be transferred to other policy areas.[62]

The independence of the ECB does not preclude judicial review with regard to the delineation of its mandate.[63] The independence guaranteed by Article 130, Article 282 paragraph 3 sentences 3 and 4 TFEU only refers to the actual powers (and their specific content) that the Treaties confer on the ECB, but does not refer to the determination of the extent and scope of its mandate. It would be incompatible with the principle of conferral (Article 5 paragraph 2 TEU) if an EU institution could autonomously determine the powers assigned to it.

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62 Article 88 sentence 2 Basic Law; BVerfGE 89, 155 <208 f.>; 97, 350 <368>.

63 ECJ, Judgment of 10 July 2003, *Commission v ECB*, C-11/00, EU:C:2003:395, para. 135 et seq.

(ii) The division of powers between the EU and the Member States is governed by the principle of conferral (Article 5 paragraphs 1 and 2 TEU). This also applies to functions and powers that are assigned by the Treaties to the ESCB. According to the Treaties the ECB is responsible for monetary policy. The responsibility for economic policy, however, lies with the Member States. Articles 119 and 127 et seq. TFEU and Article 17 et seq. ESCB Statute include in principle a mandate that is limited to monetary policy for the ESCB in general and the ECB in particular.[64] In addition, the ESCB is only allowed to support the general economic policies in the EU. Following these principles, the OMT Decision does not appear to be covered by the mandate of the ECB. Relevant to the delimitation of the competences are the **objective** of an act, the instruments envisaged to achieve the objective, and its link to other provisions.[65]

As far as the classification from the point of view of the distribution of powers is concerned, it is thus crucial, first, whether the act directly pursues economic policy objectives. In the *Pringle* case, the ECJ affirmed this with regard to the European Stability Mechanism, because its aim is the stabilisation of the euro currency area as a whole. The ECJ held that such an act could not be treated as equivalent to an act of monetary policy for the sole reason that it might have indirect effects on the stability of the euro. On the basis of this case-law, purchases of government bonds may not qualify as acts of monetary policy for the sole reason that they also indirectly pursue monetary policy objectives.

However, what is relevant is not only the objective, but also the instruments used for reaching the objective and their effects. According to the case-law of the ECJ, acts of monetary policy are, for instance, the decision on key interest rates for the euro currency area and the release of the euro currency.[66] In contrast, the grant of financial assistance “clearly” does not fall within monetary policy.[67] To the degree that the ESCB thus grants financial assistance, it pursues an economic policy that the EU is prohibited from conducting.

Finally, it is relevant how the act in question relates to other provisions. In particular, references of an act to other provisions and the embedding of an act in an overall regulation that consists of several individual measures can indicate its adherence either to the economic or the monetary policy. Thus, the ECJ decided, with regard to the European Stability Mechanism, that Decision 2011/199 of the European Council of 25 March 2011, which aims at the conclusion of

64 BVerfGE 89, 155 <208 f.>.

65 ECJ, Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, para. 53 et seq., at para. 60.

66 ECJ, Judgment of 27 November 2012, *Pringle*, C-370/12, paras. 95 and 96.

67 ECJ, Judgment of 27 November 2012, *Pringle*, C-370/12, para. 57.

the ESM Treaty, because of its reference to the economic provisions of the TFEU as well as to the secondary legislation of the so-called Six-pack, has to be regarded as an additional part of the new regulatory framework to strengthen the economic governance of the EU, and that this indicates that the European Stability Mechanism belongs to the area of economic policy.[68]

According to these principles, it seemed likely that the OMT programme was not covered by the mandate of the ECB. Based on an overall assessment of the delimitation criteria that the *Bundesverfassungsgericht* considered relevant, it did not constitute an act of monetary policy, but a predominantly economic policy act. This was supported by its objective, its selectivity, the parallelism with the EFSF and the ESM and the risk of undermining their objectives and requirements.

(iii) The prohibition of monetary financing of the budget enshrined in **Article 123 TFEU** also includes a prohibition of bypassing Article 123 TFEU and Article 21.1. ESCB Statute, which forbid the purchase of government bonds "directly" from the emitting Member States, i.e. the purchase on the primary market. This prohibition is, however, not limited to this interdiction, but is an expression of a broader prohibition of monetary financing of the budget.[69] EU law recognises the legal concept of bypassing as the national legal systems do. It is ultimately based on the principle of effectiveness ("effet utile") and has repeatedly been alluded to in the ECJ's jurisprudence.[70] It seems obvious that this must also apply to the interpretation of Article 123 TFEU, and that the prohibition of the purchase of government bonds directly from the issuing Member States may not be circumvented by functionally equivalent measures.[71]

In addition to the above-mentioned aspects, the willingness of the ECB to participate in a debt cut with regard to the purchased bonds, the increased risk of such a debt cut regarding the purchased government bonds, the option to keep the purchased government bonds to maturity, the interference with the price formation on the market and the encouragement of market participants to purchase the bonds in question on the primary market were regarded as strong indications for an infringement of Article 123 TFEU.

In the view of the *Bundesverfassungsgericht* the objective mentioned by the ECB to justify the OMT Decision, namely to correct a

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68 ECJ, Judgment of 27 November 2012, *Pringle*, C-370/12, para. 58 et seq.

69 *Vestert Borger*, German Law Journal 2013, p. 113 <119, 134>; *Alberto de Gregorio Merino*, CMLR 2012, p. 1613 <1625, footnote 36, 1627>; *Koen Lenaerts/Piet van Nuffel*, European Union Law, 3rd ed. 2011, n. 11-037.

70 ECJ, Judgment of 20 June 2013, *Rodopi-M 91*, C-259/12, EU:C:2013:414, para. 41.

71 Seventh recital of Council Regulation (EC) No 3603/93 of 13 December 1993, OJ L 332, 31.12.1993, p. 1.

disruption to the monetary policy transmission mechanism, could neither change the possible transgression of the ECB's mandate, nor the violation of the prohibition of monetary financing of the budget.

(iv) Notwithstanding these objections the *Bundesverfassungsgericht* offered a way out: The OMT Decision might not be objectionable if it could be interpreted or limited in its validity in a way that it would not undermine the conditionality of the assistance programmes of the EFSF and the ESM, and would only be of a supportive nature with regard to the economic policies in the EU. This required, in light of Article 123 TFEU, that the possibility of a debt cut must be excluded, that government bonds of selected Member States were not purchased up to unlimited amounts, and that interferences with price formation on the market was avoided where possible.

Statements by the representatives of the ECB in the oral hearing of 11 and 12 July 2013 before the *Bundesverfassungsgericht* concerning the framework for the implementation of the OMT Decision suggested that such an interpretation in conformity with EU law would also most likely be compatible with the meaning and purpose of the OMT Decision.

2 Judgment of 21 June 2016 – OMT Final Decision[72]

In its *Gauweiler* decision of 16 June 2015 the ECJ accepted most of the restrictions that the order of the *Bundesverfassungsgericht* of 14 January 2014 had suggested – although it was not clear whether the ECJ had meant them in a descriptive or normative sense. Against this background, the *Bundesverfassungsgericht* decided on 21 June 2016 that if those restrictions intended to limit the scope of the OMT programme are met, this programme does currently not impair the *Bundestag*'s overall budgetary responsibility. If interpreted in accordance with the ECJ's judgment, the policy decision on the OMT programme does not "manifestly" exceed the competences attributed to the ECB.

a) Taking up the interpretation of the ECJ

The *Bundesverfassungsgericht* based its review of the OMT programme on the interpretation formulated by the ECJ in its judgment of 16 June 2015. The Court's finding that the ECB's decision on the OMT programme lies within the bounds of the respective competences and does not violate the prohibition of monetary financing of the budget was problematic but it still remained within the mandate of the ECJ (Article 19 paragraph 1 sentence 2 TEU).

[72] BVerfGE 142, 123 ff. – OMT (final judgment).

The ECJ based its view to a large extent on the objectives of the OMT programme as indicated by the ECB, on the means employed, and on the programme's effects on economic policy, which, according to the ECJ, would have been only indirect in nature. It based its review not only on the decision of 6 September 2012 concerning the technical details, but derives further framework conditions – in particular from the principle of proportionality –, which set binding limits for any implementation of the OMT programme. Furthermore, the ECJ affirmed that acts of the ECB are not exempt from judicial review, in particular regarding compliance with the principles of conferral and proportionality.

b) Serious concerns

Nevertheless, the manner of judicial specification of the Treaty evidenced in the ECJ's judgment of 16 June 2015 met with serious objections on the part of the *Bundesverfassungsgericht*'s Senate. These objections concern the way the facts of the case were established, the principle of conferral was discussed, and the way the judicial review of acts of the ECB that relate to the definition of its mandate was conducted.

- Firstly, the ECJ accepted the assertion that the OMT programme pursues a monetary policy objective without questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and without testing these assumptions with regard to the indications that evidently argue against a character of monetary policy.
- Furthermore, despite its own belief that economic and monetary policy overlap, the ECJ essentially relies on the objectives of the measure as indicated by the institution under review as well as on the recourse to the instrument of the purchase of government bonds enshrined in Article 18 of the ESCB Statute when qualifying the OMT programme as an instrument belonging to the field of monetary policy.
- Lastly, the Court provides no answer to the problem that the independence granted to the ECB leads to a noticeable reduction in the level of democratic legitimation of its actions and should therefore give rise to restrictive interpretation and to particularly strict judicial review of its mandate.

c) Decision

Despite these concerns, if interpreted in accordance with the ECJ's judgment, the OMT programme does not "manifestly" exceed the competences attributed to the ECB. The ECJ essentially performed the restrictive interpretation of the policy decision that the Senate's request for a preliminary ruling held to be possible.[73] Against this backdrop, one must assume that the ECJ considers the conditions it

[73] BVerfGE 142, 123 <222 f. para. 191 ff.> – OMT (final judgment).

specified to be legally binding. In using procedural means to limit the ECB's competences by reviewing whether the principle of proportionality has been observed, the ECJ takes up the issue of the nearly unlimited potential of the programme. The restrictive parameters developed by the ECJ do not completely remove the character of the OMT programme insofar as it encroaches upon economic policy. However, together with the conditions prescribed in the programme – Member States' access to the bond market, focus on bonds with a short maturity – it may be acceptable to assume that the character of the OMT programme is at least to the greatest extent monetary in kind. Similar reasons apply as far as Article 123 TFEU is concerned.

Since, against this backdrop, the OMT programme constitutes an ultra vires act if the framework conditions defined by the ECJ are not met, the *Bundesbank* may only participate in the programme's implementation if and to the extent that these prerequisites are met, i.e. if

- purchases are not announced,
- the volume of the purchases is limited from the outset,
- there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted,
- the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds,
- purchased bonds are only in exceptional cases held until maturity, and
- purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

Consequently, their responsibility with respect to European integration does not require the Federal Government and the *Bundestag* to take action against the OMT programme in order to protect the overall budgetary responsibility of the *Bundestag*. If interpreted in accordance with the ECJ's judgment, the OMT programme does not present a constitutionally relevant threat to the *Bundestag's* overall budgetary responsibility.[74] However, due to their *Integrationsverantwortung*, the Federal Government and the *Bundestag* have to closely monitor any implementation of the OMT programme. This compulsory monitoring shall determine not only whether the abovementioned conditions are met, but also whether there is a specific threat to the federal budget, deriving in particular from the volume and the risk structure of the purchased bonds, which may change even after their purchase.

[74] BVerfGE 142, 123 <233 para. 218 f. > – OMT (final judgment).

3 Order of 18 July 2017 – PSPP Request for a Preliminary Ruling[75]

Since 2015 the ECB has been flooding the money markets with what it calls Quantitative Easing or – speaking in a more technical way – the Expanded Asset Purchase Programme (EAPP), a framework programme of the ECB for the purchase of financial assets. The Public Sector Purchase Programme (PSPP) is part of that framework programme and accounts for, by far, the largest share of the EAPP's total volume. As of 12 May 2017, the EAPP had reached a total volume of EUR 1,862.1 billion, of which EUR 1,534.8 billion were allotted to the PSPP alone. Today it is likely to amount to about EUR 2,500 billion.

a) The case

Several groups of German citizens have filed constitutional complaints against this programme arguing that it violates the prohibition of monetary financing (Article 123 TFEU) and the principle of conferral (Article 5 TEU, in conjunction with Articles 119, 127 et seq. TFEU). Accordingly, the complainants submit that the *Bundesbank* may not participate in the programme and that the *Bundestag* and the Federal Government are obliged to take suitable measures against it. To this extent, it is the task of the *Bundesverfassungsgericht* to review whether acts adopted by institutions, bodies, offices, and agencies of the EU evidently exceed competences, or whether they touch upon the constitutional identity; where this is the case German authorities would neither be allowed to participate in the development nor in the implementation of such acts.

b) The problems at stake

It is indeed doubtful whether the PSPP is compatible with the prohibition of monetary financing. The Senate presumes that the ECJ deems the conditions which it developed, and which limit the scope of the OMT programme, to provide legally binding criteria. Against that background, it further presumes that disregard of these criteria would amount to a violation of competences also with regard to other programmes relating to the purchases of government bonds.

(i) The PSPP concerns government bonds issued by Member States, state-owned enterprises and other state institutions as well as debt securities issued by European institutions. Even though these bonds are purchased exclusively on the secondary market, several factors indicate that the PSPP decision nevertheless violates Article 123 TFEU, namely the fact

- that details of the purchases are announced in a manner that could create a de facto certainty on the markets that issued government bonds will, indeed, be purchased by the Eurosystem;

[75] BVerfGE 146, 216 ff. – EAPP (request for a preliminary ruling).

- that it is not possible to verify compliance with certain minimum periods between the issuing of debt securities on the primary market and the purchase of the relevant securities on the secondary market;
- that to date all purchased bonds were, without exception, held until maturity; and furthermore
- that the purchases include bonds that carry a negative yield from the outset.

(ii) It also appears possible that the PSPP may not be covered by the ECB's **mandate**. It is true that the PSPP officially pursues a monetary policy objective and that monetary policy instruments are used to achieve this objective; however, the **economic policy impacts** stemming from the volume of the PSPP and the resulting foreseeability of purchases of government bonds are integral features of the programme which are already inherent in its design. As far as the underlying monetary policy objective is concerned, the PSPP could thus prove to be **disproportionate**. In addition, the decisions on which the programme is based are lacking comprehensible reasons that would allow for an **ongoing review**, during the multi-year period envisaged for the implementation of these decisions, as to whether there remains a continuing need for the programme.

c) Outlook

Currently it is not possible to determine with certainty whether, based on the risk sharing between the ECB and the *Bundesbank*, the *Bundestag*'s overall budgetary responsibility could be affected by the PSPP and its implementation in terms of potential losses to be borne by the Bundesbank.

An unlimited risk sharing within the Eurosystem and the resulting risks for the profit and loss account of the national central banks would amount to a violation of the constitutional identity within the meaning of Article 79 section 3 Basic Law, if it became necessary to provide recapitalisation for the national central banks through budgetary resources to such extent that approval by the *Bundestag* would be required in accordance with the principles established by the Senate in its case-law on the EFSF and the ESM. Therefore, the success of the constitutional complaint at hand is contingent upon whether this form of a risk sharing can be ruled out under primary law.

Primary EU law provides little guidance on the decision-making of the ECB Governing Council concerning the manner and scope of risk sharing between the members of the ESCB. Consequently, the Governing Council may be able to modify the rules on risk sharing within the Eurosystem in a way that would result in risks for the profit and loss accounts of the national central banks and also threaten the overall budgetary responsibility of national parliaments. Against that background, the

question arises whether an unlimited distribution of risks between the national central banks of the Eurosystem regarding bonds in default issued by central governments or by issuers of equivalent status would violate Article 123 and Article 125 TFEU as well as Article 4 paragraph 2 TEU in conjunction with Article 79 section 3 Basic Law.

4 Judgment of 30 July 2019 – Banking Union

The latest decision dealing with the ECJ is the judgment of 30 July 2019 dealing with the Banking Union, i.e. the regulations on the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). Again, this case turned out to be an ultra-vires case and a deep uneasiness with the way EU organs handle the principle of conferral.

In the end, the court held that the SSM Regulation does not manifestly exceed the authorisation under Article 127 paragraph 6 TFEU as it does not fully confer on the ECB the supervision of all credit institutions in the euro area. As far as the SRM Regulation was concerned, the establishment of and competences assigned to the Single Resolution Board (SRB) by the SRM Regulation raise concerns with regard to the principle of conferral, but they do not amount to a manifest exceeding of competences if the Board acts strictly within the limits of the tasks and powers assigned to it. In the outcome the framework on the Banking Union does therefore not exceed the competences conferred on the EU by the Treaties if it will be *interpreted strictly*.

Furthermore, neither the SSM Regulation nor the SRM Regulation were found to encroach on the constitutional identity of the Basic Law as laid down in Article 79 section 3 Basic Law if the establishment of independent agencies will be limited to exceptional circumstances.

However – and this is supposed to be the key message of the judgment – the diminished level of democratic legitimation that results from the independence of supervisory and resolution authorities at the EU and national level is not permissible without limits and requires justification. In the domain of banking supervision and resolution, this diminished level of legitimation is acceptable in the end only because it is compensated by specific safeguards allowing for democratic accountability.

Consequently, the Federal Government and the German *Bundestag* did not participate in the adoption or implementation of secondary law that exceeds the limits of the European integration programme (*Integrationsprogramm*); therefore, there was no violation of the complainants' "right to democracy" under Article 38 section 1 first sentence of the Basic Law.

IV Conclusion

The mandate of the ECB has become a key issue in the jurisprudence of the *Bundesverfassungsgericht* during the last decade. However, it is not the only aspect of European integration that the court had to deal with. The Dublin Regime, the European arrest warrant, data protection, CETA, preventive detention, the role of the churches in the labour market as well as the right of civil servants to strike are other areas where the loyal and friendly cooperation between the *Bundesverfassungsgericht*, the ECJ and the European Court of Human Rights (ECtHR) is needed.[76]

It is a serious challenge for the present state of Union law that the principle of conferral (Article 5 paragraph 1 TEU), as well as the principle of subsidiarity (Article 5 paragraph 3 TEU) have not become law in action, but have remained just law in the books. In addition, it has turned out that is almost impossible to correct the jurisprudence of the ECJ as well as of the ECtHR even if the Treaties are amended. Taking into consideration that, contrary at least to the German understanding of the Treaties, the ECB has developed a rather limitless understanding of its mandate, that we have seen the establishment of almost 50 more or less independent European agencies and that European authorities put pressure on the Member States to grant independence to an ever growing part of their national administration, the conclusion is clear: democracy is at stake!

The Basic Law however sets substantial requirements for the level of democratic legitimation in Germany and as far as the country is affected by European integration, it is the task of the *Bundesverfassungsgericht* to ensure them.

[76] Other constitutional and supreme courts face similar challenges. For the Danish Supreme Court, see Højesteret, 6 December 2016, Case no. 15/2014 DI acting for Ajos A/S vs. The estate left by A; for the Italian Constitutional Court, see 183/1973 – *Frontini*; 170/1984 – *Granital*; 232/1989 – *Fragd*; 168/1991; 117/1994 – *Zerini*; 24/2017, 115/2018 – *Taricco II*.

Legal bridges over troubled waters? Standard of review of European Central Bank decisions by the EU Courts

Lars Bay Larsen[1]

The overarching theme and title for the 2019 ECB Legal Conference is “Building Bridges”.

Danes are - already for obvious geographical reasons - very fond of building bridges, both in the literal and in the figurative sense. However, we are not claiming that we invented neither engineering, nor bridge building. In fact, from my Court in Luxembourg it is just a fairly short drive to Trier on the German side of the border to see the impressive bridge that the Romans built across the Moselle River approximately 2000 years ago - still standing, still connecting people. But just take a look at the Danish banknotes; they are all covered with bridges. And it is not by chance that a rather well-known Danish-Swedish TV series is called “The Bridge”.

One could go on, but I shall not tire the reader with Danes and our particular fascination of bridges and bridge building. Because also lawmakers, including EU lawmakers, act as bridge builders albeit mostly in the figurative sense. Whenever the CJEU is confronted with interpreting unclear legal provisions, not rarely provisions that deliberately have been made unclear as a result of applying “constructive ambiguity” in the legislative drafting process, we too are arguably constructing “bridges of law”.

Bridges of law, just like real bridges, should not break down as soon as people start walking on them. They should rather stand the test of time, even when the going gets tough and strong economic winds are blowing from unfortunate directions. That is a good starting point, but unfortunately it is not enough. Bridges of law should also be legal or lawful, and so should the traffic on the bridge be.

That brings me finally to the core of my subject: The intensity of the judicial scrutiny by the CJEU of “bridges of ECB-law”.

While the EU Courts have progressively established the standard of review of the Commission decisions in competition matters over more than 50 years, the control of the ECB activities is a relatively new domain for them. That is perhaps part of the reason why the issue of the intensity of the EU Courts’ scrutiny in this domain has been regarded as a particularly delicate and important question.

The field of activity of the ECB is characterized by distinctive features that the EU Courts have to take in account in order to determine their standard of review.

[1] Judge, Court of Justice of the European Union. The views expressed in this contribution are mine and do not necessarily reflect those of my colleagues or my Court.

However, this task is to be accomplished in a context where the EU Courts have already developed a general conception on validity control and not in a "terra incognita". Therefore, I will first give a short description of the intensity of the EU Courts' scrutiny according to this general conception and then continue by exposing its specific application to the review of the ECB activities.

On the first point, it should be recalled that the question of the intensity of the judicial scrutiny may come up in at least two distinct procedural situations that could be of relevance. Firstly, when the validity of a piece of secondary EU legislation or the legality of an administrative decision is contested directly before the EU Courts on the basis of Article 263 TFEU, normally before the General Court (with appeal on legal grounds to the CJEU). Secondly, when a party is contesting a national administrative decision before a national court and argues that the decision has its legal basis in an invalid provision of EU law. This may give rise to a preliminary reference from the national court to the CJEU under Article 267 TFEU, as only the EU Courts, not the national jurisdictions, are competent to invalidate an act of EU law.

In both situations, the starting point is clear: in principle, the intensity of the judicial scrutiny is not specifically limited. In principle, the EU Courts' scrutiny is a full control and the limited control should be regarded as an exception.

Moreover, the limitation of the intensity of the control concerns only some aspects of the EU Courts' control. More precisely, in all cases, the EU Courts can assess, without specific limitations, whether the relevant rules on procedure and on the statement of reasons have been complied with, and whether there has been any misuse of powers. In addition, there are no specific limitations to the power of the EU Courts to control the general (abstract) interpretation of EU law on which the author of the EU act concerned has based itself.

Indeed, the limitation of the intensity of the control affects essentially two aspects of the EU Courts' control:

- Firstly, the heart of the limitation of this control is the legal qualification (subsumption) of the facts. Here we are at the crossroads where law meets fact - the core of judging one might argue. It is by reference to this aspect of the control that the EU Courts mention usually the concept of "manifest error of assessment".

- Secondly, though sometimes forgotten, the ECJ has repeatedly judged that the discretion which the EU institutions have may, in some cases, be exercised not only in relation to the nature and the scope of the provisions or decisions which are to be adopted but also, to a certain extent, to the findings as to the basic facts[2]. This implies that the limitation of the EU Courts' scrutiny may concern also the determination of the facts on which an EU act is based.

[2] Judgment of 19 November 1998, *United Kingdom v Council*, C‑150/94, EU:C:1998:547, paragraph 55.

However, it is essential to keep in mind that the limitation of the intensity of the scrutiny of EU Courts should not be confused with an absence of control[3]. In theory, in case of full review, the Court must substitute its own assessment of the facts for that of the author of the act. It presupposes, in substance, that the power exercised by the institution is a circumscribed power. In other words, it presupposes that this institution was bound to adopt a specific act without any margin of discretion, that there was only one correct solution, juridically speaking. Yet, when the author of the act had a margin of discretion and was supposed to make some choices, the EU Courts should not take the place of the lawmaker or administrator and make those choices themselves[4]. In such a case, the intensity of the scrutiny should be limited, in the sense that EU Courts should only assess if the boundaries of the margin of discretion were surpassed, in other words if there was a manifest error of assessment.

That being said, these explanations on the nature of the scrutiny of the EU Courts do not permit to draw lines and to identify neat scientific categories in which to "box" individual cases. In fact, it seems rather difficult to draw precise lines in these matters. However, I do believe that it is possible to identify some factors that may induce the ECJ (or the General Court) to exercise some judicial restraint. Likewise, I believe a couple of factors that may have the opposite effect of intensifying judicial scrutiny can be identified.

- *Decision of the EU legislator/draftsmen of the treaties*. At times, it is possible to deduce from the words used by the EU-legislators or the authors of the treaties that they have formally decided to grant a margin of appreciation to an institution. In such a case, the EU Courts should evidently respect that decision.

- *Particularly complex factual circumstances*. It is the main case of limitation of the EU Courts' review. When an institution is required to undertake complex forecasts and assessments, notably in economic or technical matters, it must normally be allowed, in that context, a broad discretion.

- *Political choices*. According to settled case law, an EU institution must be allowed a broad discretion in an area which involves political, economic and social choices on its part. This factor is generally combined with the complexity of the assessment on which these choices rest.

- *Affectation of a private party*. It follows from the ECtHR's case law under Article 6 ECHR, which corresponds to Article 47 of the EU Charter, that the more the private party is affected by an administrative decision, the more intense the judicial scrutiny should be. You can find the same idea in some recent judgments of the CJEU concerning the right to respect for private life[5].

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3 Judgment of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 39.

4 See, for example, judgments of 14 January 1997, *Spain v Commission*, C-169/95, EU:C:1997:10, paragraph 34, and of 12 March 2002, *Omega Air and Others*, C-27/00 and C-122/00, EU:C:2002:161, paragraph 64.

5 Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 48.

In the light of these considerations, it appears that the limitation of the intensity of the EU Courts' control in specific cases is, at the same time, an expression of the necessary self-restraint of jurisdictions in political matters and a consequence of the concrete incapacity of a court to transform itself into an omniscient oracle able to give perfect assessment and projection in technical or economic matters.

On the second point, concerning more specifically the control of the ECB activities, it should, before anything else, be stressed that there is no general limitation of the intensity of the EU Courts scrutiny on these activities.

Admittedly, the principle of the ECB's independence is clearly enshrined in EU primary law, especially in Articles 130 and 282(3) TFEU. This independence protects the ECB against various interventions. Nonetheless, where the draftsmen of the TFEU clearly intended to protect ECB independence, they also provided a real judicial control of its action by the ECJ. That construction has led the ECJ to consider, in the judgment *Commission v ECB*[6], that there is no tension between the ECB's independence, on the one hand, and judicial scrutiny by the ECJ, on the other hand.

Moreover, whenever the EU Courts have granted a broad margin of discretion to the ECB, this solution was never founded on the ECB's independence, but rather on the settled case law giving a broad discretion to Union institutions in some specific situations that I have presented in the first part of my contribution. It follows that one should not assume that the judicial scrutiny of ECB acts by EU Courts will, in every case, be limited, but should rather look to the specificity of each act and even to the specificity of each of the aspects of a single decision.

Therefore, I will now briefly consider the existing case law of the EU Courts concerning the intensity of their judicial review in the different fields of the ECB action. As this case law is for the moment rather limited, it is not possible to draw a complete map of the areas covered respectively by full control and by limited control.

The most important elements of this case law are to be found in the *Gauweiler*[7] and *Weiss*[8] judgments, which both concern the heart of the ECB action, i.e. the monetary policy strictly speaking. Given that, concerning the standard of judicial review, the *Weiss* judgment is essentially repeating the *Gauweiler* judgment, I will focus on the *Gauweiler* judgment.

Without exposing all the elements of the ECB action that were concerned in the *Gauweiler* judgment, I believe it is worthwhile to recall how the ECJ presented its review of the OMT decisions. Basically, one can distinguish three steps in the reasoning of the Court:

- Firstly, the ECJ verified that the OMT decisions were within the delimitation of the monetary policy resulting from primary law, by referring to the objectives of

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6 Judgment of 10 July 2003, *Commission v ECB*, C‑11/00, EU:C:2003:395.

7 Judgment of 16 June 2015, *Gauweiler and Others*, C‑62/14, EU:C:2015:400.

8 Judgment of 11 December 2018, *Weiss and Others*, C‑493/17, EU:C:2018:1000.

those acts and to the instruments employed in order to attain those objectives. At this point, it is important to remind that the ECJ should base its analysis on the objectives announced by the ECB, unless a misuse of powers had been established.

- Secondly, the Court verified that the OMT decisions were proportionate to the objectives of the monetary policy. Concretely, the Court ascertained whether those decisions were appropriate for attaining those objectives and did not go beyond what was necessary in order to achieve those objectives.

- Thirdly, the Court controlled the respect of Article 123 TFEU, i.e. that the OMT decisions could not be considered as a financial assistance from the ESCB to Member States.

Concerning the intensity of the ECJ's judicial scrutiny, there are no specific limitations to the ECJ's control in the first and the third step. On the contrary, concerning the second step, the ECJ stated clearly that its control was limited. Given that the ECB must be allowed "a broad discretion", the Court should only look for a "manifest error of assessment". It implies, notably, that the fact that the analysis of the ECB had been subject to challenge did not, in itself, suffice to reject it, given that questions of monetary policy are usually of a controversial nature and in the view of the ECB's broad discretion.

That solution was founded on the settled case law of the ECJ giving a broad discretion to Union institutions when they make choices of a technical nature and undertake forecasts and complex assessments. Coming back to the list of four factors I mentioned before, the approach of the ECJ is here founded on the second and the third factors.

This "template" was followed again in the *Weiss* judgment, in which you can find again these three steps. That being said, I would like to highlight three elements of this judgment which are relevant for our topic:

- Firstly, I believe that this judgment clearly shows the difference between a limited control and the absence of control. Indeed, an argument of the Italian government pretending that the control of the ECJ is limited, in the sphere of monetary policy, to procedural aspects was explicitly dismissed and the rest of the judgment confirms that the ECJ did not limit itself to procedural aspects.

- Secondly, the Court also had the occasion in the *Weiss* judgment to control in depth the motivation of the decision, which is a role all the more important precisely because of the broad margin of discretion that the ECB has.

- Thirdly, the ECJ recognised a broad margin of discretion for the ECB to give a concrete expression in quantitative terms of the concept of price stability and the ECJ has, on this basis, accepted the objective to maintain inflation rates at levels below, but close to, 2% over the medium term.

With regard to other fields of action of the ECB, the existing case law is more limited. On the one hand, the ECJ did not pronounce itself yet, and the analysis should

therefore be based on judgments of the General Court. On the other hand, these judgments of the General Court are less explicit and cover only a limited part of the ECB competences.

Concerning banking supervision, two sets of judgments should be mentioned. First, in two judgments, on 13 December 2017[9], the General Court has judged that the ECB enjoys a broad discretion to assess the level of a credit institution's capital requirements in the light of its risk profile and events likely to have an effect on that profile. Afterwards, in six judgments, on 13 July 2018[10], the General Court has judged that the ECB has discretion in choosing to grant or not to grant the benefit to exclude from the exposure calculation exposures that meet specific conditions. These judgments demonstrate that the ECB could also be the object of a limited control as a banking supervisor, but one cannot exclude that some parts of the ECB's action in this field could be less complex and could for this reason be submitted to a more complete review.

When it comes to access to documents, the General Court has repeatedly judged that the ECB must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields of the ECB's activities could undermine the public interest[11]. This is a direct transposition of the solution adopted by the Court concerning the Council in the same type of situation[12].

Finally, the existence of a few judgments from the General Court applying to the ECB the classical solution of limiting the control of some acts in the domains of public procurement[13] and of civil service[14] should also be noted.

In conclusion, I believe that while the EU Courts evidently have to adapt to the specificity of the fields of action of the ECB, concerning the intensity of the judicial scrutiny, this adaptation has until now essentially been based on an application, mutatis mutandis, of the concepts and the criteria already established in other domains of EU law, without giving specific privileges or disadvantages to the ECB.

As the Union and the Euro have so far made it through difficult times and across troubled waters, the legal bridges allowing inter alia for judicial control of the ECB have been kept open, applying essentially the normal traffic rules.

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9 Judgment of 13 December 2017, *Crédit mutuel Arkéa v ECB*, T-52/16, EU:T:2017:902, paragraph 180.

10 Judgment of 13 July 2018, *Banque postale v ECB*, T□733/16, EU:T:2018:477, paragraph 69.

11 Judgment of 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, not published, EU:T:2012:635, paragraph 43.

12 Judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34.

13 Order of 2 July 2009, *Evropaïki Dynamiki v ECB*, T-279/06, not published, EU:T:2009:241, paragraph 64.

14 Judgment of 28 February 2018, *Paulini v ECB*, T-764/16, not published, EU:T:2018:101, paragraph 48.

Judicial review of central bank actions: can Europe learn from the United States?

Stefanie Egidy[1]

1 Introduction: Current challenges for central banks

All over the world, the political pressure on central banks is rising. The Federal Reserve is a prominent example. It is one of the current US President's favourite scapegoats. As of September 2019, more than seventy of his tweets attack the Federal Reserve's policies. They call it weak, make it responsible for the economy and personally attack its Chair Jerome Powell. This breaks a culture of political self-restraint against commenting on the Federal Reserve's monetary policy.[2] It also derails the conversation. In August 2019, the former President of the Federal Reserve Bank of New York fuelled this debate. He suggested that the Federal Reserve should refuse to enable the current US President's economic policy and maybe consider how its decisions will affect the political outcome in the 2020 presidential election.[3] Most importantly, this all creates a dangerous precedent threatening central bank independence.[4]

All the more crucial is a discussion about the pressing underlying topic of how to balance central bank independence and accountability. The Federal Reserve enjoys a large degree of independence, especially its budgetary and personal independence. Both Congress and the judiciary can hold it accountable. Indeed, the US legislature set up various accountability mechanisms including appointment procedures, audits and hearings, as well as reporting and transparency requirements.[5] However, when the financial crisis of 2007-2009 significantly expanded the Federal Reserve's power, only few legislative initiatives manged to dial

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2 Criticism of the Federal Reserve's monetary policy has always existed; see, for example, the analysis addressing the time between 1959 and 1961, Knipe (1962). However, most criticism was voiced moderately, with a delay or in private, see Cox (2018). Former US President Bill Clinton reportedly placed large emphasis on not commenting on the Federal Reserve, see Riley (2017) quoting Alan Blinder; see also Smialek (2019). But see Goodhart and Lastra (2018), p. 58, discussing the recent political attacks in several countries. Thiele (2018), pp. 106 et seq., argues in favour of allowing political public criticism instead of silencing debate, unless it uses "the threat of consequences or sanctions".

3 Dudley (2019).

4 On the impact of populism on central bank independence, see Goodhart and Lastra (2018).

5 See Lastra (2015), pp. 91 et seq., on the accountability of the Federal Reserve in a comparative perspective; the increasing independence of central banks is usually accompanied by an establishment of other accountability mechanisms, Bank for International Settlements (2009), p. 15.

back its authority.[6] This leaves the courts to promote accountability and enforce legislative limits of power. In light of the current challenges, the courts at the same time need to safeguard central bank independence.

In the EU, the sovereign debt crisis has led to a surge of case law. When the European Central Bank (ECB) joined the Troika and used unconventional measures, the Court of Justice of the European Union (CJEU) was called upon to adjudicate these issues. How should courts – themselves independent institutions[7] – review measures of independent central banks? US courts have been resolving challenges against the Federal Reserve System for one hundred years.[8] Which standard of review do they apply to actions of the Federal Reserve? And what can we learn from this perspective with regard to the judicial review of the ECB? The first part will provide a taxonomy of US case law. The second part will suggest three lessons. First of all, the deliberate refusal of US courts to review monetary policy could serve as a model for the CJEU to delineate an unreviewable core of monetary policy. Then, this should be combined with a deferential review of the penumbra and a strict review of the outer bounds. And finally, the high evidentiary standard for access to information claims should guide the interpretation of the ECB's transparency regime.

2 The Federal Reserve and the ECB

The Federal Reserve System and the Eurosystem are in charge of setting monetary policy in the United States and the euro area, respectively. Both the Federal Reserve and the ECB are endowed with a large degree of independence.[9] This key characteristic insulates the central banks from the common political processes in order to avoid capture, emphasise expertise and ensure a faster and more flexible decision-making process. Experts in central banks can thus develop long-term policies without regard for the short-term needs of political actors.

Two important features distinguish the Federal Reserve from the ECB. First, the ECB's status is enshrined in the Treaty on the Functioning of the European Union (TFEU). Therefore, it can only be altered by a unanimous vote of all EU member states. Article 130 TFEU explicitly grants the ECB wide autonomy to regulate and act within the monetary policy field.[10] The Federal Reserve, however, was created in

6 See, for instance, the "Federal Reserve Act amendments on emergency lending authority" in § 1101 Dodd-Frank Act, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376-2223.

7 Goodhart (2002), pp. 195-202, draws "an analogy between the independent judiciary and an independent central bank"; see also, on this parallel between the two institutions, Goodhart and Meade (2004), pp. 19 et seq., 21-23, and Zilioli (2017), pp. 97 et seq.

8 See, e.g., *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 269 F.4 6 (5th Cir. 1920), revised by the Supreme Court, 256 U.S. 350 (1921).

9 Cukierman (1992), pp. 369-414, developed an index of central bank independence, ranking Switzerland and West Germany as most independent. Zaring (2015), p. 180, uses the term "superindependence" to describe both the ECB (p. 180) and the Federal Reserve's Federal Open Market Committee (p. 183).

10 Case C-11/00, *Commission v ECB*, EU:C:2003:395; see also Goebel (2005), p. 638.

1913 through an act of Congress, namely the Federal Reserve Act,[11] which can be modified through the regular process of legislation despite its characterization as a "super-statute"[12]. Therefore, the Federal Reserve is always under threat of a potential limitation or even withdrawal of powers by Congress.[13] However, the independence of the Federal Reserve is so deeply enshrined in the political system that Congress has not enacted any serious limitations of authority.[14] The Federal Reserve's financial independence plays a particularly important role. Its budgetary autonomy prevents Congress from threatening to impose financial constraints.[15] The possibility of legislative interventions last became relevant in response to the financial crisis of 2007-2009.[16] In order to protect the stability of financial markets, the Federal Reserve had made extensive use of its emergency authority.[17] The legality of these measures was disputed.[18] In several lawsuits brought against these emergency actions, the courts exercised deference and did not enforce substantive limits contained in the Federal Reserve Act, partly because of the emergency circumstances.[19] Beyond minor restrictions, Congress failed to enact comprehensive limitations of power.[20]

The differences in the legal bases of the two central banks also affects their institutional roles vis-à-vis other actors. While the ECB is one of the institutions of the European Union, the Federal Reserve is characterized as a so-called "independent agency".[21] This notion describes its position as an autonomous part within the executive, yet removed from executive or presidential influence.[22] How this independence is realised in practice depends in part on political pressures and

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11 The Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251, codified at 12 U.S.C. §§ 221-522 (2018).

12 Eskridge and Ferejohn (2010), p. 120.

13 Porter (2009), p. 485.

14 Zaring (2015), pp. 174 et seq.; Conti-Brown (2015), pp. 271-274, emphasises the importance of considering non-legal, informal, and contextual factors for understanding the Federal Reserve's independence.

15 The controversy about funding the Consumer Financial Protection Bureau through Congress instead of the Federal Reserve speaks to the importance of budgetary independence, see Merle (2018); on the relevance of budgetary independence, see also Zaring (2015), pp. 173 et seq.; Milakovich and Gordon (2013), p. 373, emphasise the importance of Presidential control over an agency's budget; Barkow (2010), p. 44, explains that Congress can assert pressure on an agency through the budget and is thus vulnerable to pressure from interest groups; Conti-Brown (2015), pp. 273-286, analyses the Federal Reserve's historically budgetary independence.

16 Romano (2014), pp. 25-37, assesses the mechanisms underlying the hurried legislative responses taken in reaction to the financial crisis of 2007-2009 and criticises the lack of sound information and deficits in Congressional deliberation.

17 Sec. 13(3) Federal Reserve Act; on the Federal Reserve's emergency actions, see Egidy (2019), pp. 171-189; see also Porter (2009), pp. 502-509.

18 See the in-depth analysis of Mehra (2010), who concludes that the Federal Reserve "exceeded the bounds of its statutory authority" (p. 273); similarly Emerson (2010), pp. 125-132; for a defence, see Gabilondo (2013), pp. 781-785.

19 This deference regarding emergency actions under review is apparent in *Starr International Co. v. Federal Reserve Bank of New York*, 906 F.Supp.2d 202, 237 (S.D.N.Y. 2012), affirmed, 742 F.3d 37 (2d Cir. 2014), cert. denied, 134 S. Ct. 2884 (2014). The Court of Appeals affirmed the dismissal of Starr's claims referencing "the extraordinary measures taken by FRBNY to rescue AIG from bankruptcy at the height of the direst financial crisis in modern times" (742 F.3d 37, 42).

20 See footnote 8.

21 See Datla and Revesz (2013), deconstructing the features of independent agencies.

22 Ramirez (2007), pp. 349 et seq.; Hubble (2013), p. 1825, concludes that "[t]he FRB meets almost all of the criteria of agency independence"; Barkow (2010), pp. 42-64, develops further criteria; for an overview, see also Harris (2015), pp. 398-400.

necessities.[23] Some describe "a long-standing political culture of deference […] over matters of central banking".[24]

Second, the Federal Reserve pursues a dual mandate. Its goals are to safeguard price stability as well to pursue maximum employment.[25] This balancing task makes the Federal Reserve more vulnerable to be held responsible for unwanted economic developments than the ECB, whose primary prescribed goal is price stability.[26]

In addition to their competences in monetary policy, both central banks have taken on supervisory functions. In 2015, the EU legislature conferred supervisory authority on the ECB,[27] while the Federal Reserve's competences as a banking regulator and supervisor[28] increased after the financial crisis of 2007-2009.[29] Moreover, the Federal Reserve is in charge of securing the stability of financial markets, acts as a lender of last resort through its discount window and provides financial services.[30] The Federal Reserve's independence mainly shields its monetary policy-making authority. However, its organisational independence also covers its regulatory and supervisory activity.[31]

3 Taxonomy of US case law

US federal courts have jurisdiction to review claims against the Federal Reserve, i.e., against the Federal Open Market Committee (FOMC) as well as the Board of Governors. To give an impression about recent data: From 2010 to 2018 the case load amounted to 85 cases.[32] About 30 percent of cases dealt with freedom of information claims, while about 25 percent were lawsuits against regulatory and supervisory decisions. One case challenged monetary policy[33] and another one contested the institutional design of the Consumer Financial Protection Bureau and

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23 See Vermeule (2013), p. 1198, who mentions "legislative retaliation", "political backlash" and even "genuine internalization of norms of Fed independence" as those limits; see also Zaring (2015), pp. 173-175, on the role of the Federal Reserve and the FOMC role vis-à-vis Congress and the President.

24 Hubble (2013), p. 1825; Shull (2014), p. 17, similarly speaks of a "widely accepted belief"; Zaring (2015), p. 173, refers to a "culture of noninterference".

25 12 U.S.C. § 225a; the third goal of "moderate long term interest rates" is seldom explicitly referenced and considered part of the dual mandate, see Steelman (2011), p. 5 endnote 7; Labonte (2013), p. 1; on the history of the dual mandate, see Goldberg (2013-2014), pp. 346-354.

26 Article 127(1) TFEU.

27 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63; see Zilioli (2016b).

28 12 U.S.C. § 248.

29 For an overview of legislative changes introduced by the Dodd-Frank Act, see Hubble (2013), p. 1822-1824.

30 12 U.S.C. § 248.

31 Hubble (2013), p. 1825.

32 All data are taken from the Annual Reports of the Federal Reserve to Congress, in the section on "Litigation", available under www.federalreserve.gov/publications/annual-report.htm, last accessed on 20 October 2019.

33 *Love v. Federal Reserve Board of Governors*, 2015 U.S. Dist. LEXIS 75598, decided on 11 June 2015.

the Financial Stability Oversight Council.[34] The following taxonomy will review these four most relevant categories.

3.1 Non-justiciability of monetary policy decisions

The first category of cases consists of monetary policy decisions. Relying on a case decided during the Great Depression, the Federal Reserve's monetary policy decisions have been largely exempt from judicial review.[35] Absent extreme circumstances, courts refrain from deciding cases directed against monetary policy.[36] The doctrinal explanations for their dismissal vary. Depending on the claim, courts deny justiciability or standing. In general, courts view the Federal Reserve's monetary policy decisions such as setting interest rates as "unsuitable for judicial review".[37] The underlying reason for this adjudication could be seen as a deference to central bank independence. Judge Augustus N. Hand best summarized this in 1929 during the Great Depression. In *Raichle v. Federal Reserve Bank of New York*, the plaintiff had demanded compensation for damages allegedly caused by the Federal Reserve's monetary policy.[38] This resembles non-contractual liability claims against the ECB.[39] The plaintiff based his tort claim on the allegation that "the Federal Reserve had spread propaganda concerning a shortage of money, restricted the supply of credit for investment purposes, and caused stock and bond prices to fall in value, thus depriving the plaintiff of property without due process of law."[40] The Court of Appeals refused to subject these monetary policy decisions to judicial second-guessing and agreed with the Federal Reserve Bank that "the questions raised are political, and not justiciable."[41] It ruled as follows:

"It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made. [...]

We can see no basis for the contention that it is a tort for a Federal Reserve Bank to sell its securities in the open market, to fix discount rates which are unreasonably

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34 State National Bank of Big Spring v. Bernanke, No. 12-cv-1032 (D.D.C., filed 21 June 2012); State National Bank of Big Spring v. Bernanke, No. 13-5247 (D.C. Cir., notice of appeal filed 2 August 2013).

35 Porter (2009), p. 509; Hubble (2013), p. 1825, emphasises that the Federal Reserve's monetary policy decisions are viewed as outside the scope of the APA and of judicial review; Ramirez (2001), p. 528, assumes that a commitment to the Federal Reserve's discretion is to be blamed for the absence of judicial review for "any purported victim of the Fed's policy"; Posner and Vermeule (2010), p. 58, explain that "the Fed's activities are subject to only the most deferential judicial review, if any."

36 Davidoff and Zaring (2009), p. 478.

37 *Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542, 49 (7th Cir. 1985); cited by *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985).

38 This case was brought against the Federal Reserve Bank of New York prior to the establishment of the FOMC, see Conti-Brown (2015), pp. 300 et seq., on the FOMC's creation.

39 See, e.g., Case T-289/13, *Ledra Advertising v Commission and ECB*, EU:T:2014:981.

40 Federal Reserve Bulletin, August, 1929, p. 566, cited by Shull (2014), p. 17; for the full charge see *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910, 912 (2d Cir. 1929).

41 *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910, 916 (2d Cir. 1929).

high, or to refuse to discount eligible paper, even though its policy may be mistaken and its judgment bad. The remedy sought would make the courts, rather than the Federal Reserve Board, the supervisors of the Federal Reserve System, and would involve a cure worse than the malady."[42]

Until today, this analysis is relevant.[43] Very few subsequent cases challenged the constitutionality of the US monetary policy system in general. In two such decisions, the district courts denied standing and quickly dismissed the complaints.[44] For tort claims, courts can rely on a statutory exclusion from review instead of citing this doctrine of non-justiciability. The sovereign immunity doctrine, specifically stipulated in the Tort Claims Procedure Act, protects the Federal Reserve from being sued in federal court for "[a]ny claim for damages caused by … the regulation of the monetary system" as long as this immunity has not been waived.[45] Most recently, a District Court rejected a challenge against monetary policy decisions on this basis.[46]

Remarkably, the Court of Appeals in *Raichle v. Federal Reserve Bank of New York* implied potential outer limits to the wide deference it established. The Court suggested that the Federal Reserve Bank's actions could constitute a "legal wrong" if undertaken in "bad faith".[47] It is unlikely that courts will ever find the Federal Reserve's decisions to be made in bad faith.[48] Yet, this explicit restriction serves as a reminder that there could be future situations in which courts might choose to intervene and review in substance the Federal Reserve's activity in the field of monetary policy.

3.2 Institutional design challenges

The second set of cases deals with the Federal Reserve's institutional design.[49] In particular, they consist of challenges against the composition of the FOMC, the Federal Reserve's principal monetary policymaking body.[50] The plaintiffs ranged from Senators and Congressmen to private individuals and businesses. They all considered the selection process to the FOMC to be unconstitutional.

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42 ibid., at 915. It is rarely discussed that these remarks are obiter dicta because the Court of Appeals dismissed the case due to the plaintiff failing to enjoin the Federal Reserve Board of Governors as a necessary party, *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910, 916 (2d Cir. 1929).

43 Zaring (2015), p. 175 points out that, so far, "[n]o court has disagreed".

44 *Bryan v. Federal Open Market Committee*, 235 F.Supp. 877, 879, 880, 882 (D. Mont. 1964) expressly citing *Raichle v. Federal Reserve Bank of New York*; *Howe v. U.S.*, 632 F.Supp. 700 (D.D.C. 1986).

45 28 U.S.C.A. § 2680(i). See *Research Triangle Institute v. Board of Governors of the Federal Reserve System*, 132 F.3d 985, 988 et seq. (4th Cir. 1997) applying this provision.

46 *Love v. Federal Reserve Board of Governors*, 2015 U.S. Dist. LEXIS 75598, decided on 11 June 2015.

47 *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910, 914 et seq. (2d Cir. 1929).

48 See *Huntington Towers, Ltd. v. Franklin National Bank*, 559 F.2d 863, 869 (2d Cir. 1977) citing *Raichle v. Federal Reserve Bank of New York* and briefly reviewing whether "the FRB's actions were in bad faith or engaged in with the intention of injuring the plaintiff".

49 See Zaring (2015), pp. 176-180; see also Conti-Brown (2015), pp. 305-307.

50 12 U.S.C. § 263; see also the extensive summary of the history of the FOMC in *Reuss v. Balles*, 584 F.2d 461, 461-464 (D.C. Cir. 1978); see also Bernstein (1989), pp. 118-124.

The FOMC is composed of twelve members. Seven members are appointed by the US President with confirmation by the US Senate.[51] They also constitute the Board of Governors, the Federal Reserve's main governing body. The other five members are chosen among the presidents or first vice presidents of the twelve private regional Federal Reserve Banks, which are privately funded and organised, semi-autonomous institutions.[52] Each of their presidents is elected by the board of directors of the respective Federal Reserve Bank, two-thirds of whom are elected by the commercial member banks in its district.[53] Thus, these five members of the FOMC represent the banking industry. Critics view their participation in the exercise of significant monetary policymaking powers as a violation of the Appointments Clause of the US Constitution.[54] According to this constitutional provision, "Officers of the United States" need to be appointed by the President with confirmation by the Senate. The constitutional question is still unanswered because all of the claims were dismissed either due to a lack of standing or based on the doctrine of equitable discretion.[55]

In one early challenge against the FOMC in 1976, a member of the US House of Representatives brought suit in his dual capacity as a member of the legislature and a private bondholder.[56] As a legislator, Representative Reuss argued that the selection process to the FOMC prevented him from exercising his constitutionally conferred impeachment powers and that the improper delegation of competences to this private-public entity appropriated his legislative powers. As a private bondholder, he claimed that the FOMC's impact on interest rates and inflation deprived him of his property without due process of law in violation of the Fifth Amendment to the US Constitution.[57] The District Court, confirmed by the Court of Appeals, denied standing with regard to both claims. Standing before federal courts under Article III of the US Constitution requires the plaintiff to have "suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized […] and (b) actual or imminent, not conjectural or hypothetical".[58]

With regard to Reuss' claim as a bondholder, the Court of Appeals denied standing because Reuss failed to claim a specific injury exceeding a "generalized grievance"[59]

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51 12 U.S.C. § 241.

52 12 U.S.C. §§ 263, 341.

53 12 U.S.C. §§ 263(a), 302, 304.

54 The Appointments Clause, Article II, § 2, cl. 2 U.S. Constitution, states that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint […] all other Officers of the United States". See Conti-Brown (2015), pp. 301 et seq., 305-307; Zaring (2015), pp. 178-180, views this aspect critically, but emphasises other accountability mechanisms. The importance of this issue is increased when factoring in governor vacancies on the committee that make the intended majority of members appointed by the President and confirmed by the Senate "unstable", see, pointedly, Conti-Brown (2015), pp. 304 et seq. Both Conti-Brown and Zaring cite the Supreme Court's ruling on the unconstitutionality of the Public Company Accounting Oversight Board as further support for this critique, see *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

55 Conti-Brown (2015), pp. 305-307, criticises this "kind of hedge around Fed independence".

56 *Reuss v. Balles*, 73 F.R.D. 90, 91 (D.D.C. 1976); affirmed 584 F.2d 461, 464 et seq. (D.C. Cir. 1978).

57 *Reuss v. Balles*, 584 F.2d 461, 465, 468 et seq. (D.C. Cir. 1978).

58 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted) establishing part one of the three part test.

59 ibid., at 560.

shared by other private bondholders.[60] Moreover, the Court argued that even a ruling requiring presidential appointments for all FOMC members would not remedy his alleged injuries.[61] This holding mirrored the dismissal of an earlier case. Here, a private owner of a treasury bill had challenged the FOMC because it lacked a proper congressional mandate, represented an unconstitutional delegation of authority, used funds outside of the congressional appropriations process, comprised five private members and kept its meetings as well as decision criteria secret.[62] The non-delegation concerns raised have remained unresolved and are the subject of much academic debate.[63] Subsequent cases confirmed the lack of standing of individual bondholders, for instance when private plaintiffs claimed damages due to the high interest rates for which the FOMC was responsible.[64]

With regard to Reuss' claims as a legislator, the Court also denied standing. It explained that declaring the selection process to be unconstitutional would leave the delegation of powers to the FOMC intact and therefore not remedy his alleged injury.[65] Rather, Reuss could always initiate an impeachment process or introduce a law modifying the selection process.[66]

Two Senators revived this issue when they brought suit arguing that the unconstitutional selection process improperly deprived them of their due influence.[67] In contrast to the earlier adjudication, the courts granted standing, but dismissed the cases based on the doctrine of "equitable discretion".[68] They found that an unconstitutional selection procedure could deprive the Senators of their "vote for or against confirmation."[69] However, the courts held that the Senators could not use the judiciary to solve this highly controversial issue because they "could obtain substantial relief from [their] fellow legislators through the enactment, repeal, or amendment of a statute."[70] Therefore, they rather needed to address their concerns in Congress and pursue legislative action.[71] The District Court in one of the cases had dismissed the action on the merits, arguing that the Appointments Clause was not applicable because the five members were not (and did not need to be) "Officers

60 *Reuss v. Balles*, 584 F.2d 461, 469 et seq. (D.C. Cir. 1978).

61 ibid.

62 *Bryan v. Federal Open Market Committee*, 235 F.Supp. 877, 878 et seq. (D. Mont. 1964).

63 Zaring (2015), pp. 182-184, raises concerns about this constitutional question; for an extensive analysis, see Bernstein (1989), pp. 124-137, who concludes that the design and structure of the FOMC is "constitutionally flawed" (p. 153).

64 *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*, 766 F.2d 538 (D.C. Cir. 1985).

65 *Reuss v. Balles*, 584 F.2d 461, 467 (D.C. Cir. 1978).

66 ibid., at 468.

67 *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981), cert. denied 454 U.S. 1082 (1981); *Melcher v. Federal Open Market Committee*, 644 F.Supp. 510, 511 et seq. (D.D.C. 1986); affirmed by 836 F.2d 561, 562 (D.C. Cir. 1987); cert. denied 486 U.S. 1042 (1988); see Zaring (2015), pp. 178-180, discussing the merits of these claims.

68 *Riegle v. Federal Open Market Committee*, 656 F.2d, 873, 881 (D.C. Cir. 1981); *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 563 et seq. (D.C. Cir. 1987).

69 *Melcher v. Federal Open Market Committee*, 644 F.Supp. 510, 513 et seq. (D.D.C. 1986).

70 ibid.; see also *Reuss v. Balles*, 584 F.2d 461, 465 footnote 14 (D.C. Cir. 1978), on the intricacies of judicial challenges by legislators.

71 *Melcher v. Federal Open Market Committee*, 644 F.Supp. 510, 513 et seq. (D.D.C. 1986).

of the United States."[72] The Court emphasised that "[e]ver since the birth of this nation, the regulation of the nation's monetary systems has been governed by a subtle and conscious balance of public and private elements"[73] and refused "to upset this deliberate, time-honored balance."[74]

The decisions emphasise the priority of the political process to establish proper rules governing the appointment and decision-making processes. At the same time, they imply concerns about the selection process and suggest that courts might be willing to review these issues if brought by a plaintiff with standing.[75] This creates procedural safeguards that counteract the lacuna of substantive review of monetary policy. This finding mirrors the dichotomy between the focus of US administrative law on strictly enforced procedural safeguards and the wide executive margin of discretion left by loose substantial standards such as the "arbitrary and capricious" standard. The real test is yet to come. Recent events suggest that this test might not involve another act in the "long-lived battle over the composition of the Federal Open Market Committee"[76]. Rather, the public disputes about the appointments to the Board of Governors suggest that there is no shortage of conflict in other areas. The dispute about the succession of the director of the Consumer Financial Protection Bureau already reached the judiciary (although it was voluntarily dismissed).[77]

3.3 Transparency requests

A third category of cases is access to information claims. The Freedom of Information Act (FOIA) demands that administrative agencies make reasonable efforts to search for the requested information and disclose the relevant information upon request unless covered by one of nine exemptions.[78] Both the Board of Governors and the FOMC are subject to FOIA regulations as separate government agencies and have promulgated specific regulations.[79] FOIA explicitly states that the agencies bear the burden of proof when invoking an exemption to withhold information and that the courts judge the matter de novo potentially reviewing

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72 ibid., at 518-524.

73 ibid., at 521.

74 ibid., at 522.

75 But see Zaring (2015), p. 181-184, who argues that "the FOMC is probably too old and too important to be vulnerable to life-threatening constitutional challenge" (p. 181). He also points out that a non-delegation challenge against the FOMC would have to be brought by "primary deal banks […] or perhaps their financial market competitors" (p. 183), who could fulfil the standing requirement. With regard to the emergency actions during the financial crisis, see also the remarks of the Congressional Oversight Panel (2010), p. 80 footnote 298: "It is unclear whether anyone would have standing to sue the Federal Reserve related to its actions involving AIG, and in any event, the standard of review is very deferential (requiring clear evidence of arbitrariness and capriciousness)."

76 *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 562 (D.C. Cir. 1987) referring to three earlier decisions, namely *Committee for Monetary Reform v. Board of Governors*, 766 F.2d 538, 539 et seq. (D.C. Cir. 1985); *Riegle v. Federal Open Market Committee*, 656 F.2d, 873, 874-876 (D.C. Cir. 1981); *Reuss v. Balles*, 584 F.2d 461, 462-464 (D.C. Circ.), cert. denied, 439 U.S. 997 (1978).

77 *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), the subsequent appeal was voluntarily dismissed, No. 18-5007, 2018 WL 3526296 (D.C. Cir. 2018).

78 5 U.S.C. § 552(a)(3) and (b).

79 5 U.S.C. § 552, implemented by 12 C.F.R. §§ 261 and 12 C.F.R. §§ 271 respectively.

information in camera.[80] Thus, it establishes a strict standard of review – especially in contrast to the general "arbitrary and capricious standard" of administrative law.[81]

In practice, disputes about FOIA requests are typically decided through summary judgment.[82] This requires the moving party, usually the Federal Reserve, to show "that there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law".[83] The Federal Reserve bears the burden to prove that it conducted an adequate search and that the information is protected by one of the exemptions.[84] It can do so through an affidavit providing specific support for its argument. While it is sufficient when the Federal Reserve's assertions are "logical" or "plausible", the FOIA requester can bring evidence to the contrary, which is to be treated as credible.[85] The courts need to review the submitted evidence. So far (and contrary to national security judgments), the courts have not expressed concern about second-guessing the Federal Reserve's assertions about harm of disclosure.[86]

The most powerful enforcement of transparency rights took place in response to the financial crisis of 2007-2009. In its aftermath, a multitude of cases reached the courts. Some cases focused on the validity of the Federal Reserve's evaluation of the potential harm of disclosure. These are the most relevant in the current context. Other decisions reviewed whether the Federal Reserve had made a reasonable and good faith effort to search the requested documents, sometimes held at the private Federal Reserve Banks.[87] This examination of search efforts is an important first step in exercising effective control because only information that has been assembled can be submitted to the court for a further review in camera.

The two most prominent judgments of the Court of Appeals compelled a major release of documents about the Federal Reserve's emergency actions.[88] Two news agencies demanded disclosure of detailed information on emergency loans made to private banks through the Discount Window in April and May 2008,[89] as well as of

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80 5 U.S.C. § 552(a)(4)(B).

81 See *U.S. Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 755 (1989).

82 See *Ball v. Board of Governors of Federal Reserve System*, 87 F.Supp.3d 33, 41 (D.D.C. 2015); *Gold Anti-Trust Action Committee, Inc. v. Board of Governors of Federal Reserve System*, 762 F.Supp.2d 123, 130 (D.D.C. 2011).

83 Rule 56(a) Federal Rules of Civil Procedure.

84 *Ball v. Board of Governors of Federal Reserve System*, 87 F.Supp.3d 33, 41 (D.D.C. 2015), citing *American Civil Liberties Union v. U.S. Department of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011).

85 *Ball v. Board of Governors of Federal Reserve System*, 87 F.Supp.3d 33, 41 (D.D.C. 2015), referring to the US Supreme Court, states that this "evidence […] is to be believed, and all justifiable inferences are to be drawn".

86 *American Civil Liberties Union v. U.S. Department of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011) states that "courts 'lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case'".

87 *Junk v. Board of Governors of Federal Reserve System*, signed 29 August 2019, 19cv385 (DLC), 2019 WL 4082770 (D.D.C. 2019); see also Karlson (2010), arguing that Federal Reserve Banks should be considered government agencies under FOIA.

88 *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010); *Fox News Network, LLC v. Board of Governors of the Federal Reserve System*, 601 F.3d 158 (2d Cir. 2010).

89 *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 649 F.Supp.2d 262, 267-270 (S.D.N.Y. 2009); *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143, 145 et seq. (2d Cir. 2010).

information about the loans made under the lending programs of the Federal Reserve Banks from August 2007 to November 2008.[90] The Court applied a strict standard of review. Asking for summary judgment, the Federal Reserve had to provide specific evidence in support of invoking an exception that was not put into question by evidence of the requester.[91]

The decisions examined whether the Board of Governors could refuse access to information that they viewed as "privileged or confidential" under FOIA exemption 4 or whose disclosure could harm "program effectiveness" under FOIA exemption 5.[92] The Court held that the Federal Reserve failed to bring "specific evidence" for its contentions.[93] The Board of Governors had submitted affidavits from its employees, describing the potential stigma that a disclosure would have for recipients of emergency measures.[94] The Court viewed these statements as speculative. Accordingly, they were insufficient to substantiate the alleged "imminent competitive harm" through disclosure.[95] The Court stressed that "the risk of looking weak to competitors and shareholders is an inherent risk of market participation; information tending to increase that risk does not make the information privileged or confidential under Exemption 4."[96] Therefore, the Federal Reserve failed to meet the burden of proof. With regard to concerns about "program effectiveness", the Court found the Federal Reserve's fear of further instability through disclosure to be plausible. However, it held that "a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine 'the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].'"[97] Because Congress had placed high emphasis on transparency in the FOIA, it would be an "impermissible deference" to the Federal Reserve to allow it to "withhold whatever it deems harmful to disclose".[98]

In *Fox News Network LLC v. Board of Governors of the Federal Reserve System*, the lower District Court had sided with the Federal Reserve, but was subsequently overruled.[99] It had granted a wide margin of discretion and relied solely on the contentions of the Board of Governors, claiming that the disclosure of information negatively impacted the government's future procurement of information, caused

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90 *Fox News Network, LLC v. Board of Governors of the Federal Reserve System*, 601 F.3d 158, 159 (2d Cir. 2010) overruling *Fox News Network LLC v. Board of Governors of the Federal Reserve System*, 639 F.Supp.2d 384 (S.D.N.Y. 2009).

91 *Ball v. Board of Governors of Federal Reserve System*, 87 F.Supp.3d 33, 40 et seq. (D.D.C. 2015).

92 5 U.S.C. § 552(b)(4). FOIA exemption 4 excludes from disclosure "matters that are [...] trade secrets and commercial or financial information obtained from a person and privileged or confidential". FOIA exemption 5 excludes "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency […]".

93 Regarding exemption 4, see *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 649 F.Supp.2d 262, 279 (S.D.N.Y. 2009).

94 *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 649 F.Supp.2d 262, 279 (S.D.N.Y. 2009).

95 ibid., at 280.

96 ibid.

97 Bloomberg, L.P. v. Board of Governors of the Federal Reserve System, 601 F.3d 143, 151 (2d Cir. 2010) citing *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

98 ibid., at 150.

99 *Fox News Network LLC v. Board of Governors of the Federal Reserve System*, 639 F.Supp.2d 384 (S.D.N.Y. 2009).

substantial competitive harm and undermined the Federal Reserve's effective performance of duties.[100] The District Court held the that a disclosure of information might allow inferences that could cause competitive harm, trigger bank runs, violate business secrets and create a stigma for banks that impairs the Federal Reserve's mission.[101] Remarkably, the Court refrained from citing any economic insight for the plausibility or accuracy of these causal assumptions. It merely claimed that "[t]he Board's concerns [...] cannot be dismissed" and "the Board's concern is real."[102] The assumed theoretical and causal mechanisms at play remained unclear. The Court of Appeals rightfully overturned this decision.

From a comparative perspective, it is important to note that the US Supreme Court has opened up a middle ground between transparency and secrecy with regard to the Federal Reserve's monetary policy.[103] It solved the conflict between these competing interests by allowing a delayed publication. The underlying case dealt with the information request of a law student who demanded the immediate instead of a delayed release of the "Domestic Policy Directive" claiming research interests.[104] This directive contains the FOMC's monthly analysis of the state of the economy and its conclusions for a suitable monetary policy and was published with a delay of 45 days, i.e., once the requested information was no longer effective.[105]

The Supreme Court qualified the directive as an "intra-agency memorandum" and introduced a "privilege for confidential commercial information", even though FOIA's plain language demanded prompt disclosure.[106] The Supreme Court held that "a slight delay in the publication" was justified "if the Domestic Policy Directives contain sensitive information not otherwise available, and if immediate release of the Directives would significantly harm the Government's monetary functions or commercial interests".[107] Based on this privilege, the Supreme Court remanded the case for further consideration to the District Court to review the evidence with regard to the harm caused.[108] The District Court, however, deferred to the assessment of the Federal Reserve. It held that this was "a dispute over economic theory [and] proper monetary policy".[109] Therefore, "the Court [was] an inappropriate forum" because it "lacks the expertise necessary to substitute its judgment or that of the

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100 ibid., at 400.

101 ibid., at 401 et seq.

102 ibid., at 401.

103 *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 367 (1979) (diss.), emphasizing that FOIA "establishes no middle ground".

104 *Merrill v. Federal Open Market Committee of the Federal Reserve System*, 413 F.Supp. 494, 496 et seq. (D.D.C. 1976). See similar requests brought by doctoral students against the ECB, Case T-436/09, *Dufour v ECB*, EU:T:2011:634 and Case T-3/00, *Pitsiorlas v Council and ECB*, EU:T:2007:357.

105 *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 340 (1979). Currently, the Domestic Policy Directive is contained in the minutes of the meetings of the FOMC (which are published with a three week delay) and often release on the same day.

106 ibid., at 352-360.

107 ibid., at 363.

108 ibid., at 364; *Merrill v. Federal Open Market Committee of the Federal Reserve System*, 516 F.Supp. 1028, 1030-1032 (1981).

109 Merrill v. Federal Open Market Committee of the Federal Reserve System, 516 F.Supp. 1028, 1031 (1981).

plaintiff's experts for that of the FOMC".[110] Ultimately, the Federal Reserve could delay its publication.

In contrast to the CJEU's tendency to accept secrecy, it is important to emphasise that this dispute focused solely on the legality of a delay in publication – i.e. a "temporary suppression" – and never about a permanent nondisclosure.[111]

3.4 Supervisory and regulatory role

US courts review regulatory and supervisory decisions of the Federal Reserve, which constitute the fourth group of cases.[112] They apply a deferential standard of review with regard to the substance of the decisions. Instead, the courts focus on checking the decision-making process. This doctrine is rooted in administrative law. Central bank independence or rights beyond due process play no role in these judicial rulings.

The concrete standard of review depends on the legal basis of each measure. In US banking law, various rules govern the Federal Reserve's supervisory and regulatory actions. Some banking law statutes explicitly stipulate a specific standard of review. For instance, § 1848 Bank Company Holding Act prescribes deference to the Federal Reserve Board's findings of fact, "if supported by substantial evidence".[113] Absent such specific legislation, the general Administrative Procedure Act (APA) is applicable to the Federal Reserve as an independent administrative agency. The APA excludes from judicial review any action that is "committed to agency discretion by law".[114] This exclusion only applies to the Federal Reserve's monetary policy actions, but does cover its activity as a supervisor or regulator.[115] According to the APA, a judicial challenge is successful if the administrative action is "arbitrary or capricious".[116] One decision has highlighted that this test is "one and the same" as the "substantial evidence test".[117]

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110 ibid., at 1032 et seq.

111 This important fact is also the subject of the dissenting opinion *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 365 et seq. (1979) (diss.). Compare to the adjudication of the General Court in cases against the ECB, e.g., Case T-590/10, *Thesing and Bloomberg Finance v ECB*, EU:T:2012:635; Case T-376/13, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB*, EU:T:2015:361.

112 Reviews conducted through the appeals process within the Federal Reserve are beyond the scope of this analysis: instructively, see Hill (2015), pp. 1129-1138, 1163-1165.

113 12 U.S.C. § 1848.

114 5 U.S.C. § 701(a)(2).

115 *Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542, 1549 (7th Cir.1985), holds that the APA excludes from review "Federal Reserve Board decisions setting interest rates"; this decision is cited by *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985); *Heckler v. Chaney*, 470 U.S. 821 (838) (1985) emphasises its narrow scope of application. See also Hubble (2013), p. 1825, stating that "exactly which of FRB's banking rulemaking can be subject to judicial review is confusing."

116 5 U.S.C. § 706(2)(A).

117 *Association of Data Processing Service Organization v. Board of Governors of Federal Reserve System*, 745 F.2d 677, 683 (D.C. Cir. 1984). Yet, a comprehensive review of the Federal Reserve's case law has not been undertaken. Hubble (2013), p. 1825 footnote 138 raises this criticism; see also Zaring (2010), pp. 166-168.

US courts have always applied deference on the basis of these standards. Early cases did so without a consistent doctrine. In one instance, the Court of Appeals relied on *Raichle v. Federal Reserve Bank of New York* and denied subject matter jurisdiction.[118] The Federal Reserve had granted rescue funds to Franklin National Bank, which was on the verge of collapse. Ultimately however, the funds were insufficient to prevent the "largest bank failure in United States history" at the time.[119] The plaintiff had previously borrowed from Franklin National Bank, was unable to refinance after its collapse, defaulted on its obligations and thus demanded compensation of damages from the Federal Reserve for concealing Franklin National Bank's insolvency.[120] The plaintiff, a construction company, brought a tort claim against the Federal Reserve. In *Huntington Towers, Ltd. v. Franklin National Bank*, the Court dismissed the case arguing that the tort claim "may not be adjudicated here".[121] Moreover, the contested decisions "were exercises of judgment by the public officials concerned and were well within their competence and authority".[122] The Court, however, emphasised that this wide discretion might find its limits if there was "clear evidence of grossly arbitrary or capricious action".[123] In another case, *Board of Governors of the Federal Reserve System v. First Lincolnwood Corp.*, the Supreme Court upheld the denial of a bank's application to become a bank holding company paying "great respect" to the Federal Reserve's "longstanding construction of its statutory mandate".[124] The decision was "within the authority conferred by Congress[,] supported by substantial evidence", and therefore not arbitrary and capricious.[125] A similar case concerning the Federal Reserve's regulatory activity deemed it "entitled to the greatest deference" in the interpretation of its statutory authority due to it legislative history.[126]

In 1984, the US Supreme Court developed what is known as "Chevron deference," named after the landmark case.[127] Until today, this doctrine guides the judicial review of all administrative agencies, including the Federal Reserve.[128] It assumes that when Congress has consciously endowed administrative agencies with independence and discretion, it thereby prohibits judicial second-guessing. This doctrine grants wide deference to agency rule-making. The Supreme Court held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction

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118 *Huntington Towers, Ltd. v. Franklin National Bank*, 559 F.2d 863, 869 (2d Cir. 1977).

119 ibid., at 865 (2d Cir. 1977).

120 ibid., at 865 (2d Cir. 1977).

121 ibid., at 868 (2d Cir. 1977).

122 ibid., at 868 (2d Cir. 1977).

123 ibid., at 868 (2d Cir. 1977).

124 *Board of Governors of the Federal Reserve System v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

125 ibid., at 253 et seq. with footnote 19; see section 9 Bank Holding Company Act, Public Law 84-511, 70 Stat. 133, 12 U.S.C. § 1848.

126 *Board of Governors of Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 46, 75 et seq. (1981).

127 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

128 See *Loan Syndications and Trading Association v. Securities and Exchange Commission*, 882 F.3d 220, 222 (D.C. Cir. 2018); *NACS v. Board of Governors of Federal Reserve System*, 746 F.3d 474, 482-496 (D.C. Cir. 2014). However, Bozman (2019), pp. 1126-1129, suggests an "uncertain future of Chevron" due to the Supreme Court's current composition.

of the statute."[129] This establishes a two-step test.[130] The first step reviews whether Congress has clearly spoken on the particular issue. Here, the courts exercise full review and apply the "traditional tools of statutory construction".[131] There often is disagreement over the correct interpretation.[132] Step two applies a reasonableness standard, which usually results in a deferential treatment of the Federal Reserve's actions.[133] Until today, the Chevron doctrine guides the adjudication on the Federal Reserve.[134]

This standard is overall "[h]ighly deferential"[135] with regard to substance. The Supreme Court most prominently emphasised that a decision is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise".[136] It demanded that "the agency must examine the relevant data and articulate a satisfactory explanation for its action."[137] This means that the agency must present a rational basis for its decision and consider all relevant factors without "a clear error of judgment".[138] Courts have also applied this standard in cases

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129 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

130 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Sometimes, the two steps get conflated, See, e.g. *NACS v. Board of Governors of Federal Reserve System*, 746 F.3d 474, 477 (D.C. Cir. 2014): "Applying traditional tools of statutory interpretation, we hold that the Board's rules generally rest on reasonable constructions of the statute."

131 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 note 9 (1984); but see Board of Governors of Federal Reserve System v. Dimension Financial Corporation, 474 U.S. 361 (1986) applying Chevron deference to the first step.

132 *Loan Syndications and Trading Association v. Securities and Exchange Commission*, 223 F.Supp.3d 37, 54 (D.D.C. 2016), upheld the Federal Reserve's final rules as "reasonable" in Chevron step two, after concluding that step one had been met. *Loan Syndications and Trading Association v. Securities and Exchange Commission*, 882 F.3d 220, 224-229 (D.C. Cir. 2018), overturned this decision and strictly reviewed "the statutory boundaries set by Congress" in Chevron step one. With the roles reversed between the District Court and the Court of Appeals, see *NACS v. Board of Governors of Federal Reserve System*, 958 F.Supp.2d 85, 97 et seqq. (D.D.C. 2013), that only applied Chevron step one and found no ambiguity. *NACS v. Board of Governors of Federal Reserve System*, 746 F.3d 474 (D.C. Cir. 2014) overturned this decision because it found ambiguity and applied step two, but held the decision to be "reasonable" (except for one aspect).

133 While an early decision applied Chevron and struck down a regulatory amendment enacted by the Board of Governors, *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. 361 (1986), later cases upheld the Federal Reserve's decision using the "reasonableness standard", even if often not explicitly citing Chevron. See Friedberg and Gordon (1988), pp. 376 et seq. See Zaring (2011), pp. 543 et seqq., with a critical view on "reasonableness review" in financial regulation law; see also Bernstein (2016), pp. 6-12, on the complexity and opacity of the reasonableness standard.

134 Recent examples are *Loan Syndications and Trading Association v. Securities and Exchange Commission*, 223 F.Supp.3d 37, 54, 49-54 (D.D.C. 2016); *NACS v. Board of Governors of Federal Reserve System*, 958 F.Supp.2d 85, 97 et seqq. (D.D.C. 2013).

135 *AT & T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000); Friedberg and Gordon (1988), p. 402.

136 *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983).

137 ibid.; with regard to the Federal Reserve, see *MetLife v. Financial Stability Oversight Council*, 177 F.Supp.3d 219, 230 (D.D.C. 2016); *NACS v. Board of Governors of Federal Reserve System*, 746 F.3d 474, 493 (D.C. Cir. 2014), demanding a "reasonable justification" and remanding back "to the agency for additional investigation or explanation" (internal citations omitted).

138 *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 42 et seq. (1983); *MetLife v. Financial Stability Oversight Council*, 177 F.Supp.3d 219, 230 (D.D.C. 2016).

against the Federal Reserve.[139] These procedural control mechanisms are of particular importance due to the Federal Reserve's independence.[140]

4 Constructive comparative findings

Does this comparative perspective provide any lessons for a standard of review in cases against the ECB? Three suggestions are developed here. First, the deliberate refusal of US courts to review monetary policy could serve as a model for the CJEU to delineate an unreviewable core of monetary policy. Judicial clarity on the non-justiciability of certain decisions might allow room for and trigger a normative debate outside of the judicial system. Thus, it can function as an accountability mechanism. Second, there should be a deferential review of the penumbra and a strict review of the outer bounds of the ECB's authority. Third, a high evidentiary standard for access to information claims should guide the judicial review of the ECB's transparency regime. The CJEU needs to meet transparency requests with a burden of proof that holds the ECB accountable for its justifications of secrecy.

4.1 The value of deliberate deference

US courts refuse to review monetary policy decisions, except in extreme circumstances. In contrast, the CJEU formulates an all-encompassing standard of review for monetary policy decisions.[141] This standard was first created in *Gauweiler* and later confirmed in *Weiss*.[142] In both cases, the ECJ emphasised the duty of the ECB to "use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy".[143] It also tested the ECB's measures against its classic proportionality standard.[144] Following its tradition, most prominently developed in competition law with regard to cases against the Commission, the CJEU granted a wide margin of discretion because the ECB needs "to make choices of a technical nature and to undertake forecasts and complex assessments".[145] This deference in itself is convincing. Both for the Commission and the ECB, the CJEU offsets this wide discretion by stressing the duty "to examine

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139 See, for instance, *Loan Syndications and Trading Association v. Securities and Exchange Commission*, 223 F.Supp.3d 37, 48 et seq., 67 (2016); *NACS v. Board of Governors of Federal Reserve System*, 746 F.3d 474, 492 (2014); *National Association of Mortgage Brokers v. Board of Governors of the Federal Reserve System*, 773 F.Supp.2d 151, 169 (D.D.C. 2011); *American Bankers Ins. Group, Inc. v. Board of Governors of the Federal Reserve System*, 3 F.Supp.2d 37, 40 et seq. (D.D.C. 1998); *Money Station, Inc. v. Board of Governors of the Federal Reserve System*, 81 F.3d 1128, 1135 (D.C. Cir. 1996).

140 Sharkey (2014) therefore argues that "in the absence or failure of executive oversight, heightened judicial scrutiny should apply" (p. 1592).

141 Zilioli (2017), pp. 94 et seqq., assesses this difference.

142 Case C-62/14, *Gauweiler*, EU:C:2015:400, para. 41, 66 et seqq.; Case C-493/17, *Weiss*, EU:C:2018:1000, para. 49, 71 et seqq.

143 Case C-62/14, *Gauweiler*, para. 75; Case C-493/17, *Weiss*, para. 91.

144 Case C-62/14, *Gauweiler*, para. 66-92; Case C-493/17, *Weiss*, para. 71-100.

145 Case C-62/14, *Gauweiler*, para. 68; Case C-493/17, *Weiss*, para. 73.

carefully and impartially all the relevant elements of the situation in question".[146] Yet, the CJEU has so far refrained from checking any details of the ECB's decision-making process. It has rather relied on the ECB's own description of how it made the necessary assessments.[147] In contrast, the CJEU has, under certain circumstances, carefully reviewed whether the Commission fulfilled this obligation. In several cases, the CJEU found that the Commission had violated its duty, for instance when it failed to show that the expert group it relied on possessed the necessary knowledge, when it presented evidence that was unfounded, unconvincing and incomplete, and when it did not take data from a relevant time period into account.[148] Overall, the CJEU formulates a potentially sharp standard of review with regard to the ECB's monetary policy decisions, but ultimately refrains from applying it.

This doctrinal approach has disadvantages compared to the US adjudication. It creates uncertainty about the intensity of review applied in each case.[149] The courts become the final arbiter in all cases by categorically subjecting central bank measures to a strict standard of review combined with an individual exercise of deference in each case that does not follow clear criteria.[150] It frames the discourse about monetary policy in legal argument, thus substituting a political debate about alternatives, power imbalances and democratic accountability. It also creates incentives for other institutional actors, who could hold the ECB accountable, to view judicial review as the primary and even sole accountability mechanism instead of acting themselves. This potentially crowds out other forms of accountability.[151] Therefore, an argument can be made that the CJEU should be more explicit in delineating the wide margin of discretion it applies to the ECB's monetary policy decisions. In carving out an unreviewable core of monetary policy-making, it would give weight to the value of deliberate deference. This deliberate deference might trigger and allow room for a normative debate outside of the judicial system – a debate that could serve as an additional accountability mechanism. It would also allow the legal community to debate the concrete margins that delineate this unreviewable core of monetary policy from the periphery.

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146 Case C-62/14, *Gauweiler*, para. 69; Case C-493/17, *Weiss*, para. 30; Case C-269/90, *Technische Universität München*, EU:C:1991:438, para. 14, 22; Case C-12/03 P, *Commission v. Tetra Laval*, EU:C:2005:87, para 39, formulating the duty to "establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it"; Case C-405/07 P, *Netherlands v. Commission*, EU:C:2008:613, para. 56.

147 Case C-62/14, *Gauweiler*, para. 72 et seqq.

148 Case C-269/90, *Technische Universität München*, para. 21 et seq.; Case C-12/03 P, *Commission v. Tetra Laval*, para. 46; Case C-405/07 P, *Netherlands v. Commission*, para. 58-75; see also with regard to these cases Kokott/Sobotta (2017), p. 108.

149 See the academic contributions deciphering the standard of review, Zilioli (2017), pp. 92 et seqq., 98 et seqq.; Lehmann (2017); Kokott/Sobotta (2017), p. 109 et seq.; Goldmann (2014).

150 See the informative analysis of Justice Gertrude Lübbe-Wolff in her dissenting opinion on the OMT decision of the GFCC, *OMT*, BVerfGE 134, 366, 421.

151 To the contrary, Kokott/Sobotta (2017), p. 110, emphasise that "compliance with obligations to examine carefully and impartially all the relevant element of the situation in question and to give an adequate statement of reasons […] would promote the debate of monetary policy."

4.2 Reviewing the outer bounds of central bank authority

The suggested deliberate deference with regard to monetary policy-making needs to be accompanied by a more rigorous review of adherence to the outer bounds of central bank authority. Most importantly, a strict standard of review is warranted with regard to the provisions of the TFEU that limit the ECB's competences and prohibit monetary financing. With regard to the measures that fall in between the unreviewable core and the outer limits in this concept of concentric circles, a deferential review seems most suitable.[152] This could mirror the current standard of review employed towards all monetary policy measures. Consequently, the Court should be more outspoken about the criteria that lead to a heightened judicial review. A few examples of such criteria should be suggested here.[153] The CJEU should increase scrutiny the more unconventional monetary policy measures are and the further from the typical core of monetary policy they can be situated. Similarly, actions that are taken outside of a clearly outlined process and whose transparency is uncertain should receive more judicial attention, for example when the ECB participates in international negotiations on granting financial assistance to member states or when it sends informal letters to exert pressure on member states to seek financial assistance. The real-world impact of such actions can be large. Courts should provide oversight even though these actions are not easily amenable to judicial review. Further, the greater the proximity to fundamental rights, i.e., the larger the individual effect of measures, the stricter they should be reviewed. Therefore, the degree of scrutiny should increase along these dimensions.

So far, the CJEU has not declared a measure of monetary policy to be in violation of the Treaties.[154] Incidentally, neither has the German Federal Constitutional Court (GFCC) found a violation of the German Constitution.[155] Thus, the current approach of formulating a strict standard of review and softening it dependent on the specific nature of the contested measure will very likely not produce different outcomes compared to the modified approach proposed here. Yet, the presented suggestion could prompt the CJEU to elaborate more clearly, along which characteristics it adjusts its standard of review.

4.3 Evidentiary standard for information requests

US courts apply a strict evidentiary standard of review to transparency cases. They demand evidence for the central bank's assertions when rejecting an information request. Consequently, they fully check the validity of the arguments the Federal Reserve makes to defend non-disclosure. The main reason for this strict review lies in the statutory basis of information requests. The US FOIA puts a strong emphasis

[152] On the deconstruction of this concept in the context of US fundamental rights review, see Kanter (2006).

[153] See, for further parameters, Zilioli (2017), pp. 99 et seq.

[154] Case C-62/14, *Gauweiler*; Case C-493/17, *Weiss*; see also the review by Zilioli (2016a).

[155] Despite its strict standard of review, the GFCC ultimately found the ECB's measures to be constitutional: BVerfGE 142, 123, OMT. The final decision following the CJEU's judgment in *Weiss* has yet to be delivered, the oral hearing was held on 30 July 2019.

on the enforcement of transparency and explicitly states that the agencies carry the burden of proof. This approach can serve as a model for the CJEU and challenges the factual assumptions underlying the CJEU's adjudication.

The ECB is subject to the transparency requirements of Article 15 TFEU, in relation to access to documents, only when exercising its administrative tasks. Nevertheless, the ECB grants public access to documents according to a general transparency regime laid down in a decision on public access to documents.[156] This legal framework establishes a rule of transparency accompanied by exemptions that justify non-disclosure – a concept similar to the US FOIA and other freedom of information rules. In its case law, the General Court (GC) has developed a certain evidentiary standard. It demands that the applicants put forward arguments that sufficiently challenge the ECB's reasons for non-disclosure. To compensate for this burden put on the requesters of information, the GC has been increasingly strict about the depth of the necessary statement of reasons from the ECB. It commits the ECB to give detailed reasons for rejecting an information request that addresses all of the information withheld and all of the exemptions invoked. When examining the applicants' challenges to these reasons, the GC assesses whether the ECB made a "manifest error of assessment" when rejecting the information request.

In reviewing these challenges, the GC has so far applied a large margin of discretion and basically deferred to the assumptions of the ECB. This is not only true with regard to facts or evaluations that necessitate specific knowledge present inside the central bank. Assumptions about the mechanisms and functioning of financial markets also remain practically unreviewed. Only in one case so far did the GC reject the ECB's argument that disclosure could undermine monetary policy because the requested information had already been published by Banco de Portugal two years previously.[157] The ECB asserted "that the effects of Banco de Portugal's decision to make public that information cannot be compared to the effect of disclosure by the ECB".[158] Moreover, Banco de Portugal had only published the approximate amount of credit provided to a specific bank.[159] The GC rejected this argument as manifestly without foundation. It held "that the ECB cannot claim that disclosure by it of the amount of credit in question at the time the contested decision was adopted could have given rise to speculation as to [the concerned bank's] financial situation and have had a negative impact on its sale process, as well as undermining, as a consequence, the public interest as regards the stability of the financial system in Portugal".[160] A similar line of argument can be found in the jurisdiction of the GFCC. The Court was confronted with a claim by an opposition party and some of its members seeking information about certain decisions that the

156 Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents, ECB/2004/3, OJ L 80, 18.3.2004, p. 42.

157 Case T-730/16, *Espírito Santo Financial Group v ECB*, EU:T:2019:161. This mirrors the holding of the US Supreme Court that excludes delaying the publication of already available information, *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 363 (1979).

158 Case T-730/16, *Espírito Santo Financial Group v ECB*, EU:T:2019:161, para. 119.

159 ibid.

160 ibid, para. 136.

German government and executive made during the financial crisis.[161] The GFCC refused to accept the government assertion that the release of outdated information would destabilize financial markets.[162] During its oral hearing, the GFCC heard economic insights into potential consequences of a publication of the requested information.[163] It concluded that under the given circumstances the release of outdated information could not reasonably affect financial markets.[164]

Against this backdrop, an argument can be made that the CJEU should heighten the standard of review applied in transparency cases. This could be done by enforcing the standard the GC has already spelled out. In a recent case, the GC stressed its own powers. It emphasised its "duty to establish whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it".[165] In applying this intense standard of review – which resembles the standard of review in the United States –, however, the GC however exercised leniency. It deferred to the ECB's assertions and did not require any specific evidence. It passed up the chance to take the ECB's commitment to transparency seriously and empower the judiciary to prompt the necessary changes. Increasing judicial scrutiny for access to information claims would enhance transparency, promote accountability and compensate for a weaker substantive review of central bank measures.[166]

5 Conclusion

Judicial evidence from the United States shows, on the one hand, that courts refrain from questioning the Federal Reserve's monetary policy decisions. This explicit judicial deference applies to both regular activities and emergency actions in the field of monetary policy. On the other hand, courts exercise full review if there is a Congressional mandate. This is particularly obvious in the standard of strict review applied in FOIA cases, but also determines review in the supervisory and regulatory area, which is governed by specialized legislation.

This diagnosis stands in stark contrast to the state of judicial review in cases brought against the ECB. There are of course plenty of reasons for these differences between the two jurisdictions apart from the different legal systems. Some relate to the genesis of each central bank as well as their structure and institutional design. Others are based on the divergent political economies in both jurisdictions, the role of courts in general and the relationship between the judiciary, the central bank and the legislator. All of this should neither be denied nor disregarded. However, it is

161 BVerfGE 147, 50.

162 ibid. para. 312-325, 345-357.

163 ibid. para. 160.

164 ibid. para. 312-325, 345-357.

165 Case T-116/17, *Spiegel-Verlag Rudolf Augstein and Sauga v ECB*, EU:T:2018:614, para. 39 (translation by the author), relying on case T-257/07, *France v Commission*, EU:T:2011:444, para. 87.

166 Despite potential negative consequences of transparency (see Dawson, Maricut-Akbik and Bobić (2019), pp. 81-85), the comparative evidence suggests a preponderance of benefits.

suggested that, based on the ECB's own commitment to transparency, the CJEU should increase the standard of review when reviewing decisions to withhold information. The refined US adjudication on FOIA cases can serve as a model. This would also fit the EU narrative of promoting transparency and mobilizing individuals to ensure compliance with EU law. While acknowledging the unreviewable nature of a substantive core of monetary policy, the CJEU should strictly review the outer limits of central bank authority and develop criteria for reviewing the space in between. The currently pending and all future cases before the CJEU give it the opportunity to sharpen and refine its adjudication further. Here, the comparative conclusions could be put into practice.

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Part 3
Autonomy of interpretation of Union law by the Court of Justice of the European Union


François Bilteen
André Bouvaresse

The concept of autonomy in Union law: some fundamental questions

The autonomy of Union law has been a central theme in many recent fundamental judgments of the Court of Justice of the European Union (CJEU), both regarding the participation of Member States or the Union in systems of international adjudication, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or investment arbitration, and vis-à-vis national courts. The autonomy of Union law is thus directed towards adjudicators both inside and outside the Union. Although a key judicial concept, autonomy has not yet been sufficiently analysed. What are the legal arguments and the underlying considerations of the CJEU in developing its "autonomy concept"? What are the limits to and requirements for the application of Union law by non-Union adjudicators? And what does the willingness of the CJEU to scrutinise the acte clair doctrine signify? The papers in this Part discuss the judgments of the CJEU in Case C-284/16 *Achmea*, in Case C-416/17 *Commission* v *France* and Opinion 1/17, all of which, in effect, shield the autonomy of interpretation of Union law by the CJEU. The papers also consider these questions from the perspective of international law and the impact of the concept of autonomy on the development of a rules-based international order, especially in current times.

The concept of autonomy of EU law: from Opinion 2/13 (accession to the ECHR) to Achmea and Opinion 1/17 (CETA)

François Biltgen[1]

By building bridges, two places far apart find a possibility to communicate. Often bridges already exist. Then the question is: are they wide and solid enough to allow good communications? The bridges which are the subject of our topic, are they solid enough? Do we need new bridges?

This paper will be divided into three main parts. First, I shall introduce the concept of autonomy of EU law, in particular its implications for the European Union's judicial system. Second, I will discuss the *Achmea* judgment[2] in that light. Finally, I shall turn to Opinion 1/17 on the EU-Canada CET Agreement (CETA)[3].

1 The role of the EU judicial system in protecting the autonomy of EU law

In its Opinion 2/13[4], the Court of Justice of the European Union considered that the accession of the EU to the ECHR, as envisaged by the draft accession agreement, was liable to adversely affect the specific characteristics and the autonomy of EU law. That Opinion provides, at paragraphs 153 to 200, a good summary of the meaning and scope of this notion of autonomy, as developed over the decades in the case-law of the Court.

The concept of autonomy was forged by the founding judgments of the Court, notably *Van Gend & Loos* and *Costa*[5], in which the Court stated that the founding treaties established a new legal order possessing its own institutions; and that EU law is characterised by the fact that it stems from an independent source of law, by its primacy over the laws of the Member States and by the direct effect of a whole series of provisions which apply to their nationals and the Member States themselves. In *Internationale Handelsgesellschaft*[6], fundamental rights were recognised as an integral part of the general principles of EU law, for which the Court

1 Judge at the Court of Justice of the European Union.

2 Judgment of 6 March 2018, *Achmea*, C -284/16, EU:C:2018:158.

3 Opinion 1/17 of 30 April 2019, EU:C:2019:341.

4 Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454.

5 Judgments of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1, and of 15 July 1964, *Costa*, 6/64, EU:C:1964:66.

6 Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114.

of Justice draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The Court thereby laid the foundations for the provisions of the Charter of Fundamental Rights.

As Opinion 2/13 makes clear, those essential characteristics of EU law have given rise to a structured framework of principles, rules and interdependent legal relations linking the EU and its Member States, and its Member States with each other. It must be remembered that this legal structure is based on the fundamental premise that each Member State shares with all the other Member States a set of common values on which the EU is founded, in particular the rule of law, as stated in Article 2 TEU. That premise implies, and justifies, the existence of mutual trust between the Member States, which allows an area without internal borders to be created and maintained.

It is the judicial system of the EU which safeguards the specific characteristics and autonomy of EU law, by ensuring consistency and uniformity in the interpretation of that law. Article 19 TEU gives concrete expression to the value of the rule of law by entrusting the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.

This bedrock of the EU legal order has been the focus of some recent important judgments of the Court, arising from cases in which the independence of national judges who apply and interpret EU law has been called into question. The independence of national courts is essential not only in respect of Article 47 of the Charter but also to the proper working of the preliminary ruling mechanism. In *Associação Sindical dos Juízes Portugueses*[7], the Court examined in particular the external independence of the national court in question, which means freedom from external constraints and pressures which could result from hierarchical relationships or the ways in which judges are appointed, remunerated and removed from office. Internal independence, on the other hand, concerns impartiality, equal distance between the parties to proceedings and lack of personal interest in the outcome of those proceedings.

In a noteworthy jurisprudential development, the Court was faced in *Minister for Justice and Equality*[8] with a situation in which a person was contesting a European Arrest Warrant (EAW) issued by a Polish court, on the grounds that legislative changes in Poland had brought into question the independence and impartiality of courts in that country, thus undermining his right to a fair trial. The Court applied, by analogy with Article 47 of the Charter, its case-law relating to the avoidance of inhuman and degrading treatment (proscribed under Article 4 of the Charter). It concluded that the execution of an EAW issued for the purposes of a criminal investigation could be refused if (1) there were indications of a real risk of breach of

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7 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.

8 Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586.

the fundamental right to a fair trial on account of systemic or generalised deficiencies in the independence of the issuing Member State's judiciary, provided that (2), in the light of all relevant circumstances, there were substantial grounds for believing that the person concerned would run such a risk on surrender to that State.

Following that judgment, the Court has very recently granted an infringement action to the Commission against Poland on account of those same legislative changes, which include the lowering of the retirement age of judges at the Supreme Court[9]. It is significant that, unlike a similar case which it had previously brought against Hungary on the grounds of age discrimination, the Commission's claim against Poland had been based on a breach of Article 19(1) TEU and Article 47 of the Charter.

The keystone to the judicial system of the EU is the preliminary ruling procedure, provided for under Article 267 TFEU. This procedure enables a dialogue between the Court of Justice and the courts of the Member States, the aim of which is to ensure the uniform interpretation of EU law and thereby the preservation of its autonomy.

The importance of the preliminary ruling procedure is underlined by the third paragraph of Article 267 TFEU, according to which a national court of last instance is obliged to make a reference to the Court on a question relating to the interpretation or validity of EU law. This obligation has given rise to the "acte clair" doctrine, as laid down by the Court in *Cilfit*[10]. In that judgment, the Court stated:

"The third paragraph of Article 177 of the EEC Treaty [now Article 267 TFEU] must be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community."

The obligation for a last instance court to make a reference in all but "acte clair" cases of interpretation of EU law has given rise to two particular developments in the Court's case-law. First, having long established that State responsibility, potentially leading to the award of *Francovich*[11] damages, can be engaged by a decision of a last-instance court which violates EU law[12], the Court implicitly held in *Ferreira de Silva e Brito*[13] that such a violation includes the failure of a last-instance court to

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9 Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531.

10 Judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335.

11 Judgment of 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428.

12 Judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513.

13 Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565.

submit a preliminary reference when the interpretation of EU law needed to resolve the case before it is not an “acte clair”.

Second, in *Commission v France*[14], the Court upheld a complaint brought by the Commission that the French Conseil d’État had infringed the third paragraph of Article 267 TEU by not making a preliminary reference on a matter of interpretation of EU law which was not exempt under *Cilfit* from the obligation of such a reference. Thus, the Court’s finding in this case was in response to an action brought by the Commission. It arose in the particular circumstance of the Conseil d’État’s having previously made a preliminary reference in order to assess the compatibility of French tax law with EU primary law, which resulted in the judgment in *Accor*[15]. However, in establishing procedures for the reimbursement of the advance payment, the levying of which had been found in *Accor* to be incompatible with EU law, the French court did not make a preliminary reference even though the compatibility of those procedures with EU law was not obvious and, indeed, was rejected by the Court in *Commission v France*.

These two strands in the Court’s case-law illustrate the importance to the rule of law in the EU of the judicial system set up by the treaties and, in particular, the preliminary reference mechanism.

The final point to make in this part of my contribution is that the preservation of the autonomy of EU law is dependent on the definitive interpretation of EU law’s remaining the sole preserve of the Court. In particular, as is made clear in Opinion 2/13, an external court, such as the European Court of Human Rights, should not be able to call into question the Court’s findings in relation to the material scope of EU law in order, for example, to determine whether a Member State is bound by the fundamental rights of the EU.

2 The *Achmea* judgment

Having alluded to the essential aspects of the autonomy of EU law and, in particular, the role of the EU judicial system in safeguarding that autonomy, I now turn to the *Achmea* judgment.

As is known, the case referred to the Court for a preliminary ruling concerned a bilateral investment treaty (BIT) concluded between the Netherlands and what was, at the time of drawing up the treaty in 1991, the Czech and Slovak Federative Republic. The Court was essentially asked whether Article 8 of the BIT, under which an investor from one of those countries could bring proceedings concerning a dispute about investments in the other country before an arbitral tribunal, was incompatible with EU law, in particular Articles 267 and 344 TFEU. That was what the Slovak Republic was arguing in its defence in the dispute in question. As a reminder, Article 344 TFEU precludes Member States from submitting a dispute

[14] Judgment of 4 October 2018, *Commission v France (Advance payment)*, C-416/17, EU:C:2018:811.

[15] Judgment of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581.

concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in those treaties.

A few words about the background to the *Achmea* case are appropriate. The BIT in question was one of many drawn up between existing Member States, on the one hand, and principally, though not entirely, States in Central and Eastern Europe, on the other hand. The BITs involving these latter states were concluded after the fall of the Iron Curtain, but before they joined the EU in 2004 or later.

The Member States which submitted observations in the proceedings before the Court fell into two groups, as the Advocate General pointed out in his Opinion. One group comprised the Member States who considered the arbitration clause in the BITs compatible with EU law – these were essentially the states from which the investors came and were thus rarely defendants in disputes. The other group included the states which joined the EU in or after 2004 and were essentially recipients of investments. These agreed with the Slovak Republic that the arbitration clauses were incompatible with EU law. As for the Commission, it indicated that the EU institutions had considered the relevant BITs to be necessary instruments in preparing the accession of the Central and Eastern European states to the EU.

It should therefore be kept in mind that in *Achmea*, the Court was confronted with a very specific type of investment treaty: concluded between a Member State and a country which was initially a third country. That country later became a Member State and, as such, became part of the EU legal order and, in particular, bound by the principle of mutual trust.

The Court also emphasised that the arbitration proceedings provided for in Article 8 of the BIT were different from commercial arbitration. The latter originates in the freely expressed wishes of the parties, while the proceedings in the BIT derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies foreseen in Article 19(1) TEU, disputes which may concern the application or interpretation of EU law. Commercial arbitration had featured in previous cases of the Court[16], without the question of incompatibility with EU law arising. Instead, the Court had held that judicial review of arbitral awards, even if limited in scope, must include the examination of the fundamental provisions of EU law and, if necessary, the making of a preliminary reference.

What, then, were the key findings of the Court in *Achmea*? It should be emphasised that these findings concern, not the compatibility of the particular BIT as such with EU law, but only the arbitration procedure provided for under Article 8 of that BIT.

After stating the principle, enshrined in Article 344 TFEU, that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, the Court recalled its case-law in relation to that autonomy, as summarised in Opinion 2/13. The first problem

[16] Judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, and of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675.

identified in respect of the contested arbitration clause was that an arbitration tribunal could be called upon to interpret or apply EU law, particularly the provisions concerning the fundamental freedoms. This was so because that clause required the tribunal to take account of the law in force of the contracting party concerned. It might be added that such an eventuality would by no means have been unlikely in the particular dispute in which Achmea was involved, which arose from a prohibition by Slovakia to distribute profits generated by investments such as the one undertaken by Achmea in that Member State.

The second problem was that an arbitral tribunal such as that referred to in Article 8 of the BIT was not situated within the judicial system of the EU. It could not be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. In this context, the Court referred to Opinion 1/09 on the creation of the European and Community Patent Court[17]. That Opinion had in particular emphasised that the courts and tribunals in the EU judicial system were subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU, namely the preliminary reference procedure, infringement proceedings under Articles 258 and 260 TFEU and *Francovich* state liability.

The third problem, which arose out of the first two, was that the arbitration clause stipulated that the decision of the arbitral tribunal was final. Moreover, the tribunal could choose the Member State in which it sat. The consequence of this was that the potential for judicial review of an arbitral award was dependent on the particular procedural rules of that Member State. In the case in point, Frankfurt was chosen as the seat of arbitration and, under the German Code of Civil Procedure, only a limited review of an arbitral award was possible. The German court seized did not have full capacity to review the compliance of the award with EU law. As a result, it could not be ensured that questions of EU law which the arbitral tribunal might have to address could be submitted to the Court via the preliminary reference procedure.

I will conclude this survey of the *Achmea* judgment by recalling once again that it found incompatible with EU law an arbitration clause in a particular type of bilateral investment treaty. Crucially, it was an investment treaty between two Member States, or at least became such after the accession of Slovakia to the EU. The placing of the dispute resolution mechanism outside the EU judicial system called into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established in the Treaties.

In that respect, as the Court pointed out in the judgment, it is different from a court created or designated by an international agreement to which the EU itself is a party. This brings me to the final part of my contribution, in which I will discuss the CETA Opinion.

[17] Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123.

3 Opinion 1/17

The CETA is a so-called “new-generation” trade agreement. The ground was laid for the process of its conclusion by the Court’s Opinion 2/15 on the Free Trade Agreement between the EU and Singapore[18]. In that Opinion, the Court established that provisions relating to indirect investments, to disputes between investors and States and to related dispute resolution and mediation mechanisms were matters of shared competence between the EU and its Member States. Such an agreement therefore had to be concluded by both the EU and the Member States.

The ratification of the CETA by the Member States is ongoing. It should be remembered that it has met with popular opposition in several countries, where it has often been associated with the proposed TTIP agreement between the EU and the United States. In particular, the Walloon region of Belgium voiced strong concerns, and under that Member State’s federal system agreement from the regions was necessary for the deal to pass. This led to the EU and Canada issuing a joint interpretative instrument aimed at meeting those concerns. It also led to the request from Belgium for an Opinion from the Court on the compatibility of Section F of the CETA, covering the resolution of investment disputes between investors and states, with the Treaties and fundamental rights. Opinion 1/17 thus did not come about as a response to a request by an EU institution.

In Opinion 1/17, the Court began by recalling its principles relating to the creation of a court responsible for the interpretation of the provisions of an international agreement to which the EU is a signatory, as stated in previous case-law including Opinion 2/13 and *Achmea*. Such a court is in principle compatible with EU law; indeed, the EU’s competence in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of such a court. An international agreement may, moreover, affect the powers of the EU institutions, provided that the essential character of those powers are satisfied so that there is no adverse effect on the autonomy of the EU legal order.

It therefore followed that the Investor-State Dispute Settlement (ISDS) system envisaged by the CETA, consisting initially of a tribunal and an appellate tribunal and subsequently a multilateral investment tribunal, would be compatible with EU law only if it had no adverse effect on the autonomy of the EU legal order. In particular, since those bodies would stand outside the EU judicial system, they could not have the jurisdiction (1) to interpret or apply provisions of EU law other than those of the CETA or (2) to make awards that might have an adverse effect on the operation of the EU institutions in accordance with the EU constitutional framework.

In its examination of the agreement, the Court concluded, first, that it did not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law beyond the provisions of the agreement itself. Therein lay an important difference from the arbitral tribunals in *Achmea*. Crucially, Article 8.31.2 of the CETA makes it clear that the tribunals shall not have jurisdiction to determine the legality of a disputed

[18] Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017, EU:C:2017:376.

measure under the domestic law of a party to the agreement. The Court thereby distinguished that agreement from the draft agreement on the creation of a unified patent litigation system, declared to be incompatible with EU law in Opinion 1/09, and with the arbitration clause examined in *Achmea*. Moreover, to the extent that an examination of the effect of a contested measure may require that the domestic law of the respondent Party be taken into account, the Court noted that the same provision of the CETA stated unequivocally that such an examination would not constitute an interpretation of that domestic law but would take it into account as a matter of fact, the CETA tribunal being obliged to follow the prevailing interpretation given to the law by the courts and authorities of that Party.

Second, the Court determined that the tribunals created under the CETA would not be capable of calling into question public interests set out in the Treaties and the Charter. It noted that the agreement expressly limited the scope of the ISDS mechanism and the law applicable, thereby ensuring that those tribunals have no jurisdiction at all to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, public morals and health and life of humans and animals, the preservation of food safety, or the protection of plants and the environment, welfare at work, product safety, consumer protection and fundamental rights.

The Court finally examined the question, raised by Belgium in its request for an Opinion, whether the envisaged ISDS mechanism was compatible with the right of access to an independent tribunal. As the Court noted, such a right is enshrined in Article 47 of the Charter, to which the EU is subject when entering into an international agreement that encompasses the establishment of bodies that are primarily judicial in nature and competent to resolve disputes between, in particular, private investors and States.

It should be stated that the CETA departs from the traditional approach to dispute resolution in investment issues by creating independent, impartial and permanent tribunals to deal with such issues, taking inspiration from the principles of judicial systems. However, in its assessment of the ISDS mechanism, the Court raised a couple of caveats.

As far as access to the tribunals is concerned, the Court considered that, as the agreement stood, the costs of legal representation and of the proceedings may be such as to deter a natural person or an SME from initiating proceedings. There was no concrete commitment in the agreement itself to put in place a regime that would guarantee the level of accessibility required by Article 47 of the Charter upon the creation of the tribunals. There was only the Statement (No. 36) of the Commission and the Council, which committed to better and easier access through the adoption by the CETA joint committee of additional rules to reduce the cost of access for natural persons and SMEs, and through co-financing measures and technical assistance for actions brought by SMEs. The Court therefore held that the conclusion of the CETA by the Council was subject to the premise that the financial accessibility of the CETA tribunals for all EU investors concerned would be ensured.

On the independence of those tribunals, the Court found that there was no issue in relation to the internal aspect of independence. As far as external independence was concerned, the Court highlighted Article 8.31.3 of the CETA, which provides for the CETA joint committee to adopt interpretations of the agreement upon the recommendation of the Committee on Services and Investment. Such interpretations are binding on the CETA tribunals, and the joint committee may decide that the binding effect begins on a particular date. The Court was of the opinion that this provision was not problematic in itself – indeed such a provision was neither illegitimate or unusual under international law. However, it was important that interpretations determined by the joint committee have no effect on the handling of disputes that had been resolved or brought prior to those interpretations. Otherwise, there was a risk that the joint committee could have an influence on the handling of specific disputes and therefore participate in the ISDS mechanism. Thus, in the light of Article 47 of the Charter, Article 8.31.3 of the CETA could not be interpreted as allowing the EU to consent to decisions on interpretation of the CETA joint committee which would produce effects on resolved or pending disputes.

It can thus be seen that, while the ISDS system envisaged by the CETA was held to be compatible with EU law, the caveats which the Court inserted into its Opinion concerned issues of central importance to the EU legal system, namely the guarantees provided by Article 47 of the Charter.

4 Conclusion

In conclusion to my contribution, it is clear that an essential element of the constitutional legal order of the EU is the judicial system as founded on Article 19(1) TEU and Articles 267 and 344 TFEU. As the case-law of the Court shows, this judicial system safeguards the values enshrined in Article 2 TEU and, above all, the rule of law in the EU.

The *Achmea* judgment must be understood in this light. The arbitral tribunals provided for in the BIT between the Netherlands and former Czechoslovakia were not EU courts or tribunals but were likely to interpret EU law without the Court of Justice having the possibility to exercise full control. Conversely, the planned CETA tribunals will not interpret EU law beyond the provisions of the CETA itself. BITs, such as the one at issue in *Achmea*, are between Member States of the EU, which are therefore subject to the principle of mutual trust. It is therefore all the more vital that any disputes arising are subject to the scrutiny of the EU judicial system. On the other hand, given that the CETA is a bilateral agreement between the EU and a third state, the question of mutual trust does not arise.

The scope of *Achmea* should not be overestimated. It is essentially limited to arbitration clauses in BITs between Member States, mainly entered into before one of those states acceded to the EU. The *Achmea* judgment does not destroy bridges between the Courts of the EU and those of Member States. The problem in that case was that the German court in question did not have full capacity to review an arbitration award in respect of compliance with EU law.

On the other hand, the reasoning in Opinion 1/17 should not be under-estimated. The Court did not give an unqualified seal of approval to the CETA but issued some caveats in the course of its examination of the ISDS mechanism provided for in that agreement. Nonetheless, the Court's Opinion 1/17 enables the conclusion of so-called "new-generation" international trade agreements to which the EU is a party and thus builds new bridges.

The anatomy of autonomy: themes and perspectives on an elusive principle

Panos Koutrakos[1]

1 Introduction

Few EU law principles have attracted as much attention in the last few years from such diverse audiences as that of autonomy. International and EU lawyers, constitutional and trade specialists, scholars and practitioners, decision-makers and the civil society have all been exercised by the implications that the principle of autonomy has in areas that range from the protection of fundamental human rights to investment arbitration.[2]

This paper aims to reflect on the scope and legal implications of autonomy in two ways. First, it will step back and tease out four themes that emerge from the origins and development of the principle. It will, then, look forward by identifying three perspectives which are central not only to the position of the principle in the light of the recent Opinion 1/17 on the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada,[3] but also to its further evolution as a significant part of the fabric of the EU's constitutional order.

2 Looking back: four themes on the origins and development of autonomy

2.1 First theme: judicial origin

The principle of autonomy of EU law is the outcome of judicial creation. There is no reference to it in primary law. Instead, the principle emerged in the early

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2 From the increasingly voluminous literature, see C Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again', (2017) 54 CMLRev 1627, P Koutrakos, 'The Autonomy of EU law and International Investment Arbitration (2019) 88 Nordic Journal of International Law 41, J Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in M Cremona (ed), Structural Principles in EU External Relations Law (Oxford: Hart Publishing, 2018) 291 and J.W. van Rossem, 'The Autonomy of EU Law: More is Less?' in R.A. Wessel and S. Blockmans (eds.), Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations (Berlin: Springer, 2013) 13.

3 EU:C:2019:341.

constitutional case-law of the Court of Justice which stressed the fundamentally distinct character of the then new legal order. It was the conception of the latter as "a new legal order of international law for the benefit of which the states have limited their sovereign rights"[4] that led to what appears now to be the unavoidable conclusion that, "[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply".[5]

It was this extraordinary character of the Community's founding document, the unique legal features of its rules and their normative implications for the Member States that became the foundations of the autonomy of the Community, and later the Union, legal system. As the Court put it in Costa itself, "… the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".[6]

2.2 Second theme: internal and external dimensions

It was the above notion of the Union legal order as a new and distinct part of international law that gave rise to the process of constitutionalisation which led gradually and inexorably to the constitutional maturity and complexity of the current EU legal order.[7] In this early context, autonomy had an internal dimension: it was intended to bolster the normative features of the nascent legal order in order to enable it to withstand challenges from national law. It was for this reason that the unique features of EU law were relied upon in order to enable the Court of Justice to assume a constitutional function and introduce the principles which shape the relationship between the EU legal order and the Member States and which also determine the legal status of individuals. In addition to the principles of supremacy and direct effect,[8] these principles include the liability of national authorities for a violation of EU law,[9] the gradual transformation of national courts into EU courts,[10] and the reliance upon general principles and fundamental human rights as a matter of EU law against both EU and national measures.

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4 Case 26/62, *Van Gend en Loos*, EU:C:1963:1.

5 Case 6/64, *Costa v. ENEL*, EU:C:1964:66.

6 ibid.

7 On the 'new' aspects of the EU legal order, see S Weatherill, 'From Myth to Reality: The EU's "New Legal Order" and the Place of General Principles Within It' in S Vogenauer and S Weatherill (eds), General Principles of Law – European and Comparative Perspectives (Oxford: Hart Publishing, 2017) 21).

8 See A. Dashwood, 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?', CYELS, 9 (2006-2007), 81.

9 See M. Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in G De Búrca and P Craig (eds.), The Evolution of EU Law (Oxford: Oxford University Press, 2nd ed., 2011) 407.

10 See A. Arnull, 'Judicial Dialogue in the European Union' in J. Dickson and P. Eleftheriadis (eds.), Philosophical Foundations of European Union Law (Oxford: Oxford University Press, 2012), 109.

Over the years, the internal function of autonomy has met its objectives: the above principles have been accepted and applied by domestic courts as a matter of course and the EU and domestic legal orders interact successfully on the basis of a pragmatic understanding of their relationship.[11] Since the 1990s, however, an external dimension of the principle of autonomy has emerged clearly and, at times, forcefully. This is now about protecting the distinct characteristics of the mature EU legal order from interferences that originate beyond the Union.

This aspect of autonomy first appeared in Opinion 1/91 where the Court of Justice held that the European Economic Area Agreement constituted "a threat … to the autonomy of the Community legal order":[12] it would impinge on the exclusive jurisdiction of the Court of Justice (provided now under Article 344 TFEU) to rule on the division of competence, and hence, the responsibility between the then EEC and its Member States in relation to the issues covered by the Agreement, and would interfere with the binding jurisdiction of the Court in relation to EU law issues adopted after the entry into force of the Agreement.

The internal and external functions of autonomy are not easy to distinguish, either in conceptual or in policy terms. The EU's judges render their judgment with an eye to national courts and, for instance in the *Kadi* cases,[13] in full awareness of the potential role that national judges might be called upon to assume if judicial review in Luxembourg were viewed as deficient. In other words, by protecting the EU legal order against international rules that threatened the Union's system of human rights protection, the Court also protected the EU legal order against recalcitrant domestic courts which might take it upon themselves to protect domestic human rights systems and, therefore, challenge the supremacy of EU law. After all, the *Kadi* judgment was rendered in the context of widespread and intense criticism of the UN rules and procedures governing the listing regime in question. In the multi-layered constitutional order of the EU, the intrinsic linkages between the internal and external function of autonomy condition the construction of the principle by the Court of Justice.

2.3 Third theme: ambiguity

There is considerable ambiguity, if not vagueness, inherent in what autonomy is actually about. In Opinion 1/00, for instance, the Court held that compliance with the principle would entail that "the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered".[14] This statement is open-ended and, given the judicial origins of the principle it purports to define, may only mean what the Court tells us it means on the basis of concrete cases about the compatibility with EU law of specific international treaties.

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11 See G. De Búrca, 'The Evolution of EU Human Rights Law' in De Búrca and Craig (eds.), op. cit. 465.

12 Opinion 1/91, EU:C:1991:49, para. 35.

13 Joined Cases C-402/05 P and C-415/05 P, *Kadi*, EU:C:2008:461.

14 Opinion 1/00 (European Common Aviation Area), EU:C:2002:231, para 12.

This theme is underlined by the *Achmea* judgment[15] the line of reasoning of which is lacking in clarity. Whilst, for instance, the Court considers the violation of autonomy to be based on the violation of Articles 267 and 344 TFEU, the latter is not analysed in the judgment. Instead, autonomy is viewed through the lense of safeguarding the rights of domestic courts. This may be because Article 344 TFEU does not substantiate the broad reading of autonomy put forward in the judgment. After all, this provision refers to Member States only, and, therefore, does not cover actions brought by individuals.[16] This lack of clarity is compounded by the high level of abstraction in which the language of the judgment is couched. This makes it difficult to gauge the precise content of the principle of autonomy and its implications for the Union's broader investment policy. The abstract language of the judgment is all the more striking given the distinctly literal interpretation that characterises the recent case-law in other strands of EU external relations, such as treaty-making under Article 218 TFEU.[17] As such, it may whet the appetite for a wide construction of autonomy.

On the other hand, there are also elements in the judgment that may suggest a more narrow understanding of what autonomy is about, confining the judgment to the specific context of the case. After all, this was not just about an intra-EU BIT, but one whose jurisdiction clause in relation to the arbitration tribunal established thereunder was unusually broad in its scope. It is in this context that the reference to the principle of mutual trust must be understood,[18] a point clarified in the more recent Opinion 1/17.[19]

The ambiguity that underpins the articulation of autonomy is not confined to the case-law on investment arbitration. A case in point is the judgment in Mox Plant[20] which has attracted considerable criticism, especially by international lawyers.[21] Again, one would have to go past the unnecessarily convoluted reasoning of the judgment in order to consider its eminently sensible conclusion in the light of the specific legal and factual context of the case. After all, recourse to the enforcement proceedings laid down in EU primary law was sanctioned by Article 282 UNCLOS. Given that the case pertained to the interpretation of Article 344 TFEU, the concept of autonomy underpinning the judgment in Mox Plant is not as broad as it might appear.[22]

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15 Case C-284/16, *Achmea*, EU:C:2018:158.

16 This point was also made by the referring court (paras 15-17), as well as AG Wathelet (paras 138-159).

17 This theme is developed in P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' (2019) 68 ICLQ 1-33.

18 Case C-284/16, *Achmea*, op cit, para. 58.

19 Opinion 1/17, op cit, paras 126-9.

20 Case C-459/03, *Commission v. Ireland (re: Mox Plant)*, EU:C:2006:345.

21 Koskenniemi considered the judgment 'stunning' and 'squarely on the oldest, and most conservative trajectory of European thinking about the role of international law and its relations with national law': M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) European Journal of Legal Studies (www.ejls.eu/1/3UK.pdf).

22 See Koutrakos, EU International Relations Law 2nd ed (Oxford: Hart Publishing: 2015), at 184-191.

2.4 Fourth theme: autonomy is about power

Over the years, the interpretation of the principle of autonomy has acquired a strong self-referential dimension - De Witte describes it as "a subtext of selfishness".[23] Whilst it accepts, in principle, that a treaty setting up a judicial body with jurisdiction binding on the institutions of the parties, including the EU's judiciary, may be compatible with the EU's primary rules,[24] the Court of Justice has been less than enthusiastic in its approach to such arrangements in practice. In Mox Plant, the initiation of a dispute between two EU Member States before an arbitral tribunal set up under the 1982 United Nations Convention on the Law of Sea was deemed to "involve a manifest risk that the jurisdictional order laid down in the treaties and, consequently, the autonomy of the Community legal system may be adversely affected".[25] In Opinion 1/09, the establishment of a European and Community Patents Court was viewed as contrary to the right of national courts to refer questions about EU patent law to the Court of Justice.[26] Most controversially, the Court held in Opinion 2/13 that the draft agreement on the Union's accession to the European Convention of Human Rights (ECHR), negotiated between 2010 and 2013, was incompatible with the Union's primary law.[27]

What follows from the above is a rather narrow, Court-centred approach to the definition and implications of autonomy. A striking illustration of this theme was provided in Opinion 2/13: whilst ostensibly about the protection of human rights and the implementation of Article 6(2) TEU which requires that the Union accede to ECHR, the line of reasoning underpinning the Opinion had nothing to do in fact with the protection of fundamental human rights.[28] It was, instead, about the institutional and procedural arrangements negotiated carefully—and not without some input from the Court of Justice itself—in order to ensure that the interpretation of EU law would be a matter left for the Court of Justice. This approach led to the co-operation with the European Court of Human Rights being treated suspiciously, even though the relationship between the two courts had been deeply symbiotic.[29]

It has not, however, always been thus. The earlier case-law provided some indications that the application of the principle was not all about enhancing the powers of the Court of Justice. In Opinion 1/00, for instance, it was pointed out that, in accordance with autonomy, "the procedures for ensuring uniform interpretation of the rules of the [envisaged] Agreement and for resolving disputes will not have the

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23 B. De Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in M. Cremona and A. Thies (eds.), The European Court of Justice and External Relations Law: Constitutional Challenges (Oxford: Hart Publishing, 2014), pp. 33-46, at p. 39.

24 Opinion 1/91, op cit, paras 39-40.

25 Case C-459/03, *Commission v. Ireland (re: Mox Plant)*, op cit, para. 154.

26 Opinion 1/09, EU:C:2011:123.

27 Opinion 2/13, EU:C:2014:2454.

28 See, amongst others, B De Witte, 'The Relative Autonomy of the European Union's Fundamental Rights Regime', (2019) 88 Nordic Journal of International Law 65-85.

29 See, for instance, M Cartabia and S Ninatti, 'Fundamental rights in the European Court of Justice and the European Court of Human Rights' in S Douglas-Scott and N Hatzis (eds), Research Handbook on EU Law and Human Rights (Cheltenham: E Elgar Publishing, 2017) 211, S Greer, J.H. Gerards and R Slowe, Human rights in the Council of Europe and the European Union: achievements, trends and challenges (Cambridge: Cambridge University Press, 2018), in particular chs 4 and 5.

effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement ….".[30] This illustrates a rather restrained understanding of what autonomy would mean for the Union's judiciary: it is about whether international judicial bodies would be endowed with the power to interpret and apply EU rules in a manner that would be binding on the EU's institutions. This definition also includes domestic courts, in so far as they act as EU courts,[31] a point to which this analysis will return below.

It follows from the above that not only are the scope of autonomy somewhat nebulous and its limits ill-defined, but its function has also been intrinsically linked to furthering the powers of the Court of Justice. In other words, autonomy is, really, about power – what this power would cover, however, which actor would be endowed with it, and under which conditions is a matter left entirely for the Court of Justice to determine.

3 Looking forward: three perspectives on the future of autonomy

The analysis so far was about teasing out themes that emerge from the genesis and development of the principle of autonomy. The remaining of this paper focuses on the recent case-law on the principle, in particular Opinion 1/17, and identifies three perspectives that may shape the future of the principle. In doing so, the analysis draws on the theme of this book, that is building bridges, and explains how these perspectives are about bridges, either building or ignoring them.

3.1 First perspective: pragmatism

The more recent approach to autonomy by the Court of Justice emerges from Opinion 1/17. This is underpinned by a distinctly pragmatic streak which is illustrated in different ways. These may be classified as principled, policy, and procedural pragmatism.

First, principled pragmatism is about openness to the role of other international tribunals. Opinion 1/17 starts off by acknowledging that, in principle, an agreement concluded by the EU may confer jurisdiction to interpret its provisions on a new court whose decisions may be binding on the EU.[32] This in itself is hardly surprising, as the Court of Justice had made this point on a number of occasions in the past,[33] only to show distinct reluctance to accept it as a matter of principle. In Opinion 1/17,

30 Opinion 1/00, op cit, para 13.

31 Under Art. 19(1) second subparagraph, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

32 Opinion 1/17, op cit, para. 106.

33 Opinion 1/91, EU:C:1991:490, paras 40 and 70; Opinion 1/09, EU:C:2011:123, paras 74 and 76; Opinion 2/13, EU:C:2014:2454, paras 182-3.

however, a different approach emerges. Having repeated this point of principle at the outset, the Court of Justice opines that the jurisdiction of the EU and domestic courts to interpret international agreements concluded by the EU does not take precedence over either the jurisdiction of the courts of the Union's interlocutors or that of the international courts established under such agreements.[34] It is in this context that reference is made to the "reciprocal nature of international agreements".[35] This emphasis on the role of non-EU courts is also apparent in other parts of the Opinion, where it is considered "consistent" with the nature of the CETA Tribunal beyond the EU legal system that there should be no mechanism for its interactions with the Court of Justice[36] or for review of its decisions by the latter.[37]

Second, there is also policy pragmatism in Opinion 1/17 that is illustrated by the firm acknowledgment of the powers of the Union's institutions. In recognising the powers of other, non-EU, courts to interpret agreements concluded by the EU, the Court refers expressly to "the need to maintain the powers of the Union in international relations".[38] This point of emphasis is noteworthy, especially given the ongoing effort of the EU to reform the traditional Investor-State Dispute Settlement System and replace it, ultimately, with a Multilateral Investment Court.[39] Given the ongoing negotiations under the auspices of UNCITRAL,[40] the reference in the Opinion to "the need to maintain the powers of the Union in international relations" is a reminder of the intense policy context within which the CETA Opinion was rendered: it would have been a truly brave choice for the Union's judiciary to make the Union's executive and legislature unravel their policy on this matter.

This policy pragmatism is all the more noticeable in the light of the formalist streak that underpinned the judgment in *Achmea* only a year earlier. That judgment illustrated a most orthodox reading of the orthodoxy of EU law. This emerged from the outset, as the question the Court set out to address in order to ascertain whether the ISDS mechanism in the intra-EU BIT ensures consistency with EU law was whether an EU law issue related to the dispute might be brought before an arbitral tribunal. This question, however, is too broad. As such, it enabled the Court to construe the reach of the EU legal order and, more to the point, the scope of its own jurisdiction in similarly broad terms. In essence, if taken literally, the judgment in Achmea may appear to suggest that every time an EU law issue pertains to a dispute before any international tribunal, the autonomy of the EU legal order would be at stake and the Court's exclusive jurisdiction should be triggered. The implications of such a maximalist position would be striking. In fact, it would be difficult to envisage an international dispute settlement system which would meet this

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34 Opinion 1/17, op cit, para. 116.

35 Opinion 1/17, op cit, para. 117.

36 Opinion 1/17, op cit, para. 134.

37 Opinion 1/17, op cit, para. 135.

38 Opinion 1/17, op cit, para. 117.

39 See European Commission Concept Paper, Investment in TTIP and beyond – the path for reform Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court.

40 The negotiating directives are available here: http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

high normative threshold. After all, courts in all legal orders are faced with rules of other legal orders as a matter of course.[41] In *Achmea*, therefore, autonomy had been construed broadly and in uncompromising terms, it had been about conflict and viewed the relationship between EU law and international investment law as an antagonistic one. It was against that background that the policy pragmatism that emerges from Opinion 1/17 is all the more noteworthy.

Third, there is also procedural pragmatism in Opinion 1/17 and is about the Court's approach to the procedural constraints that are imposed on the jurisdiction of the non-EU tribunal under the treaty concluded by the EU. The Court of Justice held that the principle of autonomy was complied with, as the jurisdiction of the CETA Tribunal would be confined to the provisions of CETA itself[42] and would be exercised in accordance not with EU law but with international law applicable to the parties. Viewed against the prior case-law on autonomy, the jurisdiction of the CETA Tribunal would be narrow: it would not extend to the interpretation and application of EU law, as had been the case in Opinion 1/91;[43] it would not trigger the principle of mutual trust, given that it would not pertain to relations between Member states, as had been the case in *Achmea*;[44] and it would not extend to the determination of responsibility as between the EU and/or a Member State in actions brought before the Tribunal,[45] hence meeting the requirement set out in Opinion 2/13.[46]

The line of reasoning that underpins this procedural pragmatism is convincing. After all, the CETA Agreement contains various provisions which are emphatic in their objective to define the jurisdiction of the CETA Tribunal as narrowly as possible. In particular, these provisions read as if the drafters of CETA took utmost care to avoid any inferences that EU law, rather than CETA itself, would be interpreted in a binding manner by the CETA Tribunal. They were, therefore, in striking contrast to the broad scope of the jurisdiction clause in Article 8(6) of the Netherlands-Slovakia BIT in *Achmea*.

And yet, as it emerges from Opinion 1/17, pragmatism is not merely a question of treaty guarantees. There is also a leap of faith that characterises the Court's approach and that is absent in previous case-law. A case in point is the approach to the power of the CETA Tribunal "to consider … the domestic law of the disputing party as a matter of fact" under Article 8.31.2 CETA. This provision is viewed as consistent with the powers of the EU Courts, as it would not give rise to an interpretation of EU law by the Tribunal: whilst the examination by the latter "may, on occasion, require that the domestic law of the respondent Party be taken into

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41 The Court's approach was in stark contrast both to the more pragmatic Opinion by AG Wathelet (EU:C:2017:699), as well as the nuanced approach of the Arbitral Tribunal itself in Achmea which had pointed out that '[c]ourts and tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law' (PCA Case No 2008-13, Eureko B.V v Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) para. 282.

42 Art. 8.3.1. CETA.

43 EU:C:2011:123. The point was made in Opinion 1/17 in paras 123-5, as well as in para. 133 regarding the Appellate Tribunal.

44 Opinion 1/17, op cit, paras 126-9.

45 Art. 8.21 CETA.

46 Opinion 1/17, op cit, para. 132.

account", "that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law", as it would only be as a matter of fact in cases where the Tribunal would be bound to follow the interpretation of EU law given by the EU authorities, whilst, in any case, the latter would not be bound by the Tribunal's own interpretation.[47] This approach differs from the formalist scepticism that permeated prior case-law. In Opinion 2/13, for instance, the Court had objected to the co-respondent mechanism because it would only be granted an opportunity to rule subject to an assessment by the ECtHR that there had been no CJEU case-law on the matter. This somewhat innocuous provision had been viewed by the Court of Justice as tantamount to conferring on the Strasbourg Court jurisdiction to interpret the CJEU's case-law.[48]

Viewed together, the principled, policy, and procedural strands of pragmatism examined in this section illustrate an approach that is more understanding of and conciliatory towards the different ways in which non-EU courts may deal with EU-related issues. It is in this vein that the leap of faith mentioned above must be understood. It is noteworthy, for instance, that this leap of faith is not confined to the Court's approach to autonomy in Opinion 1/17, but also to equal treatment under Article 20 of the Charter.[49] It appears, therefore, that Opinion 1/17 suggests a shift of focus towards how best to ensure that the EU's own power to interpret authoritatively EU law may be affected by the parallel jurisdiction of non-EU courts in interlocking proceedings. Even though the legal context in Achmea was different, had this been the focus of that judgment, the ambiguity raised by the Court's opaque line of reasoning would have been avoided.

3.2 Second perspective: substantive constraints

In Opinion 1/17, the Court articulated a substantive constraint on the implications of autonomy: the CETA tribunal would have no jurisdiction to call into question the level of protection that the EU institutions choose about the Union's fundamental interests, such as public security, public morals, to maintain public order, to protect human, animal or plant life of health. This conclusion was reached on the basis of three interrelated considerations. First, the CETA Tribunal may only rule on a specific restriction and on the situation of a specific investor, not generally about how the EU regulates the internal market.[50] Second, CETA includes both general and investment-specific provisions that would prevent the parties from encroaching on substantive policy choices made by the parties.[51] Third, the jurisdiction of the CETA Tribunal is circumscribed by Article 8.10.2 CETA which lists exhaustively the

47 Opinion 1/17, op cit, para. 131.

48 Opinion 2/13, op cit, paras 236-245.

49 See Opinion 1/17, op cit, paras 185-6.

50 Opinion 1/17, op cit, para. 148.

51 The general provision is set out in Art. 28.3.2 CETA, whereas the investment-specific assurances are set out in Articles 8.9.1 and 8.9.2, as well as Points 1(d) and 2 of the Joint Interpretative Statement, and Point 3 of Annex 8-A to CETA.

situations in which the fair and equitable treatment obligation may be viewed to have been violated.[52]

The articulation of this substantive dimension of the principle of autonomy is noteworthy, as it illustrates a break from a body of case-law that had focused on the procedural aspects of the principle. A glaring illustration of that trend was provided by Opinion 2/13 which, whilst ostensibly about the EU's accession to the ECHR, was all about the scope and intensity of the jurisdiction of the Court of Justice. In fact, Opinion 1/17 is only the second ruling on autonomy that construes the principle in substantive terms.[53]

There is also another aspect of autonomy that is novel, namely the emphasis in Opinion 1/17 not only on the requirement to preserve the powers of the EU's institutions to protect the public interest as they see fit, but also on the democratic process that pertains to such choices. There are four references in the Opinion to the democratic process that underpins decision-making by the EU.[54] These draw on the Joint Interpretative Instrument the preamble of which provides as follows: "The European Union and its Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, safety, environment, public morals, privacy and data protection and the promotion and protection of cultural diversity".[55]

The emphasis on democratic process may shed some light on the function of the substantive constraint that Opinion 1/17 appears to articulate. After all, the Joint Interpretative Instrument was adopted in October 2016 following the challenge to the process of ratification of CETA that the Walloon Parliament had raised. The purpose of the Instrument was to assuage concerns about the allegedly pernicious impact of the CETA dispute settlement mechanism on policy-making in the EU. There is, in other words, a deeply political context within which the very function of CETA had become deeply contested. It also worth recalling, in this vein, that, in its request for an Opinion under Article 218(11) TFEU, Belgium had asked specifically whether the CETA Tribunal might, in effect, undermine the exclusive jurisdiction of the Court of Justice by interpreting the terms 'fair and equitable treatment', indirect expropriation, or unjustified restriction on the freedom to make a payment[56] in a manner that would overrule EU measures adopted in order to protected public interests pursuant to primary EU law. Viewed from this angle, the substantive policy layer that Opinion 1/17 introduces provides a response to the deeply politicised context within which the Court was asked to rule on the compatibility of CETA with EU law. It is a nod to the increasingly vocal concerns about the impact of the EU's trade deals, and the distinct scepticism, if not outright hostility, in Member States and parts of civil society.

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52 Opinion 1/17, paras 158-9.

53 The first was in Joined Cases C-402/05 P and C-415/05 P, *Kadi*, EU:C:2008:461 which was rendered in the context of the protection of fundamental human rights as a core principle of the Union's constitutional order.

54 Opinion 1/17, op cit, paras 151, 156, 159, and 160.

55 Point 1(d).

56 Arts 8.10, 8.12 and 8.13 CETA respectively.

It also illustrates an astute effort to address the potentially destabilising implications of the ensuing public disquiet for the ratification process.

While the contested position of CETA may explain the introduction of the substantive aspect of autonomy in Opinion 1/17, it does not illuminate its legal implications. The part of the Opinion dealing with this issue lacks the clarity that we find in the earlier parts about autonomy. Instead, in its references to democratic process and the policy choices of the EU's institutions, the Court appears to oscillate between the circumscribed jurisdiction of the CETA Tribunal and the regulatory autonomy of the CETA parties. Its line of reasoning, however, raises questions about the scope of the requirement that the Opinion articulates, the threshold it would introduce, and its implications for the jurisdiction of international tribunals established under treaties concluded by the EU. While quite context-specific in Opinion 1/17, it is not clear whether it may open the door to expanding further what the principle of autonomy is about.

3.3 Third perspective: the role of domestic courts

Domestic courts have played an increasingly prominent role in the development of the principle of autonomy. In Opinion 1/09, the Court concluded that the draft Agreement on the European and Community Patents Court, drawn up in the context of the European Patent Convention, was not consistent with the principle, as it would undermine the rights of domestic courts to refer questions about the interpretation of EU law to the Court of Justice.[57] The pivotal role of domestic courts for the EU's system of judicial review was also stressed in Opinion 2/13[58] and the judgment in *Achmea*. Their prominence in the context of autonomy aims to strengthen the powers with which they are endowed under EU law. In *Achmea*, for instance, what was central to the Court's conclusion was the impact of the intra-EU BIT on the binding jurisdiction of domestic courts, namely to deprive them of the power to exercise full judicial review under Article 267 TFEU.

The other side of the coin, however, is the protection of the jurisdiction of the Court itself. After all, so intertwined is the function of domestic courts and the Court of Justice in the EU's judicial system that safeguarding the jurisdiction of the latter entails the protection of the former. The emphasis on the role of the domestic courts makes the principle of autonomy appear less self-referential than it is and aims to address the view that autonomy amounts to 'a rhetorical shield to help to protect the Court's own exclusive jurisdiction'.[59] Put differently, the more it focuses on domestic courts, the less autonomy may appear to be about the Court itself.

While this view may come across as somewhat cynical, it is supported by the line of reasoning we find in the case-law which is, at times, broad-brush and far from

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[57] Opinion 1/09, op cit, paras 80-89.

[58] Opinion 2/13, EU:C:2014:2454, paras 175-6.

[59] B. de Witte, 'European Union Law: How Autonomous is its Legal Order?' 65 Zeitschrift für öffentliches Recht (2010) 141, at 150.

convincing. There is, for instance, some delicious irony in the fact that the Court's concern in *Achmea* for protecting the power of the domestic court to refer would be expressed in response to a preliminary reference. In fact, the broad terms in which the role of domestic courts was approached in that judgment is striking. Reference was only made to two factors: the final nature of the award and the freedom of the tribunal to choose its seat and law applicable to the procedure; and the fact that domestic courts may only review the award to the extent that national law permits. There was no discussion of the central role of domestic courts in enforcing arbitral awards or their power to condition the enforcement of such awards on the basis of their compatibility with public policy.[60] And whilst the public policy exception is not provided for in all international investment regimes,[61] it was not prohibited under the rules pertaining to the enforcement of the arbitral award in *Achmea*.

In the light of the above, there is a somewhat paternalistic streak in how domestic courts are approached within the context of the principle of autonomy. The rhetoric is about their significance in the EU's judicial architecture, but, in fact, they are not entrusted with protecting autonomy themselves. This approach is in contrast with a more liberal view of the position of domestic courts. In his Opinion in *Achmea*, Advocate General Wathelet had relied upon the role of the latter in enforcing arbitral awards in order to point out how they could, in fact, protect autonomy.[62] Having pointed out that arbitral awards may only be enforced by domestic courts, he had argued that, in principle, the latter are largely granted leeway under international investment law to rely upon EU law and protect EU rules as a matter of public policy.[63] His approach, therefore, highlighted a different function for domestic courts in the context of autonomy: rather than in need of protection, they were, actually, themselves active guarantors of the principle.

The judgment in *Achmea* made no reference to the Opinion of Advocate General Wathelet. And yet, there is a lot to suggest that a more trusting approach to domestic courts would be warranted. This is borne out by the ongoing episode of the Micula saga that has been playing out before English courts. Having obtained an arbitral award in their favour, the claimants sought to enforce it before, amongst others, English courts. The award was registered in the High Court by means of an Order pursuant to the domestic law implementing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID

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60 In Case C-126/97, *Eco Swiss*, EU:C:1999:269, it was held that a domestic court could refuse to enforce an arbitral award on public policy grounds, including compliance with the EU's competition and state aids rules. This public policy exception is allowed under international rules governing investment arbitration (see Art. V (2)(b) of the 1958 Convention for the Recognition and Enforcement of Foreign Arbitral Awards).

61 See Article 53(1) International Centre for Settlement of Investment Disputes Convention.

62 EU:C:2017:699, paras 229 et seq.

63 As the ICSID Convention requires that domestic courts view an arbitral award as if it were a judgment by a domestic court of last instance, AG Wathelet suggested that the Member States should avoid the choice of ICSID in their BITs (EU:C:2017:699, para. 253 of his Opinion). He also pointed out that that point was irrelevant in Achmea, as the award had not been rendered pursuant to the ICSID Convention.

Convention) in the UK.[64] The Order was challenged by the Romanian Government, supported by the Commission, on EU law grounds.

In January 2017, the High Court rejected the Romanian appeal but granted a stay of enforcement proceedings pending the resolution by the General Court of the annulment action against the Commission's Decision that had found the enforcement of the award to constitute payment of unlawful state aid.[65] This decision was based on a distinction between registration and enforcement of the arbitral award: while necessary under domestic law implementing ICSID, registration did not amount to enforcement and could not, therefore, give rise to the risk of a conflict between decisions of domestic and EU institutions. This was not the case with the enforcement of the award, as it hinged on the determination of issues pending before the EU courts. Mr Justice Blair equated the award, following its registration under English law, to a final domestic judgment. As domestic courts are bound by EU law and the duty of cooperation, the High Court cannot therefore proceed to enforce the judgment consequent on registration of the Award in circumstances in which the Commission has prohibited Romania from making any payment under the Award to the claimants because in doing so, the court would, in effect, be acting unlawfully. This does not (in the court's view) create a conflict with the international obligations of the UK as contained in the 1966 Arbitration Act implementing the ICSID Convention in UK law, because a purely domestic judgment would be subject to the same limitation.[66]

Upheld by the Court of Appeal,[67] this approach is elegant and distinctly pragmatic: on the one hand, it seeks to comply with EU law and take seriously the obligations under which domestic courts function; on the other hand, it is faithful to the letter of the international commitments assumed by the United Kingdom in the context of ICSID.

The disjunction examined in this section between the rhetoric about the role of domestic courts as EU law courts and the practice of entrusting them with safeguarding EU law is not confined to the principle of autonomy. We also find it in another area of acute sensitivity for the EU legal order, that is the Common Foreign and Security Policy, where the Court has interpreted its limited jurisdiction broadly at the expense of the jurisdiction of domestic courts to review EU measures.[68] In the context of this paper, however, it follows from the above that domestic courts need not become the cloak for a narrow and inward-looking conception of autonomy of EU law. In fact, they may become a more active participant in safeguarding the essential characteristics of the EU legal order that the principle of autonomy is designed to

64 Arbitration (International Investment Disputes) Act 1966.

65 [2017] EWHC 31 (Comm).

66 ibid, para. 132.

67 [2018] EWCA Civ 1801, where the High Court's judgment is viewed as 'careful' and its conclusion as 'both pragmatic and … principled' (para. 249). At the time of writing, the case is pending before the UK Supreme Court.

68 This argument is made in P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy', (2018) 67 International and Comparative Law Quarterly 1-35.

protect. Viewed from this angle, autonomy would become truly multi-dimensional in its scope and subtler in its implications.

4 Conclusion

Looking back at the genesis and development of the principle and, then, reflecting on its current state and further evolution, this paper highlighted the significance of the context within which autonomy is examined in the case-law. Autonomy may mean different things in different contexts. The CETA provisions, for instance, were carefully drafted in order to give as little ammunition as possible to any concern about impinging on the jurisdiction of the Court of Justice, and not all dispute settlement provisions in agreements concluded by the EU have been drafted in such manner.

Viewed from this angle, and even though we have become familiar with the far reaching implications of autonomy, we are still not clear about what it means in a number of significant legal settings. For instance, the role of investment arbitration in intra-EU BITs is far from over. While the Member States declared in January 2019 that they would revoke such agreements by the end of 2019 and, in any case, they withdrew their consent to arbitration with immediate effect, no arbitral tribunal has agreed so far not to exercise jurisdiction on the basis of the judgment in *Achmea* and the above declarations.[69] There is also the issue of managing existing claims brought under the relevant BITs. Similarly, the impact of *Achmea* and Opinion 1/17 on the Energy Charter Treaty is still unclear. This is an important question, not least because arbitral tribunals have consistently declined to accept that the Court's case-law so has any relevance to arbitration under that Treaty.[70]

It is indicative of the dynamic nature of the EU legal order that such important questions about the function of such a pivotal principle should still be open. Autonomy emerges, therefore, as defined by the very characteristics that have shaped the overall constitutional order that it is designed to protect: constantly evolving and flexible in both its scope and implications, it challenges our understanding of not only how EU law may interact with international law, but also how domestic courts may interact with the CJEU.

[69] See, for instance, United Utilities v Estonia, ICSID Case No 1RB/14/24 of 21 June 2019, paras 531-560.

[70] See, for instance, Belenergia S.A. v Italy, ICSID Case No ARB/15/40 of 6 August 2019, paras 288-340.

How autonomy could lead to subordination

Aude Bouveresse[1]

Despite the many studies, words written and spoken on this topic, it is still difficult to pin down exactly what autonomy means and, ultimately, why it matters.

In a everyday sense, it is defined as the "the right of a group of people to govern itself or to organise its own activities" which is not far from the ancient Greek, meaning "self-legislation" or "self-governance".

However, this definition fails to capture the complexity of the EU legal order as a decentralised legal system based on an international convention aimed at creating an integrated system with the law of its Member States[2]. Until recently, the Court of Justice gave no definition of the concept, apart from associating it with both the concept of independence and the specificity of the EU legal order.

In its case-law, autonomy appears, indeed at first, as a statement of independence with regard to national laws, in the sense that the interpretation and effect of EU law cannot be determined by Member States. In that sense, the Court held in its judgment in *Van Gend & Loos*: "independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage"[3]. That finding echoes the observation of the Commission in the same case, which stated "that the effect of the provisions of the Treaty on the national law of Member States cannot be determined by the actual national law of each of them but by the Treaty itself"[4]. A new stage was reached in the judgment in *Costa,* in which the Court affirmed the independence of EU law from international law, highlighting the fact that: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system"[5]. Such statement refers, however, to a relative concept of independence.

It is well known that the EU legal order cannot be considered as independent from the international legal order from which it derives[6] and, in particular, from the internal legal systems, since the effectivity and even effectiveness of EU law relies on

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2 On the different meanings of the concept of autonomy: Klamert, M. (2017), "The Autonomy of the EU (and EU Law): Through the Kaleidoscope", *European Law Review*, Vol. 42, p. 815.

3 Case 26/62, *Van Gend & Loos*, EU:C:1963:1, p. 12.

4 ibid., p. 6.

5 Case 6/64, *Costa*, EU:C:1964:66, p. 593.

6 De Witte, B. (1984), "Retour à 'Costa': La primauté du droit communautaire à la lumière du droit international", *Revue trimestrielle de droit européen*, Vol 20, p. 425, at p. 432.

Member States[7]. In that respect, if we can admit the proposal that the EU is autonomous, we must not, however, confuse the autonomy of the EU with independence. Independence from Member States' internal law must be understood only in a relative perspective, namely, due to its applicability and direct effect.

By contrast, autonomy, understood as referring to the specificity of the EU legal order, seems to be more relevant. This latter meaning can be deduced from the judgment in *Costa* in which the Court held: "[this] *independent source of law* … [has a] special and original *nature*"[8]. From the latter, the *supremacy* and the *direct effect* of EU law, as stated by the Court, have been able to take on an independent meaning in EU law compared to that given in international law. In other words, the Court "adapted and transformed public international law principles such as direct effect and supremacy, and gave them a genuinely 'unionist' shape"[9]. *Saying that however is switching from one problem to another, since "specificity" is just as ambiguous as "autonomy".*

Thus, despite the fact that the Court refers to the concept almost from the very beginning of the building of Europe, it is only recently that it has provided some fundamental elements of definition. In this respect, it must be emphasised that the concept of autonomy results from a noteworthy case-law construction which has to be analysed from a global perspective and in abstract in order to underline the way in which the Court has exploited it to build bridges with Member States.

It will be demonstrated that, through the concept of autonomy, gradually the Court sets up and reveals the essential characteristics of the EU legal order. Doing so, the Court elaborates a constitutional framework of the European Union with normative, institutional and substantive dimensions. If this recent development leads to the progressive enclosure of the Member States in a constitutional framework based mainly on the institutional relationship developed between national judges and European judges, it could also lead to the autonomy of the concept itself which, detached from the Court, could in the long run, subordinate the Court itself and compel it to respect that principle.

To clarify whether autonomy could lead to subordination, it is therefore important, first, to focus on the gradual and substantive development of the concept of autonomy by the Court.

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7 Bouveresse, A. (2018), "L'effectivité comme argument d'autorité de la norme", in Bouveresse, A. and Ritleng, D. (eds.), *L'effectivité du droit de l'Union*, Bruylant, pp. 63-85.

8 Case 6/64, *Costa*, p. 594.

9 Klamert (2017), op. cit., p. 823.

1 The gradual and substantive development of the concept of autonomy by the Court: the stones of the bridge

In the following, some clarifications about the concept of autonomy are inferred from recent case law. In particular, it is shown how the Court has gradually revealed the grounds of autonomy of the EU legal order.

1.1 The custodian(s) of the concept of autonomy

This point should not become a debate and it is sufficiently rare for it to be noticed. The institutions vested with the task of guaranteeing the autonomy of EU law are, in the first place, the Court of Justice itself and, since Opinion 1/09, the national judges and the Court of Justice. The Court is crystal clear in its *CETA* Opinion: “In order to ensure that … the autonomy of the legal order [is] preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law”[10].

In Opinion 1/91, the Court already emphasised “the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty”[11].

It is interesting to note that as Article 164 EEC provided the legal basis for the Court’s powers, the addition of national judges, as custodians of the autonomy of EU legal order, could be presented as a logical and coherent approach. The substance of this article is repeated in Article 19 TEU. In this respect, the Court noted in Opinion 1/09 that “as is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States”[12] and that “the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed”[13].

Although this is not the main issue here, it may be noted that this finding was not that “evident” on a reading of the second subparagraph of Article 19(1) TEU, according to which “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

Furthermore, taking a closer look at the wording of the case-law, it must be noted however that the mission entrusted to the national judges, to ensure the preservation of the autonomy of the EU legal order, has a narrower scope, which is limited to

[10] Opinion 1/17, *CETA*, EU:C:2019:341, para. 111.

[11] Opinion 1/91, *European Economic Area*, EU:C:1991:490, para. 35; see also Opinion 1/09, *European and Community Patents Court*, EU:C:2011:123, para. 67: “it is for the Court to ensure respect for the autonomy of the European Union legal order thus created by the Treaties”.

[12] Opinion 1/09, *European and Community Patents Court*, para. 66.

[13] ibid., para. 69.

ensure that in the interpretation and application of the Treaties the law is observed[14]. Autonomy covers, as will be developed later, a more extensive scope. This explains why, even in Opinion 1/09, after referring to Article 19 TEU in paragraph 66, the Court immediately reiterates in paragraph 67 that "it is for the Court to ensure respect for the autonomy of the European Union legal order".

1.2 The grounds of the concept of autonomy: essential characteristics

The spelling out by the Court of the essential characteristics of autonomy is a key improvement for the understanding of the concept, since the grounds of this concept are made explicit.

These grounds have been divided by the Court into two categories, namely, the "very nature of EU law" and the "constitutional structure of the EU". However, it is important to note that such classification was only drawn by the Court in 2014 in Opinion 2/13 relating to the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms[15].

1.2.1 The very nature of EU law: the uniformity of EU law, a normative dimension of the concept of autonomy

This category appears expressly in Opinion 1/91. According to the Court, the essential characteristics of EU law correspond to "its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves"[16].

These specific characteristics, presented as the main instruments to ensure the "homogeneity of EC law" in Opinion 1/91, deal, more fundamentally, with the principle of the uniformity of Community law. In that sense, in Opinion 1/09, the Court held that to confer on the Patent Court an exclusive jurisdiction in the field of the Community patent and "to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts, and consequently, would alter the essential character of [their] powers … which are indispensable to the preservation of the very nature of European Union law"[17].

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14 This finding is confirmed in Opinion 2/13, *Accession of the Union to the ECHR*, EU:C:2014:2454; Case C-284/16, *Achmea*, EU:C:2018:158; Opinion 1/17, *CETA*; and most recently in Case C-619/18 *Commission* v *Poland*, EU:C:2019:531.

15 See Contartese, C. (2017), "The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the 'Essential' to the 'Specific characteristics' of the Union and back", *Common Market Law Review*, Vol. 54, p. 1627.

16 Opinion 1/91, *European Economic Area*, para. 21.

17 Opinion 1/09, *European and Community Patents Court*, para. 89.

Two main consequences, which are linked to each other, derive from the latter. First, as supremacy and direct effect arise from the very nature of EU law, it means that uniformity has to be understood as being in the very nature of EU law.

Second, it explains also why the preliminary ruling mechanism is presented as an essential characteristic to preserve the autonomy of the EU. Indeed, it must be emphasised that the uniformity of EU law is intimately linked to the preliminary ruling procedure as has been indicated by the Court since *Van Gend & Loos*[18] in settled case-law.

In that regard, the concept of autonomy already includes both a normative meaning (i.e. primacy and direct effect) and an institutional meaning (concerning the EU institutions and their competences, in particular, those of the Court of Justice and as regards the preliminary ruling procedure).

These characteristics, that the Court later grouped as corresponding to "the very nature of EU law", did not change deeply over the time, but have been refined as characteristics "intended to ensure consistency and uniformity in the interpretation of EU law"[19] and "its full effect"[20].

Moreover, these specific characteristics, based on primacy and the direct effect of EU law, lead ultimately "to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other"[21].

In conclusion, the very nature of EU law confers, in this sense, a normative dimension to the notion of autonomy to which will be added institutional and substantive dimensions derived from the second group of essential characteristics.

1.2.2 The constitutional structure of the EU: the institutional and material dimension of autonomy

The "constitutional structure of the EU" as an essential characteristic of autonomy has been developed substantially since 2011 following Opinion 1/09 relating to the Patent Court.

It is important to keep in mind that was not originally evident that the European Community could have a "constitutional structure". It was a mere five years before Opinion 1/91 relating to the creation of the EEA that the Court held that the Treaties can be considered a "basic constitutional charter"[22].

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18 Case 26/62, *Van Gend & Loos*, p. 12: "… the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals".

19 Opinion 2/13, *Accession of the Union to the ECHR*, para. 174.

20 ibid., para. 176; and Case C-284/16, *Achmea*, para. 37.

21 Opinion 2/13, *Accession of the Union to the ECHR*, paras. 165 to 167; Case C-284/16, *Achmea*, para. 33; and Opinion 1/17, *CETA*, para. 109.

22 Case 294/83, *Parti écologiste "Les Verts"* v *European Parliament*, EU:C:1986:166, para. 23.

In this respect, in Opinion 1/91, the Court did not actually mention the constitutional structure of the EU, but merely highlighted that autonomy may be undermined if the "allocation of responsibilities"[23] is affected.

Although the Court took a broader approach in Opinion 1/00 concerning the establishment of a European Common Aviation Area, by holding that "preservation of the autonomy of the Community legal order requires … that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered"[24], it appears that until 2011 the autonomy of EU legal order was mainly justified by, and reduced to, the judicial monopoly of the Court. In this respect, its powers[25], its jurisdictional order[26], and even its case-law[27] have been presented as the core of the autonomy to be preserved.

This is not surprising in the light of Opinion 1/91 in which the Court concluded that a system of courts which conflicts with EU judicial system conflicts "more generally, with the very foundations of the Community"[28].

A decisive move towards the definition of autonomy was made in 2011 in Opinion 1/09, by including both the preliminary ruling mechanism and Article 19 TEU, not merely as elements preserving EU autonomy but also as operating directly within the essential characteristics of the EU[29].

It is very important to understand the crucial relevance of this institutional dimension, since, for the first time, the institutions of the Member States and especially the national judges are included in the definition of autonomy and considered to be an integral part of the judicial system of the European Union as "'ordinary' courts within the European Union legal order"[30]. Consequently, autonomy could no longer be seen as a simple tool to protect the Court's jurisdiction against Member State interferences. Of particular significance are the findings by the Court that "national courts … are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order" and that "tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties"[31]. The final step was taken in Opinion 2/13 relating to accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms in which the Court pointed out, expressly, that the concept of autonomy, based on "the constitutional structure of the EU", does not rely only on

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23 Opinion 1/91, *European Economic Area*, para. 35.

24 Opinion 1/00, *European Common Aviation Area*, EU:C:2002:231, para. 12. Consequently, in that opinion, the Court examines also if the powers of the Commission are not affected by the agreement.

25 Opinion 1/91, *European Economic Area*.

26 Case C-459/03, *Commission* v *Ireland*, EU:C:2006:345, para. 154.

27 Opinion 1/92, *European Economic Area II*, EU:C:1992:189, paras. 23 and 24 "… decisions taken by the Joint Committee under that article are not to affect the case-law of the Court of Justice. That principle constitutes an essential safeguard which is indispensable for the autonomy of the Community legal order".

28 Opinion 1/91, *European Economic Area*, para. 71.

29 Opinion 1/09, *European and Community Patents Court*, para. 83.

30 ibid., para. 80.

31 ibid., paras. 84 and 85.

its institutional framework but also on common values enshrined in Article 2 TEU[32] and, in particular, on the respect of fundamental rights being "at the heart of the legal structure of the EU"[33]. The addition of values, fundamental rights and principles was pivotal in giving substance to the constitutional recognition of the EU legal order, which is no longer a mere discursive statement of the Court.

Ultimately, this approach, which we could refer to as the substantive dimension of autonomy, completes the representation of the relationship between the EU and its Member States in a comprehensive constitutional structure which increasingly resembles a federal system that binds the Member States. From this perspective, the Court could not have been clearer when it held that: "[the] essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other"[34]. It is striking to note that the same reasoning was developed by the Court in its judgment in *Kadi*[35] to assert the independence of EU law from the international system.

We are far away from the simple assertion, made in the judgment in *Les Verts* v *European Parliament*[36], that the Treaties have to be seen as "a basic constitutional charter". At that time, no one could identify exactly what the critical elements of this new legal order were. Through the concept of autonomy, the Court has gradually been able to characterise them. Indeed, the definition of the concept of autonomy, enriched by normative, institutional and material dimensions, gives a real substance to the constitutional structure of the EU, with which it tends to be confused.

The evidence is provided in the *CETA* Opinion in which the Court affirms: "that autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it"[37]. But does it lead to subordination?

2 The concept of autonomy as an argument of authority

Autonomy has to be read in conjunction with specificity, uniformity and effectiveness of EU law. The crucial objective of the Court, in these judgments and opinions, remains the prevention of threats to the unity of the EU legal system. According to that aim, the Court has to consolidate its power, which was the condition for strengthening the authority of the EU legal order in a manner that builds institutional bridges with the Member States. If this permits a form of subordination of the domestic legal orders, the Court takes the responsibility to place this relationship with the Member States in a constitutional order which henceforth goes beyond the Court and to which it is likewise subject.

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32 Opinion 2/13, *Accession of the Union to the ECHR*, para. 168.

33 ibid., para. 169.

34 ibid., para. 167.

35 Case C-402/05 P, *Kadi*, EU:C:2008:461, paras. 282 to 285 and para. 316.

36 Case 294/83, *Parti écologiste "Les Verts"* v *European Parliament*, para. 23.

37 Opinion 1/17, *CETA*, para. 110.

2.1 Autonomy as an argument to protect the authority of the Court's jurisdiction

It must be recalled that the European Economic Community was set up to create a single economy among the Member States. Without uniformity, EU law would be deprived of its Community character. In that regard, the Court observes, in a leading judgment, that the full effect, autonomy and particular nature of EU law derives from uniform interpretation[38]. Put in simple words: the single market entails uniformity which entails autonomy.

From this, omnipotence on the part of the Court of Justice can be inferred. Since uniformity is consubstantial with the Union's legal order, and since uniformity is preserved by the Court[39], its judicial monopoly appears to be an essential characteristic of the autonomy, for which the Court must ensure respect. Thus, as was held in Opinion 1/91, the Court is placed at "the very foundation of EU law"[40]. There is definitively a circular aspect to the reasoning.

Moreover, until Opinion 1/09 was delivered, one could highlight that the essential characteristics of autonomy corresponded mainly to the Court's own creation (i.e. direct effect, supremacy of EU law) or related to its own jurisdiction (judicial monopoly). In this perspective, it is also worth noticing that the Court, as an interpreter of the constitutional provisions of the Treaties, has been able to interpret its own powers. The Court appears to be the main actor, but also the main author of the legal system. Furthermore, in all circumstances, the Court is still the one who chooses when and what must be seen as an essential characteristic of the EU legal order or not.

Ultimately, the Court alone embodies the concept of autonomy and, to a certain extent, also the EU legal order.

This perception explains the reasoning of the Court, which considers that any impairment of its jurisdiction undermines the EU legal order. Indeed, it could be perceived that the reasoning of the Court behind the concept of autonomy is entirely devoted to preserving its jurisdiction. Its judgment in *Achmea* and Opinion 2/13 on accession to the European Convention on Human Rights could be subjected reasonably to this criticism.

However, that would not be a fair statement. It is essential to go back into time and to take into consideration recent developments in the concept of autonomy.

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38 Case C-284/16, *Achmea*, para. 37; and Opinion 2/13, *Accession of the Union to the ECHR*, para. 176.

39 Case 26/62, *Van Gend & Loos*, p. 12 "the task assigned to the Court of Justice … is to secure uniform interpretation of the Treaty".

40 Opinion 1/91, para. 71.

2.2 Autonomy as an argument to establish the authority of the EU legal order

First, it must be emphasised that the Court has to face an imperfect decentralised system where the effectivity and effectiveness of EU law depend on the Member States. Advocate General Geelhoed was crystal clear in his observation that: “In a general sense the Community legal order, although it is autonomous, is a dependent legal order to the extent that, in most fields, it depends on the efforts of the Member States to ensure full compliance with the obligations it imposes … . Where enforcement effort in the Member States is inadequate, it will be impossible to attain the objectives of the relevant Community provisions in a more or less uniform fashion throughout the Community”[41].

To counter that original weakness and strengthen the authority of EU law, the Court had to find the best way to build a bridge with the Member States. The most obvious and relevant way was to establish a link with its equivalent within the Member States: the national courts and tribunals because they use similar language, they share the same function of interpreting and applying the law and, finally, they address their decisions to the same citizens.

In that perspective, the Treaties offer the Court a solid foundation for this “bridging” process in Article 267 TFEU. The preliminary ruling mechanism is the foundational stone of the bridge.

In its judgment in *Schwarze*, the Court already underlined “the special field of judicial cooperation under Article 177, which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision”[42]. In that respect, Article 19 TEU, as interpreted by the Court, codifies the *Schwarze* ruling. The Court summarises it perfectly in Opinion 2/13 by holding that “… the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU”[43].

Indeed, and from the outset, the Court understood that the effectiveness of EU law depends on the link that it would be able to create with the national judges. In this perspective - and this is the second stone of the bridge - the consequences of recognising the direct effect of EU law are fundamental. It provided national judges with an opportunity to become autonomous in relation to their own legal system.

Accordingly, the Court provides support to national judges against any infringement of their competence to refer questions to the Court. This is indeed essential for the

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41 Opinion of Advocate General Geelhoed in Case C-304/02, *Commission* v *France*, EU:C:2005:274, point 29. See Bouveresse (2018), op. cit.

42 Case 16/65, *Schwarze*, EU:C:1965:117.

43 Opinion 2/13, *Accession of the Union to the ECHR*, para. 176

effectiveness of the EU legal order[44]. It stems clearly from the judgment in *Rheinmühlen* in which the Court highlighted "the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States". According to the Court, "any gap in the system so organised could undermine the effectiveness of the provisions of the Treaty and of the secondary Community law"[45].

But real progress was realised with Opinion 1/09 which marked a turning point by including, within the autonomy concept, the national courts and tribunals at two levels. It saw them both as an essential characteristic of the EU legal order relating to its constitutional structure and as custodians (together with the Court) of autonomy. It results from the latter that preservation of autonomy is now ensured within the framework of an integrated jurisdictional system.

2.3 Consequences in the light of subordination

Due to the developments in the concept of autonomy it can be said that the courts and tribunals of the Member States acquire somehow a constitutional status which follows the constitutional status of the Court, accordingly to Article 19 TEU.As the Court highlighted in Opinion 1/09, "the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties"[46].

Indeed, the direct cooperation established by Article 267 TFEU between the Court and the national courts is now evolving within the framework of a constitutional relationship within Article 19 TEU, which strengthens the federalisation of the EU legal system. The concept of autonomy provides a means to secure the cooperation of national judges in a constitutional framework by inserting them as an element of the constitutional structure of the EU and as guardians of it. In that sense, autonomy could be seen as a tool for the subordination of national judges. There can be no doubt, however, that the bridge was built to be crossed and is, in fact, a mandatory passage. A closer look at the wording in Opinion 1/09 confirms that point. First, the Court reminded the national judges of the principle of sincere cooperation to which they are subject. Second, the Court gave a clear signal to the national judges, by its express reference to the judgments in *Köbler*[47] and *Traghetti*[48], that any breach of EU law, including its case-law and, in particular any breach of their obligation to refer a preliminary question, will be penalised[49].

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44 Case 166/73, *Rheinmühlen*, EU:C:1974:3; Case C-210/06, *Cartesio*, EU:C:2008:723; Case C-173/09, *Elchinov*, EU:C:2010:581; Joined Cases C-188/10 and C-189/10, *Melki & Abdeli*, EU:C:2010:363; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; and Case C-619/18, *Commission* v *Poland*.

45 Case 166/73, *Rheinmühlen*, para. 2.

46 Opinion 1/09, *European and Community Patents Court*, para. 85.

47 Case C-224/01, *Köbler*, EU:C:2003:513.

48 Case C-173/03, *Traghetti del Mediterraneo*, EU:C:2006:391.

49 See Opinion 1/09, *European and Community Patents Court*, para. 83: "the national courts have the most extensive power, or even the obligation, to make a reference to the Court" see also paras. 86 and 87 and for a recent application: Case C-416/17, *Commission* v *France*, EU:C:2018:811.

Despite the fact that the Treaty refers to a relationship of "cooperation" and the Court presents it as a "dialogue between one court and another"[50], the conjunction of the principle of autonomy and Article 19 TEU moves the cooperation towards an integrated jurisdictional system with a vertical axis of authority. In that respect, the Court mentions expressly in the *CETA* Opinion that "in order to ensure that those specific characteristics and the autonomy of the legal order thus created are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In accordance with Article 19 TEU, it is for the national courts and tribunals and the Court to ensure the full application of that law in all the Member States and to ensure effective judicial protection, the Court having exclusive jurisdiction to give the definitive interpretation of that law"[51].

As a final point, it must be stressed that the development of autonomy now goes beyond the Court itself. It includes national jurisdictions as well as values and principles in such a way that autonomy reflects the new constitutional legal order of the EU. This means that the bridge is not a one-way street and, as such, it is also more difficult for the Court to justify the concept of autonomy solely as a means of defending its monopoly of jurisdiction. Autonomy is gradually becoming detached from the Court and it may even subordinate the Court itself.

The recent case-law referring to Article 19 TEU is enlightening on this issue. The judicial system established by the Treaties ensures the preservation of the autonomy of the EU (not only EU law). Since the introduction of Article 19 TEU by virtue of the Lisbon Treaty, this is a mission ensured not only by the Court, but also by national judges. The Court has gone further, however, and indicated that Article 19 TEU has to be read as giving "concrete expression to the value of the rule of law stated in Article 2 TEU, [and] entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals"[52]. Consequently, the Court is no longer the only guardian of autonomy, but has to share this task with national courts and tribunals. Moreover, as a part of the notion of fundamental rights based on common values, Article 19 TEU gives to the concept of autonomy another recipient: individuals[53]. In this respect, *Kadi* and Opinion 2/13 already stressed the importance of fundamental rights within the concept of autonomy. There is no doubt that such requirements will require the Court also to submit to the concept of autonomy which, like Frankenstein, could evolve beyond the intentions of its creator.

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50 See Case C-284/16, *Achmea*, para. 37; and Case C-619/18, *Commission* v *Poland*, para. 45.

51 Opinion 1/17, *CETA*, para. 111.

52 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 32.

53 See also Case C-619/18, *Commission* v *Poland*, paras. 47 to 50.

Part 4
The application of national law by the ECB

The application of national law by the ECB: an introduction

Luis de Guindos[1]

The banking union is an innovative project in many ways, not least in its legal underpinnings. The regulation establishing the Single Supervisory Mechanism (SSMR) conferred upon the ECB the task of applying a rulebook that comprises a mix of both EU law and national legislation from 19 different countries. There is no real precedent for such a situation – an EU institution applying national legislation – in the history of the EU integration process.

That makes the topic of this Part a source of intense interest for legal scholars dealing with EU integration. But it is also a matter of great practical importance for those of us engaged on a daily basis in applying the rules, especially where those rules differ from one country to the next. And, as I will set out in these brief remarks, reducing the level of fragmentation in the EU rulebook is, in fact, critical for making further progress in forging a truly European banking market.

Before we get to that, it is worth considering what progress has been achieved in integrating regulation and supervision to date, and how we got to where we are. Let us start with the regulatory side. It would be tempting to start at the beginning, with the introduction of “passporting” in 1993, or, perhaps, the First Banking Directive in 1977. But it suffices to recall that in the two decades preceding the 2008 financial crisis, progress in regulatory integration was rather slow, and involved national rulebooks being subject to “minimum harmonisation” via the agreement of EU directives that needed to be transposed into national law to take effect.

That changed with the launch of the single rulebook. Originating from the comitology process of the Committees of European Supervisors (the “Lamfalussy Committees”) in the 2000s, progress in creating the single rulebook accelerated with the establishment of the European Supervisory Authorities in 2010 and culminated with the publication of the Capital Requirements Regulation (CRR) in 2013. The single rulebook aimed to reduce the opportunities for regulatory arbitrage and the existence of competitive distortions within the Internal Market. And it was achieved by implementing the core parts of the rulebook in the form of regulations, which unlike directives would be directly applicable in each Member State.

But did the single rulebook live up to its name? To be sure, it was a step change in the level of regulatory harmonisation in the EU, but it did not remove all cross-country variation in the regulatory framework. For a start, many important rules continued to exist in the form of directives, and thus needed to be transposed into national law. And, even where regulations were used, legislators chose for political

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reasons to include many options and discretions to be exercised by national competent authorities or by Member States themselves.

The creation of the Single Supervisory Mechanism (SSM) – and here we turn to the supervisory side – was a further milestone in the path towards a more integrated framework for European banking. For the participating Member States, a system of loose supervisory cooperation between national authorities, founded on the principle of home-country control, was replaced with an integrated system of financial supervision conducted by the national and supranational authorities. The ECB became directly responsible for supervising significant institutions and indirectly responsible for supervising others. And the ECB received specific powers and responsibilities in the field of macroprudential policy.

One consequence is that options and discretions assigned to the competent authorities of Member States are now exercised by the ECB. Indeed, in 2016, the ECB published a Guide and a Regulation harmonising the exercise of over 130 options and discretions within the SSM. Yet despite this progress, it remains the case that the ECB, as banking supervisor, has to apply a patchwork of rules that can differ substantially from one jurisdiction to the next. While this is explicitly foreseen in the SSMR, such a variegated regulatory landscape can have adverse consequences for day-to-day supervision, and for the broader objective of ensuring a level playing field and the integrity of the internal market for banking.

Problems with the status quo

There are three main sources of national regulatory divergence affecting the functioning of the SSM today: (1) the “minimum harmonisation” approach of EU directives; (2) the differential exercise by the Member States of options and discretions that are explicitly included in EU legislation; and (3) differential national legislation that has not been subject to EU harmonisation.

Let us consider the first of these. EU directives are generally minimum harmonising. Member States subscribe to a set of minimum standards in exchange for their firms gaining access to the markets of other jurisdictions. But Member States remain free to impose stricter standards if they choose to do so. The Capital Requirements Directive (CRD) is mostly minimum harmonising. And it covers many key prudential rules, such as access to the activity of credit institutions, the supervisory review and evaluation process (otherwise known as Pillar 2), sanctioning powers and more. Another relevant example is the Bank Recovery and Resolution Directive, which inter alia confers on banking supervisors a set of tools aimed at handling crisis situations at an early stage (“early intervention measures”); such tools are subject to national transposition by Member States.

It sometimes makes sense for prudential requirements to reflect specific local circumstances, even in a single banking market with a single supervisor. For example, it can be appropriate to set macroprudential policies in a way that varies from one jurisdiction to the next. Economic and financial cycles, as well as the structures of financial markets, are not fully aligned across Member States, and

macroprudential authorities have the best knowledge of systemic risks brewing in their jurisdictions. The framework for macroprudential policymaking in the banking union reflects this: national authorities remain responsible for exercising macroprudential policies in their jurisdictions, while the ECB can "top up" requirements if it deems it necessary to do so. This flexible use of tools can support financial stability and thus also the single market. Of course, there is a risk that this can lead to ineffective domestic ring-fencing.

In addition to this ring-fencing risk, minimum harmonisation can also result in unjustified inconsistencies. One example is the rules on so-called "fit and proper" assessments of members of a bank's management body. These rules are contained within the CRD and elaborated via a set of European Banking Authority (EBA) guidelines, but transposition across Member States is inconsistent. The result is that the ECB could be required in one jurisdiction to approve governance arrangements and suitability assessments of managers who would not be deemed suitable in other jurisdictions. Similarly, experience gained in the first five years of the SSM shows that differences in the crisis management toolkit can hinder the prompt and effective tackling of crises.

Turning to the second source of variation – options and discretions granted to Member States – such measures can discourage further integration of the European banking sector. For example, subject to certain conditions, the CRR provides for waivers from the application of liquidity requirements on an individual basis. This should enable cross-border groups to manage their liquidity more efficiently, on a group-wide basis. But several Member States currently exercise an option not to exempt intragroup exposures from large exposure restrictions, thereby limiting banks' freedom to move liquidity between different group entities. This disincentivises banks from applying for liquidity waivers and ultimately limits the benefits of operating in more than one Member State.

These Member State options and discretions point to a larger issue with the single rulebook – namely, that it is more restrictive for banking groups operating across borders in the EU than it is for groups operating within a single Member State. For example, where an institution and parent company are located in the same Member State, the obligation to meet prudential requirements on an individual basis can be waived under specific conditions. This permission allows the group to meet requirements on a consolidated basis only, which can facilitate an efficient use of resources within the group. By contrast, this permission is not available where the individual institution is established in a different Member State from its parent. In the medium term, we would welcome a rebalancing of the rulebook to remove this hurdle to cross-border banking.

Finally, we have those areas of national law that have not yet been subject to EU harmonisation. Let me highlight two issues in this regard. First, in the area of macroprudential policy, a substantial part of the toolbox is limited to national measures, which – in the absence of EU-level harmonisation – may result in inconsistent application of those instruments. Also, the interactions of national measures with other, more harmonised instruments may vary from one country to another, making it difficult for policymakers to identify overlaps, assess interactions

and calibrate policy measures in a coherent manner across jurisdictions. This calls for the extension of a more harmonised macroprudential toolkit at the EU level.

Second, there is national legislation that lies outside the supervisory field, but which is nevertheless directly relevant for the resolution or liquidation of banks. Here, a key example is insolvency law, which remains very much a national affair. The lack of harmonisation of insolvency law matters because bank failures are handled through insolvency – unless it is deemed in the public interest for the bank to be resolved. Since national insolvency laws are very diverse, this can create significant uncertainty for creditors in the event of a failure. The best outcome here would be harmonisation of insolvency law, although this may not be realised in the short term.

The European banking sector today benefits from a single rulebook, overseen by the EBA, a single supervisor in the ECB, as well as a Single Resolution Board. These developments have been essential for ensuring that the emergence of a pan-European banking market is achieved safely and sustainably, without undue risk to depositors, creditors or wider financial stability. But if I have one message for you today, it is that the integration journey is not complete: if we are to realise the benefits of a truly European banking market, further steps to reduce fragmentation in the prudential rulebook, and to harmonise related areas of national legislation, must remain a priority for lawmakers.

Incorrect implementation of EU directives: what effects for the ECB and the CJEU, and what mechanisms for rectification?

Karen Banks[1]

1 Introduction

I have been asked to address a topic which raises difficult and novel questions, and which requires exploration of a subject on which I am myself a novice, that is to say the obligation imposed on the ECB by Article 4(3) of the SSM Regulation[2] (SSMR) to apply, for the purpose of carrying out the tasks imposed upon it by that Regulation, not only all relevant Union law, but also, where that law is contained in directives, the national law implementing those directives. I am conscious that quite some ink has already been spilt on the tricky question of what happens if a Member State fails to transpose a directive, or does so in a wrongful manner, and I can only hope to push the analysis a very little further, hopefully with the benefit of "fresh eyes". I therefore underline not only that my contribution is made in an entirely personal capacity, but also that any views I may put forward have to be seen as entirely tentative and exploratory.

To come then to the point: In case a Member State has not implemented an obligation contained in a directive, or has done so incorrectly, is the ECB obliged simply to apply nothing at all in the first case, and the incorrect national provision in the second? Is it imaginable that a Union institution should be bound to apply a rule which is in breach of Union law? And how could the ECB fulfil the role conferred on it by the Regulation of "contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State" if it were prevented from applying the rules of EU law which are the bedrock of the system it is supposed to apply? Clearly Article 4(3) SSMR was written on the assumption that national provisions implementing relevant directives would generally be in compliance with those directives, and no doubt they generally are. This however leaves us with our problem of what to do when they are not.

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1 Deputy Director-General Legal Service, European Commission. Opinions expressed in this article are purely personal and cannot be attributed to the European Commission.

2 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

2 Limiting the damage

2.1 Interprétation conforme

The first port of call in such a situation is of course the technique of "interprétation conforme", ie seeking to interpret the national provisions so as to bring them into conformity with the requirements of EU law. As we all know, however, this technique has its limits. It cannot be used to interpret a national provision "contra legem". Moreover, where a directive has simply not been implemented at all, or where a part of the necessary legislation is missing, there may very well not be any national provision to interpret.

2.2 Limited direct effect of directives

More than one writer on this subject[3] has already explored the possibility for the ECB of relying on the direct effect of a directive in such circumstances. Two objections instantly spring to mind: the relevant provision of the directive in question may not be sufficiently clear, precise and unconditional to allow it to produce direct effect; and even a clear, precise and unconditional provision of a directive cannot be applied directly against an individual or other non-State entity. The position of the Court of Justice on both these points has been comprehensively recalled in its recent judgment in *Poplawski II*[4], and seems unlikely to change. There is no more room for theories of exclusionary direct effect as against the direct effect of substitution: the primacy of EU law alone does not allow a faulty provision of national law to be set aside.

It seems clear therefore that we can only explore the possibility of direct effect in the present context in the case of rather precise provisions of a directive, or at least of provisions having a clear minimum content.

Now, what about the problem of applying a provision of a directive directly to the activities of credit institutions? This may be possible in certain cases – where a Member State has obtained control of a bank via a bailout, for instance. In such cases, the credit institution may be treated as an "emanation of the State", and those provisions of a directive which are sufficiently precise may be applied to it under the theory of estoppel developed by the Court of Justice in cases such as *Ursula Becker*[5] and *Foster / British Gas*[6]. Under this approach, a Member State has to be prevented from taking advantage of its own failure to comply with EU law, and provisions of a directive which are sufficiently clear and precise may be relied upon

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3 Di Bucci, "Quelques questions concernant le contrôle juridictionnel sur le mécanisme de surveillance unique", in *Liber Amicorum Antonio Tizzano*, Torino, G. Giappichelli Editore, 2018, pp. 316-331; Kornezov, "The application of national law by the ECB – a maze of (un)answered questions", in *ESCB Legal Conference 2016*, Frankfurt am Main, pp. 270-282.

4 Case C-573/17, *Daniel Adam Poplawski / Openbaar Ministerie*, EU:C:2019:530.

5 Case 8/81, *Ursula Becker / Finanzamt Münster-Innenstadt*, EU:C:1982:7.

6 Case C-188/89, *Foster and Others* / *British Gas*, EU:C:1990:313.

as against it and all bodies which can be assimilated to it. It is true that the cases I refer to involved so-called “vertical direct effect” where individuals sought to rely on the provisions of a directive against a State authority or another body closely associated with the State. However, there seems to be no reason of principle why the direct effect of a directive should not be invoked against a State-controlled entity at the suit of the ECB. As Judge Kornezov pointed out in his article on this subject[7], the Court’s theory of estoppel focuses more on the addressee of the obligation (ie the State) than on the one who asserts it. There does not appear therefore to be any obstacle to the ECB’s relying on directly applicable provisions of a directive as against a bank which is owned or otherwise controlled by the State.

2.3 Alternative approaches

What about other banks which have to be regarded as non-State entities? Is there any way to avoid the ECB being obliged to apply to them the content of national law provisions which are contrary to a directive?

The theory of general principles of EU law which the Court of Justice has occasionally applied in order to impose the essential content of a directive on a private entity - where the general principle in question coincided with the obligation contained in the directive - seems unlikely to lend itself to the area of banking rules. Those rules which I have looked at seem rather nitty-gritty, and not at all similar to the general principle of non-discrimination on the grounds of age, which was the subject matter of cases such as *Mangold*[8] and *Kücükdeveci*[9]. There seems therefore to be little scope for the use of this approach in the present context.

Another idea has been put forward by my colleague Vittorio Di Bucci[10] to “get around” the issue of horizontal direct effect. He points out that the classical objection to the direct application of directives to private entities is that such an effect is reserved to areas in which the EU has competence to adopt regulations. However, the Court of Justice has accepted that a regulation may incorporate by reference an obligation set out in a directive. It did this notably in the case of *Viamex*[11], where the availability of an export refund for bovine animals pursuant to a regulation was made dependant on respect of animal welfare obligations which were set out in a directive. The Court stated that it could not be precluded, in principle, that the provisions of a directive may be applicable by means of an express reference in a regulation to those provisions, provided that general principles of law and, in particular, the principle of legal certainty, are observed. Vittorio’s idea is that Article 4(3) SSMR can be understood as such an incorporation by reference. The obligations in question

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7 *Op. cit*, footnote 3.

8 Case C-144/04, *Werner Mangold / Rüdiger Helm*, EU:C:2005:709.

9 Case C-555/07, *Seda Kücükdeveci / Swedex GmbH & Co. KG*, EU:C:2010:21.

10 *Op. cit*, footnote 3.

11 Joined Cases C-37/06 and C-58/06, *Viamex Agrar Handels GmbH, Zuchtvieh-Kontor GmbH (ZVK) / Hauptzollamt Hamburg-Jonas*, EU:C:2008:18.

would thus be seen as flowing, not from the direct effect of the provisions of the directives, but from the application of Article 4(3) SSMR itself.

I have to admit that, when I first read this idea, I was not convinced. It seemed to me that the general reference in Article 4(3) SSMR to "all Union law", and specifically the injunction to the ECB to apply, in parallel with Union law, the national legislation implementing directives, was a far cry from the express incorporation by reference of particular provisions of a directive. However, on reflection I have seen that some imaginative thinking is needed in order to avoid a result in which an EU institution would be obliged to apply national provisions which were in breach of Union law, thus undermining rather than upholding the effectiveness of that law.

We have to recall that Recital 34 of the SSM Regulation makes it clear that the application of national law by the ECB is without prejudice to the primacy of EU law, and that the ECB should "base itself on, and act in accordance with, the relevant binding Union law". Article 4(3) SSMR has thus to be interpreted as meaning that the ECB shall apply national law only to the extent that it is compatible with Union law, and where it is not so compatible, it must apply those provisions of EU law which are capable of being directly applied or of producing direct effect. Article 4(3) SSMR has therefore to be read as incorporating by reference, or making directly applicable, those provisions of directives which have not been correctly implemented in national law and which are sufficiently clear and precise to be applied directly.

What of the Court's stricture that such an approach is possible only subject to the principle of legal certainty? In the Court's caselaw, this concept has generally been applied so as to prevent the direct effect of a directive (see, for example, cases *Pretore di Salò*[12], *Kolpinghuis Nijmegen*[13], *Berlusconi*[14]), or even the interprétation conforme of national law in the case of a regulation (*X*[15]) where this would have the effect of aggravating the penal liability of an individual as compared with the situation provided for in national law. The principle of non-retroactivity of the criminal law would certainly also have to be respected in the present context, so that the ECB would not be able to apply a rule of a directive implying any penal liability.

To sum up therefore as regards the effect of Article 4(3) SSMR on the ECB, if my reasoning is correct it can, and indeed must, apply the provisions of relevant directives directly in the absence of legally permissible national implementing provisions, with the exception of provisions of a directive which are not capable of being applied directly for lack of precision and unconditionality and those provisions involving criminal liability.

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12 Case 14/86, *Pretore di Salò / X*, EU:C:1987:275.

13 Case 80/86, *Kolpinghuis Nijmegen BV*, EU:C:1987:431.

14 Joined Cases C-387/02, C-391/02 and C-403/02, *Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others*, EU:C:2005:270.

15 Case C-60/02, *X*, EU:C:2004:10.

3 Implications for the CJEU

What of the implications of incorrect implementation of EU directives for the CJEU? The General Court has the task of reviewing decisions of the ECB and in that framework will have to assess whether the ECB has acted correctly in

- interpreting national law;
- judging that national rules were potentially contrary to EU law;
- construing them in such a way as to avoid such incompatibility;
- where that is not possible, disapplying them and applying directly provisions of a directive.

This implies a complex exercise for the General Court, in which it has to interpret national law itself, in order to assess whether the ECB's understanding of it was correct, and whether the ECB applied correctly the notions of national law which are necessary to understand how far latter can be "pushed" towards compatibility with EU law. The General Court will above all have to assess whether the ECB was correct in those cases in which it determines that a national provision is not in conformity with the requirements of a directive and therefore applies directly a provision of that directive. An appeal will then lie to the Court of Justice against the findings of the General Court.

4 Remedies

All of this of course leaves an unsatisfactory situation. As we have seen, certain provisions of directives which have not been correctly implemented will not be capable of being applied directly. Moreover, the NCAs which supervise "less significant" credit institutions will not be in a position to apply the provisions of non-or-poorly implemented directives, at least in the case of privately owned banks. There will thus be a lack of equal application of the rules to all players. Other remedies will thus be needed, and the role of the Commission in bringing infringement proceedings will be important.

4.1 Infringement procedures

The Commission's Communication of January 2017 on its current policy in relation to enforcement action[16] makes it clear that priority is given to cases of failure to communicate implementation measures, and to cases of incorrect implementation. The importance of national legislation being in line with EU law is underlined, as without this citizens cannot readily assert the rights they derive from that law. Moreover, the Communication stresses that the Commission will act firmly on

[16] Communication from the Commission, "EU law: Better results through better application", (OJ C 18, 19.1.2017, p. 10).

infringements which obstruct the implementation of important EU policy objectives. I think it is clear that the construction of the Banking Union is such a policy objective, and I have no doubt that any complaint concerning national legislation which is in breach of a directive in that sector, or regarding a failure to legislate at all in order to implement such a directive, would be taken very seriously indeed. The obligation of the Commission to practise sincere cooperation with the ECB is a further factor which would encourage it to act energetically in such a case.

As regards a failure to communicate any measure to implement an obligation set out in a directive adopted under a legislative procedure, Article 260(3) TFEU provides for a particularly effective means of enforcement, in that it allows the Commission, when it brings the matter before the Court of Justice pursuant to Article 258 TFEU, to ask the Court to impose a lump sum or a periodic penalty payment on the defaulting Member State. Thus, unlike in the case of a normal infringement action, the Commission does not have to wait until a Member State has failed to comply with a first judgment before it can seek a financial sanction. This difference is of course justified by the fact that there can be no doubt or dispute about the fact that a Member State which has failed to communicate any measure in order to implement a directive knows very well that it is in default.

This reinforcement of the means at the Commission's disposal was introduced by the Treaty of Lisbon. For some years thereafter, the Commission limited itself to asking for the imposition of periodic penalty payments. However, because a periodic penalty payment is imposed by the Court in relation to any period following the judgment during which the infringement continues to exist, such a sanction can only be imposed if the infringement persists at the date of judgment. This of course was not lost on the Member States, and the Commission observed that they had a tendency to introduce the necessary measures once proceedings before the Court had reached a very advanced stage, occasionally just before judgment. This would then lead to a withdrawal of the case by the Commission, since the infringement as described in the application to the Court would no longer exist. This pattern of late withdrawals was not much appreciated by the Court, and indeed the Commission found the situation deeply unsatisfactory also. Therefore, in the 2017 Communication to which I have already referred, the Commission announced that henceforward it would ask the Court to impose both a lump sum and a penalty payment in cases of non-transposition. The advantage of this is that, because the lump sum relates, not to the future but to the period during which the infringement existed, even if a Member State brings the infringement to an end during the court proceedings, the case continues to have an interest because the lump sum can still be imposed. Therefore, as regards new cases, that is cases in which the letter of formal notice has been sent after the date of the Communication, the Commission no longer withdraws a case of non-transposition once the Application has been sent to the Court.

Needless to say, the new instrument of Article 260(3) TFEU has given rise to quite some controversy with the Member States. The main discussion has concerned their view that it could only be applied in a case of total failure to communicate any measure to implement a directive, whereas the Commission has maintained that it

could also be used in a case of partial failure to communicate such measures. Therefore, whenever we could identify a clear transposition "gap", whether because the national measures failed to cover some material aspect of the obligations imposed by a directive, or because they did not cover all the national territory, the Commission would refer to Article 260(3) TFEU, and ask the Court to impose a sanction. The Member State in question would protest that Article 260(3) TFEU was not applicable, and in many cases other Member States intervened to support this point of view. However, in July this year we finally managed to reach judgment in one of these cases, *Commission / Belgium*[17], and the Court of Justice has fully endorsed the Commission's approach. We therefore have a rather effective instrument at our disposal in case a Member State fails, whether in whole or in part, to implement in national law the obligations laid down in a directive.

Where the problem is one, not of an absence of national provisions necessary to implement a directive but of incompatibility between the provisions of a directive and those of national law, we have to have recourse to a regular action based on Article 258 TFEU, with of course the possibility, if a Member State does not comply with a judgment resulting from that procedure, of applying for a sanction to be imposed pursuant to Article 260(2) TFEU.

The infringement procedure is often perceived as being rather slow[18], involving as it does a double exchange with the Member State in question before a quite time-consuming court case. However, the advantage of all these procedural steps is that they give the opportunity for real and deep exchanges to take place, and a great many infringements are eliminated before the matter goes to court. Moreover, the Commission is capable of acting swiftly where there is real urgency. In the case concerning the judges of the Polish Supreme Court, less than four months passed between the sending of the letter of formal notice and the application to the Court[19].

Once before the Court, in a case of real urgency, where there is a danger that some action by the Member State might cause serious and irreparable prejudice before the Court had had the time to arrive at a final judgment, the Commission can apply for interim measures pursuant to Article 279 TFEU. The interim measure most often requested in an infringement case is the total or partial suspension of a contested national measure. The Commission would have to be able to establish a *prima facie* case, as well as satisfying the Court of the real urgency of the matter and of its superior interest in obtaining the interim measure sought, as against that of the Member State in a rejection of the application. It is only in rare and truly urgent cases that such an application is made. I cannot judge whether the kind of errors of transposition which are likely to arise in the banking world could ever give rise to such a degree of urgency as to justify such a step.

In a case where this degree of urgency does not exist, but where there are nevertheless serious reasons for considering that the matter needs to be dealt with

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17 Case C-543/17, *Commission / Belgium*, EU:C:2019:573.

18 On average, the time taken between the decision to send a letter of formal notice and a decision to go to court is around two years.

19 Case C-619/18, *Commission / Poland*, EU:C:2019:531.

in an expeditious fashion, the Commission can apply, pursuant to Article 133 of the Rules of Procedure of the Court of Justice, for the case to be dealt with under an expedited procedure.

4.2 Action for damages

A final word on remedies: in a case where an individual has been harmed by the failure of a Member State to implement, or to implement correctly, a directive, s/he can bring an action in damages before the national courts, subject to the conditions laid down by the Court of Justice in *Francovich*[20] and subsequent cases.

5 Conclusion

In this short contribution I have tried to illustrate possible ways of limiting the damage flowing from a failure to transpose, or from a defective transposition, of one of the directives referred to in Article 4(3) of the SSM Regulation, as well as pointing to certain remedies for such damage. I am conscious that the suggested ways of avoiding the worst consequences are open to debate, but they are the result of the extreme originality of the legal architecture with which we have to deal. It will be interesting to see how the EU courts solve these problems in practice.

[20] Joined Cases C-6/90 and C-9/90, *Andrea Francovich, Danila Bonifaci and others / Italian Republic*, EU:C:1991:428.

Mutual judicial deference? The delineation of the (interpretative) competence of European and national courts in the judicial review of ECB acts based on national law

Miro Prek[1]

1 Introduction

Under Article 4(3) of the SSM Regulation[2] "[f]or the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options".[3]

The rationale behind this provision is fairly straightforward. Under this regulation, the ECB is sole in charge of the supervision of significant credit institutions in respect of certain key aspects of their functioning.[4] Yet the relevant material rules have been adopted by means of directives – essentially the CRD IV[5] – which must be transposed and implemented in the national legal orders. Moreover both the CRD IV and the relevant Regulation – the CRR[6] – leave the Member States with certain options and discretion when it comes to determining the content of their provisions. Since an EU institution is in charge of applying rules that have not been fully harmonised at EU level, it is possible that the *lex materiae* the ECB must apply is, in part, constituted by national law.

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1 President of Chamber at the General Court of the EU. I wish to thank Dr. Silvère Lefèvre, Legal Secretary at the General Court for his assistance. All views expressed are personal.

2 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

3 On this question see Lo Schiavo (2019); Boucon and Jaros (2018); Coman-Kund and Amtenbrink (2018); Kornezov (2016); Ter Kuile, Wissink and Bovenschen (2015); Witte (2014).

4 See Articles 4(1) and 6(4) of the SSM Regulation.

5 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338)

6 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1, corrigenda OJ L 208, 2.8.2013, p. 68, and OJ L 321, 30.11.2013, p. 6).

As a consequence, should an application be lodged against a decision of the ECB, the General Court might be called upon to verify not only whether such a decision complies with EU law but also whether it is in conformity with the relevant national legislation implementing the CRDIV or by which the Member States have exercised the options left to them by the CRR or the CRDIV.[7]

This, not unique but still rather an odd situation, raises interesting questions relating to the powers of the General Court, should it come to the conclusion that the relevant domestic law – or its interpretation by national courts – is not compatible with the CRD IV and the CRR. Is the General Court entitled to depart from the case-law of national courts, when it needs to interpret the applicable national law in judicial review proceedings against the decisions of the ECB, or even to set aside such national legislation if it were found to be contrary to the relevant EU law? Is there a clear allocation of competence between the EU Courts, on the one side, and national courts on the other side, according to which the General Court must in all circumstances apply national law, as interpreted by national courts, even though such national law may actually contradict the relevant EU law?

In other words, to put the question differently, should the General Court be vested with the same powers – or rather duties – that the most revered and well known case-law of the Court of Justice has recognised to national courts?

Two key powers are particularly relevant. The first one is the duty of a national court to interpret its domestic law in conformity with EU law. This power is deemed by the Court of Justice to be "inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it".[8] The second one concerns what is sometimes referred to as the "invocability of exclusion", by which a national court refrains from applying the provisions of its domestic law that are incompatible with EU law.[9]

My personal view is that the answer should, to a large extent, be affirmative in the sense that the General Court should be vested with such powers, but that they should be applied with great caution. In order to justify this position, I would like to make the three following points.

First, the use of domestic law in the context of the SSM Regulation differs from other situations, underlined below, in which the General Court also make use of national law.

Secondly, there is no absolute rule relating to the allocation of competence between the national courts and the EU Courts that prevent the General court from interpreting national law or even assessing its compatibility with EU law.

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7 On this question see the "Overview of options and discretions set out in Directive 2013/36/EU and Regulation (EU) No 575/2013" (European Banking Authority) < http://www.eba.europa.eu/supervisory-convergence/supervisory-disclosure/optionsand-national-discretions>.

8 See e.g. Case C-84/12, *Koushkaki*, EU:C:2013:862, para. 76.

9 Case 106/77, *Simmenthal*, EU:C:1978:49.

Third, account should be taken of the principle that the General Court cannot be forced to base its decisions on erroneous legal considerations.

2 The application of national law by the General Court and the specificities of banking supervision litigation

Banking supervision litigation is not the only field in which the General Court may have to apply provisions of national law. Indeed, there exist several situations in which the General Court is called upon to apply national law. I will not enter into a detailed analysis of this question since it falls outside the scope of this contribution.[10] I will just confine myself to two examples.

The first one concerns contractual litigation on the basis of an "arbitration" clause. Under Article 272 TFEU "[t]he Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law". Such litigation falls within the jurisdiction of the General Court since the entry into effect of Decision 2004/407/EC.[11] Because the General Court does not decide *ex aequo et bono* it resolves such litigation on the basis of national law.[12] Indeed, under Article 340 TFEU the General Court is bound to apply the "national law that governs the contract rather than general principles common to the legal systems of the Member States."[13]

The second one relates to trade-mark litigation.[14] Since an intellectual property right recognised in the law of a Member State may serve as the basis of an opposition against the registration of an EU trade mark or of the cancellation of a registered EU trade mark on the basis of Article 8(4) or 60(2) of Regulation (EU) 2017/1001, the General Court may have to apply national law, should the acknowledgement of the existence of such earlier right by a board of appeal of the EUIPO be challenged.[15]

In these two situations, should the General Court need to determine the exact meaning of the rules of national law that it needs to apply, it will refer to the case-law of the national courts, without exercising any form of scrutiny over such interpretation, accepting it as it is. This rather "passive" approach is strongly influenced by the case law of the Court of Justice relating to infringement proceedings in which national law is being scrutinised: "the scope of national laws,

10 On this question see Prek and Lefevre (2017).

11 Council Decision of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ L 132, 29.4.2004, p. 5).

12 See Prek and Lefevre (2017), pp. 374-378.

13 Joined Cases C-80/99 to C-82/99, *Flemmer and Others*, EU:C:2001:525, para. 54.

14 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1).

15 Prek and Lefevre (2017), p. 380.

regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts".[16]

However, the application of national law on the basis of Article 4(3) of the SSM Regulation is different inasmuch as national law is used in an area which is heavily regulated by EU legislation: here, national law transposes the CRDIV or exercises the options granted to Member States by the CRR. This is very different from the application of national law in the context of contractual litigation, for which there are only few substantive provisions of EU law, or in the context of the trade-mark regulation in which national law serves to identify the existence and scope of a prior unregistered right. In such situations it is unlikely that national law may conflict with a provision of EU law.

By contrast and in view of the detailed and precise nature of the CRR and the CRDIV, the possibility that a provision of national law – by its own virtue or because of its interpretation by a national court – may contradict EU law, cannot be excluded. Thus it is important that the General Court possesses sufficient powers to ensure the primacy of EU law over conflicting national law, as does any national court.

Indeed, since Article 4(3) of the SSM Regulation provides the ECB with a task that should belong to national administrations (applying national law) and, as consequence, the General Court is called upon to exercise a function that should be exercised by a national court (the review of the correct application of national law), logic would commend that it be vested with the same powers as the ones recognised to a national court so as to ensure the primacy and the effectiveness of EU law.

3 The allocation of competences between EU courts and national courts allows for some flexibility

It might be argued that the recognition of such powers to the General Court would be contrary to Article 19 TEU which allocates to the Court of Justice of the European Union (that is to say to say the Court of Justice and the General Court) the task to ensure that in the interpretation and application of the Treaties the law is observed. Thus the interpretation of national law or the assessment of its compatibility with EU law would fall within the jurisdiction of national courts and not of the EU Courts. Such a view is based on a rigid allocation of competence between the EU Courts and the national courts, which is not reflected in the current case-law as it stands.

On the one hand, national courts are entitled to interpret EU law. This is especially the case when they do not constitute courts of last resort, since they are not under a duty to request a preliminary ruling from the Court of Justice, even though the provision of EU law at stake may need interpreting. Even courts of last resort that are, in principle, duty-bound to refer a question of interpretation to the Court of Justice under Article 267 TFEU, can avoid doing so under the *acte clair* doctrine.[17]

[16] See e.g. Case C-433/13, *Commission v Slovakia*, EU:C:2015:602, para. 81.

[17] Case 283/81, *Cilfit and Others*, EU:C:1982:335, para.16.

National courts are also, to a certain extent, entitled to consider the validity of an EU act, providing that they conclude that such act is completely valid.[18]

On the other hand, there are instances in which EU Courts need to interpret national law. This may be so because there is no case-law on which they could base their interpretation. Indeed, in the absence of decisions by the competent national courts, it is for the EU courts to rule on the scope of those provisions.[19]

Moreover, there are also instances in which EU Courts not only interpret national law, but also assess its compatibility with EU law.

This is obviously the case in the course of infringement proceedings before the Court of Justice on the basis of Article 258 TFEU. Another illustration is the recent judgment in *Rimšēvičs and ECB v Latvia*[20] based on Article 14.2 of the Statute of the ECB. In this judgment, the Court of Justice went further than merely establishing an incompatibility of a national decision with EU law through a declaratory judgment,[21] as it, in effect, annulled the national act at stake.

Such an assessment – or something very close to it – may take place in situations in which there is no provision equivalent to Article 258 TFEU. One may consider that, in the course of a preliminary ruling procedure the need to provide a national court with a "meaningful answer" to its question sometimes leads the Court of Justice to assess the compatibility of national legislation with EU law,[22] and that the competence of the national court in relation to the assessment of validity of national law is preserved in appearance only.

Less frequently, the General Court may also have to "pass judgement" on the compatibility of national law with EU law. This happens, notably, in the course of an application for annulment against a Commission's decision qualifying a national taxation scheme as State Aid: in order to assess the legality of such a decision, the General Court needs to analyse the compatibility of national legislation at stake with Article 107 TFEU.[23]

4 The General Court cannot be forced to base its decisions on erroneous legal considerations

Consequently, I believe that there is no imperative impediment preventing the General Court from departing from the case-law of national courts so as to favour an

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18 Case 314/85, *Foto-Frost*, EU:C:1987:452, para. 14.

19 Case T-712/15, *Crédit mutuel Arkéa v ECB*, EU:T:2017:900, para. 132; see also Case C-263/09 P, *Edwin v OHIM*, EU:C:2011:452, para. 53, in which the Court of Justice refers to the taking into account of academic articles for that purpose.

20 Cases C-202/18 and C-238/18, *Rimšēvičs and ECB v Latvia*, EU:C:2019:139.

21 As proposed by Advocate General Kokott in *Rimšēvičs v Latvia* and *ECB v Latvia*.

22 See e.g. Case C-417/10, *3M Italia*, EU:C:2012:184, paras. 41 to 44; Case C-308/01, *GIL Insurance and Others*, EU:C:2004:252, paras 71 & al.

23 See e.g. Cases T-515/13 and T-719/13, *Spain and Others v Commission*, EU:T:2015:1004, paras. 119 & al.

interpretation of domestic law that would be compatible with EU law or even to set aside a provision of domestic law that would be incompatible with either the CRR or the CRDIV. An additional consideration supports this view. If the General Court was not provided with such powers it would be bound to apply national provisions that are incompatible with EU law, and thus base its decision on erroneous legal considerations. In that respect, it is worth noting that the principle that the General Court cannot be forced to base its decisions on erroneous legal considerations has sometimes been used in the case-law to justify the extension of the Court's jurisdiction beyond the arguments put forward by the parties.[24]

Although the context is different here, the rationale remains the same: it might be that the only solution for the General Court to avoid indirectly committing a breach of the relevant EU law is to favour its own interpretation of domestic law or to set it aside. If it does not do so, it may be led to infringe its very clear duty as enshrined in Article 19 TEU "to ensure that in the interpretation and application of the Treaties the law is observed".

5 Conclusions

In view of these three considerations, I believe – but that is my personal opinion – that in the course of the review of a decision of the ECB applying both EU and national laws on the basis of Article 4(3) of the SSM Regulation, the General Court should be entitled, if this is necessary, to depart from the interpretation of the national courts and even to set aside a national legislation if it is contrary to the relevant EU law.

However, such powers should be exercised in a manner as deferential as possible towards the competence of national courts.

The principle that the General Court cannot be forced to base its decisions on erroneous legal considerations serves not only as a justification of an "intrusion" in the jurisdiction of national courts, it also defines the limits of such an "intrusion". Whenever an interpretation of national law that makes it compatible with EU law exists, the General Court should follow it, without further scrutiny as to the merits of such an interpretation.

There is a concrete case to illustrate what I have just said. In *Caisse regionale du Credit Agricole*,[25] once the General Court had established that interpretation of the relevant provisions of the *Code Monétaire et financier* by the French *Conseil d'État* was compatible with its own interpretation of the CRDIV, it rejected all arguments based on an alleged violation of national law by the ECB on the sole basis of that

[24] See e.g., Case C-470/02 P (order) *UER/M6 and Others*, EU:C:2004:565, para. 69; Case T-58/08 P, *Commission v Roodhuijzen*, EU:T:2009:385, para. 35; Case T-108/11 P, *ETF v Michel*, EU:T:2013:625, para. 35.

[25] Cases T-133/16 to T-136/16, *Caisse régionale de crédit agricole mutuel Alpes Provence and Others v ECB*, EU:T:2018:219.

judgment of the *Conseil d'État*, without any further scrutiny of the relevant national law.

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The application of national law by the European Central Bank: challenging European legal doctrine?

Fabian Amtenbrink[1]

1 Introduction

The operationalisation in late 2014 of Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and establishing a Single Supervisory Mechanism (SSMR) has profoundly changed the European financial market regulatory and supervisory landscape.[2] The most apparent change is the role of the European Central Bank (ECB) in the new integrated single supervisory framework in which it is responsible for the effective and consistent functioning of the SSM and in which national competent authorities (NCA) "assist the ECB in carrying out the tasks conferred on it by [the SSMR], by a decentralised implementation of some of those tasks in relation to less significant credit institutions"[3].

One prominent feature of the SSM that has already as such been identified in various scientific treatises are the arrangements concerning the application of national law by the ECB. Pursuant to Article 4 (3) sub-para. 1 SSMR, in applying all relevant Union law for the purpose of carrying out the tasks conferred on it by the SSMR, including all relevant secondary law, the ECB must not only apply national legislation by which options explicitly granted in regulations have been exercised, but also national legislation transposing relevant directives.

Di Bucci has rightly underlined the significance of Article 4 (3) sub-para. 1 SSMR for giving rise to a "largely unprecedented situation in which a Union institution within the framework of its prerogatives iure imperii, is obliged to not only apply Union law, but also certain provisions of national law".[4] It provides, as Witte has pointed out, for "[a] genuine novelty" when compared to other modes of the execution of Union law by the ECB.[5] As regards the main rationale for this arrangement, this author refers to

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2 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

3 Brackets added. See Case C-450/17 P, *Landeskreditbank Baden-Württemberg - Förderbank v. ECB*, EU:C:2019:372, para. 41, on appeal from Case T-122/15, EU:T:2017:337.

4 Own translation. See V. Di Bucci (2018), p. 326: "L'art. 4, para 3, RMSU a donné lieu à une situation largement inédite, …".

5 A. Witte (2014), p. 109, as has already referred to in F. Coman-Kund and F. Amtenbrink (2018), p. 135. Generally, on the different administration models in EU law see e.g. P. Craig (2018) p. 27 et seq; J. Mendes (2018).

the practical need to ensure that all existing financial market regulation is actually included in the scope of EU law applied by the ECB. This became necessary, because the drafters of the SSMR - in contrast to the subsequently adopted SRMR[6] - did not include the substantive provisions on which the supervision of credit institutions is based into the secondary Union law act itself.[7] More broadly, it is the EU's past approach to the regulation of financial services in the internal market, which has not only relied on regulations that include options and discretions, but mainly also directives, that has necessitated the inclusion of this provision so to ensure that the full body of Union law can be applied by the ECB.[8]

It is little surprising that the "astonishing legal amalgam"[9] that this provision has created has received considerable attention in the academic literature. Commentators have not only pointed out the distinctiveness of the arrangements by which a Union institution is compelled to apply national law, but mainly also the practical difficulties that follow from this, when it comes to determining the actual scope of national law that the ECB has to take into account, the appropriate method of interpretation, the scope of review of national law by the Court of Justice of the European Union (CJEU), as well as the dealing with the specific situation of the inadequate implementation into domestic law of relevant secondary Union law in the shape of directives (including both non-implementation and erroneous implementation).[10]

Yet, as will be highlighted hereafter, these arrangements have implications that surpass the operation of the SSM itself, as they touch upon fundamental aspects of European legal doctrine that have received comparably less attention until now. By way of illustration, hereafter the implications of two aspects linked to the application by a Union institution of national law are discussed: the direct application by the ECB of directives that have been inadequately implemented into national law and, moreover, the exercise of public power by the ECB that is at least partially rooted in national law. The latter point has recently also been scrutinised by the German Federal Constitutional Court (Bundesverfassungsgericht) in its decision on the compatibility with the German Federal Constitution (Grundgesetz) of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM).[11]

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6 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

7 As already observed by E. Peuker (2014), pp. 766-767.

8 On the trend to include options and discretions in financial market regulation see Z. Kudrna and S.Puntscher Riekmann (2018), pp. 144-158.

9 A. Kornezov (2016), p. 270.

10 See e.g. A. Witte (2014); E. Peuker (2014); G. Schuster (2014); A. Kornezov (2016); S. Lautenschläger (2016); M. Martini and Q. Weinzierl (2017); V. Di Bucci (2018); F. Coman-Kund and F. Amtenbrink (2018).

11 BVerfG, Urteil des Zweiten Senats vom 30. Juli 2019 - 2 BvR 1685/14 -, Rn. (1-320). See also the English summary in Press Release No. 52/2019 of 30 July 2019. At the time of writing of this contribution no official translation of the judgment was available.

2 On the (direct) application of directives by the ECB

The case of the inadequate implementation of a directive may be considered to form a particular salient problem in the context of the application of national law by the ECB pursuant to Article 4 (3) sub-para. 1 SSMR.[12] Here the question arises how the effective and consistent application of the EU financial market acquis can be ensured. One solution that has been proposed is the (direct) application of directives by the ECB.

2.1 Consistent interpretation

When considering the possible legal effects that a directive may produce in the case of an inadequate implementation it must first be recalled that - to the extent that it is permitted at all - the direct effect of directives must be considered an ultimum remedium. It is preceded by another strategy to safeguard the effectiveness of the provision of a directive that has been inadequately implemented in national law: consistent or harmonious interpretation.

The obligation to interpret the national legal system "so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive"[13] does not only rest on the judicial branch of government, but all state authorities and thus, namely also administrative bodies charged with exercising tasks covered by the scope of a directive.[14] It has been rightly argued that this must equally apply to the ECB in the context of the SSMR.[15] In fact, rejecting such an obligation or at least such a right on parts of the ECB would have as a consequence that a Union institution could find itself having to apply national law that is (clearly) in contradiction with secondary Union law.[16]

Leaving aside the legally relevant question of the actual scope of this duty on parts of the ECB,[17] the limits set in the established jurisprudence of the CJEU are the general principles of law, namely legal certainty and non-retroactivity, as well as the exclusion of contra legem interpretation of national law.[18] An inadequate implementation of a directive can thus not in all instances be remedied through a consistent or harmonious interpretation of existing national law.

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12 See in particular V. Di Bucci (2018); F. Coman-Kund and F. Amtenbrink (2018), p. 157.

13 Joined Cases C-397/01 to C-403/01, *Pfeiffer*, EU:C:2004:584, para. 113, inter alia with reference to Case 14/83, *Von Colson and Kamann*, EU:C:1984:153, para. 26, and Case C-106/89, *Marleasing*, EU:C:1990:395, para. 8.

14 Case 103/88, *Costanzo*, EU:C:1989:256, para. 31.

15 G. Schuster (2014), p. 8; V. Di Bucci (2018), p. 327.

16 A. Kornezov (2016), pp. 275-276. See in this context preamble No 34 of Council Regulation 1024/2013, which states that the application of national law is without prejudice to the principle of the supremacy of Union law.

17 See e.g. A. Kornezov (2016), p. 276. Joined Cases C-397/01 to C-403/01, *Pfeiffer*, EU:C:2004:584, para. 116.

18 See Case C-573/17, *Poplawski*, EU:C:2019:530, para. 74-78, with further references to relevant jurisprudence.

2.2 Direct application

Neither Article 4 (3) sub-para. 1 nor any other part of the SSMR provide any clues as to how the situation of an inadequately implemented directive should be dealt with by the ECB, or the NCAs for that matter. If anything, it can be argued that the wording of the first sentence of this provision assumes the existence of national law that can be applied by the ECB. As such it postulates a normal course of events whereby Member States fulfil their obligation to correctly implement directives within the given transposition period.[19]

Whether and to what extent this situation can actually arise in practice is an empirical question that can only be answered with reference to the actual legal framework applicable in each Member State and its application by the ECB and NCAs. While for example the provisions of CRD IV are very specific in many areas, the sheer number of implementing measures that have been reported by Member States seem to support the hypothesis that there will be instances in which the correct implementation of a directive by a given national measure or its correct interpretation may be called into question.[20]

Article 4 (3) sub-para. 1 SSMR may not itself rule out the possibility of a direct effect of directives. Yet, general European legal doctrine on the direct effect of directives is rather unequivocal on this point. While individuals can under certain circumstances invoke provisions of a directive against a Member State and its organs, the Member State that has failed to (correctly) implement a directive cannot directly rely on its provisions vis-à-vis an individual (no reversed vertical effect).[21] The same has been held for the direct application of a directive in relations between individual (no horizontal direct effect), whereby the CJEU has argued that allowing for such a direct effect "would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations".[22] Moreover, the CJEU has referred to the principle of legal certainty that prevents directives from creating obligations for individuals.[23] To be sure, the CJEU's approach to direct effect has not remained uncontested in the academic literature and even among Advocates General of the CJEU.[24] Yet, it currently (still) has to be considered the law as it stands.[25]

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19 Article 288 TFEU.

20 Directive (EU) No 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

21 Case 14/86, *Pretore di Saló*, EU:C:1987:275, para. 19. Recently: Case C-545/17 *Pawlak*, EU:C:2019:260, para. 89.

22 Case C-91/92, *Faccini Dori*, EU:C:1994:292, para. 22-25.

23 Case C-201/02, *Wells*, EU:C:2004:12, para. 56.

24 See namely P. Craig (2009), who refers to several opinions by Advocates General of the CJEU.

25 As also seems to be recognised by P. Craig and G. de Burca (2015), p. 205.

Various arguments have been forwarded why the reliance on the substantive parts of a directive by the ECB may be considered to fall outside the scope of the direct effect doctrine. [26] Two main arguments are briefly discussed here.

First, it has been suggested that in the context of Article 4 (3) sub-para. 1 SSMR the ECB would not directly rely on the provisions of a directive, but rather on the provisions of the SSMR itself, which expressly refers to regulations and directives.[27] In support of this view reference is made to the jurisprudence of the CJEU, where it has been pointed out that the basic rule that a directive cannot of itself impose obligations on individuals does not preclude, "in principle, that the provisions of a directive may be applicable by means of an express reference in a regulation to its provisions, provided that general principles of law and, in particular, the principle of legal certainty, are observed."[28] Yet, the wording of Article 4 (3) sub-para. 1 SSRM, which only broadly refers to all of Union law, including Union law that is composed of directives, can hardly be considered to create legal certainty on parts of individuals, i.e. credit institutions, as neither the directives that have to be complied with nor the relevant provisions that apply are expressly stated.[29] Also, the non-exhaustive enumeration of relevant directives in the Preamble to the SSMR cannot be considered to provide such legal certainty.[30]

Kornezov has moreover pointed out that the application of this legal construct "could in fact result in the circumvention of the requirements of Article 4 (3) (1) of the SSM Regulation, as it would allow the ECB systematically to disregard the applicable national law."[31] Be that as it may, even proponents of such a solution exclude its application to sanctions or penalties, at least when of a criminal law nature, as a result of an indirect reliance on a directive through the application of the SSRM.[32]

A second main argument that can be submitted against the applicability of the direct effect doctrine is that in the context of the SSMR the circumstances that may lead to a direct application of a directive are substantially different from those for which the direct effect doctrine has been developed by the CJEU. Indeed, the ECB is a Union institution charged with the application of Union law and thus not an organ of the Member State that has failed to fulfil its Treaty obligation to (correctly) implement a directive. Yet against this view Coman-Kund and Amtenbrink have submitted that "[w]hile the ECB does not qualify as an organ of the member states, by the virtue of its powers pursuant to Article 4(3) of the SSM Regulation, it exercises public authority on the territory of the respective member state".[33] In support of this view these authors refer to Article 9 (1) SSMR, which puts the ECB on an equal footing

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26 For an overview of arguments see namely A. Kornezov (2016) and V. Di Bucci (2018).

27 V. Di Bucci (2018), p. 329.

28 Joined Cases C-37/06 and C-58/06, *Viamex et al.*, EU:C:2008:18, para. 27-28, as already referred to by V. Di Bucci (2018).

29 Similar A. Kornezov (2016), p. 279.

30 Brackets added. Reg. 1024/2013, Preamble No. 34.

31 A. Kornezov (2016), p. 279.

32 V. Di Bucci (2018), p. 329.

33 F. Coman-Kund and F. Amtenbrink (2018), p. 157.

with an NCA when fulfilling its main tasks laid down in Article 4(1) and (2) SSMR.[34] Put differently, this provision stands for the "legislative substitution" of [the] national supervisory authorities with the ECB.[35] What is more, it cannot be seen how the situation of the direct application of a directive by a national organ substantively differs from that of the application by the ECB when it comes to its effects on legal certainty.

What thus results from this brief and admittedly selective analysis is that the European legal doctrine on the direct effect of directives must in principle also apply to the ECB in the context of the SSMR. Witte has observed in this context that allowing for the direct application of directives by the ECB would "diverge from the spirit of the SSM Regulation - it would result in an almost total levelling of the difference between directives and regulations as far as banking supervision is concerned", and, moreover, result in a situation in which the ECB would effectively no longer apply national law as such, thereby disregarding the intention of the drafters of Article 4(3) SSMR "to respect the role of national legislation".[36]

What is more, it is questionable whether a direct or indirect (via an implicit reference in the SSMR) application of directives could be confined to the specific case of the application of national law by the ECB itself. An extension of this exemption to NCAs in the context of the supervision of less significant credit institutions would directly challenge the EU legal doctrine on the exclusion of reversed vertical direct effect, whereas the restriction to the ECB would imply that less significant credit institutions in a given Member State could be subjected to a different supervisory regime than significant credit institutions situated in the same Member State.[37] This would moreover put the NCAs, which participate in the preparation of draft supervisory decisions in the Supervisory Board and in the Joint Supervisory Teams for each significant credit institution in a somewhat awkward position. In some instances, they would effectively take part in giving direct effect to directives, whereas in others they would be barred from doing so. Also, as the SSMR allows the ECB at any time to decide to exercise direct supervision also for less significant credit institutions, it would also be effectively up to the ECB to decide whether it wants to give direct effect to a directive in a given case.[38]

Another side effect of a direct application of a directive that has not been adequately implemented into national law would be that the ECB as a Union institution would effectively take on the role of enforcing the obligations of Member States deriving from primary Union law, a task that TFEU assigns primarily to the European Commission by means of the infringement procedure foreseen in Article 258 TFEU.

It is difficult to see how arguments in favour of an aberration of the legal doctrine on direct effect that are based on the unique character of Article 4(3) SSMR and the will of the Union legislator expressed in that provision that all of Union law is applied by

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34 ibid, p. 157

35 J. Gren (2018), p. 19, also with reference to Article 9(1) SSMR.

36 Brackets added, see A. Witte (2014), pp. 108-109.

37 See already F. Coman-Kund and F. Amtenbrink (2018), p. 157.

38 Article 6(5)(b) SSMR.

the ECB, or the need to secure the objective of ensuring high standards of supervision, can outweigh fundamental considerations on the essential characteristics of EU law, as established in the CJEU's jurisprudence on the direct effect of directives. Indeed, one may question the appropriateness of the incidental alteration of European legal doctrine through the introduction of a rather peculiar administrative model in a secondary Union law act that is based on a special legislative procedure,[39] and that result from the specific regulatory approach in the field of financial market regulation and the absence of political will to introduce a single European supervisor for all credit institutions.

3 On the broader constitutional implications of the application of national law by the ECB

While Article 4 (3) sub-para. 1 SSMR may challenge European legal doctrine relating to the basic characteristics of EU law, the application of national law by a Union institution has also broader constitutional implications that are not necessarily limited to the supranational level.

Indeed, of all objections that have been raised against an application of national law by the ECB in the academic literature, the principle of democracy and the (need for the) democratic legitimation of bureaucracies may be considered the most fundamental ones.[40] Underlining the relevance of this point is the extensive dealing of the German Federal Constitutional Court with the democratic credentials both of the SSM and SRM in its 2019 decision on the compatibility with the German Federal Constitution of these two main pillars of the European Banking Union.[41]

3.1 The case for democratic legitimacy

The need for an adequate democratic legitimation of the ECB does not only arise from its role as Union institution exercising public power at the supranational level based on primary and secondary EU law, namely the SSMR, but also from the fact that - as has been pointed out in the previous section - in some areas the ECB substitutes national public authorities in exercising banking supervision, thereby also applying relevant national law. To the extent that the latter is the case, this specific policy field is thus by and large removed from national constitutional mechanisms ensuring a democratic back coupling of the exercise of public power that exists for NCAs not only through the role of the national legislator (parliament), but also through what may be referred to as the accountability of administrative bodies.[42] The latter is not only provided by courts, but mainly also by mechanisms ensuring the legal supervision of administrative bodies in charge of exercising the delegated tasks

[39] Article 127(6) TFEU.

[40] E.g. E. Peuker (2014), p. 767 et seq.

[41] See fn. 11 above.

[42] For an extensive discussion see E. Peuker (2014), p. 767 et seq.

and powers that operate at an arm's length from political institutions.[43] This forms part of what Brito Bastos refers to as the " 'objective' purpose" of administrative law "of ensuring the legality of administrative action – of maintaining the obedience of bureaucracies to the will of democratically legitimized legislatures".[44]

Crucially, to the extent that SSM-related tasks and powers are exercised by the ECB, they are not only removed from national mechanisms, but also placed at arm's length from other directly or indirectly democratically legitimized institutions at the supranational level. This is due to the ECB's rather unique position in the supranational legal order that has originally been justified with the need to ensure an effective conduct of monetary policy for the single currency area. Its degree of independence guaranteed by Article 130 TFEU and the Statute of the European System of Central Banks and of the European Central Bank does not only set the ECB apart from other Union institutions, but also from past and in many instances also present national central bank systems around the globe.

This approach to the institutional positing of the ECB has by and large been extended to its role in the SSM, as the global trend to depoliticize monetary policy authorities has swapped over to supervisory authorities.[45] In the opinion of some commentators, the general Treaty provision on the independence of the ECB and the national central banks when exercising the powers and carrying out the tasks and duties conferred upon them by primary Union law also covers the tasks assigned to the ECB in the context of the exercising of the Union legislative competence included in Article 127(6) TFEU.[46] Yet, even if this is not the case, it derives from the SSMR itself, namely Article 19, that when carrying out the tasks conferred on it by that Regulation, both the ECB and the NCAs must act independently and objectively in the interest of the Union. Namely the members of the Supervisory Board are not allowed to seek or take instructions from Union or national institutions or bodies. As regards NCAs this arguably excludes arrangements at the national level that can impair their autonomous decision-making in the SSM context. Thus, while the national level cannot provide for mechanisms ensuring legal supervision of the ECB, at the European level, the independent position of the ECB effectively stands in the way of the introduction of a system of legal supervision by another Union institution, such as by the European Parliament or the European Commission.

To be sure, the independence of the ECB in the context of the SSMR cannot as such be considered in breach of the principle of democracy as expressed by Article 10 TEU. Indeed, the CJEU has emphasised that this principle (which also has to be taken into consideration when interpreting acts of secondary Union law), "does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government", provided that such public authorities are "required to comply with the law subject to review by the

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43 Due to the limited space available the important role of courts cannot be covered in this contribution.

44 F. Brito Bastos (2018), p. 102.

45 Generally on this trend: F. Amtenbrink and R.M. Lastra (2008). For the SSM: E. Peuker (2014), p. 770, with further references.

46 M. Selmayr (2015), p. 1481, para. 110.

competent courts".[47] In the same judgment the CJEU has however also pointed out that "the absence of any parliamentary influence over those authorities is inconceivable"[48], arguably making the point that such independent public authorities cannot operate without sufficient democratic legitimation.

Lenaerts has observed that "democracy within the EU is not limited to the participation by the European Parliament in the legislative process but also encompasses other forms of governance", including what he refers to as "rule-making by administrative agencies".[49] This author emphasises that "it is for the EU judiciary to make sure that those other forms of governance remain as democratic as possible", whereby "[t]his can be achieved, for example, by making sure that they enjoy sufficient representation or are subject to parliamentary control."[50] There must thus be a sufficient degree of democratic back coupling in place for such independent agencies.

3.2 Mechanisms of democratic back coupling in the SSMR

The 2019 decision of the German Federal Constitutional Court is noteworthy not only for its analysis of the national and European channels of democratic back coupling of the powers that the ECB exercises in the SSM, but also for its rather SSM-friendly evaluation of the existing arrangements at the European level. In fact, while the mechanisms identified by the German Court taken together may under the current arrangements in its opinion reach the minimum level of democratic legitimacy and control within the meaning of the German Basic Law (namely Article 20 (1) and (2)), at least from the European point of view some doubts can be raised.

Hereafter, three main mechanisms that are also discussed by the German Court are briefly considered, namely the legal basis of the SSMR, the democratic legitimation of its main decision-making organs, and the accountability arrangements applicable to the ECB in the context of the SSMR.[51]

3.2.1 Legal basis

In its judgment the German Court points to the application by the ECB of national law that is adopted by national parliaments as one channel of democratic legitimation.[52] Yet, the SSMR based on which the ECB exercises its powers is a rather less strong source in this regard. Indeed, as is well known, the SSMR has been adopted based on Article 127 (6) TFEU, which refers to a special legislative procedure in which the Council decides by unanimity on the conferral of specific tasks to the ECB

47 Case C-518/07, Commission v Germany, EU:C:2010:125, para. 42.

48 ibid, para. 43.

49 K. Lenaerts (2013), p. 293.

50 ibid, p. 293.

51 As noted above, the role of courts and thus also legal protection as a source of democratic legitimation is not discussed in the present contribution.

52 BVerfG, Urteil des Zweiten Senats vom 30. Juli 2019 - 2 BvR 1685/14 -, Rn. 212.

concerning policies relating to the prudential supervision of credit institutions. The role of the European Parliament in this legislative procedure is limited to being consulted. In fact, the role of the European Parliament is no greater than that of the ECB itself, which has an equal procedural right to be consulted. The democratic legitimation of the role of the ECB that is provided by the legal basis of the SSMR is thus rather indirect.

3.2.2 Decision-making organs of the SSM

In considering a sufficient democratic back coupling, the German Court has also referred in rather general terms to the appointment of the decision-making bodies of the ECB.[53] Moreover, in the English language press release concerning the judgment reference is made to the "procedure to appoint the members of the Board, which is independent when carrying out its tasks" as contributing to "democratic control".[54]

When it comes to decision making at the central level of the SSM, the SSMR features a rather complex procedure that can inter alia be explained by the need to organisationally separate the banking supervisory from the monetary policy function within one and the same institution, i.e. the ECB, while at the same time leaving the competences of the main decision-making bodies of the ECB as laid down in primary Union law unaltered. So while the SSMR vests the planning and execution of the supervisory tasks conferred on the ECB in the Supervisory Board, the latter only prepares and proposes draft decisions that the ECB's Governing Council has to formally adopt thereafter.[55] The fact that these decisions are deemed to be adopted unless the Governing Council objects within a prescribed period does not change the author of the actual decisions.

The ECB's Governing Council consists of the Members of the ECB's Executive Board and the central bank governors of the euro area Member States. The ECB President and the other members of the Executive Board are appointed by the European Council, acting by a qualified majority of the euro area countries, on the recommendation of the Council, and after European Parliament and the Governing Council of the ECB itself have been consulted.[56] The Rules of Procedure of the European Parliament describe a rather extensive screening procedure and even foresee a final vote on the approval of candidates. The latter may actually lead to a request that a nomination be withdrawn and that a new nomination be submitted to the European Parliament. Still, the fact of the matter is that the European Council is not legally obliged to comply with such a request, the role of the only directly democratically legitimised Union institution in the appointment of the main decision body of the ECB (and thus of the SSM) is limited. The national central bank

53 BVerfG, 2 BvR 1685/14 -, Rn. 212.

54 Press Release No. 52/2019 of 30 July 2019, section 2. a) aa).

55 Article 26(1) and (8) SSMR.

56 Article 283(2) TFEU.

governors are appointed according to diverse national procedures, which not in all instances foresee a meaningful role for national parliaments.

Interestingly, the European Parliament has a stronger position in the appointment procedure applicable to the Supervisory Board. The ECB's candidates for the Chair and the Vice-Chair have to be approved by the European Parliament. It is only then that the Council can adopt an implementing decision by qualified majority of the euro area Member States to appoint them.[57] This role of the European Parliament and also of the Council does not however also extend to the four additional ECB representatives in the Supervisory Board, which are appointed by the ECB's Governing Council itself. Finally, the representative of the NCAs are appointed according to diverse national procedures.

Overall, the democratic back coupling that can be construed from the composition and appointment of the main decision-making body of the SSM, i.e. the ECB's Governing Council, but also its main administrative body, i.e. the Supervisory Board, is rather frail.

3.2.3 Accountability arrangements of the SSM

Another important source of democratic legitimacy are accountability arrangements that can facilitate political control of the exercise of public power by independent agencies.[58] In this regard the German Federal Constitutional Court in its 2019 decision has pointed out rightly that such arrangements can provide the competent authorities with the possibility to assess the action of the ECB, to have these action legally reviewed and to enforce Union law. Yet, a closer examination of the accountability arrangements that can be found for the SSM, namely laid down in its Articles 20 and 21, suggests that there is room for improvement.[59]

Considering the long-standing debate on the democratic accountability of the ECB, the existence of Article 20 SSMR on accountability and reporting is a remarkable recognition by the European legislator of the need for adequate mechanisms in this regard. Indeed, the first sentence of this provision sets a clear tone by stating that the ECB is accountable to the European Parliament and to the Council for the implementation of the SSMR. Noteworthy is also the Inter-institutional agreement that the ECB and the European Parliament have concluded "on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism".[60] Yet, the usefulness of the accountability arrangements

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57 Article 26(3) SSMR.

58 In the banking supervisory context see e.g. F. Amtenbrink and R.M. Lastra (2008), p. 119 et seq.

59 The word 'suggest' is used deliberately to emphasise that within the confinements of this contribution it is not possible to provide an in-depth analysis of these arrangements, including the reporting and transparency requirements. On the latter see e.g. F. Coman-Kund, A. Karatzia, and F. Amtenbrink (2018).

60 OJ L 320, 30.11.2013, p. 1.

included in Article 20 SSMR as mechanisms ensuring democratic back coupling is somewhat questionable.

Article 20(1) SSMR refers in general terms to the ECB. It is the latter that is instructed to submit annual reports to the European Parliament, Council, European Commission, and Eurogroup, that has to reply orally or in writing to questions put to it by the European Parliament and the Eurogroup, and that has to cooperate sincerely with any investigations by the European Parliament.[61] However, when it comes to actual exchanges, it is the Chair of the Supervisory Board that has to appear before the relevant committees of the European Parliament and the Eurogroup. These arrangements are not fully aligned with the actual decision making procedure in the SSMR, as it is not the Supervisory Board, but the ECB's Governing Council that is required to formally take all supervisory decisions.

The inclusion of the Eurogroup, rather than the Council in the composition of the euro area Member States, as the body to which the ECB has to report and before which the Chair of the Supervisory Board has to appear upon request is at least unfortunate from a symbolic point of view. After all, the CJEU has emphasised that the Eurogroup constitutes an informal body without decision-making power that cannot be equated with a configuration of the Council.[62]

The bi-annual scheduled hearings before the ECON Committee of the European Parliament can be considered as a cornerstone of the accountability arrangements in the SSM and both the European Parliament and the Supervisory Board of the ECB undoubtedly take these exchanges very seriously. Yet, a qualitative study of the supervisory dialogue suggests that the close link between monetary policy and financial stability paired with the concentration of the tasks related to these fields in the ECB make a clear separation of accountability difficult in practice at least for European parliamentarians.[63]

A crucial question that has to be raised in this context is to what extent the European Parliament, or the euro area Member States for that matter, actually have the means at their disposal to assign consequences to their evaluations of the ECB's execution of its SSM-related tasks. In the view of the German Federal Constitutional Court, the Union legislator has the final control on banking supervision, as it may decide as a result of its continuous assessment of the SSM to amend or even repeal the SSMR.[64] Yet, as it has been pointed out above, in the context of the SSMR the European Parliament cannot be considered a Union legislator, as the ordinary legislative procedure does not extend to Article 127(6) TFEU. But even for the democratically elected representative of the euro area Member States in the Council the hurdles for an amendment of the SSMR are high, as this requires consensus.

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61 Article 20(2), (6) and (9) SSMR.

62 Joined Cases C-105/15 P to C-109/15 P, *Mallis et al.*, EU:C:2016:702, para 46 et seq.

63 For a more detailed analysis see D. Fromage and R. Ibrido (2018); F. Amtenbrink and M. Markakis (2018).

64 BVerfG, 2 BvR 1685/14 -, Rn. 217.

What is more, neither the Council nor the European Parliament are in a position to dismiss the members of the ECB's Executive Board that form part of the ECB's Governing Council, let alone the national central banks' governors. While these arrangements can be very well explained with the need to shield the ECB from undesirable political influence, they do come at the expense of the possibility to dismiss ECB officials as an accountability instrument.

Overall, when evaluating the significance of the accountability arrangements at the European level for a democratic back coupling of the public power exercised pursuant to the SSMR, it must be considered that these arrangements are based on reporting requirements and the obligation of the accountee to explain itself. They do not put those institutions or bodies at the helm of the accountability mechanism in the position to actually assign concrete consequences to their evaluation.

The same observation can also be made for the accountability arrangements included in Article 21 SSMR vis-à-vis national parliaments. Similar to what has been observed for Article 20 SSMR above, the introduction of these arrangements is certainly an important step in recognising the importance of accountability arrangements. Indeed, the involvement of national parliaments can be viewed as an acknowledgement of the composite procedures that involve both supranational and national authorities in the decision making process, and, moreover, of the role that the ECB plays in the application of national law pursuant to Article 4 (3) sub-para. 1 SSMR. At the same time it has to be recognised that this provision at least on paper limits the role of national parliaments in the ECB's accountability framework to aspects of the supervision of credit institutions in a given Member State,[65] while at the same time also not serving as the primary legal basis for the accountability of NCAs vis-à-vis national parliaments.[66]

4 Conclusions and outlook

What becomes clear from the discussion above is that the SSMR and namely the arrangements by which the ECB applies national law pursuant to Article 4 (3) sub-para. 1 SSMR have implications that surpass the operation of the SSM itself. Given a broad reading they challenge European legal doctrine pertaining to the basic characteristics of EU law. What is more, the SSMR raises fundamental questions concerning the democratic legitimation of the exercise of public power by the ECB. It is thus little surprising that these arrangements have already caught the attention of legal commentators and, in one case, also of a national constitutional court.

As regards the direct application of inadequately implemented directives by the ECB, the arguments in favour of such a possibility, namely based on the effective application of the SSMR, cannot outweigh concerns that are triggered by the prospect of an incidental alteration of European legal doctrine as a result of the introduction of a rather peculiar administrative model in a secondary Union law act.

65 Article 21(3) SSMR.

66 Article 21(4) SSMR.

If inadequately implemented directives are (to become) a substantial hurdle for the effective application of the EU banking supervisory legal framework, the question must be allowed, whether the (conceptual) difficulties which the approach taken in Article 4 (3) sub-para. 1 SSMR triggers warrant a different approach to financial market regulation in the EU. This comes on top of the negative implications that the application of directives and regulations with options and discretions are considered to have.[67] Another avenue is to rely on the ECB's power to give instructions to NCAs, thereby avoiding the direct application of national law.[68]

To be sure, the abandoning of directives as a legislative instrument and, moreover, the reduction of national discretion may come at the expense of "sufficient room for flexibility" in the EU supervisory framework and may moreover pose a "challenge for financial supervisors aiming to 'err on the side of caution'".[69] What is more, refraining from using directives as legislative instruments would also have important implications for the usability of legal bases in primary Union law.[70]

Turning to the issue of the democratic legitimacy, it has to be stressed that the need for an adequate democratic back coupling does not only arise from the role of the ECB as a Union institution in exercising public power at the supranational level, but also from the fact that in some areas the ECB substitutes national public authorities in exercising the tasks and powers of banking supervision, thereby also applying relevant national law.

On closer examination the SSMR and namely the explicit accountability arrangements foreseen in its Articles 20 and 21 provide for a relatively thin basis at least for the supranational democratic legitimation of the ECB's role in the SSM, even if the ECB itself takes its obligations arising from these arrangements very seriously. Enhancing these arrangements is arguably even more complicated than what has been observed for a new approach to financial market regulation. This would call for some fundamental changes to the legal and institutional structure of the SSM, which would require unanimity in the Council and possibly even an amendment of primary Union law itself.

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67 See in this regard ECB (2017); G. Monti and C.A. Petit (2016), p. 12.

68 F. Coman-Kund and F. Amtenbrink (2018), p. 172.

69 P. Cavelaars, J. de Haan, P. Hilbers and B. Stellinga (2013), p. 26 and pp. 28-29.

70 See e.g. Article 53 TFEU.

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Part 5
Extraterritorial sanctions, central banks and financial services


Annamaria
Viterbo

Extraterritorial sanctions, central banks and financial services: an introduction

Benoît Coeuré[1]

Sanctions are an important instrument of collective global security under the UN Charter. Increasingly, however, sanctions are being imposed on a unilateral basis rather than within the multilateral framework of international coordination. And they are being used more frequently, too. The news is replete with reports of assets being frozen, tankers being intercepted, and other forms of sanctions being imposed on individuals, groups or states for a variety of reasons: from combating international terrorism to pressing for regime change.

Some of these unilateral measures – in particular when originating from economically powerful countries – may have an impact far beyond the borders of the countries targeted, and gain global relevance. As a result, sanctions have increasingly become a source of serious international tensions and disputes.

The international side-effects of extraterritorial sanctions raise important questions from both a policy and a legal perspective, which are also relevant for central banks. For example, there have been repeated calls over the past year or so for the euro to assume a more prominent international role. These calls have come on the back of the growing understanding that being the issuer of a global reserve currency confers international monetary power, in particular the capacity to "weaponise" access to the financial and payments systems. If the euro were to play a more prominent role at the global level, this would have material consequences for the conduct of monetary policy.

But central banks are also frequently called on to assess whether some of their transactions fall under sanctions' rules, or whether banks affected should be refused access to central bank refinancing operations. This Part covers some of the basic legal questions surrounding extraterritorial sanctions, focusing in particular on central banking aspects.

Annamaria Viterbo analyses the legality of extraterritorial sanctions under international economic law. She lays the groundwork for the discussion by explaining the concept of extraterritorial jurisdiction. She then discusses the legality of extraterritorial sanctions in the light of WTO law, international monetary law and international investment law, as well as the potential legal remedies.

Lucio Gussetti addresses extraterritorial sanctions from an EU perspective, focusing specifically on the EU's stance on US sanctions. He presents some of the legal challenges arising from the extraterritorial reach of US sanctions. He then

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discusses why the European reaction should be organised at the EU level instead at the national level, as well as the appropriate form of EU reaction.

Extraterritorial sanctions and international economic law

Annamaria Viterbo[1]

1 Introduction

For decades, international economic law was the most apolitical branch of international law. Since the 1990s, however, governments have increasingly adopted unilateral sanctions to pursue foreign policy objectives and nowadays security concerns are undermining multilateralism and international cooperation.[2] The UN General Assembly and the Human Rights Council have affirmed several times that unilateral sanctions breach international law.[3] More recently, the UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, argued that "the resort by a major power of its dominant position in the international financial arena against its own allies to cause economic hardship to the economy of sovereign States is contrary to international law, and inevitably undermines the human rights of their citizens."[4] Particularly controversial is the extraterritorial reach of unilateral sanctions, which undermine core principles of international law such as the principles of sovereign equality of States, territorial integrity, the duty of non-interference in the domestic affairs of other States, and the duty to fulfil international law obligations in good faith. On top of that, extraterritorial sanctions are at odds with international law rules governing the exercise of jurisdiction by States.[5]

This research, along with assessing the lawfulness of extraterritorial sanctions under the specific standpoint of international economic law, aims at establishing whether

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2 See van der Herik, L. (2017); Happold, M. and Eden, P. (2016); Ronzitti, N. (2016), pp. 103-126; Malloy, P. (2015); Marossi, A. and Bassett, M. (2015); Pellet, A. and Miron, A. (2013); Carter, B. (2011); Hufbauer, G.C. et al. (2009); Kern, A. (2009).

3 See, for instance, UN Human Rights Council Resolution, "Human Rights and Unilateral Coercive Measures", A/HRC/RES/37/21, 23 March 2018 and UN GA Resolution, "Human Rights and Unilateral Coercive Measures", A/RES/73/167, 17 December 2018.

4 See UN Human Rights Office of the High Commissioner, "US Sanctions Violate Human Rights and International Code of Conduct, UN Expert Says", 6 May 2019, available at www.ohchr.org.

5 In particular, although their customary law nature is debatable, the protective principle and the effects doctrine are often resorted to in order to justify an otherwise unlawful exercise of extraterritorial jurisdiction. For a different view, see Meyer, J. (2009), pp. 905-967: the author contends that a wide range of secondary sanctions are permissible if tailored to regulate activities exclusively on the combined grounds of territoriality and nationality.

legal remedies are available to countries or entities affected by these measures.[6] The article draws mainly from examples of US sanctions and it is structured in four parts. Part I outlines the key concepts behind primary and secondary sanctions and analyses the scope and nature of the extraterritorial sanctions imposed by the United States: while the scope of US extraterritorial sanctions is crucial to establish who is entitled to seek remedies under international economic law, the nature of the restrictions defines the set of applicable rules. Part II turns to international monetary law, Part III focusses on international trade law, and Part IV assesses the relevance of international investment law. The issues raised by the extraterritorial application of anti-money laundering measures are outside the scope of this research paper.[7]

2 Pushing the limits of jurisdiction: US primary and secondary sanctions and their extraterritorial application

The current US administration has aggressively taken recourse to unilateral sanctions. They range from targeted asset freezing, comprehensive trade embargoes, travel bans and a variety of other measures, touching upon all the pillars of international economic law. US sanctions are imposed by US Statutes and Executive Orders,[8] and they are generally implemented through regulations. Their application is the primary responsibility of the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury, sometimes in consultation with the US Department of State or other federal agencies. Especially when designed to have an extraterritorial reach, unilateral sanctions open up a number of questions regarding their legitimacy with respect to international economic law. However, in order to better understand their operation, it is necessary to describe at the outset the difference between primary and secondary sanctions. In fact, although secondary sanctions are all extraterritorial, extraterritorial sanctions are not necessarily only secondary.[9]

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6 Countries primarily targeted by sanctions can more easily initiate proceedings. See, for instance, the case pending between Iran and the United States before the International Court of Justice (ICJ) on the alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights. Iran instituted proceedings in July 2018 following the re-imposition of sanctions by the United States, claiming the violation of the provisions on fair and equitable treatment, the free transfer of funds, the most-favoured nation and national treatment principles as well as of the provision on freedom of commerce and navigation.

7 On this subject, see Bismuth, R. (2016), pp. 37-64.

8 The International Emergency Economic Powers Act (IEEPA) of 28 October 1977 (50 USC §§ 1701-1706) is the primary legal authority for the adoption of economic sanctions by the US executive branch. The IEEPA authorises the US President to issue Executive Orders imposing broad economic sanctions in response to a "national emergency" with respect to an unusual and extraordinary foreign policy or national security threat, which originates in whole or substantial part outside the United States (§ 1701). The Trading with the Enemy Act of 1917 (TWEA) gives the President the authority to regulate or to prohibit transactions involving property in which a foreign country or their nationals have an interest only in times of a declared state of war. Currently, Cuban sanctions are the only ones still governed by the TWEA.

9 Bechky, P. (2018), p. 11. See also Forrer, J. (2018).

2.1 Primary sanctions

Primary sanctions prohibit individuals and companies in the sanctioning State from carrying out business with the sanctioned country. These measures cause the interruption of almost all trade, financial and investment flows towards the targeted country, with the exception of humanitarian goods.

US primary sanctions apply to US persons, US-origin goods and transactions taking place within the US territory. The term “US persons” includes: i) US citizens and permanent resident aliens (regardless of where they are staying or are employed and, therefore, even when they are abroad); ii) any person or entity physically situated within the United States (and, therefore, also foreigners temporarily visiting the United States); iii) all US incorporated entities and their foreign branches. As a consequence, for example, a US national employed abroad by a foreign enterprise is prohibited from working on Iran-related projects. Similarly, a foreign branch of a US bank is prohibited from conducting business with North Korea.

US primary sanctions have a clear extraterritorial reach in three cases.

a) Usually, primary sanctions apply also to “non-US persons” when they cause US persons to infringe sanctions or when they facilitate transactions (including deceptive or structured transactions) for, or on behalf of, any person subject to sanctions or, more in general, when they cause actions to occur in the territory of the United States in furtherance of prohibited transactions and activities. These provisions prevent the by-passing of sanctions and allow the exercise of US jurisdiction even when US persons are not directly involved.

b) A number of programmes require foreign persons possessing items of US origin or content to comply with US sanctions and export controls. In particular, these programmes prohibit the export, re-export or transfer of goods, software and technology that are subject to US export controls even if they are manufactured abroad, when they contain components of US origin exceeding a *de minimis* threshold or when they incorporate specific US technology.

Foreign companies procuring items from a US supplier to re-sell them, or to incorporate them into a product manufactured outside the United States, have to comply with US sanctions and export controls. Failure to do so entails hefty fines and can lead to the company being blacklisted.

For instance, in May 2019 the US Commerce Department’s Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR)[10] adding Huawei Technologies Ltd. and 68 of its non-US affiliates to the Entity List, claiming that the Chinese electronic appliances manufacturer was involved in activities contravening US national security and foreign policy (notably, for exporting, re-

[10] The Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) are two important United States export control laws governing the export, re-export or transfer of commodities, software and technology. They contain a list of names of foreign persons – including individuals, businesses, research institutions, government and private organisations, and other types of juridical persons – that are subject to specific license requirements for the export, re-export or transfer of specific items.

exporting and selling to Iran items subject to US jurisdiction in violation of US sanctions).

c) Certain sanctions programmes are addressed not only to US persons but also to foreign entities owned or controlled by US persons.[11] The latter are prohibited from directly or indirectly engaging in business activities in targeted countries or with targeted counterparties.

This kind of sanction was already applied in the 1960s, when the United States restricted trade with the People's Republic of China. At that time, in application of the sanctions regime, the US Ministry of the Treasury ordered the French corporation Fruehauf, which was two-thirds owned and controlled by its US parent company Fruehauf International, to rescind a contract it had entered into with China. The United States argued that their jurisdiction derived from the fact that a US corporation held the majority of the shares of the company.[12]

Later, in 1982, the United States imposed sanctions on the Soviet Union and prohibited foreign subsidiaries of US companies from supplying parts and services for the construction of a natural gas pipeline running from Siberia to Europe. Concurrently, non-US firms, which were using US-licensed technology, were prohibited from exporting equipment or technologies to the Soviet Union. After vehement protests of European countries and of the Commission of the (then) European Communities,[13] US extraterritorial sanctions and re-export controls were eventually lifted.[14]

Similar extraterritorial sanctions were later deployed against Iran[15] and Cuba[16] and are still enforced today. In March 2019, for instance, Stanley Black & Decker Inc., an American manufacturer of industrial tools and household hardware, and its Chinese subsidiary, Jiangsu Guoqiang Tools co., accepted a USD 1.9 million settlement agreement with the OFAC for having exported power tools and spare parts to Iran. The items were shipped to Iran either directly from China or through third countries.[17]

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11 Prohibitions extend to foreign subsidiaries of US parent companies when: (i) a US person holds a 50 percent or greater equity interest by voting rights or value in the entity; (ii) a US person holds a majority on the Board of Directors; or (iii) a US person directs the operations of the subsidiary.

12 See Court of Appeal of Paris, *Société Fruehauf Corp. v. Massardy*, 22 May 1965, in ASIL (1966), *International Legal Materials*, p. 476, on which Craig, W.F. (1970), pp. 579-601.

13 Comments of the European Community on the Amendments of 22 June 1982 to the US Export Regulations, Presented to the United States Department of State on 12 August 1982, in ASIL (1982), *International Legal Materials*, pp. 891 ff. See also District Court at the Hague, *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.*, judgment of 17 September 1982, in ASIL (1983), *International Legal Materials,* pp. 66-74, para. 7.3.2.

14 Recently, the United States has threatened to impose sanctions on foreign companies participating in the Nordstream 2 project, the construction of a gas pipeline between Russia and Germany.

15 See, for instance, § 560.215 of the Iranian Transactions and Sanctions Regulations, 31 C.F.R. Part 560.

16 Consistent with the Cuban Democracy Act of 1992 (CDA) and § 515.559 of the Cuban Assets Control Regulations (31 CFR Part 515), US owned or controlled entities in a third country are prohibited from engaging in transactions involving the direct or indirect import or export of goods or services (financial services included) with Cuba.

17 See US OFAC Settlement Agreement with Stanley Black & Decker, Inc. and its Chinese subsidiary Jiangsu Guoqiang Tools co., 14 March 2019, available at www.treasury.gov

2.2 Secondary sanctions

Secondary sanctions apply to foreign persons and to activities taking place entirely outside the jurisdiction of the sanctioning State. They are specifically designed to discourage foreign persons from engaging in certain economic activities with countries or entities targeted by primary sanctions, even if these activities cannot be directly linked to the jurisdiction of the sanctioning State.

Notably, US secondary sanctions impel foreign entities to withdraw from activities in targeted countries or cease transactions with targeted subjects, even when their home country does not prevent them from doing so and even when it prohibits compliance with US sanctions (e.g. when blocking legislation is adopted[18]). Basically, secondary sanctions force foreign entities to choose between preserving their access to US markets or keeping doing business with the targets of US sanctions.

While a violation of US primary sanctions entails fines and even criminal proceedings, the infringement of US secondary sanctions triggers measures that limit the possibility to operate in the United States. In fact, a prohibited conduct will trigger measures aimed at foreign persons, which may prevent US financial institutions from extending loans in excess of USD ten million, prohibit the US Export-Import Bank from issuing loans, credits or credit guarantees on exports of goods or services to the sanctioned person and restrict participation in US government tenders for procurement. Furthermore, any specific export licence or permission may be denied or withdrawn, and the foreign party may even be included in the Specially Designated Nationals List (SDNs List)[19] and have its assets frozen or be subjected to financial or property-based sanctions similar to those deriving from being blacklisted.

Other measures are specifically envisaged for foreign financial institutions knowingly providing significant financial services to any person targeted by sanctions. These measures include: the blocking of property and interests in property situated in the United States or in the possession or control of US persons, with restrictions covering also any related transaction; prohibitions or stricter conditions on the opening or keeping of correspondent and payable-through accounts in the United

[18] A blocking statute is a piece of legislation aimed at nullifying the effects of the extraterritorial application of laws of foreign countries. See, for instance, Council Regulation (EC) No 2271/96 of 22 November 1996 (the so-called 'EU Blocking Statute'), as lastly amended in 2018, protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 309, 29.11.1996, p. 1). Article 6 of the EU Blocking Statute contains a *clawback provision*, enabling EU operators to recover all damages, including legal costs, from the natural or legal person who caused them as a consequence of the application of US sanctions.

[19] The SDNs List, which is administered by OFAC, indicates individuals and companies owned or controlled by, or acting for or on behalf of, sanctioned countries. The SDNs List also includes individuals, groups and entities designated under US sanctions programmes that are not country-specific, such as those against terrorism or narcotics trafficking. Notably, even foreign individuals and companies found not complying with extraterritorial sanctions might be designated in the SDN List or in another restricted parties list (e.g. the Foreign Sanctions Evaders List or the Entity List).

States, with termination or suspension of existing ones;[20] as well as prohibitions on acting as primary dealer in US government bonds or as repository for US government funds.

In their practical effects, these measures deny foreign financial institutions access to US financial markets and are far more detrimental than monetary fines, having a wide-ranging deterrent effect. For fear of being excluded from the US market, foreign entities are unwilling to entertain any economic relations with targeted entities. In particular, due to the unpredictability of an ever-changing legislation and to its lack of clarity, business operators tend to over-comply with secondary sanctions in order to avoid incurring any risk.[21]

To date, the United States have adopted secondary sanctions targeting foreign companies or individuals doing business with Burma, Cuba, Iran,[22] Libya, North Korea, Russia,[23] Syria, Zimbabwe and, as recently as the 5th of August 2019, with Venezuela.[24]

The most notorious secondary sanction programme is, however, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (usually referred to as the Helms-Burton Act).[25] In 1996, when the Act was adopted, the embargo against Cuba was broadened to include foreign corporations with no connection to US ownership which were either trading or investing in the country.[26] The provisions contained in Title III of the Act are the most controversial. They create a private cause of action authorising former US owners of property confiscated in Cuba as a consequence of the 1959 Cuban revolution to sue for damages foreign individuals or entities "trafficking" in such property. Title III purports to protect the rights of US nationals, while at the same time discouraging foreign investments in Cuba. Traffickers would be denied "any profits from economically exploiting Castro's wrongful seizures"

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20 See, for example, US Executive Order No 13810 of 20 September 2017, "Imposing Additional Sanctions With Respect to North Korea", which empowers the US Secretary of the Treasury to prohibit maintaining or opening a correspondent bank-account as well as to block their property in the United States to "foreign financial institutions" conducting or facilitating any significant commercial transaction with North Korea either directly or on behalf of any person whose assets have been frozen pursuant to previous Presidential Executive Orders (Section 4).

21 Geranmayeh, E. and Lafont Rapnouil, M. (2019), p. 65.

22 In November 2018, after its withdrawal from the Joint Comprehensive Plan of Action (JCPOA), the United States reintroduced all sanctions against Iran and Iranian entities – as well as the related secondary sanctions – that had been previously lifted. Some of these secondary sanctions aim at isolating Iran's banking sector from global finance and are directed to specialised financial messaging operators providing their services to the Central Bank of Iran and Iranian financial institutions. These sanctions have been specifically conceived for the Society of Worldwide Interbank Financial Telecommunications (SWIFT), a Belgian company that, by connecting thousands of banks all over the world, allows them to share critical information on financial transactions through secure standardised messages. In November 2018, SWIFT announced it would comply with US sanctions, suspending access to its messaging system for certain Iranian banks.

23 In 2017, the Countering America's Adversaries Through Sanctions Act (CAATSA) was adopted by Congress to tighten sanctions on Iran, Russia and North Korea. Notably, it was the first time that the United States adopted secondary sanctions related to Russia.

24 US President, Executive Order No 13884 of 5 August 2019, "Blocking Property of the Government of Venezuela." See, in particular, Section 1.

25 The Cuban Liberty and Democratic Solidarity (Libertad) Act was signed into law by President Clinton on 12 March 1996, 22 USC §§ 6021-6091.

26 According to Section 4 (8) of the Helms-Burton Act, foreign nationals means an alien, or any corporation, trust, partnership, or other juridical entity not organized under the laws of the United States.

(Section 301(11)) and would be held liable to pay statutory damages equal to the market value of the property which, in certain cases, may be even trebled.[27] A person is considered trafficking in confiscated property if, among other things, knowingly and intentionally purchases, receives, controls, transfers, invests, manages or engages in a commercial activity using or otherwise benefitting from confiscated property.[28] The pejorative term *trafficking* is deliberately chosen to stigmatise activities which, for foreign businesses, are regular investment opportunities.[29] In fact, persons investing in former US property in Cuba perform business transactions under the exclusive jurisdiction of the Cuban State and in accordance with its domestic law.

The Helms-Burton Act was met with vocal protests from the European Communities, which viewed the sanctions as illegal and lodged a complaint before the WTO dispute settlement body (on which see *infra*). In 1996, to settle the case, the United States agreed to suspend the implementation of Title III and since then every US administration periodically and repeatedly renewed it. However, in a turn of events, in May 2019, President Trump officially lifted the suspension, allowing US nationals to commence civil proceedings against foreign individuals and entities whose business activities concern assets that had been confiscated from them by the Cuban government. As it did in 1996, the international community and, in particular, the European Union, protested vigorously. In April 2019, in a joint statement, the High Representative of the EU for Foreign Affairs and Security Policy and the EU Trade Commissioner condemned the US decision to reactivate Title III of the Helms-Burton Act. They warned the United States that "the EU will consider all options at its disposal to protect its legitimate interests, including in relation to its WTO rights and through the use of the EU Blocking Statute".[30]

3 International monetary law

From an international monetary law standpoint, asset freezing is the most interesting type of sanction. The blocking or freezing of assets is an important tool of US foreign policy. Sanctions, in fact, often consist in the freezing of funds and domestic bank accounts denominated in either US dollars or foreign currencies that have been opened i) either by nationals (natural and juridical persons) of countries targeted by primary sanctions or ii) by nationals of foreign countries blacklisted as a result of secondary sanctions.[31] In particular, when assets are frozen, listed persons are prevented from using their bank accounts for payments or transfers for current

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27 Damages in a private Helms-Burton Act lawsuit will be the greater of (i) fair market value at the time of taking plus interest; (ii) current market value; or (iii) the amount certified by the US Foreign Claims Settlement Commission (FCSC) (on those cases where that body has adjudicated).

28 See the definition of "traffics", provided by Section 4(13) of the Helms-Burton Act.

29 Rodman, K.A. (2001), p. 172.

30 See Joint Statement by Federica Mogherini and Cecilia Malmström on the decision of the United States to further activate Title III of the Helms-Burton (Libertad) Act, 17 April 2019, available at www.eeas.europa.eu

31 In the case of Iran (1979) and Libya (1986), the US sanctions contained a blocking order extending to Iranian and Libyan governments' dollar-denominated deposits held in foreign branches and subsidiaries of US commercial banks.

international transactions. In parallel, banks are prohibited from releasing deposits or operate accounts for the benefit of listed subjects.

Unless they are approved by the IMF, similar restrictions represent a violation of Article VIII, Section 2(a) of the Articles of Agreement of the IMF (IMF Articles) on current account convertibility.[32] Almost all the IMF members have accepted the obligations arising from Article VIII, Sections 2(a) of the IMF Articles.[33] They are therefore prohibited from imposing restrictions on payments and transfers for current international transactions, and may not engage in discriminatory currency arrangements, without IMF approval. Exceptions to this rule are envisaged only in three cases: i) when a member is availing itself of the transitional regime to which it is entitled by Article XIV; ii) when restrictions are introduced for balance of payments reasons; and iii) when restrictions are introduced, with the Fund's approval, to preserve national or international security.[34] The third exception is particularly relevant for the purposes of this research.

Under the original IMF Articles, no importance was given to the circumstances leading to restrictions. Article VIII did not even make explicit reference to balance of payments problems. In 1952, however, as a result of US pressure[35] and despite acknowledging that the Fund was not the suitable forum to discuss political or military measures, the Executive Board decided to introduce a "security exception." In fact, IMF Executive Board Decision No 144(52/51) sets forth a simplified procedure for the tacit approval of exchange restrictions adopted for national or international security reasons. A member is required to notify in advance the Fund of its intention to impose such restrictions. If urgency and secrecy prevent the member from doing so, the Fund should in any case be informed as soon as possible. Once received, the notification is immediately forwarded to the IMF Executive Board. If the Fund believes that the restrictions are not justified by security reasons, it must inform the member concerned within 30 days. If called to a vote, any proposal to challenge the measures is adopted with an ordinary majority of the weighted votes cast. However, in the absence of an explicit objection by the Executive Board, the restrictions are considered retroactively approved. This tacit approval does not expire, nor does it require renewals or reviews.

To the knowledge of the author, the Fund has never objected to restrictions introduced on national security grounds, basically adopting a passive stance towards the issue.[36] Over the years, IMF members have relied on Decision No 144(52/51) both when adopting sanctions in accordance with UN Security Council resolutions and when introducing primary or secondary unilateral sanctions to combat the financing of terrorism or targeting certain governments, entities, and individuals. For

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[32] Under the Articles of Agreement of the IMF, countries are free to introduce restrictions on capital transactions.

[33] Only 17 countries have not accepted yet the obligations arising from Article VIII.

[34] A fourth exception, applying when a currency is previously declared *scarce* by the Fund, has never been used.

[35] In 1951, during the Korean conflict, the United States informed the Executive Board of their decision to impose restrictions on payments and transfers to the People's Republic of China and North Korea.

[36] Gianviti, F. (1992), pp. 1-13.

instance, the United States invoked the security exception in 1979, when assets of the Iranian government were blocked in response to the takeover of the US embassy in Tehran.[37] Since then, the United States have requested the application of Decision No 144(52/51) numerous times and their current list of exchange measures is extremely lengthy.[38]

Approved security restrictions are also covered by Article VIII, Section 2(b) of the IMF Articles, which applies to controversies between private parties whose legal relationship is affected by exchange controls imposed by an IMF member. This provision defines whether and to what extent IMF members have to recognise exchange controls introduced in compliance with the IMF Articles by another member.[39] In particular, pursuant to the authoritative interpretation of Article VIII, Section 2(b) adopted by the Executive Board in 1949,[40] judicial or administrative authorities of an IMF member may not disregard another member's exchange controls as a result of conflict-of-laws rules or refuse to enforce them within their domestic legal system on the grounds that they are contrary to the public policy (*ordre public*) of the forum. Therefore, as a consequence of the special status granted to exchange controls regulations by Article VIII, Section 2(b), when the Fund gives its tacit approval to unilateral security restrictions, it significantly boosts their effectiveness and reach. Originally, the purpose of Article VIII, Section 2(b) was to create a cooperative framework among IMF members only in balance of payments matters.[41] The application of such cooperative and non-conflictual framework to national security restrictions is much more controversial as it leads to unreasonable outcomes. In fact, it forces also countries which do not agree with unilateral sanctions to apply them. Furthermore, the courts of an IMF member at the receiving end of such restrictions would be required to acknowledge and enforce them even when they are against the essential interests or fundamental values of their country.

Increasingly widespread unilateral sanctions demonstrate that the IMF Executive Board is unwilling, rather than unable, to discuss whether notified restrictions are indeed necessary to protect essential national security interests. In the author's view, the IMF framework on security restrictions should be critically reviewed and updated. In the first place, the IMF could benefit from distinguishing more thoroughly between multilateral and unilateral sanctions. Already in 1981, a proposal was made to amend the IMF framework on security restrictions to remove the tacit approval procedure and admit only measures in line with UN Security Council resolutions.[42] The matter, however, has never been debated at the Executive Board.

An alternative approach consists in reviewing the 1949 IMF authoritative interpretation of Article VIII, Section 2(b) to exclude unilateral sanctions from the

37 See Edwards, R. (1981), pp. 870-902. See also Boughton, J. (2001), p. 120.

38 See IMF (2018), p. 3455. Compare with the list of exchange measures maintained, for instance, by Germany in accordance with EU regulations and UN Security Council resolutions.

39 Ebke, W. (2012), p. 19.

40 The IMF Executive Board Decision No 446-4 (1949) provides the Executive Board's authoritative interpretation of Article VIII, Section 2(b).

41 Pursuant to IMF Article VIII, Section 2(b), in fact, a member requiring temporary exchange restrictions to protect its balance of payments was to be assisted by all other members.

42 Edwards, R. (1981), pp. 897 ff. See also Lichtenstein, C. (1986), pp. 981-992.

scope of application of the provision. Article XXIX of the IMF Articles sets forth the procedure. Upon request of a member country, a decision on authoritative interpretations is first adopted by the Executive Board, but it may be appealed by referring it to the Board of Governors. In this case, the question will be considered by the Committee on Interpretation of the Board of Governors. Remarkably, each member of the Committee will have one vote and its decisions will be final unless the Board of Governors rules otherwise (with an eighty-five percent majority of total voting power). This procedure represents the only exception to the IMF weighted voting system and, despite not having been applied since the end of the 1950s, it might be reactivated to increase the chances of reaching consensus on the contentious issue of unilateral sanctions.

4 International trade law

The WTO is the only multilateral instrument available for countries whose entities are targeted by extraterritorial sanctions, even if neither the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Trade in Services (GATS) regulate the extraterritorial application of trade restrictive measures as such. Trade sanctions have very rarely been challenged before the WTO and in most cases the applicant was the State directly targeted by sanctions, on the grounds that these would breach the most-favoured nation (GATT Article I(1)) and the national treatment principles (GATT Article III(4)).[43] Conversely, the violation of the non-discrimination principle cannot be readily claimed by countries targeted by secondary sanctions. The latter do not infringe the most-favoured nation principle as all countries other than the one directly targeted are treated alike. As for the national treatment, domestic and imported products are subject to the same sanctions.

So far, the only dispute on extraterritorial sanctions was lodged in 1996 by the European Communities (EC) over the Helms-Burton Act.[44] The EC requested consultations and then the establishment of a panel, claiming that the extraterritorial application of the US embargo on trade with Cuba was inconsistent with the obligations arising from the United States' membership in the WTO. In April 1997, the European Communities and the United States announced they had settled the dispute by signing a Memorandum of Understanding, with the United States committing to a continued suspension of the most controversial parts of the Act.[45] However, as a consequence of the reactivation of the Helms-Burton Act in May 2019, it is likely that a new request for consultations will soon be filed before the WTO by

[43] See, for instance, the Panel Report in the case *United States – Trade Measures Affecting Nicaragua*, 13 October 1986 (L/6053), unadopted. The Panel was established under request of Nicaragua to review the 1985 US embargo prohibiting all trade with Nicaragua. For other sanctions-related disputes raised in the pre-WTO era, see Hahn, M.J. (1991), p. 559; Schloemann, H. and Ohlhoff, S. (1999), pp. 432 ff.; Goodman, R. (2001), p. 104; Mavroidis, P. (2012), pp. 370 ff.

[44] *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for the establishment of a Panel by the European Communities, WT/DS38/1, 13 May 1996 (G/L/71). In particular, the European Communities alleged violations of GATT Articles I, III, V, XI and XIII, and GATS Articles I, III, VI, XVI and XVII.

[45] See European Union-United States, Memorandum of Understanding Concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act, 11 April 1997, in ASIL (1997), *International Legal Materials,* Vol. 36, pp. 529-530.

the European Union. Leaving aside the merits of the dispute (that is, whether the measures at stake are inconsistent with GATT or GATS provisions), this section will focus on the line of defence the United States will most likely adopt in the dispute: the GATT security exception. The aim is to assess whether this defence is available to countries adopting unilateral sanctions with extraterritorial reach.[46]

GATT Article XXI – mirrored by GATS Article XIV bis – allows members to derogate from the obligations imposed by other provisions of the GATT to protect essential national security interests or to fulfil the obligations arising from the Charter of the United Nations.[47] Many scholars have long considered this exception capable of jeopardising the multilateral trade system, a loophole that entitles any country to defend its unilateral trade barriers dodging the WTO jurisdictional oversight.[48]

It is worth noting though that, in April 2019, in the case *Russia – Measures Concerning Traffic in Transit*, a Panel applied the GATT security exception for the very first time.[49] The Panel Report was adopted by the Dispute Settlement Body without being appealed. Many commentators have defined this landmark decision a "constitutional moment" for the WTO system, since the Panel was able to create a well-defined legal space to operate in a highly political context as well as to provide a "flexible and politically sensitive framework" to treat the trade vs. security issue.[50] The dispute revolved around the economic sanctions adopted by Russia against Ukraine and, in particular, on the consistency with WTO rules of restrictions introduced on the transit through Russia of Ukrainian goods directed to Asian countries. Although concerning primary sanctions, the case certainly helps to assess whether the security exception can be successfully relied upon to justify extraterritorial sanctions.

Before considering the Panel Report, it is worth reproducing the text of GATT Article XXI(b):

"Nothing in this Agreement shall be construed:

[…]

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46 Multilateral sanctions, authorised by the UN Security Council pursuant to Chapter VII of the UN Charter, fall within the scope of GATT Article XXI(c), according to which nothing in the agreement shall be construed "to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

47 On the negotiating history of GATT Article XXI and on instances in which the provision was invoked under the GATT 1947 framework, see: *Multilateral Trade Negotiations – The Uruguay Round*, Negotiating Group on GATT Articles, Note by the Secretariat, Article XXI, MTN.GNG/NG7/W/16, 18 August 1987, available at www.docs.wto.org. See also the Appendix of the Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019. On the GATT security exception see Bhala, R. (1998), pp. 263-317; Alford, R.P. (2011), pp. 697-759; Balan, G.D. (2012), pp. 365-393; Neuwirth, R. and Svetlicinii, A. (2015), pp. 891-914; Akande, D. and Williams, S. (2003), pp. 365-404; Schill, S. and Briese, R. (2009), pp. 61-140; Hestermeyer, H.P. (2011), pp. 569 ff.; Voon, T. (2019), pp. 45-50; Delimatsis, P. and Cottier, T. (2008), pp. 329-48.

48 For instance, John H. Jackson and Andreas F. Lowenfeld maintained that "These exceptions, however, if given a broad interpretation could undermine the whole WTO treaty and impair the security and stability of the world trading system for which the WTO has been created" (Jackson, J.H and Lowenfeld, A.F. (1997), p. 2). See also, Mavroidis, P.C., (2012), p. 367.

49 Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019. The Panel was chaired by prof. Georges Abi-Saab.

50 See Benton Heath, J. (2019); Desierto, D. (2019); Bogdanova, I. (2019b); Vidigal, G. (2019), pp. 203–224.

(b) to prevent any Member from taking any action which *it considers necessary* for the protection of *its essential security interests*

(iii) relating to fissionable materials or the materials from which they are derived;

(iv) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(v) *taken in time* of war or other *emergency in international relations*" [emphasis added].

In *Russia – Measures Concerning Traffic in Transit*, Russia's main argument was that the security exception was self-judging and, therefore, the Panel lacked jurisdiction on the matter.[51] This position was supported in their third-party submission by the United States,[52] which also contended that issues related to a State's essential security are non-justiciable. Ukraine, instead, argued that the security exception is an affirmative defence and that therefore panels have jurisdiction to review its invocation. The Panel rejected the self-judging argument and affirmed its jurisdiction, but it also found that Russian measures fell within the scope of the exception as they met the requirements set forth by GATT Article XXI(b).

First of all, the Panel pointed out that Article XXI(b)(iii) implicitly acknowledges that wars or other emergencies in international relations entail a fundamental change of circumstances, which radically alters the parameters to assess consistency with WTO rules. Therefore, unlike in the case of measures covered by the exceptions set forth by GATT Article XX, there is no need to preliminarily establish whether measures taken during a war or other international crises would breach WTO rules if they had been taken in normal times.

The Panel then turned to GATT Article XXI(b) to consider the self-judging nature of the security exception holding that, while the determination of the terms "essential security interest"[53] and "necessary"[54] falls within the discretion of WTO members, it is the panels that have the power to objectively assess the existence of one of the three situations listed in subparagraphs (i) to (iii) of the provision: the handling of nuclear materials, arm trafficking and war or other emergencies in international relations. As such, the three subparagraphs operate "as limitative qualifying clauses"

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51 On the difference between the jurisdiction of the panel and the justiciability of the security exception, see Bogdanova, I. (2019a), p. 13.

52 See Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, 5 April 2019, Annex D-10, Executive Summary of the arguments of the United States, p. 106. The same position is adopted by the United Arab Emirates in the pending case *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS526.

53 On this point, the Panel first pointed out that *essential security interests* "may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally" (para. 7.130). This notwithstanding, such interests "will depend on the particular situation" and "can be expected to vary with changing circumstances." For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests (para. 7.131).

54 Recognising the members' discretion to assess the necessity of the measures means that WTO panels will not evaluate whether there are "reasonably available alternative measures" to achieve the protection of the State's legitimate interests which are less trade-restrictive (para. 7.108).

intended to narrow the margin of discretion granted to member States by the provision (para. 7.65). Consequently, the Panel rejected the argument that the whole security clause is self-judging (paras. 7.102-7.104). More importantly, the panel established three legal tests that can be used to assess whether the security exception may be successfully relied upon to justify the adoption of extraterritorial sanctions.

(a) First, not each and every situation that may lead to extraterritorial sanctions falls within the interpretation of "emergency in international relations" provided by the Panel. The Panel affirmed that "emergency" means "a situation of armed conflict, or of a latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a State" giving rise to "defence of military interests, or maintenance of law and public order interests" (paras. 7.76 and 7.111).[55] On the contrary, political or economic conflicts between States, even when urgent or serious in a political sense, do not classify as emergencies unless they trigger "defence and military interests, or maintenance of law and public order interests" (para. 7.75). This is probably one of the more significant aspects of the decision, as it prevents WTO members from indiscriminately qualifying any conceivable security threat as an emergency.

Moreover, the Panel implicitly considered that for an emergency to exist, it must directly involve the complainant, which is the country primarily targeted by sanctions (para. 7.119).[56] This requirement could per se be sufficient to exclude secondary sanctions from the scope of GATT Article XXI(b). The Panel, however, did not clarify this aspect, possibly not grasping its importance in the context of secondary sanctions.

Taking the Helms-Burton Act as an example, even assuming that at the time of its introduction the situation might have qualified as an emergency (the Act was passed by Congress in February 1996 after two civilian aircrafts were shot down by the Cuban air force in international air space, killing three US citizens and a US resident), it is disputable that such emergency still exists today or that, after more than two decades, it requires urgent action.

(b) Second, a correlation must be proven between the emergency, the measures adopted and their plausibility to protect the State's security interests. In order to assess the correlation between the emergency and the restrictions, the Panel considered the timing of events and the objective fact that the measures were taken during the emergency (para.

[55] The Panel took into consideration also the fact that the UN General Assembly had recognised the situation between Ukraine and Russia as involving armed conflict (para. 7.122). See UN GA Resolution, "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", A/RES/71/205, 19 December 2016.

[56] On the other hand, the Panel was careful not to require the sanctioning State to be specifically affected by the invoked emergency as this would have contradicted the wording of the provision. On this point, Vidigal, G. (2019), p. 212.

7.70 and 7.124-7.125). The Panel also addressed the causal nexus issue, maintaining that measures cannot be remote or unrelated to an emergency or to the security interests of a State (para. 7.145).

In this regard, it is easy to see how far extraterritorial sanctions are from the alleged emergency. Trading counterparts of a country targeted by primary sanctions – potentially situated anywhere in the world – can in fact only pose a very indirect and remote threat to the sanctioning State.[57]

Moreover, the plausibility of extraterritorial sanctions as measures capable and necessary to protect the essential security interests of the sanctioning State is highly debatable. On this point, the Panel argued that not all security interests fall within the scope of the provision but only those related to "quintessential functions of the State, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally" (para. 7.130).

The author contends that, while a plausible nexus can be established for secondary restrictions concerning arm trafficking or the handling of nuclear materials, it is far more questionable to maintain that the trading of power tools, hardware and utensils may threaten the national security of a faraway country.

Reference should also be made to the 1982 Decision Concerning Article XXI of the General Agreement,[58] which implies that contracting parties should refrain from taking action against members that are not directly involved in a war or other international relations emergency. The preamble of the Decision, in fact, recognises that the "Contracting Parties should take into consideration the interests of third parties which may be affected".

(c) Third, for what concerns the burden of proof, the Panel established that it is on the respondent to provide details about the essential security interests it deems affected by the emergency, producing sufficient evidence of the risks detected and demonstrating that the trade restrictions actually protect the interests at stake (paras. 7.136-7.137). Only in a situation of armed conflict, or of breakdown of law and public order, the requirements to satisfy the burden of proof are minimal (paras. 7.134-7.135). Therefore, it will be far more difficult for a sanctioning State to demonstrate that nationals from third countries are playing an active role in the emergency and that extraterritorial sanctions – with regard to their content, structure and expected operation – are capable of protecting its essential security interests.

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57 Of this opinion also Mitchell, A. (2017), p. 300.

58 The Decision Concerning Article XXI of the General Agreement was adopted by the GATT Contracting Parties on 30 November 1982 (L/5426). According to the Decision, GATT Contracting Part should be informed to the fullest extent possible of trade measures taken under Article XXI, and all Contracting Parties affected by actions taken under Article XXI retain their full rights under the GATT.

In brief, a sanctioning country should: a) demonstrate the existence of a war or other emergency in international relations; b) explain what fundamental functions of the State the restrictive measures are seeking to protect; c) and illustrate the sufficient and plausible connection of secondary sanctions with the security interests to be protected. It is therefore very unlikely that extraterritorial sanctions can be found to fall within the scope of the security exception and withstand the scrutiny of a panel.

This notwithstanding, the fact that the WTO dispute settlement mechanism, once the crown jewel of the multilateral trade system, has plunged into a deep crisis cannot be underestimated. Over the last years, the United States have regularly criticised the judicial overreach of the WTO Appellate Body and expressed their discontent over the WTO Dispute Settlement Understanding's procedural rules. For this and for other reasons, they have consistently blocked the approval of Appellate Body appointments. Unless the current impasse is quickly overcome, by the end of 2019 the Appellate Body will not have enough members to review appeals. Unfortunately, the Panel Report in Russia – Measures Concerning Traffic in Transit might further estrange the United States from the WTO. Actually, the United Stated were extremely dissatisfied with this ground-breaking decision,[59] as the interpretation of the security exception provided in the Panel Report will certainly influence the outcome of pending disputes, among which those where the United States – standing as respondent – have invoked GATT Article XXI to justify their tariffs on steel and aluminium.[60]

5 International investment law

In 1996, the Helms-Burton Act already showed that extraterritorial sanctions could be used against established foreign investments and hamper the liberalisation of investment flows. The Act was introduced during the negotiations of the Multilateral Agreement on Investment (MAI),[61] which as a consequence suffered a polarisation of positions. While the United States argued that legal acts adopted to pursue essential security interests fall within the scope of the MAI general exceptions,[62] Canada presented a proposal to prohibit secondary boycotts that would affect foreigners investing in sanctioned countries.[63] The debate over the MAI was also

59 Miles, T. (2019).

60 See, for instance, the dispute raised by China: *United States – Certain Measures on Steel and Aluminium Products* (DS544). Other disputes against the United States have been filed by the European Union, Turkey, Switzerland, Russia, Norway, Mexico, Canada and India, claiming that there is no legitimate or plausible national security rationale for the tariffs.

61 On the MAI see: Kobrin, S.J. (1998), pp. 97-109; Muchlinski, P.T. (2000), pp. 1033-1053; Whiterell, W.H. (1995), pp. 1-14.

62 Devereaux, C., Lawrence, R.Z. and Watkins, M.D. (2006), p. 159.

63 Canadian Statement on the Helms-Burton Act to the Negotiating Group of the MAI, 14 and 15 March 1996, p. 3 as reported by Chapman, A. (1997), p. 22.

influenced by the agreement reached between the European Union and the United States to settle their WTO dispute. In exchange for a continued suspension of Title III of the Helms-Burton Act, the European Union had in fact agreed to support the US proposal to include in the text of the MAI language intended to deter any investment or transaction in property illegally expropriated pursuant to international law.[64] The latest version of the MAI, adopted in April 1998 just a few days before the negotiations were formally abandoned, included a general exceptions provision as well as two country-specific draft text proposals: one prohibiting secondary investment boycotts and the other on conflicting requirements.[65] In the end, lack of consensus on investment-related aspects of extraterritorial sanctions and on the breadth of the national security exception contributed to the failure of the MAI project.

Without a multilateral treaty promoting and protecting investments, foreign entities affected by extraterritorial sanctions will struggle to identify an appropriate legal basis to challenge the measures. This is because investments affected by extraterritorial sanctions are usually made in the country directly targeted by sanctions (e.g. investments made by a Swiss corporation in Iran) and, as such, they are not protected by an international investment agreement (IIA)[66] hypothetically concluded between the sanctioning country and the investor's country (in this example, a US-Switzerland bilateral investment treaty (BIT)). Notably, there are no IIAs between the United States and industrialised countries or emerging economies, the majority of the US IIAs currently in force being with developing countries.

Only in a limited number of cases will investors protected by an IIA concluded between the United States and their home country be able to bring claims before an investor-State arbitral tribunal.

First, this might happen when, as a consequence of secondary sanctions, a foreign party is blacklisted (e.g. in the SDNs List) and, as a consequence, its assets are frozen. If this measure concerns an investment made in the United States (as defined in the relevant IIA), the blacklisted foreign party may claim a violation of the principle of fair and equitable treatment or indirect expropriation as the State, by freezing its assets, is interfering with the use, enjoyment or benefit of its investment. In addition, an assets freeze may also entail a restriction on payments and capital movements, resulting therefore in a violation of the free transfer clause.

In IIAs, a key standard of protection is the free transfer clause, which grants the right to repatriate the investment and all related proceeds without restrictions and the right

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64 European Union-United States: Memorandum of Understanding concerning the US Helms-Burton Act and the Iran & Libya Sanctions Act, 11 April 1997, in ASIL (1997) *International Legal Materials*, Vol. 36, pp. 529-530. For an analysis of the Understanding, see Smis, S. and van der Borght, K. (1999), pp. 227-236.

65 See Negotiating Group of the MAI, "The Multilateral Agreement on Investment", Draft Consolidated Text, 22 April 1998, DAFFE/MAI(98)7/REV1, p. 76 and Annex 1, pp. 121-126.

66 The notion of IIAs usually includes bilateral investment treaties (BITs) and broader economic cooperation agreements – like free trade agreements (FTAs), economic partnership agreements (EPAs), preferential trade and investment agreements (PTIAs) and regional integration agreements (RIAs) – aimed at protecting, promoting and liberalising foreign investments.

to make any transfer required to develop and maintain an existing investment.[67] The rights arising from the free transfer provision though are usually subject to certain requirements. In particular, some treaties condition the free transfer of funds to compliance with judicial or administrative orders and judgments and with the laws and regulations of the host State on bankruptcy and insolvency as well as on criminal and penal offences.[68] Consequently, the host country is practically allowed to unilaterally revise the level of protection whenever it deems it appropriate. Whether the terms "criminal or penal offences" include infringements to sanctions regimes remains an unsettled question in international investment law.

For a second scenario, reference can be made to the reactivation of Title III of the Helms-Burton Act. In fact, since May 2019, US nationals holding claims to property confiscated in Cuba may file lawsuits to demand monetary damages from foreign investors "trafficking and profiteering" from such property. Clearly, Title III does not provide a direct remedy against the allegedly unlawful expropriation of US property that occurred in Cuba. Rather it provides US nationals with an alternative remedy, in the form of compensation from those considered by the US government as "aiding and abetting" the Cuban government.[69] As a result, foreign nationals profiting from property confiscated in Cuba might be ordered to pay the damages allegedly suffered by the plaintiffs. A judgment rendered pursuant to Title III is enforceable over the assets of a foreign entity that are situated in the United States. In this case, the foreign investor may claim that the implementation of the decision amounts to an indirect expropriation of its investment or to a breach of its legitimate expectations under the fair and equitable treatment provision. This would be the case of, for instance, a European hotel chain with premises all over the world which is ordered to compensate for the damages arising from its investment in expropriated US property in Cuba and, as a result, has its assets in New York seized in favour of the plaintiff.

Third, extraterritorial sanctions could amount to a breach of an investor's legitimate expectations under the fair and equitable treatment provisions, if the possibility of trading with a country that, at a later stage, is targeted by sanctions was the reason behind an investment made in the United States. Assuming that a Moroccan investor opened a US clothing company to manufacture T-shirts using exclusively Egyptian raw cotton and Egypt is subsequently targeted by US sanctions, the foreign investor may invoke the Morocco-United States BIT, which has been in force since 1991.

Besides, recent US IIAs include a denial of benefits clause[70] by which a country may deny protection to an investor of the other country if two cumulative conditions are met: the enterprise is owned or controlled by nationals of a third country and the country denying protection does not maintain diplomatic relations with that third

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67 On free transfer of funds provisions, see Viterbo, A. (2012), pp. 243 ff.; Bishop, D.R., Crawford, J.R. and Reisman, W.M. (2005), pp. 165-171; Dolzer, R. (2010), pp. 533-544; Newcombe, A. and Paradell, L. (2009), pp. 399-416; Turyn, A. and Facundo Perez, A. (2010), pp. 51-78; UNCTAD (2000), pp. 28 ff.; UNCTAD (2007), pp. 56-63; Waibel, M. (2009), pp. 497-518.

68 See for instance Article 7 of the US Model BIT 2012.

69 See Reinisch, A. (1996), p. 557.

70 A denial of benefits clause is contained also in Article 1113 of the NAFTA and in Article 14.14 of the United States-Mexico-Canada Agreement. On denial of benefits clauses, see in particular, Mistelis, L.A. and Baltag, C. (2018).

country.[71] This provision would therefore allow the United States to deny investment protection to a company of the other country operating on US soil, when this is owned or controlled by nationals of, for example, North Korea. Interestingly, while there is no explicit reference to economic sanctions in the denial of benefits clause of US IIAs,[72] Article 8.16 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) mentions measures related "to the maintenance of *international* peace and security", hinting at the fact that the provision only covers multilateral sanctions, thus excluding unilateral measures introduced for national security purposes. Case law has not assessed whether the clause also covers extraterritorial sanctions.

In any case, the United States can always argue that freezing measures are being adopted to protect their essential security interests. Notably, all investment treaties entered into by the United States contain security exceptions. For instance, Article 18 of the 2012 US Model BIT expressly safeguards each party's ability to apply "measures that *it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the *protection of its own essential security interests*" [emphasis added].[73] The wording of the clause – which differs from GATT Article XXI – is deliberately designed to allow a flexible interpretation of "essential security", leaving ample room for manoeuvre to the party proclaiming that a measure is necessary for the protection of its security interests. Moreover, the issue of the self-judging nature of the national security exception contained in US IIAs is still unsettled. It is therefore unclear whether the United States should be discretionally entitled to define the existence of a threat to their essential security interests and consequently decide the course of action to be adopted.[74] The WTO case might influence future arbitral tribunals through a process of cross-fertilisation.

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71 In addition, the denial of benefits clause usually allows a State party to deny benefits to an enterprise which has no substantial business activities in the territory of the Contracting Party under whose domestic law it is constituted or organised. The purpose of the *denial of benefits* clause is to exclude protection to investments and investors which, although formally satisfying the definition of the applicable IIA, do not have a real economic connection with the home State.

72 The denial of benefits clause was first included in the 1994 US Model BIT and it is now envisioned by Article 17(1) of the 2012 US Model BIT. See also Article 1113 NAFTA and Article 17 of the Energy Charter Treaty.

73 See also Article 2102 of the NAFTA and, with the same wording adopted by Article 18 of the 2012 US Model BIT, Article 32.2 of the USCMA. During the negotiation of NAFTA Article 2102, the United States made it clear that, if necessary, they would invoke the article to prevent any circumvention of the Cuban sanctions programme.

74 See, Permanent Court of Arbitration, *CC/Devas (Mauritius) Ltd. et al. v. The Republic of India* (Case No. 2013-09), Award on Jurisdiction and Merits, 25 July 2016, para. 213 ff.; ICSID, *Continental Casualty Company v. Argentine Republic*, Award of 6 September 2008, ARB/03/09, paras. 174-178 On the self-judging nature of essential security clauses see Mola, L. (2010), UNCTAD (2009), pp. 94-95; Burke-White, W.W. and von Staden, A. (2008), pp. 307-410. Many authors acknowledge that in this field of international investment law States should be entitled to a wide margin of appreciation.

6 Conclusions

From all of the above, it is possible to conclude that there is no international economic law mechanism that can effectively contrast the adoption of unilateral sanctions that have an extraterritorial application.

The IMF weighted voting system makes it extremely difficult to modify consolidated rules that would allow the introduction of exchange restrictions for national security reasons. In addition, no dispute settlement mechanism is envisaged under international monetary law.

Investments affected by extraterritorial sanctions are usually made in the country directly targeted by sanctions and, as such, they are not protected by bilateral investment agreements. Only in a limited number of cases will investors be able to file a claim before an investor-State arbitral tribunal and, in those cases, the sanctioning State will likely invoke the security exception contained in the applicable IIA.

As for extraterritorial trade sanctions, while the WTO dispute settlement mechanism might in principle provide an effective legal remedy, it appears doomed to become incapable of functioning very soon. As argued cogently by Simma and Pulkowski, this opens up the possibility for affected countries to resort to countermeasures: “If states create new substantive obligations along with special enforcement mechanisms, they merely relinquish their *facultés* under general international law in favour of a special regime’s procedures to the extent that and as long as those procedures prove efficacious. When such procedures fail, enforcement through countermeasures under general international law becomes an option”.[75]

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[75] Simma, B. and Pulkowki D. (2006), pp. 508-509.

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Extraterritorial sanctions and the EU: challenges and legal counter-instruments

Lucio Gussetti[1]

1 Introduction

The EU is currently subject to undue external pressure caused by US actions, such as secondary sanctions. This pressure has increased to even stronger levels since summer 2018, when the US unilaterally decided to withdraw from the Joint Comprehensive Plan of Action (JCPOA) or the so-called Iran nuclear deal and reactivated its unilateral sanctions, which it had committed to lift under the deal. The US also recently ceased to waive some provisions of the Cuban Liberty and Democratic Solidarity Act of 1996 (the so-called Helms-Burton Act), which, among other things, allow for legal proceedings against persons that "traffic" in US property expropriated by the Cuban regime.

The extensive scope of US sanctions and their use of the important US financial system as a source of immense pressure on non-US persons present a great challenge for the EU and economic operators based in the EU. Indeed, they impinge both on the EU's economic sovereignty and on the healthy development of European business based on the single currency, the euro.

US actions have also called the viability of the Iran nuclear deal into question, especially considering Iran's recent decision to no longer respect some of its obligations under the deal, in response to the alleged failure from the EU to respect its own commitments under the deal following the US' withdrawal.

Finding a way to shield European banks, and more generally the European financial system, from US extraterritorial sanctions is thus of major importance and may be considered an absolute political priority.

This paper will start with some background on the international law issues of jurisdiction and explain how some US sanctions do not comply with international law principles. It will then explain why the EU needs to react in a unitary way and how it has resisted US pressure so far. It concludes by describing a possible EU mechanism that could help the EU resist unlawful US sanctions more effectively.

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2 Premise: international law

2.1 General principles

According to the general principle of jurisdiction in international law, States have jurisdiction to legislate and enforce laws with regard to: (i) their nationals and entities established under their legislation; (ii) activities carried out within their territory; (iii) in limited circumstances, activities which can have a damaging impact on the national interest of the State, when there is a sufficient connection (nexus) between that activity and the State's national interest; and (iv) some crimes defined by international law which are subject to universal jurisdiction.

Within those limits, international law does not prevent national legislation from having certain extraterritorial effects. However, extraterritorial effects of national legislation which go beyond the limits defined by the above principles of international law are unlawful. This is the case for some US sanctions.

2.2 The United States' approach to sanctions

2.2.1 Some US sanctions have unlawful extraterritorial effects

The European Union considers that some US sanctions have unlawful extraterritorial effects. Indeed, some US sanctions not only affect the targeted third country – as EU sanctions do – but also affect the relationship between the sanctioned country and other third countries. By doing so, the sanctions do not respect the autonomous actions of third countries in their own foreign policy.

It retains a broad interpretation of what the general principle of jurisdiction in international law requires.

The US distinguishes between "primary sanctions" and "secondary sanctions". However, use of those two classifications blurs the distinction between the lawful and unlawful extraterritorial effects of such sanctions.

2.2.2 Primary sanctions

Primary sanctions apply to US persons and entities. However, they may also have unlawful extraterritorial effects because of the wide interpretation applied by the US to the concept of a US person or entity.

2.2.3 Secondary sanctions

Secondary sanctions apply to (i) foreign persons and entities (ii) for activities carried out outside the US territory (iii) without a sufficient nexus between the activity triggering the sanctions and its national interest. The only trigger for imposing those sanctions is the use of the US dollar and the US financial system.

For example, under the Iran Sanctions Act 1996, the United States imposed sanctions with respect to any person or entity whose investments in Iran in excess of a certain amount contribute to the enhancement of the Iranian ability to develop their petroleum resources. Under the US National Defence Authorization Act for Fiscal Year 2012, foreign financial institutions may not knowingly conduct or facilitate any significant financial transaction with the Central Bank of Iran or any other designated Iranian financial institution. Such foreign financial institutions are prohibited from maintaining correspondent accounts in the United States, with only strictly limited exceptions.

In light of the importance and broad use of the US dollar in payments and of the US banking system, the scope of those sanctions is thus very extensive, and abusively so. In fact, the sanctions appear to be an attempt to disguise the unlawful extraterritorial effects behind the justification that they protect vital US interests from being damaged.

The damage caused by such US sanctions on the EU and on its economic operators presents a significant challenge. They violate international law and impede the attainment of the Union's objectives[2].

3 The need for a unitary defensive response at EU level

Considering the damage caused by and impact of such US extraterritorial sanctions, they require a unitary defensive response from the EU as a whole.

3.1 Requirement of unity in the international representation of the Union

Besides having the effect of reinforcing its credibility internationally, it is clear that, under EU law, the Union has to have unity in its international representation. This legal requirement stems from settled case-law of the Court of Justice of the European Union, in particular from the case of *Commission v Sweden*, the so-called PFOS case[3], which the Court of Justice has recalled recently in the case of

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2 Explanatory memorandum (C/2018/3572 final) of Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (C/2018/3572) (OJ L 199I, 7.8.2018, p. 1).

3 See Case C-246/07, *Commission v Sweden*, EU:C:2010:203, para. 73.

Commission v Germany, or the OTIF case[4]. Moreover, the requirement of unity also flows from the principle of sincere cooperation set out Article 4(3) TEU, which states that the Member States shall facilitate the achievement of Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

3.2 A unilateral national reaction from Member States would also distort the operation of the internal market

If this requirement of unity in the international representation of the Union is to be effective, it must apply both to cases of actions taken by the EU and to EU defensive reactions to foreign extraterritorial sanctions which impede the attainment of the EU's objectives. In particular, a unilateral national reaction from Member States would affect the unitary nature of the EU's economic foreign policy. If Member States reacted unilaterally to foreign extraterritorial sanctions, for example by adopting their own national sanctions, then, to the extent that those national sanctions had a clear unilateral impact on the functioning of the internal market, they would be incompatible with EU law.

This has been confirmed by the Court of Justice in the Kadi I cases[5]. There, the Court stated that, given the link of economic and financial measures to the operation of the internal market, such measures cannot be imposed unilaterally by a Member State. The multiplication of national measures might indeed affect the operation of the internal market and such measures could have a particular effect on trade between Member States. They could also create distortions of competition, because any differences between the measures taken unilaterally by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators despite there being no economic justifications for that advantage or disadvantage.

This is also the logic behind Article 215 TFEU. Article 215 TFEU provides for the necessary legal basis to ensure the implementation of sanctions regimes adopted under the EU's Common Foreign and Security Policy (CFSP) within the competences covered by the TFEU, and notably the internal market, in order to avoid potential distortions. This is done through the adoption of TFEU regulations

[4] Case C-620/16, *Commission v Germany*, EU:C:2019:256, para. 93: "It is settled case-law that, in particular where the subject matter of an agreement or convention falls partly within the competence of the European Union and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the European Union."

[5] Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461, para. 199 to 230: "If economic and financial measures such as those imposed by the contested regulation, consisting of the, in principle generalised, freezing of all the funds and other economic resources of the persons and entities concerned, were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market. Such measures could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment. In addition, they could create distortions of competition, because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators although there were no economic reasons for that advantage or disadvantage."

which are immediately applicable in the Member States and ensure a harmonised implementation of the regimes in an area without internal borders.

3.3 A unilateral national reaction from Member States would also affect Union competences

Foreign sanctions with unlawful extraterritorial effects impede the attainment of the Union's objectives to contribute to the harmonious development of world trade and to the progressive abolition of restrictions to international trade[6]. One of the areas at stake is thus the Union's common commercial policy, which is regulated in Article 207 TFEU and is, as set out in Article 3(1)(e) TFEU, an exclusive competence of the EU. Article 207 TFEU is also one of the legal bases of the Blocking Statute.

It is also worth considering whether Article 215 TFEU could provide a legal basis for the EU to adopt the necessary reactive, "defensive" measures. Article 215 TFEU provides that, where a decision adopted under the CFSP provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the EU "shall adopt the necessary measures". It is likely that this wording would allow the adoption of reactive, "defensive" measures against a third country such as the US that is unlawfully interfering with EU's relations with the targeted third country, for example Iran.

Therefore, a unilateral response from Member States would be neither desirable nor legally possible. A single, uniform response at EU level is the only possible solution.

4 The EU response

The EU has already started to react defensively against US sanctions with unlawful extraterritorial effects.

4.1 The Blocking Statute

The EU adopted the Blocking Statute in 1996 in response to US sanctions with unlawful extraterritorial effects concerning Cuba, Iran and Libya.

The Blocking Statute aims at countering the unlawful effects of third-country extra-territorial sanctions on EU operators and to protect EU operators engaging in lawful international trade and/or movement of capital as well as related commercial activities with third countries in accordance with EU law.

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6 Recital (1) of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 309, 29.11.1996, p. 1) (the Blocking Statute).

It was updated on 6 June 2018[7] to extend its scope of application to the reactivated US sanctions in relation to Iran. The Blocking Statute is thus part of the EU's political and legal support for the continued full and effective implementation of the JCPOA, including by sustaining trade and economic relations between the EU and Iran.

4.1.1 How the Blocking Statute functions

The Blocking Statute functions by prohibiting EU operators from complying with the legislation listed in the Blocking Statute which has extraterritorial effect, or with any decision, ruling or award based thereon, given that the EU does not recognise its applicability to or effects towards EU operators (Article 5(1) Blocking Statute). Exceptionally, compliance can be authorised by the Commission in case non-compliance seriously damages the interests of the operators or of the Union (Article 5(2) Blocking Statute).

The Blocking Statute bans the recognition and the enforcement of any foreign decision, including court rulings or arbitration awards, based on the listed legislation which has extraterritorial effect, or on actions based thereon or resulting therefrom (Article 4 Blocking Statute).

It also allows EU persons to recover damages arising from the application of the listed extraterritorial legislation from any person or entity causing the damages (Article 6 Blocking Statute).

4.1.2 Perceived inadequacies of the Blocking Statute

The Blocking Statute has a broad and ambitious objective, aiming to provide strong protection for EU operators, and it has been used previously in the national context in Member States. However, it still lacks a sufficient deterrent effect. This is of course largely due to the relevance and importance of the US financial system in global affairs. EU operators often consider it to be a greater risk to fully comply with the Blocking Statute, thereby risking their access to the US financial system, rather than just ceasing to comply with US sanctions and continuing their legitimate business with Iran.

The Blocking Statute fails to address this cost-benefit calculation by EU operators, instead imposing its obligations directly on the operators, thus exposing them directly to the scrutiny and powers of the Office of Foreign Assets Control of the US Department of the Treasury (OFAC), rather than allocating the responsibility for not complying with US extraterritorial sanctions to the political level, i.e. EU institutions or Member States. The Blocking Statute thus sometimes incentivises EU operators to conceal their compliance with US sanctions. This contributes to obscuring the economic policy unique to each Member State, fuelling a negative loop in the operation of the EU internal market.

[7] Commission Delegated Regulation (EU) 2018/1100, with entry into force on 7 August 2018.

4.2 INSTEX

The Instrument in Support of Trade Exchanges (INSTEX) is the other EU instrument introduced in the hope of fighting against extraterritorial sanctions.

4.2.1 How INSTEX functions

INSTEX is a special purpose vehicle aimed at facilitating legitimate business with Iran. It was established by the so-called E3 (France, Germany and the UK) on 31 January 2019, with very active technical support from the EU, as part of European efforts to preserve and safeguard the JCPOA.

By 28 June 2019, INSTEX was announced to be operational and its first transactions are being processed. The EU has been providing extensive conceptual and legal support in this regard, including in the critical area of due diligence. INSTEX is available to all EU Member States and some EU Member States are in the process of joining it as shareholders. It will soon be open to economic operators from third countries. The corresponding Iranian entity, the Special Trade and Finance Instrument (STFI), has also been established and the complementary cooperation will need to accelerate.

INSTEX will function as a transaction tool. It is not a bank and will not facilitate any direct cross border (EU-Iran) financial transfers. Rather, it will act as a platform for recording transactions/claims of EU exporters and importers arising from commercial transactions with Iran. It will then manage the settlement of these claims by instructing EU importers and exporters which use INSTEX to bilaterally settle these respective claims within the EU.

INSTEX will therefore provide an additional mechanism for legitimate trade with Iran and complement existing market solutions and commercial European banking channels. It will do so in full respect of the relevant EU and international regulations on anti-money laundering and countering the financing of terrorism.

Initially INSTEX will focus on sectors where there is an urgent need to facilitate payment channels in order to avoid negative impacts on the Iranian population, such as for medicines, medical equipment, food import and export and basic consumer goods.

4.2.2 Perceived inadequacies of INSTEX

INSTEX is based on the voluntary participation of the Member States and for the time being, it focuses on specific sectors for which trade is, in any case, permissible under US sanctions. Consequently, INSTEX is a limited solution which may not be as effective as it was hoped.

Admittedly, it provides a relatively high degree of protection as it benefits from the support of the national governments involved. However, the transactions it processes

could still be sanctioned by the US, if the US considers the instrument circumvents its sanctions. As such, INSTEX is not a mechanism which provides a sufficient degree of certainty in the processing of the transactions with Iran.

It is not an EU-wide system and it impinges on the EU competences and the functioning of its internal market, creating a potential Institutional risk, in particular with possible divergence between its operations and the interpretation of EU law by the Court of Justice of the European Union.

5 The need for an EU mechanism

Given the described inadequacies of the Blocking Statute and INSTEX, it is clear that a more effective solution needs to be explored at EU level. Its objective would be to preserve contracts between EU operators and operators from countries affected by US (or other foreign countries extraterritorial) sanctions, by incentivising the use of the euro. As Benoît Cœuré, Member of the Executive Board of the ECB, said, "being the issuer of a global reserve currency confers international monetary power, in particular the capacity to 'weaponise' access to the financial and payments systems."[8]

5.1 A possible avenue with the ECB and the euro

One promising avenue could be to establish a mechanism within the ECB to permit economic relationships to comply fully with an autonomous and effective EU foreign economic policy. This would also act as a strong statement of political will to assert the EU as a foreign policy actor vis-à-vis US extraterritorial sanctions.

A mechanism within the ECB could be used to finance transactions between EU operators and, for example, legitimate Iranian operators. The ECB would record the legitimate transactions and/or claims between EU and Iran trade partners using for example existing infrastructure (such as TARGET2). The ECB would receive payment from the EU-based bank representing an EU importer and make payment to the EU bank representing an EU exporter upon receiving funds from the Iranian counterpart or within a fixed deadline. The cross flow of funds would be confined strictly to within the ECB. It would thus act as a type of clearing house, with working balances (*fonds de roulement*). This arrangement would provide more structure than INSTEX and would apply in the whole internal market.

The precondition to an effective use of such a mechanism is the use of the euro at every stage of the transactions concerned. Operators on both sides need to make payments in euro, without exception, so as to create a real currency "Chinese Wall"

[8] Speech by Benoît Cœuré, Member of the Executive Board of the ECB, at the Council on Foreign Relations, New York City, 15 February 2019. https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190215~15c89d887b.en.html

or firewall insulating the transactions from triggers based on dollar-usage in US sanctions.

5.2 Compatibility with the objectives of the ECB and the Union

Such mechanism would be compatible with the objectives of the ECB and the Union. According to Article 127(1) TFEU, Article 282(2) TFEU and Article 2 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank (the ESCB Statute), without prejudice to its primary objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 TEU.

The objectives in Article 3 TEU include contributing to the protection of Union citizens, to peace and security, to free and fair trade, and to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Nothing in the description of the ECB's tasks, functions and operations in the Treaties seems to prevent the ECB from performing that role. For example:

According to Article 3.2 of the ESCB Statute, the task of the ESCB to hold and manage the official foreign reserves of the Member States shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances (*fonds de roulement*). By analogy, it could be envisaged that the ECB would hold and manage working balances exclusively in euro.

According to Article 3.1 of the ESCB Statute, the basic tasks to be carried out through the ESCB shall be, inter alia, to hold and manage the official foreign reserves of the Member States and to promote the smooth operation of payment systems. Related to this, Article 22 of the ESCB Statute provides that the ECB may provide facilities and may make regulations to ensure efficient and sound clearing and payment systems within the Union and with other countries.

Article 23 of the ESCB Statute provides that the ECB may, inter alia, establish relations with central banks and financial institutions in other countries and may conduct all types of banking transactions in relations with third countries.

5.3 Advantages of using ECB infrastructure

There are a number of advantages to this type of mechanism using euro-denominated transactions through the ECB.

First, the ECB is a subject which is significantly far from the reach of US sanctions. Not only is the ECB an institution of the EU with legal personality, but its officials also enjoy the full range of immunities granted to employees of international

organisations. Being a potential subject of US sanctions would not have substantial consequences considering the ECB's limited direct interests in the US.

Second, this mechanism would foster trust between EU operators and EU banks to deal with targeted countries. EU banks would transfer the payment from the EU importers, and receive the payment for EU exporters, directly to/from the ECB. EU banks would be reassured to deal directly with another bank, the ECB, which is familiar to them and which they can trust. The outside balance would be achieved between central banks.

Finally, the governments of the Member States, possibly after having received the necessary re-assurances from the banks concerned, could act as guarantors for the transaction to the ECB, to compensate its potential imbalance – always in euro – thus preserving the integrity of its budget and its autonomy.

Part 6
Transparency, confidentiality, and exchange of information between authorities


of Auditors is entitled to audit at the level of the ECB.
Christian Kroppenstedt
Päivi Leino-Sandberg
Frank Elderson
Francesco Martucci

Transparency, confidentiality and the exchange of information between authorities: an introduction

Christian Kroppenstedt[1]

Like the other EU institutions, the European Central Bank (ECB) is required to act within the limits of the powers conferred on it under the Treaties and in conformity with the procedures, conditions and objectives set out in those Treaties.

Those conditions and objectives include the principle of transparency as enshrined in Article 15 of the Treaty on the Functioning of the European Union, the obligation to comply with rules on confidentiality and the need to participate in the exchange of information. The scope of each of these elements and, in particular, their interaction with each other, have to be assessed in the specific context of the ECB and on a case-by-case basis.

The principle of transparency and the conditions under which it applies to the ECB reflect the specific nature of the ECB's tasks and its institutional set up. The ECB is only subject to the general rules on public access to documents in respect of administrative tasks. With regard to non-administrative tasks, such as its monetary policy role, the ECB is able to establish specific rules governing access to its documents, in part with the objective of allowing the necessary space to ensure proper decision-making. There have been a number of court cases where the ECB's decision not to provide access to documents has been challenged and some cases are currently pending. The judgments of the Court of Justice of the European Union in such cases have considerably improved the understanding of the conditions and limits that apply to the ECB's public access regime.

As far as confidentiality is concerned, the ECB is subject to the obligation of professional secrecy and prevented from disclosing any information which is covered by this obligation. The question of if and when information ceases to be covered by this obligation should be examined on a regular basis. In some cases it may be decided that the obligation is absolute and there is no scope for balancing it with the principle of transparency. This does not apply to the sharing of information in the context of the principle of loyal cooperation. Insofar as information is shared in the exercise of the duty of loyal cooperation and there is a need-to-know justification, confidential information can be shared, provided that the receiving party ensures that it is kept confidential.

The Article of the EU Treaty which establishes the principle of conferral of limited powers also establishes the principle of mutual sincere cooperation. The ECB does not act in isolation when it exercises its powers but cooperates with other public

[1] Deputy Director General Legal Services, European Central Bank.

bodies at EU and national level for the purpose of achieving its objectives. The Treaties contain several provisions setting out this principle in relation to the ECB. The principle of sincere cooperation also has its limits – i.e. a refusal to cooperate would be justified for legitimate reasons such as protecting the rights of third parties or the risk that the functioning or independence of the ECB could be hindered – and such limits may also depend on which of its powers the ECB is exercising. The principle of sincere cooperation should also not lead to the ECB's competences and responsibilities being blurred or mixed with those of other public bodies at EU and national level. In any event, and with due respect for the principle of independence, this principle of cooperation does not allow the ECB to enter into ex ante coordination.

Part 6 examines a number of specific aspects of these matters.

Professor Päivi Leino-Sandberg addresses public access to ECB documents, asking whether accountability, independence and effectiveness are an impossible trinity. She challenges the ECB's existing accountability arrangements as being too limited, particularly in view of the number of additional tasks which have been transferred to the ECB, and argues that there is a need to go beyond the formal accountability requirements laid down in the Treaties.

Frank Elderson examines the exchange of documents between the European System of Central Banks and national authorities: between transparency and independence. Based on his own experience as an Executive Director at De Nederlandsche Bank, he concludes that the practice of national parliaments to be rather restrained in requesting documents from their national central banks in the exercise of the monetary policy function or from the ECB has changed with the transfer of supervisory competences to the ECB. Given the differences between the two policy areas, a different approach to transparency – i.e. being more transparent – should be considered.

Finally, Professor Francesco Martucci considers the relationship between the European Court of Auditors (ECA) and the European Central Bank: a challenge for loyal cooperation. He concludes that the recent conclusion of a Memorandum between the ECB and the ECA regarding audits on the ECB's supervisory tasks is good proof of how the principle of loyal cooperation can be successfully exercised in practice.

Public access to ECB documents: are accountability, independence and effectiveness an impossible trinity?

Päivi Leino-Sandberg[1]

1 Introduction

The title given today is something that I return to with great pleasure. The accountability of the ECB was the topic of my Master's thesis that I wrote in the very early days of the ECB operations, and finished in the spring of 2000. The thesis was subsequently published, and became my first article.[2] The question then was less about public access to documents, as not even Regulation 1049/2001[3] existed at the time, but more broadly about whether and how independence and accountability could be reconciled, and whether the various accountability structures created for the ECB were satisfactory.

In 2000, the question of a new central bank, entrusted with exceptionally hard-coded independence, was something that provoked a great deal of constitutional concern in many Member States, including my own.[4] There was a strong conviction that the bank indeed needed to be independent [5] and that it should have "a clear mandate, which is directed primarily at the objective of ensuring price stability".[6] The ECB's independence is not absolute, it is granted for a reason, to protect the integrity of its monetary policy.[7] Independence is not intended to shield the ECB as an institution as such, and does not "separate it entirely from the EU and exempt it from every rule of EU law". The ECB is subject to "review by the Court of Justice and control by the Court of Auditors",[8] and operates under various reporting requirements to the Union's political institutions.

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1 Professor of Transnational European Law, University of Helsinki. I thank Tuomas Saarenheimo for comments on an earlier draft.

2 Leino, P. (2000), "The European Central Bank and Legitimacy – Is the ECB a Modification of or an Exception to the Principle of Democracy?", *The Jean Monnet Working Papers* 11.

3 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

4 On this, see also Leino, P. and Salminen, J. (2013) "Should the Economic and Monetary Union be democratic after all? Some reflections on the current crisis", *German Law Journal,* No 7, pp. 844-868.

5 Case C-62/14, *Gauweiler and Others v Deutscher Bundestag*, EU:C:2015:400, para. 40; Case C-11/00, *Commission v ECB*, EU:C:2003:395, para.134. On independence more recently, see Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Latvia*, EU:C:2019:139.

6 Case C-62/14, *Gauweiler and Others v Deutscher Bundestag*, EU:C:2015:400, para. 44.

7 Case T-251/15, *Espírito Santo Financial (Portugal) v ECB,* EU:T:2018:234, para. 76; building on (see, to that effect, judgment Case C-11/00, *Commission v ECB*, EU:C:2003:395, paras. 130, 131 and 134).

8 Case C-11/00, *Commission v ECB*, para. 135.

At the same time, the concern raised was the mechanisms of accountability might prove unsatisfactory, even if the focus then was on the way the ECB would use the conventional means of monetary policy and interpret price stability. Had we known then what the new central bank would be called to do, and the central role it would play in deciding the fate of nations and tackling the existential questions of the Eurozone, the concerns would have probably been greater. Whether the ECB's accountability structures work is relevant not only for the EU level but also because ECB operations affect national accountability structures. As the Court recently noted, the two legal orders are particularly integrated in the area in which the ECB operates, offering the ESCB a "hybrid status".[9]

I have been asked to address different but intertwined issues: public access to ECB documents, accountability, independence and effectiveness, with a question of whether these constitute an impossible combination. My starting point is that independence has never excluded checks and balances. In democratic societies, no institution can be absolutely independent and unconstrained.

While in the course of everyday business, independence and accountability often appear as contradictory goals, in a deeper sense, I see their relation as symbiotic. It is specifically because of its hard-coded independence that the ECB needs effective checks and balances through accountability structures. Accountability exists to defend the ECB's independence. Without visible and convincing accountability structures, the ECB's use of its powers would eventually lose its legitimacy and its independence would be increasingly questioned. It is strongly in the interests of the ECB to be – and to be perceived as being – accountable. Accountability is "a very evocative word, and it is one that is easily used in political discourse and policy documents, because of the image of transparency and trustworthiness it conveys. 'Accountability' and 'accountable' have strong positive connotations; they hold the promise of fair and equitable governance."[10]

For assessing accountability, I use Bovens' well-known description of accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences".[11] For a highly independent institution such as the ECB, any *consequences* are indirect. There is no expectation that it would face direct, real-time consequences (such as replacement of its leadership) as the result of political or popular concerns – that would be contrary to the very definition of independence. But were it to be perceived to be repeatedly careless about the limits of its mandate, giving rise to widespread popular

9 Joined Cases C-202/18 and C-238/18, *Ilmārs Rimšēvičs and ECB v Latvia*, paras 69-70.

10 Bovens, M. (2010),"Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism", *West European Politics*, Vol. 33, No. 5, pp. 946-967, p. 948.

11 ibid., p. 951.

discontent,[12] the political organs in charge of its mandate would have a hard time to ignore this in the context of the next Treaties change.

Changing the Treaties is of course a hugely complicated process, not something that would be done solely to amend the ECB's mandate, which makes the ECB's independence far more deeply constitutionalised than that of other central banks. But this does not mean that the ECB is entirely untouchable, or should not include a certain degree of responsiveness in its policies. This responsiveness clearly does not entail rights of participation similar with those that the Treaties and Court jurisprudence require the Union's political institutions to comply with – this is specifically what the ECB's independence is about. For this reason, also the function of public access rules is somewhat different in relation to the ECB when compared with institutions engaging in legislative activities.

Many of the ECB's accountability arrangements were designed for an institution with a far narrower role than the ECB has today. After its inception, the ECB has received a number of additional tasks that are not directly about price stability.[13] This has revived the debate about whether the existing accountability arrangements are satisfactory. This paper argues that there is a need to go beyond the formal requirements of the Treaties and assess the accountability and transparency requirements of each of the two ECB's current roles individually. Different roles should lead to different assessments.

This paper aims to make visible the ECB's policy on public access to documents and transparency, on the one hand, and accountability, on the other hand, and how this policy, reflected in institutional practices, compares with more general understandings of the two concepts. First, I will focus on public access to documents. My examination is mainly technically legal and is based on the legal framework and the jurisprudence applying it. Building on these findings, I will then discuss the function of transparency in ensuring accountability in relation to some of the ECB's new tasks: tasks in the Single Supervisory Mechanism and the debate surrounding the letters sent to a number of euro area prime ministers in the context of the ECB's ELA decisions. These cases help to demonstrate the broader point of why it is important that independent organs have – despite their independence – structures that ensure their accountability.

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12 An indication of such discontent could be the challenges to ECB measures, which have been brought through national constitutional courts, bringing together several groups of individuals, including a group supported by more than 11 000 signatories, claiming that the ECB is acting ultra vires and threatens key principles of democracy. See Case C-62/14, *Gauweiler and Others v Deutscher Bundestag*; Case C-493/17, *Weiss and Others*, EU:C:2018:1000. While these cases indicate that judicial review of these types of decisions remains limited, they do demonstrate that there might be other reasons for the ECB to remain within the constraints of its mandate.

13 On less conventional ECB measures, see also Leino-Sandberg, P. and Saarenheimo,T. (2014) "Euroopan keskuspankki ja euroalueen kriisi – olisiko määrällinen keventäminen yhteensopiva EKP:n mandaatin kanssa?" (The European Central Bank and the euro area crisis – would quantitative easing be compatible with the ECB's mandate?'), *Lakimies* No 7–8, pp. 1066–1077.

2 Public access to documents

2.1 ECB public access regime

When public access to ECB documents is discussed, the usual argument goes as follows: while Article 15(3) TFEU exempts the ECB, the ECB has been generous and provided some access from the early days by adopting Decision ECB/2004/3,[14] which in fact makes it more transparent than the Treaty requires.[15] The ECB's website assures that the Bank "gives a high priority to communicating effectively with the public". In its view, transparency helps the public to understand the ECB's monetary policy, which in turn makes monetary policy more credible and effective. Transparency means that the ECB explains how it interprets its mandate and that it is forthcoming about its policy goals.[16] Statements such as these have a clear objective: to explain that the ECB is forthcoming about public access and acknowledges its positive potential.

At the same time, this description gives the impression, confirmed in previous research, that the ECB understands transparency primarily as communication.[17] It leaves the ECB in charge of what becomes publicly available and when. Following this understanding, the main function of transparency is to support the effectiveness of monetary policy. Such an approach reduces transparency essentially to a public relations exercise. It has little to do with the right of public access as a fundamental right (Article 42 Charter of Fundament Rights of the European Union (CFREU)), or with the purpose of openness provided for in Article 15(1) TFEU), and further clarified in the preambles to Regulation 1049/2001 and the ECB's own public access Decision ("openness enhances the administration's effectiveness, legitimacy and accountability, thus strengthening the principles of democracy").[18]

Under Article 15(1) TFEU, all EU institutions are to operate "as openly as possible". Keeping in mind the exception in Article 15(3) TFEU, how free is the ECB to settle its own disclosure policies? The argument made here is that Decision ECB/2004/3 is not in line with the general objective of "as openly as possible", nor does it lay a ground for a public access or transparency policy. Instead, the ECB has a confidentiality policy. While ECB statements make rhetorical references to transparency, both its legal framework and its implementation provide evidence of

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14 Decision of the European Central Bank of 4 March on public access to European Central Bank Documents (ECB/2004/3) (OJ L 80, 18.03.2004, p. 42).

15 This is also noted by the Court in Case T-116/17, *Spiegel-Verlag and Michael Sauga v the European Central Bank*, EU:T:2018:614, para. 21.

16 European Central Bank, "Transparency" available at www.ecb.europa.eu/ecb/orga/transparency/html/index.en.html

17 Curtin, D. (2017), "'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency", *European Law Journal*, Vol. 23, No 1-2, pp. 28–44, at p. 34.

18 In fact, there have been hostilities in the ECB towards understanding public access as a fundamental right. See Joined Cases T-3/00 and T-337/04, *Athanasios Pitsiorlas v the Council and the ECB*, EU:T:2007:357. Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2015/1) (OJ L 84, 28.3.2015, p. 64).

"the enduring importance of secrecy both in daily practice and as an idea".[19] In reality, public access to ECB documents is entirely exceptional. Under its public access rules nearly everything that concerns the ECB's key tasks or that might be of some interest for the general public is categorically confidential. The little transparency there is, it is not a result of the implementation of a right of public access, but a strategic choice by the ECB based on the expectation that selective disclosure will support its own policy goals.

The ECB Rules of Procedure[20] address confidentiality of and access to ECB documents, with emphasis on the former. Under Article10.4 of the ESCB Statute, the proceedings of the decision-making bodies of the ECB are confidential but under Article 23 of the Rules of Procedure, the Governing Council may decide to make the outcome of its deliberations public. Article 23 also provides a legal basis for Decision ECB/2004/3. Further, Article 23.3 specifies that all ECB documents are to be classified and handled in accordance with the organisational rules regarding professional secrecy and management, and confidentiality of information.[21]

In Article 23a on "Confidentiality and professional secrecy regarding the supervisory tasks", the ECB Rules of Procedure require members of the Supervisory Board, of the Steering Committee and of any substructures established by the Supervisory Board to comply with professional secrecy requirements. Article 23a defines all documents drawn up by these supervisory bodies as ECB documents and thus classified and subject to the rules provided under Article 23.3. These rules do not reflect the exception granted in Article 15 TFEU nor they take into account that the recently granted supervisory tasks of the ECB differ in nature from the ECB's monetary policy responsibilities.

Detailed rules on public access to documents are included in the Decision ECB/2004/3, the purpose of which is "to define the conditions and limits according to which the ECB shall give public access to ECB documents and to promote good administrative practice on public access to such documents". Thus, it is the ECB's own decision, adopted under Article 12.3 of the Statute, which gives the Governing Council the power to adopt Rules of Procedure that "determine the internal organisation of the ECB and its decision making bodies". The scope of the Decision ECB/2004/3 clearly reaches beyond questions of internal organisation, and regulates what the CFREU clearly defines as an issue of fundamental rights. That a legal act not approved in a legislative procedure is used to settle and define how a fundamental right is applied is rare. Access to documents is not a technical issue. As Fenster puts it: "Divining when transparency must give way because disclosure

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19 Donaldson, M. and Kingsbury, B. (2013), "The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications", *Annual Review of Law and Social Science*, Vol. 9, pp.119-47 at p. 120.

20 Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33).

21 See the ECB's Confidentiality Regime, found in the Annex to the Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39) (OJ L 300, 18.10.2014, p. 57). All documents created by the ECB must be assigned one of the five security classifications: ECB-SECRET, ECB-CONFIDENTIAL; ECB-RESTRICTED, ECB-UNRESTRICTED or ECB-PUBLIC. The classification is further discussed in Curtin (2017).

would harm the public good is a complex task, one that leads to frustrating debates and ritualistic political and legal struggle over abstract democratic ideals and deeply held anxieties".[22]

The Decision ECB/2004/3 reflects, but is not identical to, Regulation 1049/200. It contains different, new exceptions compared to Regulation 1049/2001. This is not unusual. Moreover, new exceptions do not necessarily reduce transparency, and if sufficiently clearly delineated, they can add clarity and rigor to the application of the ECB's access policy. More than a hundred EU acts refer to Regulation 1049/2001, some with a simple reference confirming its applicability, others modifying its application in some way. In the latter group are in particular the founding regulations of many agencies.[23] However, all of these are exceptions approved by the EU legislature with the view of clarifying or adding exceptions that are relevant for the agency in question. Their effect is not to turn a public access instrument into an instrument of confidentiality.

This is, however, essentially what the Decision ECB/2004/3 does. It makes access so rare that the main rule of all documents being available to the public, and many of them being proactively disclosed, in Regulation 1049/2001 becomes the exception in the ECB decision. The latter makes a rhetorical reference to the EU's constitutional principles on openness, but no effort to apply them. There is little indication in Decision ECB/2004/3 that the different roles of the ECB as monetary policy maker, bank supervisor or the promoter of good economic policies are reflected in its transparency regime. Moreover, the differentiation between administrative and non-administrative matters in Article 15 TFEU is difficult to trace in the Decision ECB/2004/3.

Like Article 4 of the Regulation 1049/2001, Article 4 of the Decision ECB/2004/3 includes two types of exceptions: those that are mandatory and laid down in the first paragraph (i.e. the institution is under an obligation to refuse disclosure in case harm from the disclosure can be demonstrated to incur) and those that contain a public interest test that requires the institution to balance the possible harm with the public interest in disclosure, laid down in the second paragraph. Where disclosure of a document would undermine the protection of an interest in the mandatory list of exceptions, the institution shall refuse access to the document. Thus, the institution is only required to justify that the protection of the interest in question is undermined. If the applicable exception includes a public interest test, the institution must add a third stage to the evaluation, where it balances the interest, the protection of which could be undermined, against the public interest in disclosure.[24] The distinction between the two kinds of exceptions also affects the Court's standard of review. If the exception is mandatory in nature, the Court may restrict its review to verifying

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22 Fenster, M. (2017), *The Transparency Fix. Secrets, Leaks and Uncontrollable Government Information*, Stanford Law Books, p.11.

23 Korkea-Aho, E. and Leino, P. (2017), "Who owns the information held by EU agencies? Weed killers, commercially sensitive information and transparent and participatory governance" *Common Market Law Review*, Vol. 54, No. 4, pp. 1059–1091.

24 See Case C-39/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, EU:C:2008:374, paras. 37-44.

whether the procedural rules and the duty to state reasons have been complied with, whether facts are accurately stated and whether there has been a manifest error of assessment or a misuse of powers.[25] The exceptions that contain a public interest test require more balancing from the institutions and the decisions will come under stricter scrutiny by the Court.

In the Decision ECB/2004/3, the emphasis is on mandatory exceptions included in the first paragraph, which is heavily edited to reflect the ECB's own confidentiality concerns. Perhaps most importantly, compared to Regulation 1049/2001, it provides much stronger protection to the confidentiality of the ECB's decision making bodies and, consequently, to its internal documents. While the Regulation 1049/2001 allows refusing access to internal documents, this is only in the event disclosure would "seriously undermine the institution's decision-making process". [26] Even then, access could be allowed if there is an "overriding public interest in disclosure". In contrast, the Decision ECB/2004/3 elevates "the confidentiality of the proceedings of the ECB's decision-making bodies, the Supervisory Board or other bodies established pursuant to Regulation (EU) No 1024/2013" into a mandatory exception, alongside with public security and international relations, where there is a presumption of public interest in confidentiality. Unlike the Regulation 1049/2001, the Decision ECB/2004/3 does not require the demonstration of harm to decision making; nor does it include a temporal distinction between decisions that have already been taken and those that have not yet been concluded.[27] The paragraph also includes a number of new mandatory exceptions to those found in the Regulation 1049/2001.[28]

The second paragraph is identical to the one in Regulation 1049/2001, but the Decision ECB/2004/3 includes a third paragraph that addresses in particular documents "drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and NCBs, NCAs or NDAs". Thus, the scope of ECB confidentiality also reaches national competent authorities, reflecting the *hybrid status* of ECB decision making, as further explained below.

Unless disclosure is specifically authorised, under the ECB Rules of Procedure, ECB documents are not accessible until after 30 years.[29] In comparison, Council documents relating to legislative procedures are automatically disclosed after the

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25 Case C-266/05 P, *Jose Maria Sison v Council of the European Union*, EU:T:2011:687, para. 34.

26 See Case T-189/14, *Deza, a.s. v European Chemicals Agency*, EU:T:2017:4, paras. 172-173. When evaluating harm, the institution may also take into account whether the procedure to which those documents relate has been closed. Case C-506/08 P, *Kingdom of Sweden v European Commission and MyTravel Group plc*, EU:C:2011:496, para. 81.

27 Case T-798/17, *Fabio De Masi and Yanis Varoufakis v European Central Bank*, EU:T:2019:154.

28 Added exceptions include the internal finances of the ECB or of the NCBs; protecting the integrity of euro banknotes; international financial, monetary or economic relations; the stability of the financial system in the Union or in a Member State; the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions; the purpose of supervisory inspections; the soundness and security of financial market infrastructures, payment schemes or payment service providers; and the confidentiality of information that is protected as such under Union law.

29 Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) (OJ L 80, 18.3.2004, p. 33).

adoption of the act in question.[30] Against this background, 30 years seems a curiously long time – far exceeding the mandates of the members of the ECB's decision making bodies and what could reasonably be seen as necessary to protect their independence.

It is not only the exceptions and their nature that lean towards confidentiality in the Decision ECB/2004/3, but also many of its administrative provisions, which turn the ECB's mechanisms on public access reactive in nature. They trigger disclosure only upon a specific request by an information-outsider, who always faces the problem with prerequisite knowledge.[31] For this reason, Decision ECB/2004/3 cannot be treated as a proper public access regime. These problems derive largely from the differences between Regulation 1049/2001 and Decision ECB/2004/3 (See Section 2.3.).

2.2 Jurisprudence on public access

Despite the differences, the Court has confirmed the application of its general transparency case law concerning the Regulation 1049/2001 to the Decision ECB/2004/3: the strict interpretation and application of exceptions; that risk of undermining the interest must be reasonable foreseeable and not purely hypothetical, and that when applying a public interest exception, the institutions enjoy a wide discretion in protecting an interest that is "of a complex and delicate nature which calls for the exercise of particular care".[32]

This section focuses on the application of access to documents by the ECB from the perspective of existing case law. There is not much case law – around 15 cases of which a third are staff cases where members of the ECB staff have invoked public access provisions to gain access to documents concerning their own file.[33] This suggests that the ECB's rules on access to one's own file – a right protected under Article 41 CFREU – is not clearly secured by its current legal framework.

The cases on public access to ECB documents are interesting and develop the EU access to documents regime in significant ways. The classic example of this is Dufour[34], which related to staff records in a database, thus clearly not a question involving monetary policy making but administrative aspects. The question was whether they count as a *document* for the purposes of Regulation 1049/2001. For the Court, the medium of recording was irrelevant. Another interesting case is Gabi Thesing and Bloomberg Finance[35] where the Court very exceptionally engages in a lengthy discussion about the importance of Article 10 European Convention of

30 See Council Rules of Procedure, Annex II, Article 11(6).

31 Pozen, D. (2010) "Deep Secrecy", *Stanford Law Review*, Vol. 62, No. 2, pp. 257-339, at p. 324.

32 Case T-590/10, *Gabi Thesing and Bloomberg Finance LP v European Central Bank*, EU:T:2012:635.

33 See Case F-15/05, *Carlos Andres and Others v European Central Bank* (ECB), EU:F:2008:81; Case F-26/12, *Maria Concetta Cerafogli v European Central Bank* (ECB), EU:F:2014:218, Cases F-7/11 and F/60/11, *AX v European Central Bank* (ECB), EU:F:2012:195 and T-787/14 P*, European Central Bank v Maria Concetta Cerafogli*, EU:T:2016:633.

34 Case T-436/09, *Julien Dufour v European Central Bank*, EU:T:2011:634, paras 89-91 and 153.

35 Case T-590/10, *Gabi Thesing and Bloomberg Finance LP v European Central Bank*.

Human Rights and the general provisions of the CFREU, even though it ultimately was not convinced that these arguments amended its conclusions.

The case law circles around two themes. First, it has addressed the question of how much protection ECB decision making should benefit from. Second, cases have concerned the interpretation of the mandatory exceptions relating to the protection of the "financial, monetary or economic policy of the Union or a Member State", and the "stability of the financial system in the Union or in a Member State". In line with the ECB's choice to define (all) these key exceptions as mandatory, the Court has been limited, since a public interest examination and balancing has not been required. Case law is illustrative of how the ECB views the legal framework on public access to documents and beyond that, transparency, and its application and limits, but also suggests that many procedural rights falling under established EU administrative law remain unknown to the ECB. An overarching message from the Court has been its strong emphasis on the duty of reasoning. In Pitsiorlas[36] the Court emphasised that "whilst the context in which a decision is adopted may make the requirements to be satisfied by the institution as regards the statement of reasons lighter, it may, conversely, also make them more stringent in certain circumstances" (para 273). This message is often repeated in case law. The ECB had provided no reasoning in its denial decision, and provided one only after the action for annulment had been brought. The Court stressed that the reasons for a decision have to appear in the actual body of the decision. In particular, reasoning cannot be developed and explained for the first time ex post facto before the Court.

Hence, one of the lessons that the ECB has received in applying a public access regime was to give full consideration to the reasoning of its decisions. In addition, Pitsiorlas' case offers an example.[37] The matter related to the Base/Nyborg Agreement - not a single document but a set of reports and minutes of meetings of both the Committee of Governors and the Monetary Committee. The Court found the ECB Governing Council's reasoning lacking since the ECB had not based its refusal on any specific need nor explained its refusal. Instead, the ECB Governing Council had analysed the applicant's need to get hold of the documents requested and concluded that information made available was sufficient. In particular, there was no balancing of the applicant's interests against the public interest constituted by monetary stability.[38] Again, this indicates very limited understanding of how the EU's public access regime operates. Justification of the access request is never a requirement (not even in the Decision ECB/2004/3), and thus the institution is not expected or even allowed to assess why disclosure is being requested. Instead, the institution should only assess the harm of disclosure.

A general feature of much of the Court's recent case law on Regulation 1049/2001 has been discussion about public interest. In the ECB jurisprudence this discussion is absent for the simple reason that it hardly ever invokes exceptions that would

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36 Joined Cases T-3/00 and T-337/04, *Athanasios Pitsiorlas v Council of the European Union and European Central Bank*, EU:T:2007:357.

37 ibid.

38 ibid., paras 269-271.

require balancing public interest. De Masi and Varoufakis v ECB is in this respect a rare case since it concerned the external legal advice that the ECB was claimed to have relied on prior to its decisions on the granting of emergency liquidity by the Greek Central Bank to Greek banks.[39] The ECB had relied on two exceptions, legal advice protected by Article 4(2) and Article 4(3). In jurisprudence, the existence of a public interest has proved impossible for applicants to demonstrate beyond the legislative context,[40] and it was not easier for the applicants in this case: the Court confirmed again that it is indeed up to the applicant to demonstrate the existence of concrete facts that an overriding public interest in disclosure could be built on. The Court rejected the claims of the applicants relating to a public interest in ensuring the legality of ECB measures and accepted that disclosure of the document would weaken the *space to think* and thus jeopardise the independence of the members of the ECB's Governing Council. An appeal is pending.

Confidentiality of ECB deliberations

Much of the case law has related to the confidentiality of ECB decision making, which has been categorically defined in the legal framework described above. However, case law highlights that this limitation is not absolute but limited in particular by its duty to reason and explain its decisions. Given the wide discretion enjoyed by the ECB as regards the mandatory exceptions and the subsequent limited scope of the review conducted by the EU Courts, "the ECB's compliance with its obligation to provide a statement of reasons in relation to those exceptions takes on even more fundamental importance".[41] While the ECB has claimed strong confidentiality, often backed up by the wording of its legal regime, it has failed on procedural grounds and, as a result, has seen several decisions annulled by the Court (see below). More recently, there are cases where the Court has engaged in a lengthy exploration of the reasoning of the ECB, accepting that its reasoning in access to documents cases need not reach the level of scientific opinions. It was enough if the reasons provided were "*claires and non équivoques. En particulier, elles permettent de comprendre de quelle manière l´accès aux documents litigieux pourrait concrètement et effectivement porter atteinte à l'intérêt protégé par une exception*".[42]

The case law relating to confidentiality of decision making needs to be viewed against the Governing Council's proclaimed intention to broaden transparency of its

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39 Case T-798/17, *Fabio De Masi and Yanis Varoufakis v European Central Bank*.

40 Curtin, D. M. and Leino-Sandberg, P. (2016), "Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis". *Robert Schuman Centre for Advanced Studies Research Paper* No. 2016/63; Wyatt, D. (2019)."The Anaemic Existence of the Overriding Public Interest in Disclosure in the EU's Access to Documents Regime" *German Law Journal* (forthcoming).

41 Case T-251/15, *Espírito Santo Financial (Portugal), SGPS, SA v European Central Bank*, EU:T:2018:234. See also Case T-376/13, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v European Central Bank* (ECB), EU:T:2015:361.

42 Case T-116/17, *Spiegel-Verlag Rudolf Augstein GmbH & Co. KG and Michael Sauga v European Central Bank*, paras. 73-74.

monetary policy decisions, declared in April 2014,[43] leading the ECB to provide anonymised, general descriptions of the decision-making that had taken place[44].This does not involve detailed account of the process (the positions and arguments taken by different members of the Governing Council during their discussions), but provides a fairly detailed account of the collective reasoning of the ECB, and to some extent also the different views expressed, in a non-attributed form.[45] As such, it is not about public access to documents but rather constitutes monetary policy communication.

As regards formal public access requests, I give the example the two Espírito Santo Financial Group (SGPS) cases[46] regarding certain documents relating to the ECB's decision of 1 August 2014 to suspend the access of Banco Espírito Santo (BES) to monetary policy credit instruments.[47] The ECB's reliance on confidentiality has been strong, which is demonstrated also by how it attempted to claim a general presumption of confidentiality for the minutes of meetings of the Governing Council.[48] The Court pointed out that the purpose of these presumptions has been to free the institution from to general duty to a specific individual examination of each document. Since the ECB had provided partial access, it had examined the documents, and was also required to provide specific justification. Much of the Court's criticism was directed at how the Bank had applied partial access.

The Court accepted that access to the minutes of meetings of the Governing Council may be refused. However, Article 10.4 of the Statute does enable the Governing Council to make the outcome of its deliberations public. As a consequence, its decisions do not enjoy absolute protection. The Court built heavily on the claimed objective of Decision ECB/2004/3 to make ECB documents as widely available to the public as possible and the duty to interpret and apply exceptions narrowly. As a result, the Court refused to offer full confidentiality protection to either the outcome of ECB decision making or the minutes recording them.[49] An appeal is pending.

The ECB had also claimed that as the requested documents related to internal consultations between the ECB and Banco de Portugal, they fell under Article 4(3)

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43 "Monetary policy communication in turbulent times". Speech by Mario Draghi, President of the ECB, at the Conference De Nederlandsche Bank 200 years: Central banking in the next two decades, Amsterdam, 24 April 2014, available at http://www.ecb.europa.eu/press/key/date/2014/html/sp140424.en.html

44 ibid.

45 Curtin (2017).

46 Case T-251/15 and T-730/16, *Espírito Santo Financial Group v the European Central Bank*, EU:T:2019:161.

47 Even though the case was brought under the public access regime, it was in practice a privileged access case, since SGPS was one of the key shareholders in BES. Of an interest for the application of Regulation 1049/2001 in general was the Court's acceptance that the fact that the ECB had failed to reply to the confirmatory application within the time limit could constitute a negative reply that can be challenged presuming that the applicant still has an interest in the measure. However, the ECB later approved an express decision, by which it de facto withdrew the implied decision. The Court accepted that this turned the application for annulment of the implied decision inadmissible, since the express decision was adopted prior to bringing proceedings against the implied one.

48 Case T-251/15, *Espírito Santo Financial (Portugal) v ECB*.

49 Case T-251/15, *Espírito Santo Financial (Portugal) v ECB*. The same is also visible in Case T-251/15 and T-730/16 *Espírito Santo Financial Group v the European Central Bank*, paras 56-61. An appeal is pending Case C-396/19 P, *ECB v Estate of Espírito Santo Financial Group*.

Decision ECB/2004/3. Disclosing this information would "affect the ability of ECB staff to freely submit uncensored advice to the ECB's decision-making bodies, thus limiting the ECB's 'space to think', and also undermine the potential for an effective, informal and confidential exchange of views within the decision-making bodies". In the Court's view, the ECB should have granted partial access by blanking out the passages and reminded that a decision refusing access can (as has indeed been the standard practice in other institutions) be based on several exceptions. Moreover, its reasoning was lacking, which had also been specifically pointed out by the applicant. Overall, the case indicates a strong willingness from the Court to find some ways of constraining confidentiality.

Application of the public interest exceptions relating to financial, monetary or economic policy and the stability of the financial system

Another significant strand of this case law relates to the application of public interest exceptions; after all, the exceptions that are mostly relevant for the ECB all fall under Article 4(1) Decision ECB/2004/3.

Gabi Thesing and Bloomberg Finance[50] concerns documents regarding the Greek debt and deficit, which the Court itself requested and examined.[51] What is interesting is the context and timing of the request. It was taken as a fact that data contained in the first document were outdated and only a snapshot of the factual situation. The risk of misleading the market was however considered a factor in favour of the application of the exception: after all, financial market participants "consider assumption and views originating from the ECB to be particularly important and reliable for assessing the financial market."[52] The Court referred to the "very vulnerable environment in which the financial markets found themselves at the time of adoption of the contested decision" and concluded that disclosure might have had negative consequences on access to the financial markets for Greece and thus affect the effective conduct of its economic policy and that of the Union.

The Versorgungswerk[53] case concerned an Annex to the Greece-ECB-euro area NCB Exchange agreement of 15 February 2012 under which the latter two exchanged their portfolios of Greek Government bond to newly issued Greek Government bonds. While the Court has generally been critical of the institutions' attempts to use hypothetical arguments, in this case the Court accepted that the ECB could base "itself on considerations which took account of hypothetical behaviour in which market participants might engage following disclosure of the information". The reasons given were "sufficiently specific to enable the applicant to

50 Case T-590/10, *Gabi Thesing and Bloomberg Finance LP v European Central Bank*.

51 The same two documents were also the subject of the *Spiegel-Verlag* case. Case T-116/17, *Spiegel-Verlag Rudolf Augstein GmbH & Co. KG and Michael Sauga v European Central Bank*, where the Court confirmed its earlier conclusion despite the time that had passed since the first cases.

52 Case T-590/10, *Gabi Thesing and Bloomberg Finance LP v European Central Bank*, para 56.

53 Case T-376/13, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v European Central Bank.*

challenge their correctness and the Court to conduct its review, the general nature of the ECB's statement of reasons is justified by the concern not to reveal information which is sought to be protected under the exception relied upon" (para 55).

The Court again referred to the practice of marked participants to use the information disclosed by central banks in the Espírito Santo Financial Group (SGPS) case.[54] Novo Banco was created as part of the procedure for the resolution of BES when a number of assets, liabilities, off-balance-sheet items and assets under management were transferred from BES. The pending sale of BES was especially important for the stability of the financial system in Portugal and as such was likely to have repercussions on Portugal's public finances and on the Portuguese banking system. Thus, the Court accepted the ECB's argument that it was foreseeable that disclosure of the ceiling for the provision of emergency liquidity was likely "to open the door to speculation by market participants", "generate unwarranted funding pressures" and thus have a negative impact on its sale process, making the exception in principle applicable. However, the essential content of the information had been made public two years earlier, in this case through public disclosure by Banco de Portugal of the approximate amount of credit granted to BES by the Eurosystem. Whether the ECB had been consulted prior to this disclosure was irrelevant, keeping in mind the vital role of Banco de Portugal in protecting the stability of the country's financial system.

2.3 Application of rules by the ECB beyond decisions that have been challenged in the Court

A final deficiency in the ECB's regime when compared to Regulation 1049/2001 relates to its administrative provisions, which would be needed to open the ECB's data management and public access policies to public scrutiny. While the Decision ECB/2004/3 does set up a two stage administrative procedure for applying documents (which is more than the Court of Justice of the European Union (CJEU) has), we do not know how it has been applied.

One missing element is Article 17(1) of Regulation 1049/2001, which places each institution under an obligation to produce an annual report "including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register". Issuing such a report is clearly an administrative task – thus it is difficult to see how Article 15(3) TFEU would liberate the ECB from producing one. As things stand, we do not know when information is provided or refused and on which grounds, nor do we know how large a percentage of its denials have been challenged in the Court or before the Ombudsman. This is information that the other EU institutions make available in their annual reports and is intended to provide grounds for an analysis of whether the institution's policies are experienced as legitimate. Lack of public information of this kind makes the evaluation of the ECB's public access policies impossible.

[54] Cases T-251/15 and T-730/16, *Espírito Santo Financial Group v the European Central Bank*.

Another clear difference between Regulation 1049/2001 and the Decision ECB/2004/3 is that the latter is careful in not laying the ECB under any obligation to maintain a register. In comparison, Article 11 of the Regulation 1049/2001 establishes that for the purpose of making "citizen's rights effective", each institution is to provide public access to an electronic register of documents where references are to be recorded without delay. For each document the register is to contain a reference number, the "subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register".

The ECB announced in its 2018 Annual Report that as part of its commitment to openness and transparency, it has now decided to establish a Public Register of Documents, which will be "gradually enhanced and complemented to provide the general public and markets with user-friendly access to documents on the ECB's policies, activities and decisions in a structured and easily retrievable manner".[55] While this is a good intention, implementation has been slow. Currently the register contains five other than administrative documents released under the public access regime: a letter from the ECB's President Trichet to Ireland's Minister from 2008; the text of a TARGET 2 agreement; excerpts of an ECB guideline from 1998; another Guideline also from 1998; and a 1999 Decision on the ECB Annual Accounts.

While also the public registers of the European Parliament and the European Commission are clearly below an acceptable standard, the ECB nevertheless continues to operate below the standard set in Regulation 1049/2001: a register containing references to all documents that it possesses. In this sense, the ECB information is covered by deep secrecy: we do not know what we do not know since most of the information in its possession is of a kind where we are not even aware of its existence.[56] In comparison, the Council's register is an example of shallow secrecy: while comprehensive, it includes references to a number of documents that are not public; these represent shallow secrets. The difference between shallow and deep secrecy is fundamental: "if those unknown-unknowns could be identified, by this very identification they would become shallow secrets, and we could, in theory, demand their publication".[57] As Pozen argues, "[t]here are many ways to reduce the depth of state secrets without spilling their contents to the wider world".[58]

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55 European Central Bank (2019), "Annual Report 2018", available at https://www.ecb.europa.eu/pub/annual/html/ar2018~d08cb4c623.en.html#toc55

56 Pozen (2010), p. 257.

57 Koivisto, I. (2016), "The IMF and the Transparency Turn", *Minnesota Journal of International Law*, Vol. 25, No 2, pp. 381-420, at p. 419.

58 Pozen (2010), p. 262.

3 Transparency, accountability and the ECB's new tasks

3.1 ECB Banking Supervision, transparency and accountability

Since the introduction of the plans for a single supervisory mechanism, there have been concerns about how the task fits in the ECB's institutional structure and should be positioned in relation to its institutional independence, keeping in mind that the task is not about monetary policy. The Single Supervisory Mechanism (SSM) Regulation intends to build a firewall between these tasks. Its preamble stresses how the objectives are different, and how "the exercise of the tasks conferred by this Regulation is fully subject to democratic accountability and oversight". [59] The ECB's accountability for its banking supervision tasks is subject to a specific regime set down in the SSM Regulation: the Chair of the Supervisory Board attends regular hearings and exchanges of views in the European Parliament and the Eurogroup. In addition, there are the usual options of written questions and the ECB Annual Report. These obligations are further clarified in an Interinstitutional Agreement between the European Parliament and the ECB[60] and a Memorandum of Understanding between the Council of the EU and the ECB.[61] At the same time, banking supervision is an area with hybrid decision making structures creating challenges to administrative, political and judicial accountability, which also underlines the need of functioning transparency arrangements.

As far as the ECB public access regime is concerned, it does not reflect the different characters of monetary policy and supervisory tasks. Its confidentiality regime seems exactly the same, including rules on classification.[62] Yet, these the two ECB's functions are fundamentally different, as are the considerations related to confidentiality. For example, the two functions use very different information sets and their decisions have a different scope. In the area of monetary policy, the ECB works primarily on publicly available macroeconomic data and any decisions are, as the main rule, universally applicable. Confidentiality exists to protect decision makers from pressure, and independence requirements are strong and specifically established. In contrast, in the area of banking supervision, the SSM works on confidential, institution specific and business/market sensitive data, and takes bank-specific decisions. One would think two such different functions would merit different public access regimes.

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59 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, preamble para 65-66 (OJ L 287, 29.10.2013, p. 63).

60 Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism No 2013/694/EU (OJ L 320, 30.11.2013, p. 1).

61 Council of the European Union and European Central Bank (2013), "Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM)", available at www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf

62 See Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39), (OJ L 300, 18.10.2014, p. 57).

On its website, the ECB provides a list of supervisory data that it will make available at certain specified times. Beyond this, the ECB is silent on whether it has received requests for public access, and what documents may have been disclosed following such requests. No documents of this kind are visible in its document register. In case access has been denied, these decisions have not been appealed to the Court because in that case they would be visible in the Court's register. This also makes it difficult to debate the ECB's disclosure policy and its compliance with the accountability assurances described above.

This is particularly worrying considering how restricted many of the SSM accountability avenues continue to be, despite the specific provisions discussed in the beginning of this section. First, there is the discussion on interinstitutional access between the European Court of Auditors (ECA) and the SSM due to the emergence of disagreement between the ECA and ECB over the exact terms of the ECA mandate and right to access documents.[63] Second, the hybrid decision making structures and the limitations of judicial accountability at the national level in the context of its "hybrid" decision making structures have received attention in relation to acts that are prepared by national authorities, but ultimately adopted by the ECB. As such, they fall under exclusive CJEU jurisdiction.[64]

However, these structures also give cause to other transparency-related concerns. Civil servants from national financial inspection bodies act as members of EU decision making bodies, often resulting in conflicts between their obligations under national legislation involving e.g. reporting to the national parliaments or cooperation with the government. This is often presumed to conflict with their professional secrecy obligations under Article 339 TFEU, but also with the provisions in the ECB Rules of Procedure and the Decision ECB/2004/3. If the latter rules are given priority, this entails that the ECB decides unilaterally, based on a competence intended for its internal organisation, that affects the implementation of constitutional provisions and rights in Member States. While this might be difficult to challenge through a legal appeal, the question is whether it is appropriate for the ECB to adopt such provisions and whether its Treaties based independence in the area of monetary policy actually requires or justifies this, or whether its approach really is slightly *overkill*.

An example would be my own country, where access to documents is a constitutional right, and the Parliament enjoys strong prerogatives in EU decision making. The Finnish Parliament has been critical about the ECB's regulatory and decision making functions. Its technical regulation and guidance has a significant

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63 European Court of Auditors (2016) "Special report No 29/2016: Single Supervisory Mechanism - Good start but further improvements needed" at V, available at www.eca.europa.eu/en/Pages/DocItem.aspx?did=39744 – On access to evidence: European Court of Auditors (2018), "Special report no 02/2018: The operational efficiency of the ECB's crisis management for banks", at VII, available at www.eca.europa.eu/en/Pages/DocItem.aspx?did=44556.European Central Bank (2019), "Press Release of 28 August 2019: ECB and ECA agree Memorandum of Understanding", available at www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190828~549dd2c932.en.html

64 Case C-450/17 P, *Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank*, EU:C:2019:372, paras 45-46. See also Case C-219/17, *Silvio Berlusconi, Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia, Istituto per la Vigilanza Sulle Assicurazioni* (IVASS), EU:C:2018:1023, paras 58-59.

impact on national actors but takes place outside the regular channels of EU preparatory work where the Parliament enjoys established channels of influence. The Finnish Parliament has placed both Suomen Pankki – Finlands Bank and Finanssivalvonta under an obligation to actively develop procedures that ensure new ways of cooperation between the national parliament, government ministries and the regulated industry so that the relevant acts can be prepared with due regard to both requirements of confidentiality and publicity while the procedures are ongoing.[65]

This kind of discussion is something that should be taken seriously. A suspicion in national parliaments that the ECB's actions are unduly secretive will undermine their trust in its work. While similar hybrid decision making structures exist in other EU agencies, provoking discussions about the relationship between national transparency regimes and Article 339 TFEU, to my knowledge, banking supervision is the only area where this discussion has reached the level of Parliamentary committees and has also been a source of repeated criticism.

The SSM Regulation is strong on the rhetorical aspects of accountability, but relies mainly on reporting. Reporting obligations are indispensable, but as a channel of accountability, they have clear limitations. First, it is not trivial for the institution to specify in advance all the information that may be of interest to voters and lawmakers.[66] Nevertheless, more importantly, with reporting obligations, it is the institution itself that ultimately controls the content of the reporting. In order to be more effective, reporting obligations would need to be complemented with consultation requirements, where executive secret keepers must actively explain and defend their plans during the policy formulation window.[67] As far as the ECB is concerned, this has been deemed incompatible with the ECB's independence. However, keeping in mind the Court's statements about the purposes of ECB independence and their connection to monetary policy, the level playing field is not the same when discussing banking supervision. In fact, it is completely different.

This would also be a good reason to revise the public access regime laid down in Decision ECB/2004/3. As it stands, it does not make any effort to differentiate between the different categories of new exceptions, nor does it encourage rigorous considerations of the public interest applicable in each case. For example, it would seem that the public interest in disclosure differs between supervisory decisions, on the one hand, and monetary policy decisions, on the other. While the monetary policy is universally applicable within the euro area, and banks verifiably have access to ECB financing at equal terms, supervisory decisions are much more tailored and leave a lot of discretion to the supervisor in each case, raising the question of equality of treatment across banks. Hence, there is a clear public interest

65 Finnish Parliament (2014),Talousvaliokunnan Mietintö 12/2014: Eduskunnan pankkivaltuuston kertomus 2013, (TaVM 12/2014 vp - K 13/2014), available at www.eduskunta.fi/FI/vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=tavm+12/2014; Talousvaliokunnan Lausunto 16/2014: Valtioneuvoston selvitys EKP:n asetuksesta kehyksen perustamisesta yhteisen pankkivalvontamekanismin puitteissa tehtävälle yhteistyölle EKP:n ja kansallisten toimivaltaisten viranomaisten välillä sekä kansallisten nimettyjen viranomaisten (TaVL 16/2014 vp - E 32/2014 vp), available at www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=tavl+16/2014

66 Pozen (2010), p. 326.

67 Pozen (2010), p. 329.

to allow sufficient public access to supervisory documents so as to alleviate such concerns.

3.2 ECB letters to national governments

The changing public perception of the ECB's role during the crisis further complicates assessment of how the ECB's accountability operates. As the *last man standing*, it gained a near-mythological reputation, which gave rise to expectations of further "acts of courage" if the situation so requires. This also created a higher risk of overreach, and in my view, a higher need for outside scrutiny.

While monetary policy is generally conducted with a view of the euro area as a whole, one could argue that the crisis witnessed an *individualisation* of monetary policy decisions. This was particularly visible in the cases of letters by the ECB President to Italy, Spain and Ireland, but also the Emergency Liquidity Assistance (ELA) decisions on Greece and Cyprus. In the letter to Italy dated in August 2011, for example, the ECB called for a "comprehensive, far-reaching and credible reform strategy", and identified the elements needed for such a strategy.[68] In his letter to the Spanish Prime Minister Zapatero the same month, President Trichet listed various reforms relating to labour market, public finances and product markets, which the ECB Governing Council had deemed essential in restoring the "credibility of sovereign's signature in capital markets".[69] The letters received by the Irish Finance Minister are of the same character.[70]

The highly prescriptive character of these letters is remarkable. They did not stop at describing the desired outcome (e.g. sufficiently sound public finances or high quality of ELA collateral) but went on to define the precise means through which these outcomes were to be attained. In this way, the ECB ventured from the field of monetary policy deep into the sovereign decision making of the national governments, and it did so in matters of existential importance to individual countries. The context was dramatic, the stakes were high, and the ECB was acting under considerable pressure. All of the letters were treated as confidential, yet soon leaked.

In each of these cases, the issue was arguably about the application of the ECB's general policies in an individual case. In the case of Italy and Spain, the link to ECB policies was not explicitly mentioned, but the letters were generally understood as comprising the conditions under which the ECB would feel able to support the two countries through its Securities Markets Program. As for the Irish letters, the measures requested were more explicitly framed as the conditions under which the

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68 Corriere Economia (2011), "Trichet e Draghi: un'azione pressante per ristabilire la fiducia degli investitori", available at www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml

69 European Central Bank (2014) "Letter from Trichet and Fernandez-Ordonez to Zapatero", available at www.ecb.europa.eu/pub/pdf/other/2011-08-05-letter-from-trichet-and-fernandez-ordonez-to-zapateroen.pdf

70 The Irish Times (2014), "Jean Claude Trichet letter to Brian Lenihan", available at www.irishtimes.com/business/economy/jean-claude-trichet-letter-to-brian-lenihan-1.1989801.

ECB would continue to authorise the ELA provided by the Central Bank of Ireland to the country's troubled banks. They led to demands from the Irish Parliament's Banking Inquiry that Mr Trichet should appear before it to defend his actions. He declined, on the basis of the ECB being accountable to the European Parliament and not national parliaments.[71]

If there ever was a case where accountability considerations would justify a careful ex post evaluation of the actions of an EU institution, this was surely it. A variety of questions regarding the letters would deserve an answer. For example, what were the internal decision making processes leading to the letters? The formal policy decisions that the letters alluded to were for the Governing Council to take, so did the Governing Council actually discuss the issue and decide that these indeed were the conditions to be attached to its monetary policy decisions? There are also far more tangible questions of equality of treatment than with normal monetary policy decisions.

In retrospect, it is obvious that the ECB could have handled the disclosure episodes better. The European Ombudsman stated this clearly in the context of the Irish letters:

"The letter should clearly have been released much earlier. The economic crisis caused great hardship for the Irish people. The least decision-makers can do in such difficult times is to provide for maximum possible transparency when it comes to explaining actions that directly affect people's lives. The failure to release also provoked intense speculation about its contents which in turn impacted on the public and political debate not just about the financial crisis but also about the role of the ECB and other EU institutions in the determination of Ireland's economic welfare. It is hardly desirable that such an important debate should be shaped around the imagined contents of a letter. Citizens have a right to be told the truth no matter how unpalatable."[72]

The ECB's decision to publish the letter came only after fierce public debate, followed by a call by the European Ombudsman, together with three further letters forming part of the same correspondence, and an explanation published on its website.[73]

In general, transparency policies are introduced because they are believed to ensure accountability, participation, public trust, enhance governance and improve project design but also for their potential to bring an institution greater influence, prestige or

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71 The Irish Times (2015), Five questions for Jean-Claude Trichet when he visits Dublin", available at www.irishtimes.com/opinion/five-questions-for-jean-claude-trichet-when-he-visits-dublin-1.2191023

72 European Ombudsman (2014), "Press release No 22/2014: Ombudsman welcomes ECB decision to release 'Irish ECB letter'", available at www.ombudsman.europa.eu/en/press-release/en/58279. On the inquiry, see "Decision of the European Ombudsman closing the inquiry into complaint 1703/2012/(VIK)CK against the European Central Bank (ECB)", available at www.ombudsman.europa.eu/en/decision/en/54178. The Ombudsman has also conducted an inquiry relating to an ECB letter sent to the Italian Government: "Decision of the European Ombudsman closing his inquiry into complaint 2161/2011/ER against the European Central Bank", available atwww.ombudsman.europa.eu/en/decision/en/48704

73 European Central Bank, "Irish Letters", available at www.ecb.europa.eu/press/html/irish-letters.en.html

effectiveness.[74] However, when transparency policies fail, the outcome might be disastrous, and far from these desired outcomes. Deep, long-lasting secrecy is often difficult to maintain, and the more politically contested the matter is, the more secrecy turns into a tool with high potential political costs.[75]

It is generally known, though difficult to confirm, that the ECB received requests for public access in relation to the letters, and did not formally disclose them even in the case they were leaked, The late disclosure of the letters and their publication with lengthy explanations demonstrates the way in which the ECB seems to think of transparency mainly as a tool of credible performance through successful impression management.[76] At the same time, the Irish letters also demonstrate what happens when control over access and disclosure is lost. Sometimes transparency would bring about possibilities to learn from mistakes. Mistakes are humane, and when operating in uncertain conditions, also overreach happens, and may be understandable. If the ECB takes decisions that divide masses – and I argue that this may have happened during the crisis; an aspect usually not connected with central bank decision making – then the solution should be openness and responsiveness, not propaganda. Regarding the 2011 letter sent by the ECB to the Italian Government, and subsequently published in a major Italian newspaper, the European Ombudsman pointed out how she

"encourages the European Central Bank to continue to regard the disclosure of documents to the public and the reasoning of decisions refusing disclosure, not only as legal obligations, but also as opportunities to demonstrate its commitment to the principle of transparency and thereby to enhance its legitimacy in the eyes of citizens."[77]

In designing proper accountability structures it is of relevance to consider what the independence is aimed at protecting. The stronger the constitutional guarantees are, the more important it becomes that they actually produce the end result that they aim at attaining. Ultimately, accountability means that if something goes wrong in the institution, society has a possibility to react. Does the ECB's accountability deliver, and in fact operate in a manner that brings about the expected outcomes: a perception of the ECB as transparent and trustworthy?

The ECB seems to suffer from a very common European malady, the syndrome of infallibility. There seems to be a conviction that, for reasons of credibility, mistakes can never happen and, if they do, they can never to be admitted but need to be hidden and denied. Nonetheless, mistakes do happen and when they do transparency is not a risk, it is a damage limitation strategy. When transparency is

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74 Donaldson and Kingsbury (2013), p. 141.

75 On this, Fenster (2017), *The Transparency Fix. Secrets, Leaks and Uncontrollable Government Information*, pp. 171-172.

76 On this, see Koivisto I. (2016), "The Anatomy of Transparency: The Concept and its Multifarious Implications", No 9, *EUI Working Paper* 1, p. 16.

77 The Ombudsman has also conducted an inquiry relating to an ECB letter sent to the Italian Government. European Ombudsman (2012), "Decision of the European Ombudsman closing his inquiry into complaint 2161/2011/ER against the European Central Bank", available at www.ombudsman.europa.eu/en/decision/en/48704

created in an uncontrolled manner through leaks, it will be far more damaging to the credibility and perceived trustworthiness of the institution than an honest and open explanation. It will make visible things that we had not wished to see; it is closely bound to shame and embarrassment.[78] Transparency is an important prerequisite for accountability in the context of European governance, but never enough on its own, since it does not necessarily involve scrutiny.[79] Accountability involves providing an "explanation and justification of conduct—and not propaganda, or the provision of information or instructions to the general public" or "a monologue without engagement".[80]

4 "Den som är väldigt stark måste också vara väldigt snäll"[81]

That the ECB is a powerful institution was never in doubt. The Maastricht Treaty granted it great powers in the field of monetary policy and an exceptional degree of independence in using them. Nevertheless, over time, its powers have expanded beyond what the drafters of the Maastricht Treaty could foresee. This is partly because the ECB has received new duties, but mostly because the unprecedented context of the financial crisis led to the ECB assuming, essentially by default, the task of taking existential decisions on the survival of the euro area.

As Pippi Longstocking says, with great powers come great responsibilities. The ECB represents an extraordinary experiment in the delegation of powers from elected bodies to unelected civil servants. For that experiment to be successful, the ECB must, over and over again, convince the European public that it is acting in their best long-term interests, in a context where there is no shortage of political actors wishing to present the ECB as a group of technocrats, intoxicated by power and serving the interests of the privileged few.

Acting in a responsible manner is not an exercise in disciplined communication. It is an exercise in transparency and accountability. Monetary policy communication, however detailed and accurate, is not transparency. Regular hearings on supervisory measures before a Parliamentary Committee are not sufficient accountability. Transparency is about providing outsiders reasonable means of finding out what is happening inside the ECB, and how it is managing the inevitable trade-offs that the use of public power always entails. In addition, accountability is about allowing, and indeed encouraging, an open debate on these trade-offs, participating in this debate, and occasionally even admitting and learning from mistakes.

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78 On this, see Koivisto (2016), p. 17.

79 Bovens, M. (2007), "Analysing and Assessing Accountability: A Conceptual Framework", *European Law Journal*, Vol. 13, No 4, pp. 447–468, at p. 453.

80 ibid., p. 452.

81 "If you are very strong, you must also be very kind" - Pippi Longstocking,

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Exchange of documents between the European System of Central Banks (ESCB) and national authorities: between transparency and independence

Frank Elderson[1]

1 Introduction

The European Central Bank (ECB) and the national central banks (NCBs) of the Member States constitute the European System of Central Banks (ESCB).[2] Together this system carries out various tasks in view of its primary objective to maintain price stability.[3] Since its beginning the ESCB has operated in the spotlights. The attention of the public has intensified during the financial crisis that hit Europe over a decade ago. Both the Treaty on European Union and the Treaty on the Functioning of the European Union cater for a Union in which decisions are taken as openly as possible and as closely as possible to the citizen.[4] On the other hand the EU legal framework imposes the concept of central bank independence.[5] In short, this central bank independence reflects the generally held view that the primary objective of price stability is best served by a fully independent institution with a precise definition of its mandate.[6] At first sight the principles of transparency and independence seem to be at odds with each other. The focus of this paper is on the exchange of documents between ESCB and such national authorities and the impact of this exchange on the ability of national authorities such as parliaments, state auditors and courts to fulfil their mandate. How can this be reconciled with central bank independence?

I will conclude that transparency and dialogue with third parties could even enhance the confidence in the independence of the ESCB.

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1 Executive Director, De Nederlandsche Bank.

2 Article 282 TFEU.

3 Article 127 TFEU.

4 Articles 1 and 11 TEU and Article 15 TFEU: “The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.”

5 Article 130 TFEU.

6 ECB Convergence Report 2018.

2 Legal setting

2.1 Primary law – general principles

Various Articles in the Treaty on European Union and the Treaty on the Functioning of the European Union provide general principles of transparency and openness:

Article 1 TEU: "… in which decisions are taken as openly as possible and as closely as possible to the citizen."

Article 10 TEU: "… Decisions shall be taken as openly and as closely as possible to the citizen."

Article 11 TEU: "… The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society."

At the same time the EU legal framework imposes the concept of central bank independence:

Article 130 TFEU: "When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks."

2.2 Secondary law – no regime for ESCB (to some extent for SSM)

Apart from the general principles of transparency found in primary law, secondary Union law such as regulations and directives do not develop the general principles except to some extent in relation to the Single Supervisory Mechanism (SSM). The SSM Regulation[7] includes an accountability framework for the ECB and the national competent authorities (NCAs).

Most NCBs are also NCAs and as such part of the SSM. Hence, the accountability framework as laid down in the SSM Regulation applies to those NCBs that are also NCA. Chapter IV of the SSM Regulation sets down the accountability regime for the SSM.

[7] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, preamble para 65-66, (OJ L 287, 29.10.2013, p. 63).

Based on Article 27.2 of the Statute of the ESCB and of the ECB, the European Court of Auditors (ECA) may only perform audits on the operational efficiency of the management of the ECB. Article 20 of the SSM Regulation however states that the ECB is accountable to the European Parliament and that ECA will examine the operational efficiency of the management of the ECB, including the supervisory tasks conferred on it.

Article 21 of the SSM Regulation also provides for a certain accountability of the ECB vis-à-vis the national parliaments of Member States. Hence the SSM Regulation provides for ECB accountability in respect of the SSM that is threefold, namely accountability vis-à-vis (i) the European Parliament, (ii) national parliaments and (iii) the ECA.

With respect to the NCAs, the SSM Regulation merely states that the regulation is without prejudice to the accountability of NCAs to national parliaments in accordance with national law for the performance of tasks not conferred on the ECB by this Regulation and for the supervision of less significant institutions.

2.3 Case law

The legal regime for the exchange of information between the ESCB and other authorities is primarily governed by the principle of sincere cooperation as laid down in Article 4(3) TEU and developed by the Court of Justice of the European Union (CJEU) in its case law. In its Order in Zwartveld and Others[8], the Court of Justice ruled that Member States and Union institutions have mutual duties of sincere cooperation. The duty of sincere cooperation of Union institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Union law is applied and respected in the national legal system. This means that every Union institution, including the Commission, should produce documents to the national court and authorize its officials to give evidence in the national proceedings. Furthermore, national courts may seek information from the Commission and may contact the Commission to prevent conflicting decisions.[9] The duty of sincere cooperation is not unconditional. In its judgment in First & Franex, the Court of Justice set boundaries to the exchange of information under the duty of sincere cooperation.[10] In principle, the duty of sincere cooperation requires a Union institution to provide information to a national court as soon as possible, but refusal to provide such information can be justified by overriding reasons relating to

8 C-2/88- Imm., Zwartveld and Others, EU:C:1990:315.

9 C-234/89, Delimitis v Henninger Bräu, EU:C:1991:91.

10 C-275/00, First and Franex, EU:C:2002:711.

the need to avoid any interference with the functioning and independence of the Union or to safeguard its interests.[11]

According to Article 13 TEU the ECB is a Union institution. Since the duty of sincere cooperation applies to all Union institutions according to case law, the ECB is bound by this principle as well. This means national courts inter alia could request information from the ECB, and the ECB could be required to authorize officials to give evidence in legal proceedings before a national court. The case law referred to above relates to requests for assistance by a national court, but the principle could also be applied to other institutions which need the cooperation of the ECB to fulfil their mandate.

The ESCB is not a Union institution, nor are NCBs by itself a Union institution. However, the duty of sincere cooperation also applies to the Member States of the EU, and NCBs are bound by the duty of sincere cooperation as an extension of the Member States.

2.4 ECB Opinions

The ECB has published several opinions regarding draft national laws which touch upon access to ESCB information by state auditors. In these opinions[12] the ECB provided specific criteria to be taken into account in the national law in order to safeguard the institutional independence of the ESCB as referred to in Article 130 of the TFEU and Article 7 of the Statute of the ESCB and of the ECB:

(a) the scope of the audit should be clearly defined in the legal framework;

(b) the activities of an NCB's independent external auditors should not be prejudiced;

(c) the audit should comply with the prohibition on giving instructions to the NCBs and their decision-making bodies;

(d) the audit should not interfere with the NCB's ESCB related tasks; and

(e) the audit should be performed on a non-political, independent and purely professional basis.

[11] Case C-275/00, First and Franex, para. 49. In its judgment in Case T-353/94, Postbank v Commission, EU:T:1996:119, the Court of First Instance asserted that, while the interests of the Union qualify as overriding reasons, this is not necessarily the case for third party interests. There is no outright prohibition of transmitting business secrets to a national court. While transmission of business secrets requires certain safeguards, protection of these third party rights is in principle a matter for national courts. An institution may only refuse to share business secrets if this is the only way to safeguard third party interests.

[12] Opinion of the European Central Bank of 14 February 2011 on amendments to the Polish Constitution concerning adoption of the euro (CON/2011/9) and Opinion of the European Central Bank of 26 October 2018 on the legal framework of the State Audit Office (CON/2018/45).

The criteria above relate to the ESCB tasks. With regard to the SSM tasks in particular, the ECB opinions[13] have stated that audits of a state auditor should:

(a) not extend to the application and interpretation of supervisory law and practices in the context of the SSM;

(b) not interfere with and not include the tasks conferred on the ECB by the SSM Regulation, and

(c) not extend to result in an indirect audit of the ECB.

In the following paragraphs, examples from practice will be discussed. The principles and criteria from primary and secondary law, case law, and the ECB opinions will be compared with the practical application by the ECB and various European and national institutions.

3 Examples from practice

In addition to the concepts of transparency and accountability vis-à-vis the general public there are institutions in Member States that have legal frameworks which cater for interaction with NCBs. Think of institutions such as state auditors, parliaments and national courts. How can these institutions be allowed to fulfil their mandate? First, the relation between the ECB, the ECA and state auditors will be discussed. Then the exchange with the European Parliament is compared to the exchange with national parliament, and finally the relation with national courts will be set out.

3.1 Relationship with European and national auditors

When it comes to interaction between the ECB, the NCBs on the one hand and auditors on the other hand, be it the ECA or state auditors, we enter a highly political arena.

3.1.1 European Court of Auditors

When it comes to the ECB the ECA has limited powers since Article 27.2 of the Statute of the ESCB and of the ECB states that the ECA´s audit powers are limited to the examination of the operational efficiency of the management of the ECB. Since the Statute of the ESCB and of the ECB is a Protocol to the Treaties this is part of the Union legal framework.

“We are not seeking to audit monetary policy,” said Klaus-Heiner Lehne, the President of ECA. “But it is essential that we have full powers to audit the ECB’s supervisory activities. This is particularly important given the high risks to public

[13] Opinion of the European Central Bank of 13 December 2016 on the auditing of Banka Slovenije’s business operations (CON/2016/59).

funds from banking failures and the complexity of the new supervisory mechanisms."[14]

Given the current legal framework and the fact that the Treaties have not changed with the introduction of the SSM this is a rather bold statement. The ECA has called on the Union's legislators to intervene and ensure the ECB allows full access to documents for audits related to banking supervision. In their letter to the European Parliament, the auditors express concern that the ECB's current position regarding access to documents and information prevents them from carrying out their work properly.[15] Banking supervision entails significant risks to the public purse, say the auditors, but they will not be in a position to carry out a proper audit of these activities unless the ECB adjusts its stance regarding access rights. The auditors have asked to amend the current regulations, clarifying that they can access any documents they consider necessary.

Indeed, where in the pre-SSM era, certain national audit institutions could examine the functioning of supervision and had access to files on significant banks held by their national supervisory authorities, in the framework of the SSM the ECA has no powers to examine the supervision exercised by the ECB. One could conclude that the introduction of the SSM without an amendment of the Treaties has resulted in a decrease in the possibilities for independent external control of supervision.[16]

In short, one could conclude that the establishment of the SSM has triggered a debate on the question to what extent the ECB – in its capacity as prudential supervisor – is to interact with the ECA. So far, there has been no unwillingness from the side of the ECB, but as Union institutions both the ECB and the ECA have to act with the boundaries set by EU legislation. This is also the guiding principle of the Memorandum of Understanding that was concluded between the ECB and the ECA, which was signed on 9 October 2019.[17]

Now that a Memorandum of Understanding has been signed, the ECA's request to the European Parliament will most likely be put on hold. If and when the role of the ECA vis-à-vis the ECB will be addressed in the political arena, close attention will need to be paid to the capacity of the ECB as central bank and monetary authority. It would be a step backwards and detrimental if the carefully drafted independence of the ECB in its monetary capacity would be tampered with.

3.1.2 State auditors

On a national level the situation seems to be even more complex and diverse.

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14 Press Release European Court of Auditors, Luxembourg, 14 January 2019 "European Central Bank must allow full scrutiny of banking supervision, say Auditors".

15 Press Release European Court of Auditors, Luxembourg, 14 January 2019 "European Central Bank must allow full scrutiny of banking supervision, say Auditors".

16 Resulting in what some call "the audit gap".

17 Memorandum of Understanding between the ECA and the ECB regarding audits on the ECB's supervisory tasks.

When I take for example the Netherlands, the accountability of De Nederlandsche Bank (DNB) vis-à-vis the Dutch State Auditor (Algemene Rekenkamer) is twofold. Different rules apply for ESCB tasks and SSM tasks.

Although the Dutch State Auditor is entitled to audit DNB pursuant to Article 7.25(3) of the Government Accounts Act 2016[18], tasks of DNB concerning the implementation of the Treaty on the Functioning of the European Union are explicitly outside the competence of the Dutch State Auditor. The explanatory memorandum to the Government Accounts Act 2016 clarifies that it is envisaged that the ESCB tasks of DNB are exempted from the scope of the Dutch State Auditor.[19]

When it comes to SSM activities the situation is however more complex. State Auditors in certain Member States, including the Netherlands, do audit NCAs for SSM activities. The question is to what extent this can be reconciled with the existing legal framework. It would, for example, go too far if such a national audit is in fact an indirect audit of the ECB. At the same time, if information is not provided to a state auditor, this leads to dissatisfaction with the state auditor and audit gaps in the report.

In the Netherlands, the Dutch State Auditor has audited the supervision on banks by DNB. The final report on this audit states:

"(…) DNB has provided almost all the information that we requested. At the same time, we did not receive all the information requested. Information from the ECB, such as the SSM supervisory manual, has been provided to us to a very limited extent. (…) As a result, we have not been given a precise picture of confidential ECB rules that co-determine how DNB implements the SREP."[20]

The excerpt from the audit report above seems difficult to reconcile with the requirements that the ECB has set out in its opinions for state audits of SSM tasks namely that an audit should not extend to the application and interpretation of supervisory law and practices in the context of the SSM, nor extend to result in an indirect audit of the ECB. The Dutch State Auditor seems to wish to extend the audit to the application and interpretation of supervisory law and practices in the context of the SSM, by addressing the rules on implementation of Supervisory Review and Evaluation Process (SREP). Furthermore, providing the Dutch State Auditor with these confidential ECB rules could lead to an indirect audit of the ECB.

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18 Wet van 22 maart 2017, houdende regels inzake het beheer, de informatievoorziening, de controle en de verantwoording van de financiën van het Rijk, inzake het beheer van publieke liquide middelen buiten het Rijk en inzake het toezicht op het beheer van publieke liquide middelen en publieke financiële middelen buiten het Rijk (Comptabiliteitswet 2016). [Law of 22 March 2017, containing rules on the management, information provision, control and accountability of government finances, on the management of public liquid assets outside the government and on the supervision of the management of public liquid assets and public funds financial resources outside the government (Government Accounts Act 2016)].

19 Explanatory memorandum to the Government Accounts Act 2016, page 156, available for download (in Dutch) at https://zoek.officielebekendmakingen.nl/kst-34426-3.html.

20 Algemene Rekenkamer report of 27 September 2017, Toezicht op banken in Nederland', page 19, available for download (in Dutch) at https://www.rekenkamer.nl/publicaties/rapporten/2017/09/27/toezicht-op-banken-in-nederland.

Although the criteria in the ECB opinions seem clear, in practice there is still a disparity between the audits on a European and on a national level, since the mandates of national state auditors are not aligned with the mandate of the ECA.

3.2 European and national parliaments

Traditionally, the ECB and the NCAs/NCBs have had exchanges with the European Parliament and with national parliaments. With the introduction of the SSM however, the interaction has intensified.

3.2.1 European Parliament

The traditional accountability obligations of the ECB include a presentation of an Annual Report on monetary policy to inter alia the European Parliament, in accordance with Article 284(3) TFEU, and the ECB's reply to oral and written questions from the European Parliament.

The SSM Regulation has introduced extensive new rules on accountability to European Parliament in Article 20 SSMR. On top of this an Interinstitutional Agreement (IIA) between the ECB and European Parliament was concluded in November 2013.[21] In short, the frequency of interaction with the European Parliament has increased which results in a different, closer working relationship. For example, the European Parliament has discussed anti-money laundering with the ECB on numerous occasions. While anti-money laundering is not a core competency of the ECB, the push by European Parliament has put the topic on the agenda of the ECB.

3.2.2 National parliaments

A new feature that was introduced with the SSM is accountability of the ECB to national parliaments, on the basis of Article 21 SSM Regulation. The ECB sends its SSM Annual Report to national parliaments. In response, the national parliaments may ask the ECB questions. The national parliament may even invite the Chair or a member of the Supervisory Board to participate in an exchange of views in relation to the supervision of credit institutions in that Member State together with a representative of the NCA.

Instead of considering national parliaments as potential adversaries of NCAs/NCBs, it would be better to see them as allies capable of assisting the NCAs /NCBs in

[21] Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, November 2013, available for download at http://www.europarl.europa.eu/document/activities/cont/201311/20131107ATT74064/20131107ATT74064EN.pdf.

achieving the goals as set out in the legal framework. For example, in the Netherlands, DNB sends a legislation letter to the Minister of Finance, every year. In this letter DNB expresses its wishes and suggestions for improved legislation and legislative changes. The Minister of Finance then forwards the letter to Parliament with his or her response. In doing so, legislation is constantly improved and adapted to the monetary policy and supervisory practice, which allows DNB as an NCA and NCB to better fulfil its mandate.

At the same time, the increased interaction with parliament in the context of the SSM should not lead to negative spillover effects for the independence of the ESCB. Members of parliament, and E(S)CB representatives, should constantly be mindful of the independence of the ESCB when it comes to ESCB tasks.

3.3 National courts

As described in the paragraph on case law, the ECB as an institution of the Union is bound by a duty of sincere cooperation with national courts, who are responsible for ensuring that Union law is applied and respected in the national legal system. The principle seems clear at first glance, but how is it applied in practice? As an example, we could look at the German Outright Monetary Transactions (OMT) case.

In Germany, several citizens filed a constitutional complaint regarding the OMT programme of the ECB. The German Federal Constitutional Court (Bundesverfassungsgericht) invited the ECB on two occasions to provide its opinion as an expert third party on the OMT decision. The first time, on 11 June 2013, the ECB's Executive Board member Jörg Asmussen gave a statement.[22] The second time, on February 16 2016, the Executive Board member Yves Mersch gave a statement on behalf of the ECB.[23] In both instances, the ECB seized the opportunity to defend the OMT programme and elaborated on the reasons behind OMT. Far more interesting however, is to find out what the position of the ECB would be if it were to decline an invitation of a national court in the future.

As discussed above, the duty of sincere cooperation means that the ECB is in principle required to provide information or to authorize officials to give evidence in legal proceedings before a national court. However, the ECB may refuse to provide such information if the functioning and independence of the Union, or the ECB as an institution of the Union, is jeopardized. In my view, it is hard to substantiate these overriding reasons in all cases where the ECB might have an interest in the outcome of the proceedings. After all, the guiding principle is still the duty of sincere cooperation, and the ECB has accepted the invitation to appear before the national court twice before, so evidently there were no overriding reasons of a general principal nature. The ECB would thus have to demonstrate in future cases, if and

[22] Asmussen, J., Introductory statement by the ECB in the proceedings before the Federal Constitutional Court, 11 June 2013, available at https://www.ecb.europa.eu/press/key/date/2013/html/sp130611.en.html.

[23] Mersch, Y., Oral hearing of the Federal Constitutional Court 16 February 2016 in the OMT proceedings, available at https://www.ecb.europa.eu/press/key/date/2016/html/sp160216.en.html.

when it envisages abstaining from an appearance, that the functioning and independence of the Union, or of the ECB as an institution of the Union, would be jeopardised if it were to give *acte de présence* before a national court. For example, if the ECB were to be compelled to reveal highly confidential information which could be detrimental to its independent monetary policy or if the ECB would be required to provide evidence against itself, such overriding reasons could be present.

Admittedly, the line between providing the information as an expert witness, or as a party that risks claims for damages, is a delicate one. In a specific case, in which a court might mingle up the roles of expert vis-à-vis the accused, a two-step approach could be a solution. The first step would be to start with a written contribution to the court, offering to appear if needed. The second step would then be to actually appear in court, but only if this is deemed necessary. This would be a pragmatic approach to solve the tension between transparency and independence once more, but until there is a clearly outline legal framework for the exchange of ESCB documents, this is probably the best solution.

4 Conclusion

Practice shows that when it comes to central banking there are general reservations on a national level to request an exchange of documents from the ECB or NCBs. There might be interactions with national parliaments and national courts but so far this has not resulted in major conflicts. It seems that the ESCB takes a pragmatic approach in this respect.

Taking on board supervision at the level of the ECB has drawn the spotlights on the exchange of documents once again. In particular, the call from the ECA to Union's legislators to intervene and ensure the ECB allows full access to documents for audits related to banking supervision is telling.

The pragmatic approach of both the ECB and the NCBs up until now may not have been ideal; it has turned out to work so far. The introduction of the SSM brought about a new interest in ECB documents which is very understandable. At the same time the constraints included in the current legal framework are still applicable. Hence, the ECB finds itself between a rock and a hard place. Given the public outcry for more transparency it is likely that a debate will be initiated in the political arena. When such a debate on the substance will take place it is imperative that close attention is paid to the differences between supervision and monetary policy that may or may not underpin a different approach in transparency from a viewpoint of independence.

Solving a “growing audit gap in banking supervision”: the relationship between the ECA and the ECB

Francesco Martucci[1]

On 28 August 2019, the European Central Bank (ECB) and the European Court of Auditors (ECA) announced they concluded a Memorandum of Understanding regarding audits on the ECB’s supervisory tasks[2]. In January 2019, the ECA called on the EU legislator to intervene and ensure the ECB allows full access to documents for audits related to banking supervision[3]. The request has been introduced after the ECA issued three special reports on the tasks carried out by the ECB in the framework of the Banking Union[4]. In all three cases, the ECA reported that it only published provisional and partial conclusions in so far as the ECB denied access to the documents needed for the auditors to perform their tasks[5].

For the first time since the introduction of the single currency, tensions arise between these two institutions. Until then, the ECA has audited the ECB on 18 occasions without difficulty, while the European Parliament showed very little interest in the audits performed on the ECB. In fact, tensions have emerged in the specific context of the Banking Union established by the EU legislator in 2013[6]. It is clear that audit is a cornerstone in the area of banking supervision, especially after the financial and sovereign debt crisis. Because the supervision and the resolution of banks require a financial public support, the powers of supreme audit institutions must be strengthened. Pursuant to Article 127(6) of the TFEU, the EU legislator decided to confer specific tasks on the ECB in the field of supervision. As a consequence of the Single Supervisory Mechanism (SSM), audit responsibilities for banking supervision have changed in the euro area. Before the Banking Union, in some Member States,

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2 Memorandum of Understanding between the ECA and the ECB regarding audits on the ECB’s supervisory tasks, 9 October 2019. ECB Press Release of 28 August 2019, “ECB and ECA agree Memorandum of Understanding”. ECA, Information note Luxembourg, 28 August 2019, “Banking supervision in the EU: the European Court of Auditors and the European Central Bank reach an agreement on sharing sensitive bank-specific data for auditing purposes.”

3 ECA, Press Release, 14 January 2019, “European Central Bank must allow full scrutiny of banking supervision, say Auditors”.

4 ECA special report 29/2016: “Single Supervisory Mechanism - Good start but further improvements needed”. ECA special report 23/2017: “Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go”. ECA special report 02/2018: “The operational efficiency of the ECB’s crisis management for banks”.

5 While the ECA audited the Commission’s intervention in the Greek financial crisis, it had attempted to examine the ECB’s involvement in the Greek Economic Adjustment Programmes. However, the ECB questioned the Court’s mandate in this respect. According to the ECA, the ECB “did not provide sufficient amount of evidence and thus we were unable to report on the role of the ECB in the Greek programmes”. ECA special Report 17/2017: “The Commission’s intervention in the Greek financial crisis”, p. 8.

6 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63.

the national supervision authorities were audited by the supreme audit institutions[7], even when the supervisory tasks were assigned to the national central bank, as it was the case in the Netherlands. It is not a coincidence that since 2011 the Dutch Court of Auditors (Algemene Rekenkamer) has been very active in promoting a debate on the audit powers in banking supervision, especially within the Contact Committee of the Supreme Audit Institutions of the European Union[8].

Since 2013, the Contact Committee of the Supreme Audit Institutions of the European Union has raised the questions of the audits carried out within the framework of the SSM[9]. It may be recalled that the SSM means the system of financial supervision composed by the ECB and national competent authorities of the euro area[10]. Within the SSM, the ECB is exclusively competent to carry out the tasks conferred by Articles 4 and 6 of the SSM Regulation[11]. While the credit institutions of significant relevance fall within ECB's jurisdiction, the national authority remains competent to supervise the other banks. Therefore, the SSM Regulation provides for a multi-level accountability system. According to Article 21(4) of SSM Regulation, the EU law "is without prejudice to the accountability of national competent authorities to national parliaments in accordance with national law for the performance of tasks not conferred on the ECB by this Regulation and for the performance of activities carried out by them in accordance with Article 6". In accordance with the principle of institutional and procedural autonomy, each Member State may lay down national accountability regime over national competent authorities. Where national supervisors take action within the SSM, accountability arrangements provided under national law apply. Accordingly, supreme audit institutions (SAIs) may audit national supervisors. The situation varies widely from one Member State to another. Therefore, there is risk that supervisory tasks would be carried out in different ways. While the SAIs are competent to audit the national supervisors competent for the supervision of non-significant credit institutions, they are not competent to audit the ECB who is competent to supervise significant credit institutions. The problem lies not so much in the difference of auditing; as long as the SAIs seek to harmonise their control within the Contact Committee. By contrast, while in some Member States, national supervisory authorities should take into account the recommendations issued by SAIs, in other Member States, national supervisory authorities are not audited.

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7 See Contact Committee Resolution on the results of the pilot study on the access of supreme audit institutions to the main financial supervisors in EU Member States, Lisbon, 2012, CC-R-2012-03. Algemene Rekenkamer, "Report of the Working Group on Public Audit Deficits; Access of Supreme Audit Institutions to the main financial supervisors in EU Member States, 25-01-2013". See Allemand, F. (2017) "Accountability and audit requirements in relation to the SSM", in ECB Legal Conference 2017, "Shaping a new legal order for Europe: a tale of crises and opportunities", 4-5 September 2017, pp. 72-73.

8 Contact Committee Resolution CC-R-2011-05. Not published. See "The governance arrangements within the European Stability Mechanism from a Dutch perspective", 24-04-2012, https://www.rekenkamer.nl/publicaties/toespraken/2012/04/24/the-governance-arrangements-within-the-european-stability-mechanism-from-a-dutch-perspective

9 Contact Committee of the Supreme Audit Institutions of the European Union (2013).

10 Article 2(9) of the SSM Regulation.

11 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, preamble para 65-66, (OJ L 287, 29.10.2013, p. 63).

Within the SSM, the ECB and the national supervisory authorities should ensure "that the Union's policy relating to the supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations"[12]. The Dutch Court of Auditors had been particularly critical of the SSM, fearing a double-speed auditing[13]. It expressed concerns at the shortcomings of ECA's audits. Since 2014, several task forces had been set up within the framework of the Contact Committee to strengthen the cooperation between SAIs concerning the audit on banking supervision. After the three special reports of the ECA, a special task force made of five SAIs issued a report by which exposed a "growing audit gap in banking supervision" which existence had been confirmed by Contact Committee's Task Force on European Banking Union in December 2017[14]. In November 2018, the heads of the SAIs of the EU and its Member States also urged clarification and harmonisation of the audit mandates of the national SAIs[15]. For its part, the ECA expressed concerns that the ECB's current position regarding access to documents and information prevents them from carrying out their work properly. In the context of the 2016 Commission discharge[16], the European Parliament shared the concerns expressed by the ECA concerning the restricted access to documents and information in relation to the ECB and requested to be kept informed regarding this problem. On 13 December 2018, the ECA sent to the European Parliament a communication calling the attention of the institutional triangle (the European Parliament, the Council and the Commission) to the lack of progress in discussions with the ECB[17]. It also called on the European Parliament "to amend Regulation (EU) No 1024/2013, establishing the SSM, with a view to clearly stipulating that the ECA is empowered to perform performance audits of the ECB's supervisory functions and that, in line with the Treaty, the ECA enjoys full rights to access any document it considers necessary for this purpose"[18].

In contrast, the ECB replied that "it disagrees with the statement that the audit has confirmed an audit gap which has emerged since the establishment of the SSM"[19]. In its view, the ECA "received all the information and documentation necessary to

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12 Recital 12 of the SSM Regulation.

13 See Bovenschen, W. (2016), "The impact of the establishment of the SSM on the relationship between De Nederlandsche Bank and the Netherlands Court of Audit", in ECB, ESCB Legal Conference 2016, Frankfurt am Main, pp. 192-196.

14 Report of the Task Force on European Banking Union to the Contact Committee of Supreme Audit Institutions of the European Union and the European Court of Auditors (Germany, Cyprus, Finland, Austria and the Netherlands).

15 Contact Committee, Press Release Luxembourg, 14 November 2018, "Audit gaps in EU banking supervision must be closed," urge EU and Member State auditors.

16 European Parliament resolution of 18 April 2018 on the Court of Auditors' special reports in the context of the 2016 Commission discharge (2017/2188(DEC).

17 Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC)), Adopted by Chamber IV at its meeting of 13 December 2018.

18 ibid.

19 ECA special report 29/2016, cited supra, p. 123.

assess the operational efficiency of the management of the ECB in accordance with Article 27.2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank and Article 20(7) of the SSM Regulation"[20]. Therefore, no limitation had been imposed on access to documents[21]. According to the ECB, "there is no lack of cooperation, but a different interpretation of the remit of the audit"[22]. As the European Commission pointed out, "[t]he ECB has demonstrated that it takes recommendations issued pursuant to such reviews seriously, often translating them into adaptations of its own rules or behaviour"[23]. Thus, the ECB has accepted the vast majority of recommendations made by the ECA.

From a legal point of view, all is a matter of interpretation. Provisions exist in primary law and secondary legislation to organise the audit of the ECB by the ECA. Pursuant to Article 27.2 of the Statute of the ESCB, "[t]he provisions of Article 287 of the TFEU shall only apply to an examination of the operational efficiency of the management of the ECB". According to Article 20(7) of the SSM Regulation, when the ECA "examines the operational efficiency of the management of the ECB under Article 27.2 of the Statute (…), it shall also take into account the supervisory tasks conferred on the ECB by this Regulation". The ECA is competent to audit the supervisory tasks carried out by the ECB within the SSM. However, the provisions do not set the limits of ECA's powers. It is not only a technical question of interpretation.

The tensions raise the constitutional issue of powers conferred upon on EU institutions. According to Article 13(2) of the TEU, "each EU institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". That provision reflects the principle of institutional balance which requires that each EU institution must exercise its powers with due regard for the powers of the other EU institutions. On the one side, pursuant to Article 127(6) of the TFEU, the ECB carries out the supervisory tasks in the framework of SSM. On the other side, in accordance with Article 27.2 of the Statute of the ESCB and Article 287 of the TFEU, the ECA may examine the operational efficiency of the management of the ECB. Article 13(2) of the TEU establishes the principle of sincere cooperation between two institutions. As has been pointed out by General Advocates, "the principle of sincere cooperation makes it possible to resolve the uncertainties arising from 'grey areas' of the Treaties [and], although it is applicable to informal cooperation between the EU institutions, its content cannot be precisely defined"[24]. This applies to the relationship between the ECA and the ECB. Because the ECA may audit the ECB in the grey areas of primary law (1), both institutions have enhanced a horizontal cooperation (2).

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20 ibid.

21 ibid., p. 129. See also the answer to a question asked by a member of the European Parliament. ECB, Letter Alfred Sant (QZ-112), 3 February 2017 L/MD/17/55.

22 ECA special report 29/2016, p. 129.

23 Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, 11.10.2017 COM(2017) 591, p. 5.

24 Opinion of Advocate General Jääskinen delivered on 18 December 2014, Council of the European Union v European Commission, Case C-409/13, EU:C:2014:2470, point 98. Opinion of Advocate General Wathelet delivered on 17 March 2015, European Commission v Council of the European Union, Case C-425/13, point 190.

1 The grey areas of primary law

The principle of institutional balance means that "the ECB is subject to an obligation to provide the ECA with any document or information necessary for the ECA to carry out the task corresponding to its legal mandate"[25]. It also implies that the ECA's audit neither affect the supervisory tasks carried out by the ECB, nor the monetary policy tasks. Within the constitutional structure of the Treaties, the ECA has a restricted mandate to audit the "operational efficiency of the management of the ECB" and shall respect the principle of independence under Article 130 of the TFEU.

1.1 The restricted mandate of the ECA to audit the "operational efficiency of the management of the ECB"

The ECA's mandate to conduct independent external audits of the ECB is enshrined in Article 27.2 of the Statute of the ESCB and Article 20(7) of the SSM Regulation. Unlike the other institutions, the ECB is subject to a limited exam by the ECA, given that so far the ECB does not claim any payments from the EU budget and has its own budget. The national central banks shall be the sole subscribers to and holders of the capital of the ECB. Pursuant to Article 27.2 of the Statute of the ESCB, "[t]he provisions of Article 287 of the Treaty on the Functioning of the European Union shall only apply to an examination of the operational efficiency of the management of the ECB". Neither the Treaty, nor the Statute of the ESCB define the concept of "operational efficiency of the management".

The ECA carries out two sorts of audits[26]. Firstly, financial and compliance audits focus on the reliability of annual accounts and the legality and regularity of underlying transactions (most notably the statement of assurance) as well as assessments of whether the systems and transactions in specific budgetary areas comply with the rules and regulations governing them. The ECB is not subject to this kind of audits by the ECA, since it is not founded by the EU budget. In accordance with Article 27.1 of the Statute of the ESCB, the accounts of the ECB and national central banks are audited by independent external auditors. Secondly, the ECA carries out performance audits on the effectiveness, efficiency and economy of EU policies and programs[27]. The performance audit refers to "an independent, objective and reliable examination of whether undertakings, systems, operations, programs, activities or organisations are operating in accordance with the principles of economy, efficiency and effectiveness, and whether there is room for improvement"[28]. Hence, efficiency must be distinguished from effectiveness and economy. For that purpose, it is necessary to refer to standards and guidelines

[25] Report, COM(2017) 591, p. 5.

[26] ECA, Public Audit in the European Union, The Handbook on Supreme Audit Institutions in the EU and its Member States, 2019 edition, p. 29. See Vogiatzis, N., "The Independence of the European Court of Auditors", CML Rev., Vol. 56, Issue 3, 2019, pp. 668-669.

[27] See Levy R., "Managing Value-for-Money Audit in the European Union: The Challenge of Diversity", JCMS, Vol. 34, Issue 4, 1996, pp. 509-529.

[28] International Organisation of Supreme Audit Institutions, Standard ISSAI 300 – Performance Audit Principles, p. 8. ECA, Performance Audit Manual, 2017, p. 7.

adopted by the ECA, in accordance with international standards. The principle of economy requires that "the resources used by the audited entity in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality and at the best price", while "the principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results"[29].

The ECA is competent to audit the ECB, but only in order to examine its "operational efficiency of the management". The word "operational", which is not used in all language versions of the Treaty[30], seems unnecessary. All the most, its insertion highlights the limits of the audit carried on the ECB. In contrast, the concept of efficiency has been clearly defined for a long time in international audit standards and in the Financial Regulation[31]. The principle of efficiency "concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives"[32]. For the ECA, "efficiency" means "the best relationship between resources employed and outputs, results and impacts achieved". Therefore, whereas the audit is limited under Article 27.2 of the Statute of the ESCB, the ECA retains a broader conception of its tasks.

The broad conception of the audit remit is reflected in the special reports issued on the ECB's management. The titles chosen by the ECA for its reports are self-explanatory: "Single Supervisory Mechanism - Good start but further improvements needed"[33], "Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go"[34]. Further, the example of the Special Report on "The operational efficiency of the ECB's crisis management for banks"[35] is really characteristic of the ECA's audit. According to its own wording, the auditors examined the "process used by supervisors for identifying banks which are experiencing financial difficulties and intervening when necessary", having regard to "the objective of crisis management [namely] the preservation of financial stability and a reduction in the reliance on public funds"[36]. To achieve this objective, crisis management involves "advance recovery planning by banks" and "identification by the supervisor of a deterioration of the financial situation of a bank and, where necessary, the use of early intervention powers"[37].

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29 ECA, Performance Audit Manual, 2017, p. 7. International Organisation of Supreme Audit Institutions, Standard ISSAI 300 – Performance Audit Principles, p. 8.

30 See for example the French version: "27.2. Les dispositions de l'article 287 du traité sur le fonctionnement de l'Union européenne s'appliquent uniquement à un examen de l'efficience de la gestion de la BCE".

31 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

32 Article 33 of the Financial Regulation.

33 ECA special report 29/2016.

34 ECA special report 23/2017.

35 ECA special report 02/2018.

36 ibid., p. 10.

37 ibid.

Furthermore, the ECA must have all means necessary to carry out its tasks. As a General Advocate stated, unlike the ECJ which "does base its decision in general on the subject-matter of the proceedings (…) The Court of Auditors, on the other hand, may also act on its initiative [...] and, in doing so, determine the object of the audit itself, having regard to its powers"[38]. In order to examine the efficiency so defined, the ECA considers that "it is the responsibility of the auditor to establish the information it needs to perform their tasks and draw conclusions"[39] and SAIs must have unrestricted access to information. Therefore, the ECA considers that it has the right to request from the ECB "any document or information necessary to carry out its task", as enshrined in Article 287(3) of the TFEU.

Nevertheless, in my opinion, these provisions must not be interpreted as meaning that the ECA has a completely unrestricted access to all documents, for two reasons. First, sincere cooperation means that the ECA shall exercise its powers with due regard to ECB's powers. Thus, the audit does not interfere with the supervisory tasks conducted by the ECB. In this perspective, the ECA admits that its performance audits "will refrain from assessing the regularity of individual supervisory decisions, thus not performing this aspect of compliance audit"[40]. The audit must also not affect monetary policy. For both supervisory and monetary functions, in order to carry out its tasks, the ECB must be able to control the information. For this reason, the exchange of information is governed by the duty of professional secrecy under Article 37 of the Statute of the ESCB and Article 27 of the SSM Regulation.

Second, Article 20(7) of the SSM Regulation is inserted in the chapter devoted to "Accountability and reporting". According to Article 20(1) of the SSM Regulation, "[t]he ECB shall be accountable to the European Parliament and to the Council for the implementation of this Regulation, in accordance with this Chapter". This shows that the main purpose of ECA's audit is to allow the European Parliament to play its role in the accountability process[41].

Furthermore, the question is not whether the concept of "efficiency" allows the ECA to control the ECB, but rather what does the word "management", which is used by Article 27.2 of the Statute of the ESCB, mean. According to Danièle Nouy, "the operational efficiency of the management of the ECB" means that the ECA may only examine the management of processes of the ECB, but not the ECB's substantive decisions"[42]. As pointed out by an author, "[t]he ECA's audit must therefore be seen as an expert contribution aimed at the continuous improvement of the ECB's internal operation, via the identification of any shortcomings. In practice, the audit performed by the ECA examines: (i) the appropriateness of internal organisational measures with respect to the aims and tasks attributed by the Treaties, (ii) the relevance of management procedures and (iii) the effective operation of the ECB with regard to

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38 Opinion of Advocate General Trstenjak delivered on 25 May 2011, European Commission v Federal Republic of Germany, C-539/09, EU:C:2011:345, point 71.

39 ECA, Communication to the European Parliament, 2017/2188(DEC), cited supra, § 4.

40 ibid., § 14.

41 Allemand, F., "Accountability and audit requirements in relation to the SSM", cited supra, p. 64.

42 Nouy, D.,ECB, Letter, QZ006, 21 March 2018.

internal rules and procedures"[43]. The boundaries between institutional management and policy implementation seem very porous. Thus, an analysis of the three special reports reveals that, for the ECA, "management" is not conceived only as management of the ECB institution, but extends to management of the tasks performed by the ECB. To be convinced of this, one has to read the report on the operational efficiency of the ECB's crisis management for banks. Due to the broad approach of the ECA, concerns have been expressed regarding the independence of the ECB.

1.2 The debate on the scope of principle of independence

The independence of the central bank is a constitutional principle of the EU law. The independence of the ECB is enshrined in Articles 130 and 282(3) of the TFEU, as well as in Article 7 of the Statute of the ESCB. Pursuant to Article 19(1) of the SSM Regulation, when carrying out the supervisory tasks, the ECB acting within the SSM shall act independently. Moreover, "the institutions, bodies, offices and agencies of the Union and the governments of the Member States and any other bodies shall respect that independence"[44].

According to Yves Mersch, "the independence the ECB enjoys is limited to the performance of the tasks conferred on the ECB in pursuit of the objective of price stability. Tasks and functions conferred on the ECB by secondary legislation do not, therefore, fall within the scope of Article 130"[45]. The member of the ECB's Executive Board put forward three main arguments to defend its position.

First, in carrying out its supervisory tasks, the ECB must apply EU acts adopted by other institutions and, where the Union law is in the form of directives, the national legislation transposing those directives. In addition, the ECB is subject to secondary regulation adopted by the Commission on a proposal from the European Banking Authority (EBA). Therefore, "the fact that a supervisor is required to act in response to decisions made by, or in cooperation with, policymakers and other supervisors means that the high level of protection from external influence that is guaranteed under Article 130 of the Treaty is not appropriate for these tasks"[46]. Indeed, while the provisions on independence in the SSM Regulation are similar to Article 130 of the TFEU, they serve a different purpose.

Second, the SSM Regulation sets out the principle of separation between monetary policy and banking supervision. The financial crisis has shown that banking supervision is strongly linked with public finances in so far as taxpayers had to bail out banks supervised at national level. Even if the SSM is based on the principle of bail-in, there is still a residual scope for public financial support. Accordingly, the

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43 Allemand, F., "Accountability and audit requirements in relation to the SSM", cited supra, p. 73.

44 Article 19(2) of the SSM Regulation.

45 Mersch Y., "Central bank independence revisited", keynote address at the "Symposium on Building the Financial System of the 21st Century: An Agenda for Europe and the United States", Frankfurt am Main, 30 March 2017.

46 ibid.

ECB's accountability for its supervisory tasks is different from and more enhanced than that for its monetary policy task[47]. Furthermore, while the accountability obligations for monetary policy tasks are laid down in Article 284 of the TFEU and Article 15(3) of the Statute of the ESCB, the ECB's accountability obligations for banking supervision tasks are specified by Articles 20 and 21 of the SSM Regulation and by two interinstitutional agreements[48].

Third, according to Yves Mersch, the highest possible level of independence granted to a central bank by virtue of Article 130 of the TFEU for the pursuit of the primary objective of price stability may not be extended to the supervisory function of the ECB, because of the principle of democratic legitimacy. The citizens entrust the ECB with the authority to implement monetary policy, since it respects the mandate of price stability defined by Article 127(1) of the TFEU. However, as defined in the SSM Regulation, the objectives of the ECB's supervisory tasks are diverse and multifaceted and are also not quantifiable. Therefore, the ECB must be more accountable when it carries out supervisory tasks. Moreover, the objectives of banking supervision might conflict with the objective of maintaining price stability. For all these reasons, it would not be justifiable to extend the independence under Article 130 of the TFEU to the ECB as banking supervisor.

While there is certainly merit to these arguments, this does not necessarily mean that the scope of independence under Article 130 of the TFEU must be limited to the tasks provided for in Article 127(2) of the TFEU. Above all, the ECB's supervisory tasks are not conferred by the SSM Regulation, but rather the Treaty, namely Article 127(6) of the TFEU, so that it must be distinguished from the European Agencies that carried out their tasks under delegated powers within the meaning of the Meroni doctrine[49]. According to Article 127(6) of the TFEU, the Council may "(…) confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions (…)". The SSM Regulation only specifies the "specific tasks" which are enshrined in Article 127(6) of the TFEU. Moreover, according to Article 139(2) of the TFEU, Article 130 of the TFEU shall apply to all Member States. Thus, even Member States with a derogation are bound by the principle of central bank independence, whereas they have not transferred the monetary competence to the EU.

As ruled in the OLAF case[50], while the ECB enjoys great independence, this does not "separate it entirely from the EU and exempt it from every rule of EU law". There is one main conclusion to be drawn from this. "The ECB is subject to the Court of Justice's power of review and, as regards the efficiency of its management, to control by the Court of Auditors, as provided for in Article 27.2 of the ESCB Statute" [51]. It

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47 ibid.

48 Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, p. 2. Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), 11.12.2013.

49 ECJ, 13 June 1958, Meroni v Haute autorité, 9/56, EU:C:1958:7.

50 ECJ, 10 July 2003, Commission v ECB (OLAF), C-11/00, EU:C:2003:395.

51 ibid., § 122.

must be clarified if the notion of "operational efficiency of the management of the ECB" under Article 27.2 of the Statute of the ESCB is the same when ECB conducts the monetary policy or acts as banking supervisor. In the view of Yves Mersch, the SSM Regulation makes a direct reference to the restricted mandate of the ECA under Article 27.2 of the Statute of the ESCB when defining the ECA's competences to audit the supervisory activities of the ECB. "However, as the ECB as a supervisor enjoys a different kind of independence than the ECB as monetary authority, there is, in practice, a differentiated application of the concept of the "audit of the operational efficiency of the management of the ECB", meaning that it is possible for the ECB to have different obligations vis-à-vis ECA"[52]. On the contrary, so far, the ECB is independent under Article 130 of the TFEU even when it carries out the banking supervisory tasks. The concept "operational efficiency of the management of the ECB" under Article 27.2 of the Statute of the ESCB must be interpreted in the same manner. It is commonly understood that the ECA's operational efficiency audit permits an evaluation of the adequacy of the governance process and internal controls, but does not extend to the areas of policy analysis and decision-making in this way with a view to preserve the ECB's (monetary and supervisory) policy independence. "Hence, ECA only possesses powers to perform audits in relation to organisational and administrative aspects of the ECB. "Efficiency'' under Article 27.2 of the Statute of the ESCB is thus interpreted in a purely administrative sense, preventing the ECA from reviewing the policies enacted by the ECB or the compliance of these policies with the ECB's principal objectives. In concrete terms, the ECA may review the decision-making process for policies but it may not review the substance of the actual policy decisions"[53].

2 The pragmatism of horizontal cooperation

Since 9 October 2019, the ECA and ECB are bound by a memorandum of understanding that concerns audits of the ECB when it is performing its supervisory tasks. Within the constitutional framework, the cooperation through an interinstitutional agreement is intended as the best solution to resolve conflicts between these two institutions. One may ask to what extent the EU legislator is competent to provide for audit rules imposed to the ECB. The MoU is the best way to reconcile accountability and independence.

2.1 To what extent has the EU legislator competence?

The Contact Committee of the Supreme Audit Institutions of the European Union himself "encourages the European Commission to propose a strengthening of the ECA's mandate concerning the audit of the ECB's single supervisory mechanism, including clarifying the scope of Article 20(7) SSM Regulation, and/or changing

52 Mersch, cited supra.

53 Baez Seara, D., and Lambrinoc-Schanz S. (2016), "The external audit of the ECB – an analysis of Article 27 of the Statute of the ESCB", in ECB, ESCB Legal Conference 2016, Frankfurt am Main, pp. 178-191.

Article 20(7) SSM Regulation and Article 27.2 of the ESCB Statute, if necessary"[54]. In January 2019, the ECA has called officially on the EU legislator to amend the SSM Regulation in order to ensure that the ECB allows full access to documents for audits related to banking supervision[55]. The institutional triangle was never favourable to amend the SSM Regulation. In the context of the 2016 Commission discharge, the European Parliament has called only on the ECB to cooperate with the ECA and asked the ECA to inform it as to whether a solution was found to the problem of access to information[56]. But, the Members of the European Parliament never proposed to amend the SSM Regulation. In 2019, in response to a parliamentary question, the Commission claimed that it did not currently have any plan to amend the rules concerning the ECA's audit on supervisory tasks of the ECB[57]. By contrast, the Commission took up a position in favour of an "interinstitutional agreement to specify the modalities of information exchange in view of permitting the ECA access to all information necessary for performing its audit mandate"[58].

However, some doubts exist as to whether the EU legislator may amend Article 20(7) of SSM Regulation in order to improve the ECA's audit powers. The wording of Article 20(7) of SSM Regulation seems merely descriptive. This provision states only that the ECA "examines the operational efficiency of the management of the ECB under Article 27.2 of the Statute". Therefore, the ECA carries out its audit on the basis of the Statute of the ESCB, rather than on the SSM Regulation. This means that any change of Article 20(7) of the SSM Regulation shall respect the limits set by primary law. An amendment to the SSM Regulation cannot amend or redefine the scope of Article 27.2 of the Statute of the ESCB.

There are two reasons why ECA's mandate may not be extended beyond what is provided for under Article 27.2 of the Statute of the ESCB. On the one hand, in accordance with Article 27.2 of the Statute of the ESCB, the ECA may only control "the operational efficiency of the management of the ECB". The EU legislator cannot extend the mandate of ECA beyond the boundaries laid down by Article 27.2 of the Statute of the ESCB which constitutes a lex specialis. While Article 287(2) TFEU allows the ECA to perform audits on the sound financial management of EU institutions and bodies, the ECA may only examine the operational efficiency of the ECB's management. On the other hand, the authors of the EC Treaty deliberately restricted the ECA's mandate in this way with a view to preserving the ECB's independence. The lex specialis provided for the ECB is justified by the necessity to respect the principle of independence under Article 130 of the TFEU. This principle justifies the limitation of the ECA's mandate in relation to both the ECB's supervisory and monetary policy functions. The audit laid down in Article 287(2) TFEU may extend to an examination of the effectiveness of an institution's and its bodies'

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54 Contact Committee of the Supreme Audit Institutions of the European Union (2016), p. 16. See also Contact Committee of the Supreme Audit Institutions of the European Union (2016), Statement, CC 1/2018, 13 November 2018.

55 ECA, Communication to the European Parliament, 2017/2188(DEC), see supra, § 23.

56 European Parliament resolution of 18 April 2018, cited supra.

57 EU Commission, 25 March 2019, Answer given by Vice-President Dombrovskis on behalf of the European Commission, Question reference: E-000246/2019.

58 ibid.

activities. “Such a high level of scrutiny would be hard to reconcile with the principle of independence”[59]. It is hard to see how the EU legislator may entrust the ECA with powers in order to impose obligations on the ECB. The question of whether an ECA may impose obligations on the ECB without breaching the principle of ECB’s independence is a constitutional question that cannot be answered other than by a possible change in the Statute of the ESCB. In the spirit of the Treaties, the ECB shall have the sole responsibility to determine its management procedures when it carries out its supervisory and monetary tasks. The Governing Council is competent to determine the internal organisation of the ECB while the Executive Board is responsible for the current business of the ECB[60].

Furthermore, the ECB shall respect the Union law, among others the professional secrecy requirements set out in primary law and secondary legislation. For this reason, it cannot provide document in violation of such provisions, even to the ECA. According to Article 37.1 of the Statute of the ESCB, members of the governing bodies and the staff of the ECB “shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy”. The professional secrecy is protected in the conditions of Article 27 of SSM regulation, which refers to Article 37 of the Statute of the ESCB and the “relevant acts of Union law”. Thus, the ECB’s duty to protect confidential information is also defined in Articles 53 to 62 of Directive 2013/36/EU (CRD IV)[61]. The professional secrecy requirements apply to the exchange of information with the ECA. This duty implies that, where the ECA requests confidential information from the ECB, the ECB can only provide such information if it is necessary for the ECA to examine the operational efficiency of the management of the ECB. For instance, as Danièle Nouy stated, regarding the ECA’s report on ECB Banking Supervision, “the ECB shared more than 500 documents, totalling almost 6,000 pages of documentation, with the ECA in the context of the audit and held 38 meetings and teleconferences with the ECA’s audit team to provide further detailed policy, process-related and bank-specific information. Bank-specific information was anonymised in order not to reveal the identity of specific banks”[62].

Therefore, we must reconcile the tasks of the ECA with the principle of independence of the ECB. To what extent may the audit tasks of the ECA under Article 27.2 of the Statute of the ESCB be limited by the principle of independence? More specifically, how would the ECB’s independence be affected by the ECA’s rights to access documents with regard to the ECB and banking supervision? That is precisely where the whole problem lies. And the answer must necessarily be pragmatic, as highlighted by the Memorandum of Understanding.

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59 Baez Seara and Lambrinoc-Schanz, cited supra, p. 180.

60 Articles 11.6 and 12.3 of the ESCB Statute.

61 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338.

62 Letter, QZ006, cited supra.

2.2 Memorandum of Understanding and accountability

External public audit is an essential element of a democratic society. It plays an important role to ensure accountability, which is particularly important in banking supervision. According to Article 10 of the TEU, there are two type of democratic legitimacy within the constitutional system of the EU. On the one side, legitimacy derives from the European Parliament which represents the EU citizens. On the other side, legitimacy relies in the European Council on Heads of State or Government and in the Council on governments, themselves democratically accountable either to their national Parliaments, or to their citizens. As a result of the conferral of supervisory tasks, the ECB has to be accountable for the exercise of those tasks towards the European Parliament and the Council as democratically legitimised institutions representing the citizens of the Union and the Member States[63]. One might wonder whether the democratic principle justifies a broad of interpretation of Article 27.2 of the Statute of the ESCB, in order to extend the ECA's mandate to audit the ECB. However, the democratic principle must be reconciled with the principle of independence.

In that respect, the relationship between the ECA and the ECB must not be seen as conflictual. By contrast, the ECA may provide legitimacy to the ECB through audit carried out in full respect of the principle of independence. Accountability differs from the classic model of democratic control, so far as it does not imply a hierarchy between the institutions. On the contrary, through appropriate accountability process, institutions are treated strictly equally. Thus, the ECB and the European Parliament have developed accountability processes that allow reconciling independence and democracy. While accountability of monetary policy is provided by the monetary dialogue under Article 284(3) of the TFEU, the ECB and the European Parliament agreed a memorandum of understanding on practical modalities of the exercise of democratic accountability within the framework of the SSM. This MoU is proving to be the best tool of accountability between independent and equal institutions. Article 295 of the TFEU must not be interpreted restrictively, so that other institutions than the Parliament, the Council and the Commission may conclude interinstitutional agreements. Therefore, while the MoU concluded between the ECA and the ECB could be seen as non-standard form of interinstitutional agreement, it is of a binding nature for both institutions.

The MoU regarding audits on the ECB's supervisory tasks comes up with answers to some questions raised during the ECA's audit of the ECB supervisory tasks. According to recital e) of the MoU regarding audits on the ECB's supervisory tasks, "[t]he ECB and the ECA acknowledge that the concept of "operational efficiency of the management'" as referred to in Article 27.2 of the Statute of the ESCB and Article 20(7) of the SSM Regulation is not defined in Union Law. To the extent applicable, "the principle of efficiency underlying Article 33 of the Financial Regulation […] may figure as a source of interpretation in the examination of the ECB's supervisory activities by the ECA in line with its mandate". The aim of the MoU regarding audits

[63] Recital 55 of the SSM Regulation: "[a]ny shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements".

on the ECB's supervisory tasks is to promote a close and sincere cooperation between the ECA and the ECB through practical arrangements. The MoU regarding audits on the ECB's supervisory tasks promotes practical information-sharing arrangements in order to provide for the ECA all the information needed to facilitate its work, while ensuring that no confidential information, market-sensitive material, including bank-specific data, will be revealed. The question is rather how to reconcile accountability, access to information and confidentiality. Regardless to the ECA's tasks, it has to be noted that the disclosure of information related to the prudential supervision of credit institutions is not at the free disposal of the ECB but subject to limits and conditions as established by relevant Union law to which both ECA and the ECB are subject.

The *first part* of the MoU regarding audits on the ECB's supervisory tasks is devoted to the ECA's right to access information relevant for its audits. It enshrines the principle that the ECA is entitled to seek and obtain all documents and information necessary for its audits of the operational efficiency of the management of the ECB, in full respect of the importance of a fully informed audit and of sincere cooperation in line with its mandate as attributed to it by Union law. On the one hand, the ECA may audit questions and request documents and information in line with its mandate while the ECB should work from the general assumption that the ECA's requests for information are within this mandate. On the other hand, the ECB may seek an explanation from the ECA as to the relevance to the ECA's mandate of the information request concerned. In accordance with the principle of sincere cooperation, such request for explanation should not be systematic.

The *second part* of the MoU regarding audits on the ECB's supervisory tasks provide for a special treatment of highly confidential documents and information. It aims to protect confidential information which is necessary due the particularly sensitive nature of the supervisory data held by the ECB. In paragraph 7 of the MoU regarding audits on the ECB's supervisory tasks, the ECA and the ECB specify the actions necessary to be taken to ensure that the legal obligations and the public interest in protecting supervisory data are also fully respected. In any case, the principle of proportionality must be respected[64] so that each confidential information request should be assessed on a case by case basis. Furthermore, the ECB has to identify a Supervisory Board member which is in charge of the regular dialogue with the ECA reporting member. In case of persisting disagreements, the dialogue can be continued between the ECA President and the ECB President or Vice-President.

The *third part* is focused on the public access to documents in the ECA. According to paragraph 10 of the MoU regarding audits on the ECB's supervisory tasks, the ECA will answer to a public access to documents regarding the SSM that the application for access to documents should be addressed to the ECB. However, the real innovation lies in the annex of the MoU regarding audits on the ECB's supervisory tasks where the categories of documents or information are listed.

[64] Paragraph 8 of the MoU regarding audits on the ECB's supervisory tasks.

The *annex* draws up the non-exhaustive list of documents or information that will be made available to the ECA if requested, while the ECB should request occasionally clarification of the relevance of the information to the ECA's mandate. Three categories of information or documents are by the Annex: process-related information, policy-related information, bank specific information.

3 Conclusion

Thanks to the conclusion of the MoU regarding audits on the ECB's supervisory tasks, the tensions between the ECA and the ECB have been reduced. This shows that the principle of sincere cooperation under Article 13(2) of the TEU is reflected in a pragmatic cooperation between institutions. There is also the question of the ECA's mandate to audit the other institutions involved in the EMU processes. Indeed, the ECA has published some special reports on the economic governance which underlined the porous boundaries between the 3 E audits (effectiveness, efficiency and economy) and the discretion of EU policies[65].

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Part 7
Memoranda of understanding as an instrument of Union law

Confidentiality clauses in MoUs: the implications of the absence of a definition for confidential information

Roberto Ugena[1]

By way of introduction, a few words can be said on the role of confidentiality clauses in the memoranda of understanding (MoUs) governing the exchange of supervisory information. Such clauses constitute one of the most frequent reasons for using MoUs, among whose provisions – the binding nature of which is always debatable – they can certainly be seen as the "more" binding.

Nevertheless, in the supervisory field, experience shows that because it is difficult to define the boundaries of confidential information and hence the scope of such clauses, sometimes the vagueness of their terms makes their application remarkably complex (and unpredictable) in practice.

Why are MoUs so important in the supervisory context?

Legislators have decided to bind supervisors, including the European Central Bank, to professional secrecy. At the same time, supervisors are expected to share information with other parties, particularly other supervisors, obviously subject to legal safeguards and constraints.

Indeed, modern supervisory regimes all agree that confidential information about individual banks that supervisors receive in the course of their duties needs to be protected. This principle, which can be identified at European level in the Capital Requirements Directive (CRD) and at global level in soft law standards such as the Basel Core Principles for Effective Banking Supervision, serves to protect the legitimate interests of institutions, which are obliged by law to provide their supervisors with an extensive range of information, including very sensitive information or even business secrets which they legitimately wish to hide from competitors.

Supervised entities therefore seek reassurance that such information will be handled properly by supervisors, and when this trust is undermined, the relationship between supervisors and supervised entities can be seriously compromised. For this reason, supervisory regimes typically include provisions binding competent authorities to professional secrecy.

At the same time, effective supervision can be hampered if authorities which need to cooperate – across jurisdictions or across different areas of competence within one

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jurisdiction – cannot exchange information with each other that is of relevance to their respective work. The professional secrecy obligations must and do therefore permit – subject to legal conditions – the exchange of information among supervisory authorities. This is where MoUs become particularly important.

Within the European Union/European Economic Area, where all authorities are subject to common secrecy standards harmonised by EU directives, the exchange of supervisory information is relatively straightforward, provided the recipient authority has a "need to know". Even so, there might also be a good case for spelling out the details of this cooperation in the form of an MoU, as is the practice when supervisors agree on the arrangements for supervisory colleges, for example.

In the case of third-country authorities, the confidentiality regime of the jurisdiction in question has to have been assessed as being equivalent to that of the EU, to avoid the passing of sensitive information to an authority which cannot be relied on to treat it with the necessary care and confidentiality safeguards. In addition, a "cooperation agreement" is needed, which usually takes the form of an MoU.

Which information does an MoU need to protect?

When negotiating confidentiality and information exchange provisions in MoUs, the first question to be answered centres on the type of information that needs to be protected.

The CRD may shed some light on this question.

- Article 53, for instance, describes the information to which the obligation of professional secrecy relates as information which persons working for the competent authority and auditors or experts working on their behalf "receive in the course of their duties".

  It thus becomes clear that any information which the same authority receives by other means is not confidential supervisory information – even though it may, of course, be protected by confidentiality provisions outside the supervisory regime with different content and scope.

  This is of importance to authorities or institutions which, like the ECB, have tasks other than supervisory ones, for instance in the areas of monetary policy or statistics, and process large amounts of information in these capacities.

- Furthermore, Article 53 permits the disclosure of information "in summary or aggregate form, such that individual credit institutions cannot be identified". That, at least, provides some guidance in the form of a general principle.

This is a negative definition, i.e. of what is not confidential. But is there a positive definition, one that says which type of data is confidential, specifically with respect to its subject matter? The CRD and the other European legislative texts on banking supervision are silent on this, also at the level of binding technical standards. Neither

do the general provisions on professional secrecy and confidentiality in primary law applicable to the ECB provide any clarification.

That leaves judges with the burden of finding a definition of “confidential” information. There is some case law casting more light on this issue. In its *Baumeister* ruling of 2018, the European Court of Justice set out some criteria to aid in determining the confidentiality of information.

The background to this judgment is a (rejected) request from a private party for access to documents held by a financial supervisory authority, so it did not arise in the context of inter-authority information exchange. The Court did, however, base its ruling on the general definition of confidentiality, which is why the latter’s value as a precedent also holds for the purposes of supervisory cooperation governed by MoUs.

Moreover, the case arose in securities markets supervision under the Markets in Financial Instruments Directive (MiFID), but the similarities of this subject area to banking supervision, as well as the parallels between the wordings of MiFID and the CRD, make it safe to assume that the same principles should also guide the interpretation of the confidentiality provisions in the banking regime. There is no obvious reason, at least, why different standards should apply within the financial sector.

One can safely assume that in the case of intra-EU supervisory cooperation, *Baumeister* will be applied by the competent authorities in the future as the benchmark against which to assess the confidentiality of information in banking supervision.

In practice, this does not solve all the open issues, as *Baumeister* does not provide any criteria related to particular subject matter deemed to be confidential. The logic of the Court is consequentialist: it links the confidential status of data to the adverse effects of their disclosure on protected parties or the functioning of the system for monitoring investment firms under MiFID. This requires an element of judgement in making the analysis, on which opinions and views might differ.

It is therefore not easy even within the EU to reply to the question of what makes information confidential. It may become even more complex when negotiating with a non-EU authority if the same difficulties in defining confidential information are found to exist in its jurisdiction.

As much as it would be desirable to have a clearer definition of the scope of confidential information in an MoU in order to facilitate its application and prevent potential disputes later on, agreeing on such a definition is clearly challenging. The different actors involved in the negotiation of an MoU come from different starting points, are bound by different legal constraints (in the case of MoUs with non-EU authorities) and obviously have different interests to protect during the negotiation process. In addition, when an MoU is being negotiated and concluded, it is impossible to foresee the entire range of future cases that it will govern.

So how do MoUs manage confidentiality safeguards?

This may be one of the reasons why MoUs in this field have a tendency to avoid such sensitive topics. They often lack a clear definition of confidentiality, not because of lassitude on the part of the negotiators, but as a result of the legal constraints by which they are bound and which they may not transgress. In some instances, the parties try to escape these difficulties by simply stating in the MoU itself that all information exchanged is to be treated as confidential. Another way out is to agree that information may only be treated as confidential if it has been labelled as such by the originating authority. Other MoUs may say nothing at all on the topic.

This leads us back to the initial factual point. MoU provisions on confidentiality in the field of supervision are sometimes drafted in a way that reflects the failure of the parties to reach an agreement on the specific scope of the confidentiality obligation, making its application in practice unpredictable, despite its potentially binding nature.

Memoranda of understanding: a critical taxonomy

Alberto de Gregorio Merino[1]

1 Introduction

This part of the book deals with memoranda of understanding (hereinafter referred to as “MoUs”). The purpose of my contribution is to set the scene with a presentation of a general character on MoUs.

I will divide my contribution in two different parts. First on a descriptive token, I will draw a taxonomy or classification of MoUs. Second, I will turn to a more analytical part, where my aim is to identify the commonalities and differences between the different types of MoUs as per the taxonomy initially drawn. I will then deal with some selected institutional and legal aspects affecting the daily practice of MoUs.

2 Taxonomy of memoranda of understanding

The legal study of MoUs is very complex. They are atypical acts, hors nomenclature, outside the categories of legal acts of the Union provided for in Article 288 TFEU and otherwise outside the typical sources and categories of public international law. If the categories of solid, liquid and gaseous in physics were to be applicable to the science of law, we could say we are facing a liquid or gaseous notion, which is highly volatile. My intention is to offer a periodic table of MoUs, hence starting with their taxonomy.

I would like also to start with a terminological remark. The legal examination of MoUs should not be limited by its name. Because we are dealing with atypical acts of undefined contours, the concept of MoUs is often formulated with different synonymic terms, such as common understandings, memoranda of cooperation, joint agreement, joint declaration or statement, framework agreement, modus vivendi, common arrangements, code of conduct, terms of reference, etc. For the sake of simplicity, I will use the term MoU to encompass the other synonymic terms.

From the EU law perspective, I would classify MoUs in three main categories:

- MoUs concluded within the framework of public international law (external relations of the Union).

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- MoUs concluded within the EU (among the institutions and bodies of the Union, among those institutions and bodies and Member States and among Member States themselves).
- MoUs concluded in the realm of economic policy and financial assistance.

2.1 Public international law

MoUs are a widespread tool in the field of public international law. They are used in most areas of international relations (trade, defence and security, diplomatic relations, environment, financial services, etc.). Recourse to MoUs is imposed by reasons of pragmatism, such as (i) the lack of formalities around them (they often become effective upon signature without the need for any further procedure or the ease with which they can be amended), (ii) the ease they offer for tackling issues which may be technical in nature, or (iii) the fact that they permit requirements of confidentiality to be addressed. As they are not international treaties, MoUs are not required to be registered with the Secretariat of the United Nations, a circumstance which makes them appropriate for fields such as defence, national security or sensitive commercial information[2].

The Union, in its international relations, has often had recourse to MoUs or legally non-binding instruments in many different fields: fundamental rights (MoU of 2007 between the Council of Europe and the European Union, which lays down modalities of cooperation between the two organisations), climate (2017 MoU between the EU and Iran on cooperation on climate change), financial/budgetary matters (MoU between the Union and Switzerland on the financial contribution to the social cohesion of the Union), or in other areas of political cooperation such as the MoU between the EU and the Organization of American States of 2009.

I would underline, in the particular field of financial services, the power of the European Supervisory Authorities (ESAs) or of the European Central Bank (ECB) as banking supervisor to conclude administrative arrangements with supervisory authorities, international organisations and the administrations of third countries (I refer to Article 33 of, respectively, the European Banking Authority and European Securities and Markets Authority Regulations[3] and Article 8 of the Single Supervisory

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2 By virtue of Article 102 of the UN Charter, "1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

3 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12) and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Mechanism Regulation[4]). On this basis, the ECB has concluded a plethora of MoUs with third countries on the exchange of confidential information and cooperation and the European Securities and Markets Authority has recently concluded an MoU with the Securities and Exchange Board of India concerning the supervision of central counterparty clearing houses (CCPs).

2.2 MoUs within the realm of the EU

The second category is the one that corresponds to MoUs between the institutions and the bodies of the Union, or among the institutions and bodies of the Union and the Member States, or among Member States themselves.

All these instruments have something in common, i.e. they constitute the expression of the principle of sincere cooperation which applies respectively to the Member States and the institutions of the Union by virtue of Articles 4(3) and 13(2) TEU.

A well settled practice has been established for decades where the Parliament, the Commission and/or the Council have concluded among themselves interinstitutional arrangements (also often called joint declarations) in different fields such as providing information in the field of international law (association and trade agreements) or the institution of a conciliation procedure or the agreement between the Parliament, Council and Commission to improve the budgetary procedure.

The Treaty of Lisbon codified this practice by laying down in Article 295 TFEU the possibility for the Parliament, the Council and the Commission to conclude interinstitutional agreements (IIA) for their cooperation in compliance with the Treaties, which may be of a binding nature. IIA are therefore no longer atypical acts but acts provided for by the Treaties and, as such, they are distinct from the notion of MoUs we are dealing with here. However, Article 295 TFEU is formulated in exhaustive terms: it refers to the possibility that the three so-called “political institutions”, the Parliament, the Council and the Commission, conclude IIAs among themselves. Article 295 TFEU cannot therefore be the basis for other agreements of the same kind and effects between those institutions and other institutions (e.g., with the ECB), or between other institutions and bodies. Yet, this does not prevent the establishment of MoUs with - or between - the institutions and bodies not referred to in Article 295 TFEU. And this does not prevent these MoUs from having legal effects analogous, if not identical, to the IIAs referred to in Article 295 TFEU - which can be binding as will be referred to later.

There are plenty of those arrangements, some of them provided for in secondary legislation. Some indicative examples include the Agreement between the ECB and the Parliament on the detailed arrangements for organising confidential oral discussions between the Chair of the supervisory board and the competent committee of the Parliament for supervisory tasks, provided for in Article 20(8) of the

[4] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

SSM Regulation; the Agreement between the Single Resolution Board (SRB) and the Parliament for holding equivalent discussions in relation to the SRB tasks (Article 45(7) of the SRM Regulation[5]); the MoU between the SRB and the ECB (provided for in Article 30(7) of the SRM Regulation) and the SRB and the Commission on cooperation and exchange of information; the MoUs between the Commission and the European Investment Bank (EIB) on the cooperation in external lending operations and the Agreement between the EIB and the Commission on the management of the European Fund for Strategic Investments (EFSI, the so-called Juncker plan Fund) provided for in Article 4 of the EFSI Regulation[6].

MoUs may also be concluded between the institutions of the Union and all or some of its Member States, with a view to fulfilling the duty of sincere cooperation and ultimately furthering the objectives of the Union. A telling example is the joint position on future cooperation concluded in November 2018 between the Commission and the European Stability Mechanism (ESM) (the ESM being an emanation of the euro area Member States) which specifies the respective roles of the Commission and the ESM decision-making bodies in the execution of ESM related functions[7].

Finally, there are MoUs among Member States which, as referred to above, encapsulate the duty of sincere cooperation among them with a view to achieving Union objectives through their enhanced coordination. This is typically the case of fields which remain close to Member States' sovereignty because they correspond to competences of coordination where Member States are the subject and the object of the policy (as economic policy is) or to competences which are very dear to Member States (such as taxation and budgetary sovereignty). An example here is the Code of Conduct on the implementation of the Stability and Growth Pact (S&GP). This Code of Conduct is the instrument that contains the common understanding and interpretation of Member States on the main elements of the preventive and corrective arms of the S&GP.

It is also the case for competences that may be exercised by the Union and which are dear to Member States' national sovereignty, such as some fields in the area of taxation. I refer here to the Code of Conduct for business taxation, where Member States have engaged to re-examine, amend or abolish their existing tax measures that constitute harmful tax competition; and refrain from introducing new ones in the future[8].

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5 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

6 Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments (OJ L 169, 1.7.2015, p. 1).

7 https://www.esm.europa.eu/press-releases/joint-position-future-cooperation-between-european-commission-and-esm.

8 Council Conclusions of 1 December 1997 concerning taxation policy and Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a Code of Conduct for business taxation (OJ C 2, 6.1.98, p. 1).

2.3 MoUs in the field of economic policy and financial assistance

These are probably the MoUs we know best. I will therefore say very few words on them. They can be concluded within EU law or inter-governmentally.

In EU law a practice has been developed over many years whereby the conditionality attached to financial assistance granted by the Union to Member States or third countries is reflected in an MoU.

Economic policy conditions attached to macro-financial assistance to third countries based on Article 212 TFEU (economic financial and technical cooperation with third countries other than developing countries) are reflected in an MoU concluded between the Union and the third country in question. MoUs have been concluded thus with countries such as Ukraine, Moldavia, Georgia, Tunisia or Jordan. This type of MoU is considered by the respective EU decisions activating assistance as an implementing act of the Union adopted by the Commission through comitology.

The same goes in respect of economic conditions attached to assistance granted pursuant to Article 122(2) TFEU, the basis of the European Financial Stability Mechanism (EFSM), whereby financial assistance was granted to Ireland, Portugal and Greece (bridge financing) during the debt crisis. Pursuant to Article 3(5) of the EFSM Regulation[9], an MoU is to be concluded between the Commission and the beneficiary Member State detailing the economic policy conditions that the Council will have established previously. A similar approach is taken in respect of the balance of payments assistance to non-euro area Member States that are experiencing or threatened by difficulties regarding their balance of payments, based on Article 143 TFEU (activated for Hungary, Romania, Latvia), as laid down in Council Regulation (EC) No 332/2002[10].

Finally, we have to refer to the MoUs concluded outside EU law, within the framework of intergovernmental entities such as the European Financial Stability Facility (EFSF) and, subsequently, the ESM. Article 13.3 ESM Treaty requires the conclusion of an MoU between the ESM and the beneficiary Member State. Noteworthy in the negotiations of the latest ESM Treaty, the text agreed by the Eurogroup in June 2019 excludes recourse to an MoU in the case of precautionary assistance[11]. The MoU is here replaced by a letter of intent by the requesting Member State, where it will highlight its main policy intentions to comply with eligibility criteria that the ESM Treaty specifies.

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9 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12.5.2010, p. 1).

10 Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 53, 23.2.2002, p. 1).

11 https://www.esm.europa.eu/press-releases/explainer-esm-reform-and-revisions-esm-treaty.

3 A critical view on memoranda of understanding

I would like to pass now to the analytical part of my presentation. Here I would like to make a first reflection. The taxonomy of MoUs has shown to us how polysemic or heterogeneous this notion may be and the different uses it encompasses. I will focus though on the commonalities shared by the different categories I have referred to.

There is a first commonality which I have already underlined, namely the fact that MoUs are atypical acts, hors nomenclature, which do not correspond to those emanating from the well-established sources of law, which in the case of EU law are listed in Article 288 TFEU. They therefore lack an automatic recognition by primary law as legal norms, a constitutional recognition in the Kelsenian sense of the term.

Second, because they are atypical acts, their adoption follows atypical procedures which are often deprived of formalities. From this point of view they provide a sort of flexibility or procedural and administrative economy to the day-to-day institutional practice and management, which makes them a very interesting tool for the Member States and the institutions.

But there is probably a more important commonality. If a legal norm may be labelled as one which establishes obligations as well as the means to enforce those obligations, MoUs are lacking in relation to these two criteria: they set out soft or incomplete obligations – often just political engagements – and/or soft or incomplete enforcement means – often essentially limited to institutional peer pressure. As such they are instruments of soft law, as opposed to instruments of hard law.

And this leads me to the following idea: MoUs as instruments of soft law, are, however, not deprived of normativity. Case law and practice show us that MoUs may have legal effects and be accordingly invoked before the European Court of Justice (ECJ) and be subject to its control.

Or, to put it in a different perspective, recourse to MoUs cannot be had to deconstruct the principles of autonomy, direct effect and primacy with which the EU legal order are endowed. MoUs cannot become a parallel legal order that Member States and institutions use to the detriment of the procedures and competences laid down in the Treaties, as well as the rights of individuals stemming from those Treaties, notably fundamental rights. Returning to the realm of physics, MoUs can be a volatile substance, but they cannot become a hazardous one.

This, in my view, explains a trend of broad control by the ECJ which, in one manner or another, has brought MoUs within the system of remedies and enforceability laid down in the Treaties. Case law shows us a pattern of extended scrutiny of MoUs, as I will show below.

First, when examining instruments such as MoUs, the ECJ has followed a non-formalistic approach: the nature and effects of an act are not determined by its nomen iuris or form but by the wording, content and aims of that act. In *France* v

Commission[12], the ECJ considered that the wording of an arrangement concluded between the Commission and the USA regarding the application of their competition laws, and labelled by the Commission itself as an "administrative agreement", created legal effects in respect of the two parties, and hence amounted to an international Treaty for the conclusion of which the Commission had no competence. In another case, with the same parties but with an opposite conclusion, *France* v *Commission*[13], the Court considered that the intention of the Commission and the USA when concluding "guidelines" concerning technical barriers to trade excluded any binding effects and, therefore, those guidelines could be validly concluded by the Commission.

Second, in some instances, the ECJ has considered the legally binding effects of MoUs or similar atypical arrangements, whilst underlining the desirability of having recourse to them as a corollary of the duty of sincere cooperation. *Commission* v *Council*[14] concerned the application of an arrangement between the Commission and the Council to decide on the exercise of responsibilities or on statements to be expressed before the FAO (UN Food and Agriculture Organization). There, the ECJ concluded that the arrangement was validly concluded as a fulfilment of the duty of cooperation between the two institutions. Moreover, it was clear from the terms of the arrangement that the two institutions intended to enter into a binding commitment towards each other and, hence, they were bound by such arrangement. Failing to respect its terms would be a breach of their obligations under the Treaties amenable to the control of the Court.

Third, the fact that MoUs or similar arrangements constitute political engagements which do not entail legally binding effects, does not mean that they are exempted from respecting the principles, competences and procedures laid down by the Treaties. In *Council* v *Commission*[15], which concerned the Commission's decision to sign an MoU with Switzerland concerning a Swiss financial contribution to Croatia, the ECJ ruled that the Commission had acted illegally by not seeking prior approval from the Council before signing, on behalf of the Union, an MoU with the Swiss authorities. The ruling clarified that a decision to sign a non-binding agreement such as the one at stake is a measure of policy-making therefore falling under the Council's powers as laid down in Article 16 TFEU. The fact that the Commission had not subject the final text of the MoU to the approval of the Council, as the institution upon which the Treaties confer the power to define the Union's policy and external action planned, meant that it had breached the principle of conferral of competences. The Commission's decision to sign the MoU was therefore annulled by the ECJ.

This last remark is very important in relation to MoUs concluded among the institutions of the Union or among those institutions and the Member States, which

[12] Judgment of 9 August 1994, *French Republic* v *Commission of the European Communities*, C-327/91, EU:C:1994:305.

[13] Judgment of 23 March 2004, *French Republic* v *Commission of the European Communities*, C-233/02, EU:C:2004:173.

[14] Judgment of 19 March 1996, *Commission of the European Communities* v *Council of the European Union*, C-25/94, EU:C:1996:114.

[15] Judgment of 28 July 2016, *Council of the European Union* v *European Commission*, C-660/13, EU:C:2016:616.

cannot constitute a disguised manner to alter the established interinstitutional balance or to regulate EU policies for which an adequate legal basis is provided for in the Treaties. IIAs and related MoUs may not depart from the rules established in primary law nor circumvent the procedures set out in the Treaties. The Treaties define exhaustively the respective powers conferred on the institutions, which may not be modified by the institutions or the Member States themselves or by agreement between them.

Moreover, interinstitutional arrangements should in principle focus on cooperation between the institutions with a view to applying existing law, thus on process and not on substance, on practical working methods and not on the articulation of policy making choices[16].

And I come here to the fourth and final point I wanted to make. The pattern of extended scrutiny by the ECJ is also evident in relation to the MoUs on financial assistance.

In the case of *Florescu*, a reference for a preliminary ruling from a Romanian court, the ECJ was called upon to interpret certain provisions of the MoU concluded between the Commission and Romania in the framework of the balance of payments assistance to that country[17]. According to the ECJ, the MoU "gives concrete form to an agreement between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that agreement, to benefit from financial assistance from the EU"[18]. As such, the Court goes on, the MoU constitutes an act of an EU institution which falls within the power of interpretation of the Court.

An interesting question concerns the consequences of the recipient Member State not complying with its engagements under the MoU. Would the consequence be limited to the interruption of the financial assistance or could actions for infringement be launched by the Commission against the State? Could the engagements unilaterally assumed by the recipient Member State, such as those in social security, employment and labour be judicially enforced by the Union? This question is ultimately linked to the one of competence. Can MoUs be used as a vehicle for actions for which the Union does not hold a competence or holds a limited competence (such as social security or employment)?

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16 It is worth noting that in 2010 the Council issued a statement where it declared that a number of provisions of the so-called Framework Agreement on relations between the European Parliament (EP) and the Commission, which regulated different aspects of cooperation between the two institutions on sharing information, on external relations/Common Foreign and Security Policy, on the implementation of EU law, would breach the principle of interinstitutional balance between the institutions and go beyond the principle of conferral of powers among the institutions. To give some examples, the text provided prerogatives to the EP in relation to international treaties not laid down in Article 218 TFEU, or special rights of information in the infringement procedures or a sort of participation of the EP in comitology meetings (OJ C 287, 23.10.2010, p. 1).

17 Judgment of 13 June 2017, *Eugenia Florescu and Others* v *Casa Judeţeană de Pensii Sibiu and Others*, C-258/14, EU:C:2017:448.

18 ibid., para. 34.

Although *Florescu* does not expressly consider this issue, in my view, MoUs can be labelled as contractual acts between the Union and a Member State where each party commits to respect the respective engagements, i.e. economic adjustment conditions in exchange for finance. If a Member State were to breach its obligations under the MoU, the legal consequence would be limited to interrupting or ceasing the assistance initially agreed. But no further means of judicial enforcement before the ECJ would be available.

Likewise, in the case of *Ledra Advertising* v *Commission and ECB*[19], the Grand Chamber of the Court held that the Commission retained its role as guardian of the Treaties when acting in the framework of the ESM and should therefore refrain from signing a MoU with the ESM whose consistency with EU law (especially, the charter of fundamental rights) it doubts. Otherwise it could be rendered liable for damages by aggrieved individuals.

Ledra concerned an action for damages. Yet, in my view MoUs concluded by the ESM may be the object of judicial scrutiny through preliminary references were they to run counter to EU law, whether economic governance provisions or fundamental rights. The ESM, being an emanation of Member States, should refrain from breaching EU law. Let us not forget that the ESM Treaty itself states that MoUs have to remain consistent with the law of the Union.

4 Conclusion

The use of MoUs is widespread in the law of the Union, be it in the international relations of the Union, in its inter-institutional relations or in the specific field of economic policy and financial assistance.

MoUs are atypical acts that follow atypical procedures, normally deprived of procedural formalities. This grants a degree of flexibility that makes them very useful and appealing to the institutions of the Union and the Member States in the day-to-day management of institutional and international relations when recourse to usual hard law is impracticable or simply not feasible. They are also a vehicle to reflect the duty of sincere cooperation among the Member States and among the institutions and bodies of the Union.

International and institutional practice shows us that, in spite of the fact that MoUs do not establish legally binding obligations nor complete means of enforcement, they are often followed by the parties to them. And their efficiency explains the success and proliferation of MoUs: they are not legally binding but they are systematically applied and followed by their addressees.

Yet, the fact that they are not legally binding does not mean that they are deprived of normativity. The case law of the Court shows us that MoUs may have legal effects and be invoked before it. The standard of judicial control of MoUs is quite extended.

[19] Judgment of 20 September 2016, *Ledra Advertising Ltd and Others* v *European Commission and European Central Bank (ECB)*, C-8/15 P to C-10/15 P, EU:C:2016:701.

There is an underlying concern explaining this case law: whereas the Court has validated recourse to MoUs, it is clear that they cannot constitute a parallel legal order which would downgrade or jeopardise the integrity of EU law or of the rights of individuals stemming from EU law. In fact, this constitutes the biggest challenge of having recourse to MoUs: to preserve MoUs' usefulness whilst simultaneously preserving the integrity of the Union legal order (including the Charter of Fundamental Rights), as the Court will continue to exercise enhanced oversight on the compatibility of MoUs and similar instruments with EU law.

Judicial review of economic and financial governance MoUs – between legal impeccability and economic flaws

Dariusz Adamski[1]

1 Two arguments

This contribution makes two overarching arguments. First, if the content of a Memorandum of Understanding (MoU) – whether establishing strict conditionality in a balance of payments crisis or pertaining to the supervision of financial institutions (comprising banks and the institutions operating on markets in financial instruments), referred to as financial governance MoUs throughout this contribution – meets some basic conditions, it is in practice impossible to win a case against it before the Court of Justice in Luxembourg. Second, while legally unchallengeable before the European top court, strict conditionality MoUs are profoundly baffling nonetheless, especially in the euro area. However, this is so for political and economic reasons only.

The next two parts of this contribution are structured accordingly. Section 2 substantiates the first of the two arguments. In Section 2.1 the vigorously expanding group of the MoUs focussed on financial institutions is looked at, from the perspective of their specific vulnerabilities in the judicial review before the Court of Justice of the EU (CJEU). This part also suggests that the detected shortcomings can and should be remedied, in practice rendering a court case against such MoUs virtually impossible to win. Dealing with a different set of the MoUs – strict conditionality arrangements concluded in a balance of payments crisis – Sections 2.2 and 2.3 argue that while this group of the MoUs is formally amenable to judicial review before the CJEU, the applicable review standards make it hardly possible to win a case against them on substantive grounds. While this should not be particularly surprising from the legal perspective, Section 3 looks at the economic and political characteristics of the strict conditionality MoUs for the euro area countries concluded during the sovereign debt crisis, substantiating the second overarching argument.

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2 Limits to justiciability before the CJEU

2.1 Financial governance MoUs

Like any MoUs, financial governance Memoranda comprise atypical acts, cooperative, negotiable arrangements, bilateral or multilateral. But, unlike strict conditionality MoUs establishing economic reforms to be pursued in exchange for stabilisation funding during a balance of payments crisis, financial governance MoUs essentially establish the areas and the modes of administrative cooperation between the authorities involved in the oversight of financial institutions. They concentrate on regulatory and enforcement assistance, information sharing, evidence gathering and confidentiality rules (Adamski (2020)).

This fast expanding group often includes provisions on information sharing about market participants. It is precisely this aspect which may become legally contentious when the information is exchanged with third country authorities espousing different standards of professional secrecy than prescribed by EU law.[2] The most important practical question of relevance in this context is what if a European authority – for instance the ECB performing its supervisory tasks in the banking sector – discloses, pursuant to a MoU, confidential information on market participants to a third country authority, which – according to its domestic law – is not bound by comparable confidentiality obligations, and then the information is leaked or otherwise disclosed, causing damage to the market participant. This issue is salient because, as finance has become global, such memoranda have been signed also with the authorities from somewhat exotic jurisdictions, including developing countries.

The liability concerns may be dispelled, however, if some basic standards of diligence are met when drafting the MoUs. These standards may entail in particular establishing the legitimate goals and the methods of processing sensitive information by the counterparties, prohibiting processing information when the standards are not met, as well as introducing warning and cooperation procedures if a confidentiality breach may occur. The arrangements should also arguably treat the cooperation between the authorities as contingent on full compliance with such standards.

Financial governance MoUs concluded so far have tended to frame the related professional secrecy obligations in much more generic, often overly casual, terms. Furthermore, they routinely include clauses disavowing any legal effects of the whole MoU, rendering the practice of exchanging confidential information with third countries unbound by equivalent statutory confidentiality obligations extremely dubious from the legal perspective.

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[2] The two main sources of professional secrecy obligations in European secondary law pertaining to financial institutions are: Art 53 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, (OJ L 176, 27.6.2013, p. 338) and Art 76 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

Justifications for the explicit denials of legal effects repeated in virtually every financial governance MoU signed by European authorities may be sought in systemic and practical considerations.

According to the systemic reasoning, financial governance MoUs can be classified neither as primary law nor as binding secondary law (regulations, directives, decisions) in the system of EU law sources. Hence they are soft law. In its interpretative document on the external action the Commission concluded that, as soft law, MoUs should be explicitly non-binding for any of their counterparties: "careful drafting is crucial to ensure that MoUs do not risk being considered as legally binding, in which case Article 218 TFEU would be applicable and the Council would be competent to conclude it. Careful drafting of non-binding instruments will ensure that they do not contain any formulation which can be interpreted as legally binding".[3]

The practical reason, supplementing the systemic justification just explained, is that binding MoUs would deprive their counterparties of the flexibility sustaining the cooperation only as long as it is convenient for all the authorities involved and that explicitly non-binding MoUs can be terminated immediately, by *fait accompli*, with no further formalities involved.

None of these arguments survives closer scrutiny, however. The approach of the Commission envisaged in its interpretative document just quoted was not devised with instruments resembling financial governance MoUs in mind. It dealt with MoUs in general, classifying them as political commitments only and never as administrative arrangements. In the case of financial governance MoUs, however, the classification ought to be reversed, because these instruments have next to nothing in common with political commitments, instead establishing goals and modes of administrative cooperation. To such administrative arrangements a prohibition of (self) binding consequences should not apply, because they are – as the Court has put it in a similar context – "rules of practice … by which … [the] institution imposes a limit on the exercise of its discretion."[4] They "ensure legal certainty on the part of the undertakings since they determine the method which … [an EU authority] has *bound itself to use*" (emphasis added).[5]

Furthermore, express denials of legal effects in the MoUs do not provide for any flexibility reconcilable with legal certainty and the necessity of shaping cooperation patterns in line with binding legal requirements. Pursuing cooperation on the basis of an explicitly non-binding arrangement does not incentivise its counterparties to follow the legal standards the other sides are bound by statutorily (unless – of course – the statutory standards of all the counterparties are equivalent). In such a situation a plaintiff in a liability case would not find it difficult to prove that a damage "flows sufficiently directly from the unlawful conduct of the institution"[6] if there is a

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3 Commission's Secretariat General and Legal Service, "Vademecum on the External Action of the European Union", SEC(2011)881, 43.

4 Case C-619/13 P, *Mamoli Robinetteria v Commission*, EU:C:2017:50, para. 51.

5 Case C-3/06 P, *Danone*, EU:C:2007:88, para. 23.

6 Case C -677/15 P, *EUIPO*, EU:C:2017:998, para. 99, and the case law cited there.

professional secrecy breach after a confidential information is disclosed by a European authority to a third country countersigner of a financial governance MoU. Conversely, if the MoU is crafted carefully as a mutually self-binding arrangement providing for the necessary contractual precautionary measures, the defendant institution would find it much easier to persuade the Court that it acted lawfully exchanging with its third country counterparty sensitive information necessary to oversee financial institutions.

Ultimately, therefore, shaping the "rules of practice" encapsulated in such instruments in precise and committing terms whenever non-compliance could entail liability claims is both systemically justifiable and highly requisite from the practical standpoint. Achieving such a goal could well be coupled with providing for flexible methods of both suspending cooperation and withdrawing from it, to avoid – in line with the practical motivation to frame mutual relations using atypical acts – excessive rigidity of the underlying instruments. As the European institutions supervising financial institutions, the ECB in charge of supervising credit institutions in particular, are influential players in global financial relations, they arguably have enough bargaining power to convince their international counterparties that, because the MoUs must comply with the obligations imposed by EU law, the cooperation must be aligned accordingly.

While financial governance MoUs have not yet reached such a mature form, which would make winning a case against them particularly difficult, European institutions, the ECB in particular, have also advanced internal discussions on how to refine the content of this fast expanding group of new governance instruments. This learning process suggests that future financial governance MoUs will more properly than now shield European counterparties from liability lawsuits.

2.2 Judicial reviewability of strict conditionality MoUs – formal aspects

Even when acting as agents of a separate international organisation, like the ESM, EU institutions are obliged to abide by EU law, including the Charter. As the CJEU pointed out in the *Ledra* case, the Commission, in particular, "retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Art. 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts."[7] This pronouncement dovetails with the previous finding, in *Pringle*, that "by its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it (…) to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law".[8]

However, in the same two decisions (*Pringle* and *Ledra*) the Court excluded all the actions of the Commission or the ECB, when they take them as agents of the ESM,

[7] Joined Cases C-8/15 P to C-10/15 P, *Ledra*, EU:C:2016:701, para. 59.

[8] Case C-370/12, *Pringle*, EU:C:2012:756, para. 164.

from the scope of EU law. More specifically, in *Pringle* it claimed that 'the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM'.[9] And, as it added in *Ledra*, "participation of the Commission and the ECB (…) in the procedure resulting in the signature of the Memorandum of Understanding (…) does not enable the latter to be classified as an act that can be imputed to them."[10]

These two sets of statements do not match together well. It is in particular hardly logical to bestow on EU institutions certain responsibilities under EU law, even when they act as agents of the ESM, and at the same time render their actions "authorless" from the perspective of EU law. The reason is that no one can be responsible for "authorless" actions. In consequence, if a strict conditionality MoU signed by the Commission on behalf of the ESM is considered unimputable to this institution, the basic logic requires that it could never breach any obligation stemming from EU law, including its guardian of the Treaties role, when negotiating, signing, or monitoring such a MoU according to its mandate. By the same token, if the actions taken by the Commission or the ECB pursuant to the Treaty establishing the ESM are not imputed to these institutions under EU law, it is hardly possible to make a cogent argument why the EU could ever be liable for them. One conclusion or the other should give in. Both cannot logically hold at the same time.

Following the "unimputability" thesis, the CJEU should dismiss any case for damages on formal grounds, instead of adjudicating on substance. However, it did proceed to the substantive review in recent cases, corroborating the contrary "imputability" thesis that actions of the Commission and the ECB, even when these institutions are agents of the ESM, are relevant from the perspective of EU law as well. This outcome might be hard to square with the quoted contrary pronouncements in both *Pringle* and *Ledra*, but it implies what sheer logic suggests: when EU institutions negotiate, conclude and monitor strict conditionality MoUs on behalf of a separate international organisation, their actions should be deemed to be acts of EU institutions under EU law as well. The fact that "the activities of the ESM fall under economic policy",[11] in which the EU has coordinating powers (Art. 2(3) and 5(1) TFEU), also suggests that acting as an agent of the EU and of the ESM at the same time is legally permissible under EU law.

If in future cases the "unimputability" thesis prevails, no judicial review of strict conditionality MoUs before the Court of Justice should take place for formal reasons. This ought to refer to preliminary reference procedures and actions for annulment, as none can be litigated when there exists no EU act to be reviewed. It would also be illogical to make an exception in this respect for liability claims, when the actions of EU institutions giving raise to them are considered unimputable to the sued institutions under EU law. If, however, in future cases the "imputability" thesis prevails regarding the Commission (signing the MoUs) or the Council (endorsing

9 Case C-370/12, *Pringle*, para. 161.

10 Joined Cases C-8/15 P to C-10/15 P, *Ledra*, para. 52.

11 Case C-370/12, *Pringle*, para. 160.

them according to Regulation 472/2013),[12] any future strict conditionality MoU should be eligible for the preliminary reference procedure, even when signed on behalf of the ESM. It is because "Art. 267 TFEU confers on the Court jurisdiction to deliver a preliminary ruling on the validity and interpretation of *all acts of the EU institutions without exception*".[13]

The next question emerging if the imputability thesis prevails is whether strict conditionality MoUs are intended to produce legal effects vis-à-vis third parties, which is necessary to establish their eligibility for Art. 263 TFEU (action for annulment) cases. To start with, it should be reiterated that deciding *Ledra* in the first instance the General Court, when confronted with pleas demanding both the annulment of the Cypriot MoU and the claims for damages, found none of them admissible, mainly because the MoU entirely pertained to the ESM system.[14] Although in appeal the Court rejected this reasoning in respect to the claims for damages, it nonetheless contended that signing a strict conditionality MoU on behalf of the ESM "is liable to have an effect in relation to the conditions governing the admissibility of an action for annulment that may be brought on the basis of Art. 263 TFEU" (para. 55).

It did not further elaborate on the relationship between the contested MoU and the action for annulment.[15] However, its *obiter dictum* could seemingly suggest that a MoU signed by the Commission on behalf of the ESM may preclude the reviewability of the MoUs in an action for annulment. Yet such a conclusion would again lead to a serious logical inconsistency: if the MoUs do not produce legal effects vis-à-vis third parties, they should be irrelevant from the perspective of the particularly salient substantive arguments, including these based on fundamental rights. It entails logically that the MoUs might produce legal effects vis-à-vis third parties, if the Court assumes – as it does – that the MoUs are capable of breaching such rights.

Such a finding, however, should not overshadow another important conclusion: even when it is accepted that a strict conditionality MoU produces legal effects vis-à-vis third parties, an action against it based on Art. 263 TFEU could hardly be decided by the Court on substantive grounds. The reason is formal, and stems from standing constraints. On the one hand, formally privileged plaintiffs – especially the European Parliament or a government of an EU country contesting austerity – would face no formal barrages to challenge a strict conditionality MoU in such a scenario. The

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12 "The Council, acting by a qualified majority on a proposal from the Commission, shall approve the macroeconomic adjustment programme prepared by the Member State requesting financial assistance": Art. 7(2) Regulation 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L 140, 27.5.2013, p. 1).

13 Case C -16/16 P *Belgium v Commission*, EU:C:2018:79, para. 44, and the case law cited there (emphasis added).

14 The duties conferred on the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own and, moreover, ... the activities pursued by those two institutions within the ESM Treaty solely commit the ESM': Cases T-289/13, *Ledra*, EU:T:2014:981, para. 45; T-291/13 *Eleftheriou*, EU:T:2014:978, para. 45, and T-293/13, *Theophilou*, EU:T:2014:979, para. 45.

15 In its decision, the second instance noted that the appellants asserted errors in law only in respect to the decision of the General Court on the conditions under which the EU may incur non-contractual liability (para. 31). In consequence, it did not address the original claim based on Art. 263 TFEU at all.

experience of the sovereign debt crisis demonstrated, though, that in practice none of the privileged plaintiffs may want to foment economic jitters by challenging the arrangements between the creditors and the government of the debtor country. On the other hand, individuals in practice bearing the burden of austerity measures may have a sufficiently strong incentive to challenge the MoUs, but they are very unlikely to have standing, because the MoUs are not "of direct and individual concern" to them, contrary to what Art. 263 TFEU requires.[16] First, the MoUs aim to rudimentarily reform national economic and financial policies with no demonstrable "individual concern" for the citizens taking their brunt.[17] Second, national governments introducing the policies routinely retain broad discretion in transposing the unavoidably very general and succinct descriptions of individual reforms enlisted in the MoU into national legislation, which leaves the individuals only "indirectly concerned" by the reforms.[18] All in all, therefore, for formal reasons individuals are practically unable to challenge a MoU upon Art. 263 TFEU, as long at least as the fiscal and economic reforms enlisted in it are drawn from the typical toolkit of general macroeconomic and financial reforms prescribed for balance of payments crises.

Finally, even if the imputability thesis prevails, no failure-to-act claim targeted at a strict conditionality MoU and based on Art. 265 TFEU would be conceivable in practice. First of all, the Treaties provide for no obligation to sign strict conditionality MoUs, either within or outside the EU system. Concluding them is therefore within the discretion of the negotiating parties. Because inactivity within the institutional discretion cannot violate the Treaties, while Art. 265 TFEU requires that the challenged institutional inactivity be "in infringement of the Treaties", a failure-to-act motion in respect to strict conditionality MoUs is formally precluded. In addition to these constraints, MoUs are always concluded very swiftly, in order to soothe the financial markets and to prevent a broader systemic implosion. The fact that a failure to grant assistance would make the sovereign financially unviable, while its default could trigger financial runs on other countries as well, renders the bargaining position of creditors extremely strong when negotiating with a country in a financial crisis and practically precludes negotiation impasses which could provoke failure-to-act arguments.

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16 Pursuant to Art. 263(4) TFEU,"any natural or legal person may … institute proceedings against an act addressed to that person or which is of direct and individual concern to them." The other two possible situations in which individuals would have standing according to the same provision (an act addressing the claimant and a regulatory act which of direct concern to her and not entailing implementing measures) would never materialise in the context discussed here.

17 Developing on the venerable so-called Plaumann test, the Court has held that 'the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it': Case C -384/16 P, *European Union Copper Task Force*, EU:C:2018:176, para. 94.

18 Specifically in this context see Cases T-541/10, *ADEDY*, EU:T:2012:626, and T-215/11, *ADEDY*, EU:T:2012:627.

2.3 Judicial reviewability of strict conditionality MoUs – substantive aspects

For the abovementioned reasons substantive arguments against the MoUs could hardly ever be evaluated by the Court in proceedings based on Art. 263 or 265 TFEU. The case-law developing since the *Ledra* case demonstrates, however, that plaintiffs could well succeed in bringing their cases to the stage of the substantive judicial review in non-contractual liability cases (Art. 268 TFEU). As also argued, the "guardian of the Treaties" pronouncement in *Ledra* implies that the same ought to apply to the judicial review under the preliminary reference procedure (Art. 267 TFEU) even when the financial assistance is granted by the ESM. The potentially most salient substantive arguments they could use in this respect pivot on whether strict conditionality MoUs are reconcilable with primary law, the fundamental rights enshrined in the Charter in particular.

This is precisely why in every case against the MoUs decided by the CJEU the Charter rights have been invoked. Since *Ledra* the Court has not tried to ignore fundamental rights claims. In this and the subsequent decisions – *Florescu*,[19] *Associação Sindical dos Juízes Portugueses* (*ASJP*)[20] and *Chrysostomides*[21] – it has clarified the relationship between the MoUs and the Charter rights, making its position sufficiently clear to predict the outcome of any future similar case.

In *Chrysostomides*, which considered – like *Ledra* – bail-in and resolution measures imposed on certain groups of Cypriot deposit-holders, bond- and share-holders in this island's two biggest banks the most serious charge against the conditionality measures also concerned violations of the right to property.[22] In *Florescu* the claimants alleged that the Romanian MoU breached their fundamental right to property, enshrined in Art. 17(1) of the Charter. The plaintiffs in this case – retired judges – saw their income, earned when combining a state pension with a salary in a public educational institution, reduced as an effect of a MoU signed by the Commission on behalf of the EU in 2009. The *ASJP* decision also pivoted on judges' income reductions caused by general austerity measures agreed between the government and the Commission. However, apparently realising the Court's dismissive stance towards arguments undermining the MoUs as violating the right to property, the plaintiffs in this latter case chose a different litigation strategy. They contended that the reductions of salaries for the judiciary – even if simply a part of cuts introduced indiscriminately throughout the whole public sector – undermine the

19 Case C -258/14, *Florescu*, EU:C:2017:448.

20 Case C-64/16, *ASJP*, EU:C:2018:117.

21 Case T-680/13, *Chrysostomides*.

22 In addition, the plaintiffs also claimed violations of the principles of legitimate expectations and equal treatment. The Court, however, found that they failed to establish any legitimate expectations in this particular case. The same, according to the Court, applied to four out of five heads of claims based on the principle of discrimination (in respect to the fifth head it concluded that the discriminatory measure was justified): Case T-680/13, *Chrysostomides*, paras. 404-508.

fundamental right to an effective judicial remedy, by weakening the material position of the judges, which in turn is necessary to maintain their independence.[23]

The fact that in these cases the Court scrutinised the substantive arguments presented by the plaintiffs has made some commentators think that the emerging pattern "leaves no doubt that – even if in the EFSF and ESM framework the Commission and the ECB act under powers conferred on them by intergovernmental agreements – their commitment to the Charter does not cease to exist."[24] On closer scrutiny, however, this "commitment" is no more than lip service. In other words, in each case the Court took all the arguments supporting the MoUs at face value, performing very succinct and brief comparison of the rights invoked by the plaintiffs and the conflicting general interests supporting austerity measures.

In *Ledra* and *Chrysostomides* it concluded that the contested bail-in of depositors, bondholders and shareholders in the two biggest Cypriot banks were limitations of their right to property proportional to the overarching public interest in ensuring the stability of the banking system of the Eurozone as a whole[25] and in reducing the size of the Cypriot financial sector.[26] When making these conclusions, the judges admitted that their judicial oversight should be reduced to the marginal review standard,[27] taking it for granted that no more proportional method of preventing the Cypriot banking system from an implosion existed in spring 2013[28] and that, had any such a meltdown of the Cypriot financial system actually happened, serious contagion effects would most likely follow for the rest of the Eurozone's banking system.[29]

Espousing a similarly cursory judicial review, in *Florescu* the Court underlined that the goal of rationalising public spending and reducing balance of payments difficulties in the context of a global financial and economic crisis constituted an objective of general public interest (para. 56). Indicating that "given the particular economic context, Member States have broad discretion when adopting economic decisions and are in the best position to determine the measures likely to achieve the objective pursued" (para. 57), it emphasised the exceptional and temporary nature of the contested austerity measures (para. 55), as well as some other – not very serious – factors mitigating their onerousness for the claimants (para. 58),[30] to recognise the contested measures as proportionate restrictions of the right to property.

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23 Under second subsection of Art. 19(1) TEU "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." Art. 47(1) of the Charter similarly enshrines "the right to an effective remedy before a tribunal." While the Charter therefore refers to the fundamental right to an effective remedy, and not explicitly to judicial independence, in *ASJP* the Court (esp. paras. 35–41) emphasised that the latter is a precondition of the former.

24 Poulou (2017), 1009.

25 Cases C-8/15 P to C-10/15 P, Ledra, para. 74; Case T-680/13, *Chrysostomides*, paras. 294-358.

26 Case T-680/13, *Chrysostomides*, para. 299.

27 As expressly admitted in Case T-680/13, *Chrysostomides*, para. 291.

28 Case T-680/13, *Chrysostomides*, paras. 301-313.

29 Cases C-8/15 P to C-10/15 P, *Ledra*, paras. 72-74; Case T-680/13, *Chrysostomides*, esp. para. 294.

30 The plaintiffs would not experience the austerity measure when they decide not to combine their pension with employment, or when their pension does not exceed the national average gross wage.

The *ASJP* decision subscribes to the very same type of judicial scrutiny. Responding to the preliminary question hinging on the notion of judicial independence, the Court entirely concentrated on the guarantees of this independence stemming from Art. 19(1) TEU, omitting the Charter.[31] This approach precluded the standard balancing of fundamental rights and contradictory public interest arguments, leading the Court to the question of whether judicial independence is at all encroached by the Portuguese austerity measures. Responding to it, the Court stressed that the cuts were "general measures seeking a contribution from all members of the national public administration ... dictated by the mandatory requirements for reducing the Portuguese State's excessive budget deficit" (para. 49). It sufficed that the measures were – along their broad reach – temporary (para. 50), to find that they cannot violate judicial independence.

From all the above decisions one can essentially infer three conditions for an endorsement of a strict conditionality measure by the CJEU, all three very easy to meet. First, there must be a debt crisis triggering the need for financial assistance. This is always the case – no government applies for a bailout unless it really has to. Second, the challenged measure must be logically linked to the efforts to counter the crisis. This condition, too, is always met by default. And third, the measure should not be excessively selective and arbitrary. Again, any austerity or structural reform from the standard toolkit applied in financial crises meets this requirement, whatever one thinks of the IMF or the so-called Washington consensus.

The very accommodative stance of the Court may be deeply perplexing for those who reject austerity and structural reforms, as applied during the last decade, for normative reasons. To be more specific, it may be tempting to assert that by accepting fundamental rights claims against austerity measures, for instance based on the premise that such measures are irreconcilable with the general principles of legal certainty and legitimate expectations,[32] "courts should particularly provide a remedy for the concerns of the excluded and muted lost generation ... Through this scrutiny, courts ensure that rights of minorities and politically marginalised groups, such as the young generation, are not violated by majoritarian decision-making."[33]

However, those who believe in the ability of courts of law to fix the most fundamental economic and political problems tend to ignore the fact that judges in the Court of Justice are certainly exquisite lawyers, but they are not experts in managing financial crises in general, and financial crises in an incomplete currency union in particular. And they know it. They know that on the one hand the euro area is a structurally flawed experiment and on the other if it disintegrates all the European project may unravel. Managing a crisis in such a fragile situation is difficult enough without the Court of Justice – a non-economic institution – trying to retrospectively impose its

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31 It did it arguably for strategic reasons. Noticing that "as regards the material scope of the second subparagraph of Art. 19(1) TEU, that provision relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Art. 51(1) of the Charter" (para. 29), the Court apparently wanted to extend its interpretation of the notion 'judicial independence' beyond the situations covered by the Charter.

32 Martín Rodríguez (2016), p. 265.

33 Poulou (2014), p. 1171.

views on the IMF, the Commission, the ECB or the ESM. So the top EU court naturally grants these institutions a wide margin of appraisal when it comes to the selection of the conditionality patterns.

In addition, striking down certain austerity measures before a court of law is not in a position to seriously alter conditionality patterns comprising a MoU. For what would happen if the Court of Justice found for instance a pension cut in a country undergoing a crisis excessively arbitrary and unjustifiable, concluding it violates some fundamental right, like the right to property? Not much, except that the national government would be immediately expected to propose a new measure in lieu of the previous one.

3 Strict conditionality MoUs in the euro area: legally impeccable, even if economically and politically questionable

Strict conditionality Memoranda are intended to overcome balance of payments difficulties, when a country cannot meet its international payment obligations because no funding on affordable terms is any longer available to its economic agents and the government. Because in that way or another such difficulties are always caused by imbalances which are in turn engendered by unsustainable domestic policies (even if the trigger for the actual financial crisis is exogenous) any external financial assistance to a country in such a situation requires, as a precondition, corrections in these policies, because otherwise the actual roots of the difficulties will not be addressed. In other words, unless domestic policies ushering in the crisis are corrected, the underlying difficulties will not be remedied properly, while the creditors would face concomitant loses.

In the reality of increasingly financialised economies domestic policy mistakes and the ensuing economic imbalances may even exclusively be located in the financial system more generally and in the banking sector in particular. In case such mistakes ultimately lead to asset market bubbles, they typically also lead to financial crises as the bubbles burst and foreign capital – perpetrating them previously – flies from the country, leading to capital account tensions. The result is an acute, abrupt crisis, but ultimately manageable more easily than the alternative situation, where the balance of payments crisis originates in the so-called real economy, intractable challenges in the balance of trade in particular. In the latter case the balance of payments difficulties are more chronic, they accumulate gradually, but they are also more difficult to address effectively.

While in practice mismanaging financial institutions – producing the first of the two types of crises – tends to go hand in hand with macroeconomic policy mistakes – leading to the other type of crises, remedies to each of the two differ depending on whether the balance of payments difficulty stems from the financial system or the real economy.

If the difficulty is caused by financial institutions, the main solution is to clean their balance sheets and to eliminate the commercial practices that have produced the crisis, in the meantime providing the liquidity necessary for the financial system to avoid chain reactions of massive bankruptcies.

Remedies are still more complicated, however, when sources of balance of payments difficulties are primarily located in the real economy. In this respect a clean macroeconomic adjustment involves whatever it takes to reduce imports, but – first of all – whatever it takes to boost exports and to sustain domestic demand. In the perfect situation of a clean macroeconomic adjustment it entails four pillars in particular. The first is a controlled devaluation as a powerful temporary measure to rebalance trade patterns. The second is structural reforms allowing for the relocation of production from less competitive to more competitive firms and sectors. The third is austerity, but austerity calibrated to eliminating inefficient public spending, while sustaining public investments where they are critical to improving potential growth of the economy. The fourth is an appropriate debt restructuring, when the previous three pillars have led to a sovereign default, which actually may happen quite easily if they are introduced properly, especially when public funding is also engaged in rescuing domestic financial institutions.

The first paradox of the bailouts envisaged in the Eurozone strict conditionality MoUs in the last decade is that only in the Spanish case[34] the imbalances in the financial sector were tackled head on. The banking union has been created to deliver the necessary reforms, but it is rather clear now that there is a very long way between establishing its institutional tissue and cleaning banks in the countries like Italy or Greece. Even in the case of Spain, its persistent Target 2 deficits suggest that capital outflows from this country's financial system have not really been reversed, implying capital account imbalances.

The second paradox, still more disturbing, is that strict conditionality MoUs aimed to address balance of trade issues faced even more serious hindrances in the euro area during the sovereign debt crisis. Countries in need of rebalancing trade could not take recourse to devaluation. Debt restructuring – anything beyond debt rescheduling – was precluded by political factors as well as discouraged by the *Pringle* doctrine of the Court of Justice[35] and the belligerent stance of the German Constitutional Court. It was ignored that if debt restructuring is precluded, austerity becomes excessive very easily. When it is in addition applied in a country with serious governance problems, its distribution may not be guided by economic factors first of all but primarily by short-sighted political calculation. If this is the case, government spending can be even more inefficient than before and investment spending cuts become too deep. They undermine potential growth, while structural reforms do not shepherd workers from the less productive industries to the more future oriented sectors.

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[34] Spain, "Memorandum of Understanding on Financial-Sector Policy Conditionality", document dated 20 July 2012, available at https://ec.europa.eu.

[35] Case C-370/12, *Pringle*.

All in all, therefore, when the local currency cannot devalue, when the government on the ground is not dedicated to a proper – sustainable – mix of austerity and structural reforms and when the creditors are unwilling to accept losses which might stem from this very mix, developing a workable set of strict conditions is next to impossible and the outcome may well be the Greek scenario of an extremely fragile economy, hysteresis effects, depleted human capital, huge emigration of the skilled and motivated and suppressed future economic prospects. But again, no judicial institution can eradicate this fundamental puzzle in the strict conditionality MoUs in the euro area, simply because this puzzle can only be solved by political decision-makers in charge of economic and financial policies. No court of law has legitimacy and expertise to correct any flawed, or absent, decisions of the proper, proactive decision-makers, no matter how harmful their denials and omissions may be for individual societies and the European project.

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Part 8
Bridging the gap between the euro area and the EU: the institution of “close cooperation”


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The institution of “close cooperation” in the SSM: an introduction

Andrea Enria[1]

1 Overlapping spheres – the EU, the euro area and the banking union

More than ten years have passed since the global financial crisis broke out, but the reverberations are still being felt across both the political and economic landscape. Given the magnitude of the crisis, this does not come as a surprise – particularly in Europe. The crisis not only blew large holes in conventional economic thinking; it paralysed the financial sector; it damaged entire economies; it destroyed countless jobs; and it rocked the foundations of European unity. Since then, the economy has largely recovered, but the political mood has deteriorated; nationalist voices have grown in both number and volume. Thus, the crisis set off a trend that has become a threat to European unity and maybe even to democracy itself.

At the same time, however, the crisis has also fostered European unity – institutionally at least. In 2012, four years into the crisis, European leaders took a big step. They acknowledged not only that a currency union was incomplete without a banking union, but that this unfinished business also represented a source of danger. Thus, they decided to close the gap. Seven years later, the 19 countries of the euro area no longer share just a common currency. They also share a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM) for banks. The banking union is here, and Europe has grown closer together.

This last statement needs to be qualified, though. It would be more precise to say that part of Europe has grown closer together. After all, there are still two Europes – institutionally speaking. There is a bigger Europe that shares a single market and the associated basic freedoms: the EU. Within this bigger Europe, there is a smaller one that also shares a common currency and a banking union: the euro area. So there are different spheres of integration, and the single market for banking is divided. While the euro area and the rest of the EU share a single rulebook for banks, supervisory regimes differ. This constitutes a barrier that runs across the single market and makes it less single than it could – and should – be.

However, while the banking union was built to support the single currency, it is not confined to the euro area; it can grow beyond it. We are seeing this now: Bulgaria and Croatia are both on track to become members of the banking union. For these

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two countries, the supervisory barriers will be lifted, and the single market will become more single.

The door is open to other countries as well. For Bulgaria and Croatia, it may be a milestone on the path to the euro. But any EU country can join the banking union, whether or not it intends to introduce the euro. Whatever the motive, the banking union offers benefits that make membership worthwhile.

2 The benefits of the banking union

The benefits of the banking union mostly derive from its size and scope. The SSM, for instance, is very broad in scope. It covers 116 large banking groups from across the euro area, including eight global systemically important banks. This allows European supervisors to take a much higher vantage point than national ones. They can see the whole range of banks' business models, organisational structures and governance arrangements. They can see all the risks and challenges that banks face. The benefits are clear. European supervisors can compare and benchmark a much greater number of banks than national supervisors. They are thus in a good position to spot new trends, new risks and new problems. They can also better assess which solutions work and which do not.

The SSM is not only broad in scope, it is also very large. Its size allows it to exploit economies of scale, for example with regard to expert knowledge. For a national authority that supervises just a handful of banks, it might not be worthwhile to employ a specialist for each and every topic. It is worthwhile, however, for an authority that supervises 117 large banking groups. A higher degree of specialisation enables European supervisors to analyse banks in more depth and thus build a better basis for supervising them.

When decisions need to be taken, the size and scope of the banking union offer further benefits. In the SSM, decisions are taken by the ECB's Supervisory Board and its Governing Council, both of which bring together 19 countries. Thus, each decision draws on the experience and viewpoints of many different supervisors. Such diversity helps us to take better decisions, and it helps to iron out national interests which often stand in the way of sensible supervision.

In view of these benefits, one could conclude that supervising banks at the European level is more effective than doing so only at the national level. To the degree that investors and depositors draw the same conclusion, membership of the banking union thus becomes a quality label. Any country that becomes a member therefore boosts the stability and the reputation of its banking sector. This in turn translates into lower funding costs for banks and, consequently, for households and companies.

Moreover, the banking union offers benefits not only in good times, but also in bad times. Not even the banking union makes banks immune to crises. When banks do encounter trouble, however, it is certainly better for them to be inside the banking union than outside of it. In crisis management, size and scope matter too. Once

again, this means more experience and deeper insights. In addition, the Single Resolution Fund is much bigger than any national fund. As there are banks whose failure might overburden national backstops, being inside the banking union protects public funds better.

However, as long as supervisory regimes differ between countries, the banking market will not be single and the playing field will not be even. This means that banks are confined within national borders, a truly European banking sector cannot emerge, and its benefits cannot be fully reaped. A country that joins the banking union thus helps the single market to become more single and to develop its full potential. So there are benefits not only in terms of the stability of the banking sector and its reputation, but also in terms of its efficiency.

3 Close cooperation – opening the banking union to the entire EU

There are many good reasons for a country to join the banking union. And through close cooperation, any EU country can do so. Close cooperation is a unique concept. Countries would join the banking union, but remain outside the euro area in all other respects. This raises a couple of questions and, sometimes, concerns.

For a country that joins the banking union the most important question might relate to power and control. To what extent would it lose autonomy in supervising its banks? Would the national authorities turn into just an extended arm of the ECB? They would not, of course. The banking union is very much a joint project. Cooperation is key; it begins with joint supervisory teams and goes all the way to the decision-making bodies. National authorities are represented in the supervisory teams and also in the Supervisory Board where decisions are taken.

Some might object to the latter point, though. Technically the ultimate decision-making body is not the ECB's Supervisory Board but its Governing Council. Since countries in close cooperation would not join the euro, they would not have a seat on the Governing Council.

This point is often raised. But while it might look like a problem in theory, it is much less so in practice. First, since the beginning of the SSM, the Governing Council has not challenged a single decision adopted by the Supervisory Board. Second, safeguards have been built into the regulation covering the decision-making process. If a country in close cooperation disagrees with a decision adopted by the Supervisory Board which affects that country, it can formally state its objection, and this then has to be taken into account by the Governing Council. Furthermore, if a country in close cooperation disagrees with the Governing Council, it can call upon a mediation panel to resolve the issue. Safeguards such as these ensure that all countries are heard at every stage of the decision-making process, regardless of whether they are formally represented in the Governing Council or not.

Cooperation is the foundation of the banking union; it is not about giving up powers, it is about sharing powers. The members share powers to achieve the same high supervisory standards across the banking union. This in turn sometimes raises another concern. What marks the end point of harmonisation? Will it lead us to a uniform banking sector? Will national characteristics such as specific business models be harmonised away? As the last five years have shown, they won't. There is value in having a broad range of business models, ranging from specialised mortgage lenders to large universal banks. Variety means stability.

In this context, it is important to distinguish between institutions and products. The SSM supervises the former, but not the latter. Responsibility for products such as covered bonds lies in the hands of national market authorities. The SSM will nevertheless ensure that prudential risks arising from such products are adequately assessed and managed by the banks.

4 Conclusion

The banking union reflects the most European of all ideas: together, we are stronger. Joining the banking union is not about handing over powers to the European level; it is about sharing powers at the European level. In the end, sharing powers does not mean losing them, it means multiplying them. As members of the banking union, countries will gain power and influence.

On the world stage, each country is small, while more and more problems reach across borders – in banking and in many other areas. The only way to solve such problems is by working together. In a globalised world, isolation is anything but splendid. But together, the countries of Europe may be able to shape policies and rules which have an impact beyond the banking union itself. Through the banking union, even small countries gain a voice in global debates, such as those which take place in the Basel Committee on Banking Supervision.

There is thus no reason to fear the banking union but many reasons to embrace it. For those EU countries that do not share the common currency, the door to the banking union is open. Close cooperation is the key. It bridges the gap between the euro area and the rest of the EU. By strengthening unity, it better equips Europe to fend off future crises.

Close cooperation in the SSM

Rosa Maria Lastra[1]

1 Introduction

Banking union was a momentous achievement in the history of the European Union. Though a number of policymakers and academics had advocated the need for a centralised system of European supervision, no concrete progress towards its realisation took place before 2012. It was the twin financial and sovereign debt crisis in the euro area that paved the way for this new stage of integration.

The Single Supervisory Mechanism (SSM) became the first pillar of Banking Union, duly anchored in primary law (Article 127(6) of TFEU)[2] and then fleshed out in a 2013 Regulation that, in accordance with such Treaty provision, conferred supervisory tasks upon the ECB in the pursuit of financial stability.

The coincidence between the jurisdictional domain of monetary policy (the euro area) and the jurisdictional domain of banking supervision (the current SSM area) that took place with the advent of the SSM was given "an evolutionary twist" with the institution of close cooperation. Under this arrangement, EU Member States (MSs) that are not part of the euro area can participate in the Banking Union, strengthening the financial linkages between euro area and non-euro area MSs or EU MSs with a "derogation".[3]

As of 2019, only Bulgaria and Croatia have formally requested to enter into a close cooperation arrangement with the ECB.

This contribution briefly analyses the legal framework of close cooperation in the context of the Banking Union, discusses the pros and cons of opting-in and staying out and considers some recent developments.

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2 Article 127(6) TFEU reads as follows:
"The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."

3 All EU MSs, except Denmark and United Kingdom, are required to adopt the euro and join the euro area. Convergence Reports for MSs with a derogation (Bulgaria, the Czech Republic, Croatia, Hungary, Poland, Romania and Sweden) are issued every two years, or when there is a specific request from a MS to assess its readiness to join the euro area.

2 Close cooperation in the Banking Union

The understanding of close cooperation ought to be anchored in the broader institutional framework of the three pillars of Banking Union[4]: (1) the Single Supervisory Mechanism, SSM, governed by Regulation (EU) No 1024/2013 (SSM Regulation)[5], (2) the Single Resolution Mechanism governed by Regulation (EU) No 806/2014[6], the EU Bank Recovery and Resolution Directive (BRRD)[7] and the Intergovernmental Agreement (IGA) between MSs that participate in the SSM on the transfer and mutualisation of contributions into the Single Resolution Fund, SRF,[8] and (3) the proposed European Deposit Insurance Scheme (EDIS).[9]

Underpinning these three pillars is the concept of a common supervisory rule book, laying down uniform terms for the authorisation and withdrawal of credit institutions, for the conduct of micro-prudential supervision over credit institutions, for the resolution of non-viable credit institutions, and for the operation of deposit guarantee schemes.

An EU Member State (MS) whose currency is not the euro can participate in the SSM by requesting the establishment of close cooperation between the ECB and its National Competent Authority (NCAs). When close cooperation has been established, the MS will also automatically join the Single Resolution Mechanism.

The scope of application of the SSM Regulation thus comprises all euro area MSs on a compulsory basis and also non-euro area MSs that voluntarily enter into a 'close cooperation' with the ECB.

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4 See Lastra, International Financial and Monetary Law (OUP, 2015), Chapter 10.

5 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

6 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

7 The BRRD was published in the OJ in June 2014. See Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190). See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.173.01.0190.01.ENG.

8 The Intergovernmental Agreement (IGA) on the Transfer and Mutualisation of Contributions to the Single Resolution Fund was signed on 21 May 2014. See http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT
See press release at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/142710.pdf.
See ECOFIN 342 (8457/14), 14 May 2014 for the publication of this IGA in the website of the EU Council. The IGA was signed by all EU MSs, except Sweden and the UK. See also http://europa.eu/rapid/press-release_MEMO-14-295_en.htm: "The IGA scope is strictly limited: it will cover the transfer of the contributions raised by the national resolution authorities to the national compartments (which will be merged after a transitional phase of 8 years) of the Single Fund; the mutualisation (60% over the first two years and 6.7% in each of the remaining six years) of the funds available in the national compartments; (…) the bail-in conditionality; and the compensation provisions to the benefit of those MSs which do not participate in the SRM. All other aspects of the SRM are dealt with in the Regulation."

9 See https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/european-deposit-insurance-scheme_en.

The legal framework of close cooperation is based upon Article 7 of the SSM Regulation, the SSM Framework Regulation (Regulation (EU) No 468/2014)[10], and the ECB Decision on close cooperation (ECB/2014/5 of 31 January 2014)[11]. Other relevant legal acts are the Regulation on Supervisory Fees ECB/2014/41 of 22 October 2014[12] and Regulation (EU) No 1022/2013 which amends the Regulation that established the European Banking Authority following the conferral of supervisory tasks to the ECB[13].

Close cooperation is established by a decision of the ECB upon the request of MS whose currency is not the euro. The procedure for establishing close cooperation consists of two main steps: (1) the amendment of the regulatory framework, which involves the preparation and adoption of the relevant national legislation, ensuring that the NCA will abide by any guidelines or requests issued by the ECB, and (2) the comprehensive assessment of credit institutions, whereby the applicant MS must provide information on its credit institutions to allow the ECB to evaluate their asset quality and to test their resilience to shocks.

The European Commission, European Banking Authority (EBA) and the other MSs have to be notified of a MS request of close cooperation. Once established, significant credit institutions will be supervised by the ECB via instructions to the NCA. Credit institutions classified as less significant institutions will continue to be supervised by the NCA, while the ECB will exercise an oversight role. The ECB will also be responsible for the conduct of common procedures for all credit institutions established in the MS that enters into close cooperation.

Participation in the SSM through close cooperation implies a change in the supervisory and resolution framework, but does not have implications for the monetary policy operational framework, so banks will not have access to regular ECB liquidity.

10 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

11 Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5) (OJ L 198, 5.7.2014, p. 7).

12 Regulation (EU) No 1163/2014 of the European Central Bank of 22 October 2014 on supervisory fees (ECB/2014/41) (OJ L 311, 31.10.2014, p. 23).

13 Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 (OJ L 287, 29.10.2013, p. 5).

3 “Opting-in” or “Staying out”?

In this section the benefits and drawbacks of opting in are considered.

3.1 Potential benefits of “opting-in”

The main benefits of entering into close cooperation are: independent supervision, financial stability, adequate treatment of home-host issues, credibility and reputation and participation in resolution (and eventually in deposit insurance).

3.1.1 Independent supervision

Independent European supervision improves the supervisory culture of the banks and creates a common playing field in terms of rules (i.e. capital requirements). A harmonised normative platform prevents or limits opportunities for regulatory arbitrage.[14]

3.1.2 Financial stability

Independent European supervision gives confidence to investors and contributes to the achievement of financial stability.[15]

3.1.3 Home-host considerations

Non-euro area MSs aspiring to enter into close cooperation are mostly host countries for banking institutions headquartered in the euro area. Given the divide between home and host state supervisory responsibilities with regard to branches and subsidiaries, the single supervision of both parent banks and cross border establishments reduces communication problems and coordination issues, with significant benefits for supervision and crisis management.[16]

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[14] See Dell’Arricia and Marquez (2006), for whom more harmonisation among supervisors results in reducing inefficient regulation. See also Danièle Nouy (2017), who divides the concept of “regulatory arbitrage” in three different forms: “intra-framework arbitrage” (within a single set of rules), “cross-jurisdictional arbitrage” (between banks of different countries), and “cross-framework arbitrage” (between different sectoral fences). For Belke and Gros (2016), the “regulatory arbitrage” would be limited in the context of close cooperation because the national supervisors will be prevented from “race to the bottom” within the SSM.

[15] See Lautenschläger (2018), who describes how strengthening the supervision and the resolution framework guarantees the enhancing of financial stability, and, accordingly, the trust of investors and customers (e.g. in not seeing a burden sharing of taxpayers’ money). See also Belke and Gros (2016), who assert that the SSM would limit the build-up of excessive risks in the “vicious link” between sovereigns and banks, improving financial stability.

[16] See Reich and Kawalec (2015) who foresee that in establishing close cooperation, the ECB would streamline communication and coordination between home and host supervisory authorities.

The powers of home and host authorities have been the subject of considerable debate in the aftermath of the financial crisis. With the advent of the SSM, the balance of powers between home and host has different dimensions, which have been clarified with the passage of the SSM Framework Regulation: (1) for euro area MSs, home/host is no longer a matter of controversy for the tasks that have been transferred to the ECB; (2) for SSM participating MSs which are not part of the euro area, as long as the close cooperation arrangement with non-euro area MSs participating in the SSM remains in place, the balance also gravitates to the centre, for those tasks that have been transferred to the ECB; (3) for non SSM EU MSs, the single market rules apply, bearing in mind the transfer of tasks to the ECB; (4) for non EU MSs, the transfer of tasks from the national authorities to the ECB signifies that the latter is the institution in charge, but the pre-existing home-host balance remains.

The ECB has taken over the supervisory responsibilities of both home and host supervisors for the significant credit institutions located in the participating MSs. The traditional single market divide, which gives prevalence to home State control, continues to apply to those tasks that have not been conferred to the ECB by Articles 4 and 5 of the SSM Regulation. The ECB acts as the host supervisor for credit institutions in non SSM EU MSs that provide banking services in participating MSs through branches or cross border services.[17]

3.1.4 Credibility of the SSM

Like in a dollarized economy where the country hires the credibility of the monetary policy of the Federal Reserve System, under close cooperation the applicant EU Member State hires the credibility of the supervision of the SSM.[18]

The credibility of the Joint Supervisory Teams (JSTs) is based on the fact that they bring together national and European perspectives, thus providing an objective and independent assessment of the significant institutions (banking groups) that are supervised.

The organisation of JSTs implies that some of NCAs' staff members work under the umbrella of the single supervisor, with some delegation of powers to the ECB's JST Coordinator who manages how the resources are invested and allocated.[19]

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17 Article 4(2) of the SSM Regulation: "For credit institutions established in a non-participating MS, which establish a branch or provide cross-border services in a participating MS, the ECB shall carry out, within the scope of paragraph 1, the tasks for which the national competent authorities are competent in accordance with relevant Union law".

18 The SSM Regulation confers 'specific tasks' related to the prudential supervision of credit institutions to the ECB, comprising a broad range of micro-supervisory responsibilities (Article 4(1)(b) to 4(1)(h)) for which it receives investigative and supervisory powers (Articles 9-16), macro-prudential supervisory powers (Article 5), early intervention and recovery plans (Article 4(1)(i)) and sanctioning powers (Article 18).

19 See Hakkarainen (2019), who underlines how sharing expertise and experience within the JSTs brings substantial benefits in terms of supervisory competence and enhances the chance to intensify supervisory scrutiny of domestic banks.

JSTs and colleges of supervisors allow European supervisors to share experience, expertise and good practice, thus giving then a wider voice in the world of international banking and standard setting. It also builds up competence in the exercise of supervision.[20]

3.1.5 Reputation

Before completing the process of opting-in, the credit institutions established in the requesting non-euro MS have are subject to a comprehensive assessment undertaken by the ECB. This assessment would identify the weaknesses of the banking system and propose remedial actions. As a consequence, financial market participants perceive a banking system under the supervision of a well-reputed institution as safer and more prudent than if it were under the domain of domestic supervisors, more susceptible of regulatory forbearance.

3.1.6 Resolution and deposit insurance

Opting-in would also result in having access to the SRM, facilitating the coordination between authorities in the case of cross-border bank failures, as explained further by Jens-Hinrich Binder in his contribution.[21] Finally, opting-in countries should also have equal rights to euro area MSs when/if the third pillar – the proposed EDIS – is established.

3.2 Risks of opting-in (incentives to stay out)

Close cooperation is not without risks and drawbacks, which are briefly analysed in this subsection.

3.2.1 Loss of freedom in decision making and flexibility

Member States that enter into close cooperation experience an unavoidable loss of freedom in decision-making and flexibility to adopt supervisory decisions. This loss of room for manoeuvre in the ability to exercise freely national supervision is similar to the domestic monetary policy loss that characterises dollarized economies – such as Panama – that “hire” the monetary policy of the US Federal Reserve System by adopting its currency.

The decision-making structures of the ECB were designed primarily for monetary policy, not for supervision. While the existence of the Governing Council is anchored in primary law (TFEU and ESCB Statute), the Supervisory Board is a creature of

[20] ibid. The benefits of opting-in would bring in terms of strengthening the voice of the members in international bodies.

[21] Opting-in countries have equal rights when participating in the Single Resolution Board.

secondary law (established according to Article 26 of the SSM Regulation). This governance issue becomes even more problematic in the case of close cooperation, where lack of representation in the Governing Council may place those non euro MSs at a disadvantage.

Member states that enter into close cooperation participate with voting rights in the Supervisory Board but not in the Governing Council, given that the ECB decision-making bodies and their composition is determined by the Treaties and secondary legislation could not change that, as discussed above. A draft decision of the Supervisory Board is deemed to be adopted unless the Governing Council objects within a certain period (Article 26(8) SSM Regulation). According to this "non-objection procedure", the Governing Council can adopt or object a draft decision of the Supervisory Board ("take it or leave it"). In case of an objection by the Governing Council, the matter can be referred to a Mediation Panel (Article 25(5) SSM Regulation).[22]

According to Article 7(4) of the SSM Regulation, the ECB cannot impose directly decisions or sanctions to credit institution established in MSs 'opting-in', and can only give instructions to the relevant NCA which is the one to adopt administrative acts directly applicable to the credit institutions (Article 7(4) SSM Regulation). The ECB also has power to apply more stringent measures in macroprudential policy to manage systemic risk for credit institutions (CRR,[23] CRD IV[24]).

3.2.2 ECB liquidity

Opting-in countries do not have access to ECB liquidity (since they are not part of the ECB monetary policy framework), resulting in an unlevel playing field. This is to some extent a manifestation of an "inverse trilemma" (echoing the trilemma in financial supervision developed by Niels Thygesen and Dirk Schoenmaker) since the area of jurisdiction of monetary policy remains national, while the area of jurisdiction of banking supervision becomes supra-national.[25]

3.2.3 Reputation ("poisoned chalice")

Reputation, which is an argument for opting-in, can also turn into a "poisoned chalice", bearing in mind that supervision is a thankless and litigious task. The ECB faces higher reputational risk (and potential threats to its cherished independence)

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22 The Mediation Panel consists of governors of central banks from the ECB Governing Council and members of the Supervisory Board.

23 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms.

24 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

25 Dirk Shoenmaker (2011) argued that a "financial trilemma" composed of financial integration, financial stability, and national financial supervision cannot be achieved simultaneously. One of them has to go (i.e., national supervision).

by keeping supervisory and monetary functions under the same umbrella[26] and these ECB-reputation risks could also affect the NCAs.

Monetary authorities are respected if they succeed in keeping inflation under control. Contrarily, supervisors that fail in their actions are subject of great criticism, scrutiny, and even legal liability.[27]

Legitimacy and democratic accountability loom in the background.

3.2.4 Termination

According to Article 7 of the SSM Regulation, close cooperation can be terminated or suspended by a decision of the ECB if the member does not fulfil its obligations (Article 7(5) SSM Regulation) or terminated by a request by the MS after a lapse of at least three years (Article 7(6) SSM Regulation). Exit permitted after 3 years and cannot then reapply for another 3 years.

This termination poses significant risks, from the perspective of the reputation of the MS and the SSM as a whole, the operational risks involved in reorganising supervisory resources and competences in supervision and resolution and the preservation of financial stability.[28]

4 Bulgaria and Croatia

Bulgaria and Croatia are the first non-euro area MS to have formally manifested their intention to enter in close cooperation with the SSM.

The formal procedure for entering in close cooperation starts with the official request of the MS to the ECB. As stated in Article 2 of the ECB Decision 2014/5[29], the MS shall use the template of the Annex 1 provided directly by the ECB. The request shall be made at least five months before the date in which the MS intends to participate in the SSM, in order to make possible to manage the procedure. Bulgaria sent this formal request on 18 July 2018. Croatia submitted the request on 27 May 2019.[30]

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26 Goodhart and Shoenmaker (1995) described the arguments for and against separation between supervisory and monetary functions. The arguments for separation are the potential conflicts of interests, the likely preferability of a single financial regulator and a danger of reputational damage, while the arguments against separation refer mostly to the central bank's role of lender of last resort and its oversight function in the payment system.

27 Lastra (2015). See also Goodhart, (2000): "Supervision is a time-consuming and thankless task.", and Ioannidou (CEPR 2012), who underlines that "supervisory failures, which to some extent are unavoidable, might undermine the ECB's reputation and credibility in preserving price stability. If a central bank is responsible for bank supervision ad bank failures occur, the public perception if its credibility could be adversely affected."

28 See Darvas and Wolff (2013), for whom the opt-out clause comes at a significant price. In particular it introduces significant uncertainty impacting negatively on the consistency of the whole banking supervisory mechanism.

29 ECB (2014).

30 https://www.hnb.hr/en/-/republika-hrvatska-uputila-zahtjev-za-uspostavljanje-bliske-suradnje-izme-u-hrvatske-narodne-banke-i-europske-sredisnje-banke.

As specified by the ECB Decision 2014/5, the MS shall ensure that its NCA will adhere to the instructions, guidelines, and requests that the ECB will issue after the close cooperation and shall provide all the information on the supervised entities that the ECB may require to carry out the comprehensive assessment. The request shall also contain a commitment that all the confidential data, helpful for the undertaking of the preparatory activities, will be provided to the ECB upon request.

The request is accompanied by an undertaking of the MS that it will adopt the relevant legislation in order to ensure that the SSM Regulation will be binding and enforceable and that the NCA will adopt all the ECB related to the supervised credit institutions. The MS is also bound to provide a copy of all the relevant national legislation, and an ECB opinion on draft legislation on these areas. Finally, the MS is deemed to ensure to notify to the ECB that the adopted national legislation obliges the NCA to adopt any measure in relation to credit institutions requested by the ECB (compliance with Article 7(2)(c) SSM Regulation).

In the case of the Republic of Bulgaria, it has confirmed through its Ministry of Finance the intention to submit to the ECB the revised draft laws amending the law on Credit Institutions, the law on Bulgaria National Central Bank and the law on the Recovery and Resolution of Credit Institutions and Investment Firms.[31] On 8 October 2018, the Bulgarian Ministry of Finance submitted for consultation and requested ECB opinion on the revised package of Draft Laws. The ECB issued the opinion on 9 November 2018,[32] concerning the Bulgarian draft laws. The Draft Law on Credit Institutions introduced a new chapter in order to ensure that the Bulgarian National Central Bank will abide by guidelines or requests issued by the ECB, and will take the necessary measures to implement the ECB legal acts adopted pursuant to the SSM Regulation. Moreover, the Bulgarian National Central Bank will issue individual administrative acts only upon a request of the ECB for the exercise of supervisory tasks with respect to significant credit institutions. Also, the Draft law introduced amendments on the Law on Credit Institutions and the Law on Bulgaria National Central Bank to ensure that the latter will provide to the ECB all the necessary information for the performance of the ECB's tasks under the SSM Regulation. In the context of close cooperation, the Draft Law introduced a new paragraph that creates an obligation for credit institution established in Bulgaria to provide all the information to the ECB in connection with the assessment of close cooperation.

The ECB declared in the Opinion that welcomed the Draft Law in link with the process of close cooperation because it ensures compliance with the obligation from national legislation to assure that the acts adopted by the ECB under the SSM Regulation are binding and enforceable.

Following Article 4 of the ECB Decision 2014/5, on 12 November 2018 the ECB started the comprehensive assessment of credit institutions established in Bulgaria.[33] The assessment consisted of asset quality review and stress test of six

31 Ministry of Finance of the Republic of Bulgaria (2018).

32 ECB (2018c).

33 ECB (2018d).

Bulgarian Banks (UniCredit Bulbank AD, DSK Bank EAD, United Bulgarian Bank AD, First Investment Bank AD, Central Cooperative Bank AD, Investbank AD). The selected banks have been chosen to ensure coverage consistent with the "significant institutions" criteria (Article 6 SSM Regulation). The general objectives of the assessment conducted by the ECB are: enhancing the quality of information available on the conditions of banks, identifying problems and implementing the necessary corrective actions, and assessing whether banks are fundamentally sound.[34]

Together with the assessment of credit institutions, the ECB carried out an overall assessment of the relevant national legislation in compliance with Article 4 of the Decision ECB/2014/5.[35] On 26 July 2019, the ECB published the outcomes of the assessment.[36] Four of the six banks covered by the comprehensive assessment (UniCredit Bulbank AD, DSK Bank EAD, United Bulgarian Bank AD and Central Cooperative Bank AD) did not face any capital shortfalls, not falling below the relevant thresholds of the stress test.

The two Bulgarian Significant Institutions that have fallen short in the capital assessment would need to address that shortage. The ECB will then adopt its Decision establishing the close cooperation, in accordance with Decision ECB/2014/5. In its Decision, the ECB will describe the fulfilment of all the criteria, the modalities for the transfer of supervisory tasks, and the date of start.

The ECB has published an opinion on the legislation necessary for close cooperation in Croatia[37] and the comprehensive assessment has also been announced.[38]

The decision from Bulgaria and Croatia to request to enter into close cooperation should be seen in the broader context of entering ERM II, in preparation for their adoption of the Euro. In this vein, close cooperation can be considered as a procedure of further integration and convergence, and as a strong commitment to adopt the euro.

5 Conclusion

Close cooperation is an innovative solution to achieve further financial integration. Despite the benefits of opting-in (which have been briefly discussed in this contribution) close cooperation is not without risks and problems. Some of them are rooted in what could be referred to as the 'inverse trilemma', that is a situation where a member joins single supervision but is not part of the single monetary policy (the lack of coincidence between the area of supervision of monetary policy and the area of banking supervision was a structural weakness of the EMU project before the

34 ECB (2018c).

35 ECB (2014).

36 ECB (2019).

37 https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2019_25_f_sign.pdf

38 https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190807~7d4af2bef0.en.html

advent of Banking Union). Some other problems stem from having the choice of 'supervision a la carte' introducing a further layer of complexity in the exercise of supervisory tasks in the EU.

But from the perspective of financial stability, close cooperation brings about substantial benefits as it instils rigour and independence in the supervisory process. European integration is made through small incremental steps and, notwithstanding the difficulties and risks that have been briefly considered in this contribution, the outlook for countries entering close cooperation is generally positive.

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Close cooperation: the SSM institutional framework and lessons from the ESAs

Niamh Moloney[1]

1 Introduction

The injection of the Banking Union's Single Supervisory Mechanism (SSM)[2] into the EU's supervisory governance arrangements for the single financial market has prompted a debate on the related intensification of variable integration. Much of this debate concerns the evolving relationship between the SSM's governance arrangements, based on the European Central Bank (ECB) acting as a direct supervisor, and those of the European System of Financial Supervision (ESFS), based on local supervision by a network of national competent authorities (NCAs), coordinated through the three European Supervisory Authorities (ESAs).[3] Variable integration also, however, characterises the SSM itself, notwithstanding the single supervisory operating framework it has put in place for the SSM "zone". This variability responds to the exigencies of the euro area/non-euro area fissure across the EU and takes the form of the novel "close cooperation regime" for non-euro area Member States who can choose to participate in the SSM.

SSM Regulation, Article 7 permits non-euro area Member States to participate in the SSM through a close cooperation arrangement, in accordance with Article 7 and its modalities (set out primarily in the 2014 SSM Framework Regulation and the 2014 ECB Close Cooperation Decision[4]). The relevant Member State becomes a "participating Member State" within the scope of the SSM (SSM Regulation, Article 2(1)), and the ECB is conferred with the same Article 4(1) (authorisation and supervisory), Article 4(2) (home/host coordination), and Article 5 (macroprudential) tasks in relation to supervised entities established in the relevant Member State as are conferred on it in relation to euro area supervised entities (Article 7(1)). The Article 7 mechanism is currently undergoing its first test with the recent requests by Bulgaria (2018) and Croatia (2019) to establish such arrangements. Much has been written about the economic and financial stability ramifications of a non-euro area Member State entering into a close cooperation arrangement and the incentives (or

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2 Established by Council Regulation (EU) No 1024/2013 of 15 October 2013 concerning specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions OJ L 287, 20.10.2013, p. 63.

3 See Moloney (2018b) and Ferran (2014).

4 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, OJ L 141, 14.5.2014, p. 1, and Decision ECB/2014/5 of 31 January 2014 on close cooperation with the national competent authorities of participating Member States whose currency is not the euro, OJ L 198, 5.7.2014, p. 7.

otherwise) for such Member States.[5] This contribution, however, focuses on the bespoke governance arrangements of Article 7. Member States in close cooperation have a distinct interaction with the SSM as compared to their euro area counterparts in two key respects.

First, the ECB cannot impose its powers on non-euro area Member States:[6] it does not have direct binding authority in those Member States or over their NCAs, and does not have directly applicable powers over supervised entities established in those Member States.[7] Article 7(1) of the SSM Regulation and Article 107(1) of the SSM Framework Regulation, however, provide that when a close cooperation arrangement is in place the ECB is to carry out the tasks referred to in Article 4(1) and (2) (supervision) and Article 5 (macroprudential action) of the SSM Regulation in relation to supervised entities established in the relevant Member State, and in accordance with the SSM Regulation Article 6 allocation of tasks as regards "significant" and "less significant" entities. To this end, the ECB is empowered to address specific and general (significant supervised entities) and general only (less significant supervised entities) "instructions" to the relevant NCA (SSM Regulation, Article 7(1) and SSM Framework Regulation, Article 107(3)). But an instruction alone does not have binding force (although, as discussed further below, the close cooperation regime provides different mechanisms for securing national application). The Article 7 regime is therefore designed to achieve a situation in which the ECB/relevant NCA relationship is "comparable to" the ECB/NCA relationship in the euro area (SSM Framework Regulation, Article 107(2)).[8] The legal conundrum generated by the ECB's lack of direct binding authority has necessitated some imaginative regulatory design to ensure that the ECB's authority is supported, and the coherence and integrity of the SSM is protected. In effect, ECB decisions addressed to supervised entities are replaced by instructions to NCAs; NCAs then adopt national administrative measures or otherwise execute the ECB's instructions. ECB decision-making is therefore intermediated.

Second, Member States in close cooperation are not, by contrast with euro area Member States, represented on the ECB Governing Council,[9] the ECB's supreme decision-making body which formally adopts the draft supervisory decisions taken by the ECB's Supervisory Board. They also cannot benefit from the support available to euro area Member States, including from the European Stability Mechanism. Such Member States can, however, withdraw from the SSM - euro area Member States cannot.

Close cooperation is thus a peculiar animal. While the ECB acts as the direct supervisor of significant supervised entities in the relevant Member State and oversees the supervision of less significant entities, the ECB does not have direct

5 See, e.g., Vollmer (2016).

6 Legal acts of the ECB cannot apply in non-euro area Member States: Statute of the European System of Central Banks and of the European Central Bank, Article 42.

7 As is affirmed by the SSM Framework Regulation, Article 107(2).

8 On whether the Article 7 regime is "comparable to" or "equivalent to" that which applies to euro area Member States see Singh (2018).

9 Article 283 TFEU.

legal authority; and the ultimate decision-maker, the Governing Council, does not have representation from the relevant Member State. Both features appear fatal from legitimation and effectiveness perspectives. Nonetheless, a variety of techniques buttress the ECB's legitimacy and its operating effectiveness. The ability of non-euro area participating Member States to withdraw from close cooperation is a similar peculiarity, one which the Article 7 regime also seeks to mitigate.

This contribution outlines the main features of close cooperation (part two); considers its challenges (part three); addresses the mitigants (part four); and reflects on similar governance design peculiarities within the ESFS (part five). Part six concludes.

2 The close cooperation mechanism: practical institutional modalities

2.1 Authority

The institutional and operational modalities that support Article 7 are in large part directed to managing the legal conundrum at its heart: how can the ECB ensure that, in the absence of direct authority over a non-euro area participating Member States non-euro area participating Member State/NCA, its authority is protected, and its instructions have binding effect? If this authority cannot be ensured, the effectiveness risks are material. The NCA could disregard an ECB instruction, thereby undermining the SSM's integrity. While outright disregard of an ECB instruction can be expected to be highly unusual, it is not entirely unlikely that an NCA, in challenging market or political conditions, could query an instruction and its legal authority. The institutional integration and cultural alignment between such NCAs and the ECB, on which the SSM's effectiveness depends, could be threatened; and spill-over effects could prejudice SSM-wide ECB/NCA relations and generate competitive distortions. Any indication of ambiguity also risks challenge by supervised entities. Further, confusion as to the extent of the ECB's legal authority raises legitimation risks. Banking supervision is a potentially politically sensitive task that can have distributive effects,[10] making the secure legitimation of ECB authority essential.[11] But the ECB's supervisory legitimacy is dependent on its operating within the mandate and delegation afforded it by the Council. If the delegation of authority is muddy, legitimation is weakened.

The close cooperation regime seeks to mitigate these risks, chiefly by clarifying the decision-making chain. Article 7(1) provides that where close cooperation has been established, the ECB "may address instructions" to the relevant NCA. Article 7(4) further specifies that where a supervisory measure should be adopted by the NCA as

[10] See, e.g., Levitin (2014).

[11] The legitimacy difficulties created by technocratic actors capable of generating distributive effects, including financial regulators, have been addressed in an extensive literature. See, e.g., Thatcher and Stone Sweet (2002).

regards a supervised entity, the ECB “shall address instructions” to the NCA, specifying a relevant timeframe of no less than 48 hours, unless earlier adoption is indispensable to prevent irreparable damage: the NCA is then to take “all necessary measures”, in accordance with the national legislation which, under Article 7, must require NCAs to follow ECB instructions. The SSM Framework Regulation clarifies the nature of these instructions. Article 108 provides that, as regards its Article 4(1) and (2) and Article 5 tasks, the ECB can give instructions, make requests, or issue guidelines (Article 108(1)). In respect of significant supervised entities, and where the ECB considers that a measure relating to Article 4(1) or (2) should be adopted by the NCA, it can address to the NCA a general or specific instruction, a request, or a guideline requiring the issuance of a supervisory decision; and in respect of less significant supervised entities, it can address to the NCA a general instruction or guideline (Article 108(2)). A similar regime applies to Article 5 tasks (Article 108(3)). Further, an over-arching obligation is placed on the NCA to take “all necessary measures” to comply, and to inform the ECB without undue delay of the measures taken (Article 108(5)).

While these provisions establish the decision-making process and “chain of command”, the intermediated, interrupted nature of the ECB’s legal authority is nonetheless clear. For example, as regards supervised entities established in the euro area-, the ECB can address decisions directly to such entities relating to their “significant” status; but for entities established in a non-euro area participating Member State, the ECB must issue instructions to the NCA which must then address a decision to the relevant entity in accordance with the instructions (SSM Framework Regulation, Article 110(3)). A range of additional techniques are, however, deployed to buttress the ECB’s authority and to ensure that its instructions have binding effect on the NCA.

The first buttressing technique is ex-ante. The formal request by a Member State for close cooperation (addressed by SSM Regulation, Article 7(2)) is designed to support a granular ECB review of the Member State’s legal regime and whether it can protect the ECB’s authority. In the required request notification (made to the Commission, the ECB, the European Banking Authority (EBA), and other Member States), the Member State must undertake to ensure that its NCA “will abide by” any guidelines or requests issued by the ECB. In addition, close cooperation is made conditional on the Member State undertaking to adopt relevant national legislation that ensures its NCA is obliged to adopt any measure in relation to credit institutions requested by the ECB. Article 7(2) further seeks to mitigate the risks to the ECB’s authority ex-ante by means of the Comprehensive Assessment review tool which allows the ECB to prepare for supervision: Article 7(2) requires the Member State to undertake to provide all information on credit institutions established in that Member State that the ECB may require for the purposes of carrying out a Comprehensive Assessment (Article 7(2)).

Once the request is made, the ECB conducts an assessment and shall adopt a decision establishing close cooperation or rejecting the request. The assessment process is governed by the 2014 Close Cooperation Decision and is closely focused on ensuring the legal environment in the relevant Member State secures the ECB’s

authority. To this end, the Decision requires that the request include an undertaking by the Member State to ensure its NCA will adhere to any instructions, guidelines, or requests issued by the ECB from the date of establishment of the close cooperation arrangement; an undertaking that the Member State will adopt relevant national legislation to ensure that legal acts adopted by the ECB are binding and enforceable in the Member State and that the NCA is obliged to adopt any measure requested by the ECB as regards supervised entities; a copy of the draft relevant national legislation and a request for an ECB opinion on the legislation; and an undertaking to notify the ECB immediately once the legislation has entered into force and, alongside, to provide the required "confirmation". This confirmation underlines the scale of the ex-ante legal due diligence as it must include a national legal opinion, satisfactory to the ECB, that legal acts adopted by the ECB under the SSM Regulation will be binding and enforceable in the Member State, and that the relevant national legislation obliges the NCA to follow the ECB's specific instructions, guidelines, requests, and measures in relation to significant supervised entities, and general instructions, guidelines, and measures in relation to less significant supervised entities, within the timeframes specified by the ECB. The ECB may also request additional information and, when assessing the relevant national legislation, must take account of its practical implementation (Decision, Article 4).

The ECB accordingly undertakes a deep dive into the national legal system to determine whether the NCA is in fact able to comply with ECB instructions, requests, and guidelines.[12] In practice, the review is directed to national laws conferring supervisory powers on the NCA so as to ensure that the NCA has all the powers necessary to follow up on ECB instructions. The recent Article 7 applications by Bulgaria and Croatia are illustrative. The ECB's final legal opinion on the required draft Bulgarian legislation,[13] for example, references an earlier Bulgarian request for an ECB legal opinion on the draft legislation, and notes subsequent revisions to this draft legislation, implying close discussion and cooperation between the ECB and the Bulgarian authorities from the outset. The final legal opinion also indicates the scale of the national legislative revisions required.[14] For example, as well as providing for the NCA to abide by ECB instructions, including by issuing administrative acts, the draft legislation addresses the internal governance of the Bulgarian NCA. In addition, the opinion, while positive, is qualified by being without prejudice to the broader assessment required of relevant Bulgarian legislation, including its practical implementation (as required by the 2014 Close Cooperation Decision, Article 4). The ECB's legal opinion on the Croatian draft legislation is similarly qualified and raises concerns that the draft legislation does not adequately ensure that ECB guidelines will be followed by the NCA.[15]

The second technique for buttressing the ECB's authority is ex-post and operates as a deterrent. The ECB is empowered to suspend or terminate a close cooperation arrangement where the initial conditions are no longer met. Under SSM Regulation

12 ECB (2018a).

13 ECB (2018b).

14 Through a new Chapter 11a in the Law on Credit Institutions: ibid, para 1.2.

15 ECB (2019a).

Article 7(5), the ECB may issue a warning to the relevant Member State that the arrangement will be suspended or terminated, in the absence of decisive corrective action and where the conditions applicable to the close cooperation arrangement are no longer met; or where, in the ECB's opinion, the Member State does not put in place the necessary legislation. The very existence of this deterrent, however, rather underlines the ambiguity as to the ECB's authority, despite the imperative for absolute clarity.

2.2 Representation

Article 7 also seeks to mitigate the lack of non-euro area representation on the ECB Governing Council by providing channels through which non-euro area participating Member State can notify the Governing Council of objections to ECB supervisory action. These channels – termed "safeguards" by the SSM Regulation[16] – can, ultimately, lead to the Member State withdrawing from close cooperation.

Close cooperation Member States, as participating Member States, are members of the ECB Supervisory Board, which takes draft decisions regarding the ECB's supervisory tasks. Formally, however, the Governing Council adopts these draft supervisory decisions (SSM Regulation, Article 26(8)). While a non-objection procedure is the decision-making default, the Governing Council is empowered to object (or change in relation to macro-prudential measures) any such draft decision (Article 26(8)). The non-euro area participating Member State is not, however, represented on the Governing Council and so may be affected by such a decision and without representation. Under a bespoke Article 26(8) and Article 7(7) procedure, however, that Member State may notify its "reasoned disagreement" with the Governing Council's objection, following which the Governing Council is to (within 30 days) confirm or withdraw its objection to the Board's original draft supervisory decision. In practice, the Governing Council could also invite representatives from the relevant Member State where it is contemplating an objection, or whenever a reasoned disagreement can be expected (recital 73). Where the Governing Council confirms its original objection, the Member State can notify the ECB that it will not be bound by the Governing Council's decision "related to a possible amended draft decision by the Supervisory Board". The ECB can, however, then move to suspend or terminate the close cooperation arrangement in consequence (see part three below). Similarly, where the Member State disagrees with a prior draft decision by the Supervisory Board, it can here also inform the Governing Council of its "reasoned disagreement" (within five days of receiving the decision; 48 hours in emergency conditions) (Article 26(8)) and 7(8)). The Governing Council is to respond within five days (and so could decide to object to the Board's draft decision, supporting the Member State). A nuclear option applies here in that the Member State has the right to terminate the close cooperation agreement with immediate effect, and so not to be bound by the Governing Council's decision.

[16] SSM Regulation, recital 43.

3 A fragile institutional context and an ambiguous legal regime

3.1 Authority

These mitigants aside, the essential conundrum remains: ECB authority depends on action at national level. This injects significant instability into Article 7 as banking regulation can be a highly political and volatile business. Legislation can be overruled. Legal opinions can be challenged through the courts. Operational arrangements, including as regards the NCA, can change. The ECB can terminate a close cooperation arrangement where the pre-conditions are no longer met. But this is a nuclear option which can be expected to generate material disruption. And even assuming a smooth ECB/NCA relationship, the instruction-based decision-making chain is cumbersome.

3.2 Representation

Difficulties can also be identified with the representation mitigants, which are of a "last resort" nature.[17] The Member State can raise objections with the Governing Council regarding draft Supervisory Board decisions, but in the face of Governing Council obduracy, withdrawal is the only formal option available – an option that brings material legal, operational, reputational, and, ultimately, financial stability risks. These risks also follow where the Member State chooses not to follow a Supervisory Board draft decision that has been revised by the Council, and so faces the possibility of ejection from the SSM. In practice, it can be expected that informal resolution is likely to be pursued and the option of intervention through the Mediation Panel is also available. Nonetheless, formal mechanisms, such as bespoke, mandatory mediation/dispute resolution channels, which could defuse tensions, are not provided for. And while the safeguards provide for some degree of non-euro area participating Member State challenge and voice, they have the colour of tolerated exceptions. They are far from the full representation enjoyed by euro area counterparts who enjoy the benefits of equality of arms, regular interaction, alliance building, and peer influence known to be associated with "epistemic communities" like the Governing Council. The representation gap is all the more troubling given the importance for many non-euro area Member States of being to influence SSM decisions relating to the supervision of euro area parent banks of their local subsidiaries.

[17] Some discomfort with these limited mitigants is clear from the SSM Regulation which notes that the rights given to non-euro area participating Member States to challenge the Governing Council "cannot and should not be construed as precedent for other areas of Union policy": SSM Regulation, recital 43.

3.3 Operational complexity

Alongside, and related to, the legal authority/representation difficulties, is the right of non-euro area participating Member States to withdraw from the SSM. Article 7 is largely silent on the implications and there is little guidance in the 2014 Close Cooperation Decision and the SSM Framework Regulation. The legal and practical entanglements in need of subsequent unravelling would, however, likely be significant and intricate, while the operational and, ultimately, financial stability implications could be material.

Under SSM Regulation Article 7(6), the Member State may request termination of the arrangement (from the ECB), but only once three years from its establishment have elapsed. Under the 2014 Close Cooperation Decision, some friction is applied to exit in the form of a requirement on the Member State to explain the reasons, including any potential significant adverse consequences as regards fiscal responsibilities. Similarly, in setting the exit date (which must be within three months), the ECB must take into account supervisory effectiveness and the legitimate interests of credit institutions. The Article 7(8) exit procedure, however, which allows the Member State to terminate the arrangement following disagreement with a draft Supervisory Board and related Governing Council decision, and "with immediate effect", is not subject to any procedural requirements. In both Article 7(6) and 7(8), the absence of a proportionality control, usually a qualifier of agency/technocratic action in the EU, is striking. So too is the absence of any form of time-lines or procedures governing orderly exit. Neither the SSM Framework Regulation or 2014 Close Cooperation Decision shed further light.[18] Clearly, where a Member State decides to leave there is little legally that can or should be done to obstruct this decision, but the absence of arrangements governing orderly withdrawal injects material legal risk into close cooperation.

There is a higher degree of conditionality relating to suspension/termination by the ECB, as might be expected given the ECB's financial stability mandate. The Article 7(5) procedure which governs the ECB suspending/terminating an arrangement where the relevant pre-conditions are no longer met, refers only to the need to take due consideration of supervisory effectiveness and the legitimate interests of credit institutions when setting the date of the suspension[19]/termination. The Article 7(7) procedure governing the ECB's ability to suspend or terminate the arrangement where the Member State disagrees with a Governing Council revision of a draft Supervisory Board decision, however, is more articulated and sensitive to the operational and market risks. In theory, suspension/termination could occur after only one incidence of disagreement, which seems wildly disproportionate given the complexities of suspension/withdrawal. But in deciding whether to suspend or terminate, the ECB is to take into account whether the absence of the

[18] SSM Framework Regulation, Article 118 sets out the procedure governing Article 7(8) but mainly maps Article 7(8). The 2014 Decision simply provides that the Member State is to request the ECB to terminate the arrangement and that the ECB is to adopt a decision clarifying the effects of the termination and indicating the termination date (Article 6(5)).

[19] Suspension cannot be for longer than six months and can be extended once (2014 Decision, Article 6(1)).

suspension/termination could jeopardise the integrity of the SSM or have significant adverse consequences as regards the fiscal responsibilities of the Member States; whether the suspension/termination could have significant adverse consequences as regards fiscal responsibilities in the objecting Member State; and whether or not the ECB is satisfied that the relevant NCA has adopted measures which, in the ECB's opinion, ensure that credit institutions in the Member State are not subject to more favourable treatment than those in other participating Member States, and that any (alternative) measures adopted are equally effective in achieving the objectives of the SSM and ensuring compliance with relevant EU law. Thus, it appears that where a Member State objects and refuses to apply the relevant Governing Council measure, suspension/termination should not follow where alternative and equivalent measures are in place, and there is no risk to competition in the internal market. Conditionality also applies as regards the existence of threats to the integrity of the SSM and the fiscal position of Member States. But while brakes are therefore applied to ECB action, orderly exit procedures are absent. Article 119 of the SSM Framework Regulation simply provides that the ECB must take due account of supervisory effectiveness, and in particular the Article 7(7) conditions, when considering suspending/terminating the arrangement, while the 2014 Close Cooperation Decision provides that the ECB must state the reasons for an Article 7/(7) (and 7(5)) decision and clarify the effects of the decision. It also provides, reflecting the general rule as to continuity which is applied within the SSM, that any ECB decisions adopted in connection with supervised entities in the relevant Member State and in force prior to the termination of close cooperation remain valid, although it is silent on the implications of this, particularly where subsequent decision are adopted in the Member State.[20]

4 Constructive ambiguity but effective?

That the Article 7 arrangements are complex and ambiguous seems clear. But this does not mean that they are not effective in supporting a sustainable relationship between the ECB and close cooperation NCAs and in addressing the representation gap at Governing Council level.

4.1 Embedding authority

While there are certainly risks associated with the ECB's intermediated authority, they are mitigated. The granular assessment of the local legal environment, recently evidenced in the Bulgarian and Croatian cases, should materially reduce legal risk. In addition, the SSM Framework Regulation specifies how its operational provisions governing NCA/ECB relations apply in the Article 7 context: Articles 110-114 provide that the Framework Regulation provisions governing the assessment of "significance", common procedures (authorisation and qualifying shareholders),

[20] It also provides that any ECB decision may also regulate the modalities for the payment of fees due by supervised entities.

macro-prudential tools, administrative penalties, and investigatory powers apply mutatis mutandis. Close cooperation NCAs are also under an obligation to ensure, variously, that the provisions governing the significance assessment can be applied (Article 110(2)); the procedures governing authorisation/qualifying shareholders can be applied and that the ECB receives the necessary information (Article 111(2)); administrative penalties are imposed only on the ECB's instructions (where applicable) (Article 113(3)); and, as regards investigations, the ECB is provided with all findings and can participate in investigations (Article 114(4)).

Alongside are the practical, operational mechanisms used to support the ECB's authority. Chief among these is the requirement for the Member State to provide all information so that a Comprehensive Assessment can be carried out; the ECB may also request additional information (SSM Regulation, Article 7(2) and 2014 Close Cooperation Decision, Article 3(1) and 4(2)). The ECB can thus obtain a detailed assessment of the condition of the supervised entities it is likely to have direct supervisory responsibility for, and so prepare for the supervisory challenges ahead. The recent Comprehensive Assessment of Bulgarian banks (July 2019), which included an Asset Quality Review and a stress test, deployed the methodologies the ECB applies in its regular Assessments of supervised entities that become significant or could potentially become significant.[21] Accordingly, it provided the ECB with a rich data-set on the condition and resilience of the major Bulgarian banks and identified those banks (two of the six reviewed) which faced capital shortfalls following the Assessment. The Comprehensive Assessment also allows the ECB to require progress as regards any national measures required regarding capital shortfalls before allowing a close cooperation arrangement to take effect.[22] The establishment of a close cooperation arrangement cannot be made conditional on the results of a Comprehensive Assessment, although the starting date of close cooperation can be made conditional on the progress made by the Member State in adopting any measures required following the Comprehensive Assessment. The process further gives the ECB a rich data-set for informing discussions with the applicant Member State and the opportunity for nudging NCA action.

At the ex-post, "business as usual" stage, the JST system should further buttress the ECB's authority. The SSM Framework Regulation clarifies that its provisions governing direct supervision of euro-area significant entities, including the constitution and operation of JSTs, apply to relevant supervised entities, albeit with refinements to the close cooperation context. These include an obligation on the NCA to ensure the ECB receives all necessary information and that ECB staff are invited to participate in onsite inspections (Article 115). The NCA must also advise the ECB of any decision it adopts (including any outside the ECB's supervisory jurisdiction) and pursuant to the ECB's instructions. Notwithstanding the intermediation of formal decision-making, the reality is that day-to-day supervision will be a matter for the JST and, certainly based on initial experience with the SSM and the success of JSTs in building an SSM culture, as well as the incentives which

[21] ECB (2019b).

[22] As has been noted by the ECB in relation to the Bulgarian and Croatian applications: ECB (2019c) and ECB (2018c).

effective JST participation generates on the ground, it is not unreasonable to suggest that friction in the ECB/NCA decision-making loop should be limited.

Further, while the intermediated decision-making chain is not water-tight and is vulnerable to national destabilisation, the incentives for the ECB/NCA to develop a good working relationship, reputational factors for the Member State, and the risks of exit should, at least, minimise the authority risks. And indirect authority of this type is not new to EU financial governance. Much of the ESAs' authority over NCAs in the ESFS is based on soft measures and on peer dynamics, as is clear from the current framing of the EU supervision debate within the soft supervisory convergence framework.[23]

4.2 Representation

As regards the absence of representation and related legitimation risks, these may also be weaker when the nature of the legitimation risk is unpacked. It can be argued that the SSM is an operational, technically-oriented construct, not concerned with norm-setting/law-making; and the practical, technocratic expression of the Member States' political will as regards the construction of Banking Union and the shoring up of financial stability. As such, the SSM has much in common with EU agencies, which are also designed as technocratic institutions operating under delegated political authority. And as it has been extensively examined, the legitimacy of such non-majoritarian, technocratic EU actors can be secured by different means. These include legislative rules that define and delimit their mandates and powers [24]; institutional design arrangements and decision-making procedures;[25] political oversight of and veto over technocratic action; judicial review; and accountability mechanisms.[26] These different devices are frequently characterised as being directed to: input legitimacy; throughput/procedural legitimacy; and output legitimacy. Input legitimacy relates to democratic representativeness and typically takes the form of technocratic actors' constitutive legislative measures and related representation requirements. Throughput or procedural legitimacy concerns their decision-making processes.[27] Finally, output legitimacy is functionally-oriented and relates to technical capacity or problem-solving ability and to review of that capacity and ability through accountability mechanisms.[28] Of all these, output legitimation through accountability is most strongly associated with the legitimacy of technocratic actors operating under delegated authority.[29]

Direct representation is accordingly only one of the techniques that can be used to secure the legitimation of technocratic actors, such as the ECB in its SSM/close

[23] See Moloney (2018a).
[24] Mendes (2017).
[25] Block Lieb (2012).
[26] Chiti (2016).
[27] Curtin, Hoffman and Mendes (2013).
[28] Judge (2015).
[29] See Amtenbrick and Lastra (2008).

cooperation capacity. And many of the different techniques associated with securing the legitimacy of technocratic actors, in particular as regards output legitimacy, can be found within the ECB's SSM operating model (including accountability mechanisms) as well as in its wider legal environment (including judicial review).[30] While the strength of the ECB's legitimacy arrangements as regards the SSM is certainly a matter of debate, [31] it can at least be claimed that there are multiple arrangements, beyond direct representation in Governing Council decision-making, designed to secure legitimacy.

This is not to say that the absence of direct representation on the Governing Council does not raise legitimacy risks. Certainly, the procedural channel available to a Member State to object to a Governing Council decision under Article 7(7) is not a promising one for the Member State as the ECB can eject the Member State from close cooperation. The stringent conditionality applicable to the ECB, however, implies that suspension/termination by the ECB is a last resort option. This makes refusal to follow a Governing Council decision, as long as such refusal is reasonable, a more viable option for the Member State. In addition, it is rare in practice for the Governing Council to object to a proposed decision by the Board.[32]

Finally, recent thinking as regards legitimacy and accountability in EU governance calls for a more flexible and pragmatic approach to establishing legitimacy. First, current thinking in EU constitutional theory - "demoicracy" analysis - suggests that the EU citizenry is connected through different transnational or horizontal networks and institutions, as well as to their States, and that these transnational relationships should be reflected in the legitimation of EU action.[33] Of particular relevance to the Article 7 context, demoicracy analysis has been associated with deriving agency/technocratic legitimacy not only from direct/vertical national representation but from – at least to some extent – horizontal, transnational, peer accountability that is based on a peer/national regulator commitment to acting in the EU interest and to supporting the agency/technocratic body through peer coordination, communication and deliberation, the sharing of expertise, and mutual monitoring of compliance and commitment.[34] Robust and supportive engagement between NCAs/the ECB on the JST for a significant supervised entity, in an ECB working group, or at Supervisory Board level could, accordingly, be regarded as legitimating ECB supervisory action, at least to some extent. Second, this more fluid way of thinking about legitimation also resonates with the "experimentalist governance"[35] approach to agency legitimacy. It links the accountability of agencies/networks of agencies to a peer

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30 The Commission's 2017 assessment of SSM accountability identified its political accountability to the European Parliament, Council, Eurogroup and national parliaments; judicial accountability through Court of Justice of the EU review; administrative accountability through internal review by the ECB's Administrative Board of Review and administrative oversight by the Commission, European Ombudsman, European Court of Auditors, and European Banking Authority; and the ECB's "consultation culture" as all forming part of its accountability arrangements: European Commission (2017).

31 Mersch (2017).

32 One Supervisory Board member has reported that in the first four years of the SSM no objection was recorded by the Governing Council: Hakkarainen (2019).

33 See Nicolaïdis (2013),

34 Buess (2015).

35 Sabel and Singer (2011).

regulator commitment to purposeful, data-informed, and diligent regulatory learning and revision.[36] Accordingly, here also robust and informed engagement between NCAs/the ECB in JSTs, ECB working groups, and on the Supervisory Board could be regarded as providing a channel for accountability and so legitimation. This brief excursus into recent constitutional and governance theory does not seek to make large claims for the extent to which operational engagement between NCAs and the ECB, including within JSTs, can provide peer-based, horizontal legitimation that compensates for the lack of direct representation by non-euro area participating Member States on the Governing Council. But it does at least suggest that there are many and various means of legitimating ECB supervisory action in the complex and multi-layered close cooperation governance environment.

5 Lessons from the ESAs

The Article 7 regime, with all its intricacies, is not unique in EU financial governance in being somewhat messy from legal authority/legitimacy perspectives. Complex and untidy governance compromises, designed to accommodate real world realities with legal and legitimation constraints, are scattered across EU financial governance, most notably within the ESAs' arrangements.

The bespoke voting and procedural modalities that apply to EBA Board of Supervisors' decision-making to protect EBA and its single market mandate from caucusing by NCAs participating in the SSM (by means of a double majority voting procedure) are well-known.[37] While not directly relevant to close cooperation, in that all banking NCAs are represented on EBA's decision-making Board of Supervisors, they exemplify how the EU can use deft procedural mitigants to bridge the euro area/single market fissure.

Of most direct relevance, however, are the techniques used to work around the application of the ESAs' binding powers in the European Economic Area (EEA) context. The decision-making bodies of the three ESAs are their respective Boards of Supervisors. Each ESA board is composed of: the (voting) heads of the relevant NCAs; the Chairperson (non-voting); one (non-voting) Commission representative; and one (non-voting) representative each of the ESRB and the other two ESAs.[38] Additionally, a representative of the ECB Supervisory Board sits on the EBA Board. NCAs accordingly have exclusive voting rights on the ESA Boards. All ESA decision-making rests with the ESA Boards, which adopt the ESAs' draft technical standards and also technical advice to the Commission on delegated rules; soft law; direct supervisory measures over supervised entities (supervisory powers are primarily

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36 Sabel and Zeitlin (2012).

37 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331 15.12.2010, p. 12, Article 44.

38 For example, EBA Regulation, Article 40. For ease of reference, this discussion takes the EBA Regulation example although the other ESAs (ESMA and EIOPA) operate under very similar Regulations.

conferred on ESMA, including in relation to short selling and the supervision of credit rating agencies and trade repositories); and any binding measures the Boards may adopt against NCAs, using the powers available to them in relation to mediation between NCAs, enforcement action against NCAs for breach of EU law, and in emergency conditions.[39] The ESA Boards have stronger legitimation than the ECB Supervisory Board in that they are the final decision-making authority within the ESAs; and as all NCAs are represented on the Boards. But there are resonances with close cooperation governance as regards ESA Board relations with the currently three European Free Trade Association (EFTA) Member States of the European Economic Area (EEA) – Iceland, Liechtenstein, and Norway.

Since 2016, the ESA Regulations have been "incorporated" in the EEA Agreement and so apply in the three EEA/EFTA Member States.[40] This incorporation followed difficult negotiations between the EU and Iceland, Liechtenstein, and Norway, through the EEA Joint Committee, on whether any "adaptations" were required for the measures' application in these three EEA Member States. The difficulties flowed from the legal authority challenges arising from the ESAs' binding powers, through their Boards of Supervisors, over supervised entities and NCAs. EEA/EFTA States are usually not permitted under their constitutions to accept binding decisions made by EU institutions directly. Accordingly, complex and challenging negotiations can arise regarding the incorporation of powers conferred on EU agencies, and as to the related adaptations required to replicate the powers of EU agencies.[41] Typically, the incorporation into the EEA Agreement of binding competences held by EU agencies, such as the granting of authorisations or the imposition of administrative sanctions, is managed through a specific adaptation, often in the form of decision-making by the EFTA Surveillance Authority.[42]

In the case of the ESA Regulations, and after very difficult negotiations reflecting the sensitive and contested nature of the ESAs' binding powers over NCAs,[43] the "adapted" Regulations as incorporated into the EEA Agreement provide that the ESA Boards of Supervisors cannot directly bind EEA/EFTA Member States' market operators or their NCAs. Any such decisions are taken instead by the EFTA Surveillance Authority. The sources and initiators of these Surveillance Authority decisions, however, are the ESA Boards of Supervisors. The EEA Joint Committee Decision that incorporates and adapts the EBA Regulation, for example[44], provides that while the Surveillance Authority takes any formal decisions binding EEA/EFTA NCAs as regards mediation, enforcement of breach of EU law, and emergency conditions, it does so on the basis of EBA Board of Supervisors' drafts (or on its own initiative). Provision is also made for EBA to participate in Surveillance Authority decisions and for EBA/Surveillance Authority dispute resolution (through the EEA

39 EBA Regulation, Article 17 (breach of EU law), 18 (emergency conditions), and 19 (mediation).

40 The ESA Regulations have been incorporated via Joint Committee Decisions Nos 199/2016 (EBA), 200/2016 (EIOPA), and 201/2016 (ESMA).

41 Fredriksen and Franklin (2015).

42 Standing Committee of the EFTA States, Subcommittee on Legal and Institutional Question, How EU Acts become EEA Acts and the need for adaptations (REF 1113623), 23 May 2013.

43 CMS (2016).

44 Decision of the EEA Joint Committee No 199/2016, OJ L 46, 23.2.2017, p. 4, Article 1.

Joint Committee). Although it locates formal legal authority with the Surveillance Authority, this system is therefore designed to ensure that ESA Board of Supervisor decisions become, through an intermediated chain, binding in the EEA/EFTA States through the Surveillance Authority. While friction in this chain cannot be ruled out, it is not unreasonable to suggest that, given the design of the decision-making process, the Surveillance Authority will typically follow the ESA Board of Supervisors' draft decision.

The initial ESA Board of Supervision decision-making stage is accordingly key. But EEA/EFTA NCAs do not have voting rights on the ESA Boards of Supervisors. Under the Rules of Procedures adopted by the ESA Board of Supervisors following the incorporation of the ESA Regulations, Norway, Iceland, and Liechtenstein sit on the three ESA Boards as full members (so not as "observers"), but without voting rights.[45] These three NCAs can take part in Board debates on supervisory measures that affect them and their market operators – but they do not have voting rights and they may ultimately be bound by these Board measures if the EFTA Surveillance Authority, as is most likely, subsequently adopts the measure in question.

As under Article 7, an intermediated process therefore supports the legal authority under which binding ESA decisions are imposed on EEA/EFTA NCAs and supervised entities; and there is a similar gap as regards representation. The Article 7 and EEA difficulties are, however, inverted: non-euro area participating Member States have voting rights at a key stage (Supervisory Board decision-making), but EEA Member States do not (Board of Supervisor decision-making); while Article 7 Member States are not represented at the ultimate formal decision-making stage, but EEA Member are (the EFTA Surveillance Authority).

There is now some evidence that this form of decision-making can work in practice. The EFTA Surveillance Authority has, for example, authorised credit rating agencies established in Norway based on draft decisions prepared by the ESMA Board of Supervisors, which has direct and exclusive power over credit rating agencies in the EU. Under the EU credit rating agency regime, as incorporated within and "adapted for" the EEA Agreement,[46] the supervision of Norwegian credit rating agencies is carried out by the EFTA Surveillance Authority and ESMA, while the Surveillance Authority, on the basis of ESMA drafts (adopted by the Board of Supervisors), can impose administrative sanctions or penalties.[47] Thus far, the rating agency decision-making process appears to be working without serious blockages.

The simple existence of parallels between the EEA/ESA arrangements and the close cooperation regime, and the absence so far of evidence that the EEA/ESA decision-making is not unduly unstable, does not trivialise the significance of the legal authority and legitimation risks posed by Article 7. It can, nonetheless, be claimed

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45 For example, Decision adopting the Rules of Procedure of the EBA Board of Supervisors (EBA/DC/2011/001 (Rev 5)).

46 Decision of the EEA Joint Committee No 203/2016, OJ L 46, 23.2.2017, p. 35, Article 1.

47 The incorporation Decision (ibid) provides, e.g. for ESMA and the Surveillance Authority to cooperate, exchange information, and consult, in particular prior to taking any action, and for the Surveillance Authority to adopt any decisions required under the EU rating regime on the basis of ESMA drafts. For a recent example see ESMA (2018).

that close cooperation is not an entirely exceptional animal in the EU's complex and fractured financial governance eco-system; and, further, that the EU can construct resilient, pragmatic, and adaptive solutions that respond to this complex governance environment.

6 Conclusion

The close cooperation arrangement is a peculiar animal. It is relatively easy to highlight its weaknesses. But this is to overlook how it seeks to provide an adaptive, workable solution to the governance and operational difficulties generated by the euro area/non euro area fissure across the EU. Further, three features of close cooperation augur well. First, it can be expected to benefit from the "learning by doing" which has long characterised the development of EU financial governance: experience with the ESAs, for example, suggests that institutional bridges are built, legal techniques are finessed, and procedures are used imaginatively. Second, the ambiguities as to formal legal authority can be managed through non-legal techniques, including practical supervisory cooperation through JSTs. Third, peer-related, "horizontal" accountability – in the JST, but also through other ECB working arrangements and the Supervisory Board, provides a means for shoring up legitimation. Finally, recent experience with EEA/ESA decision-making suggests that, however rickety they may seem, intermediated decision-making chains can work in practice.

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Participation of non-euro area Member States in the SRM: centralised decision-making, decentralised implementation – shared responsibilities

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1 Close cooperation within the SRM: Where do we stand?

While the institutional and procedural aspects of the European Banking Union have triggered an impressive amount of research, the legal framework for close cooperation with non-euro area Member States within the Single Resolution Mechanism (SRM) clearly remains uncharted territory. Thus far, the discussion has focused mainly on the fundamental arrangements laid down in Article 7 of the SSMR[2] and Part IX of the SSM Framework Regulation,[3] on the institutional challenges to implementing close cooperation operational within the Single Supervisory Mechanism (SSM), and on the incentives of non-euro area Member States to join.[4] Given wide-spread scepticism as to the practical relevance of the concept and given, further, that the first applications to enter into close cooperation (by Croatia and Bulgaria) have been made only recently, it should not come as a surprise that operational details, as defined by the above legal foundations and by an ECB Decision of 31 January 2014,[5] have received little if any attention. Against this backdrop, it is understandable that problems pertaining to close cooperation within the SRM have hardly been addressed at all. This view seems to be corroborated by the fact that the applicable legal basis for close cooperation in Article 4 SRMR[6] merely links the scope of application of the SRMR to the scope of application of the SSMR,[7] while both institutional and procedural aspects (other than arrangements for

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2 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

3 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (OJ L 141, 14.5.2014, p. 1).

4 See, in particular, Ferran and Babis (2013), pp. 273-5; Tröger (2014), pp. 489-94; for other early (and sceptical) assessments, see also Ferrarini and Chiarella (2013), pp. 61-3; Wymeersch (2012), pp. 23-5; for a more optimistic view, cf. Hinojosa-Martínez (2015), p. 57.

5 Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5).

6 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2015 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

7 Cf. Recital 15 SRMR.

the termination of close cooperation and their implications for the recoupment of contributions to the Single Resolution Fund [SRF]) are left out of the picture. Whatever the legal nature of close cooperation within the SSM,[8] the application of the concept within the SRM is conceived as an automatic extension of the arrangements established in the SSM. At first sight, it would thus appear that the implementation of close cooperation within the SRM would follow automatically from the implementation within the SSM, with little if any specific problems to be expected.

On closer inspection, though, this preliminary assessment has to be corrected. To be sure, under the legal framework established by Article 7 SSMR and Article 4 SRMR, the ECB bears the sole responsibility for the implementation, suspension, and termination of close cooperation, and such decisions will be extended automatically with regard to participation in the SRM. As will be discussed below, however, the operational requirements addressing the implications of any of these scenarios from an SRM perspective leave many aspects unresolved. Perhaps even more importantly, for reasons attributable to the respective governance structures, the operationalisation of close cooperation and the underlying division of powers between national authorities and the European level in the SRM are unlikely merely to mirror the corresponding arrangements established within the SSM, and likely to result in a significantly different emanation of the same principle. Although both regimes reflect the same policy – centralisation of decision-making and enforcement in order to enhance regulatory and supervisory effectiveness by removing national influences and cutting back national biases and policy preferences[9] –, the degree to which this objective has been accomplished differs considerably. The ECB's position within the SSM, as far as the range of competences for the direct supervision of "significant" institutions or other entities extends,[10] is characterised by the principle of exclusive competence, with the National Supervisory Authorities (NCAs) of participating Member States reduced to a more or less ancillary role[11] (which is *not* to suggest that the NCAs do not play an important part in terms of both the preparation and implementation of decisions, without which direct supervision could not work effectively).[12] By comparison, the adoption of preventive measures and resolution actions under the auspices of the SRM is more cooperative in nature, with a clear-cut division of powers between the centralised decision-making process on the one hand, and the implementation of decisions at the national level on the other hand.[13]

Within the SRM, problems of coordination between the two levels are thus likely to be an even more determinant for the effectiveness of the regime. This assessment is reinforced by differences in terms of the applicability (and relevance) of national laws

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8 Cf., for further analysis, Dumitrescu (2017).

9 See, generally, Binder (2015), pp. 5-10.

10 Cf. Article 4(1) SSMR. The following analysis focuses on the application of the concept of close cooperation with regard to "significant" institutions.

11 Cf. Article 7 SSMR. And see, generally (including coverage of the division of powers in relation to "less significant" supervisions), e.g., D'Ambrosio (2019); Gortsos (2015); Hinojosa-Martínez (2015), pp. 59-62; Nieto (2015), pp. 85-87.

12 Cf. Tröger (2014), pp. 470-1.

13 See, further, infra, 3.

within the respective frameworks. Whereas the SSM, essentially, serves as an enforcement regime for a largely harmonised set of prudential regulations, the relevance of national legislation *not* harmonised by EU law in the area of bank resolution is higher, resulting in a stronger position of national institutions in the first place.

As a consequence, close cooperation within the SRM is bound to differ structurally from the SSM: In the latter, the supervisory decisions by the ECB will not be taken directly in relation to "significant" credit institutions in the cooperating non-euro area jurisdiction, but the ECB will instruct the NSAs to act on its behalf on the basis of Article 7(4) SSMR in conjunction with Article 107(3) and Article 116 SSM Framework Regulation.[14] In other words, the enforcement of supervisory decisions under close cooperation will be different from the supervision of "significant" institutions within the euro area, in relation to which the ECB is directly in charge. By contrast, within the SRM, leaving aside certain problems relating to the representation of national interests in the decision-making process, many aspects of close cooperation will mirror more general challenges with regard to the realignment of the European and national levels, inasmuch as the implementation of decisions taken at the European level will always be carried out exclusively by national authorities, irrespective of whether or not the relevant jurisdiction is a member of the euro area.

This contribution analyses the basis for, and problems associated with, the implementation of close cooperation within the SRM in three steps. Section 2 below first examines the relevant legal framework, as defined in Article 4 SRMR in conjunction with the SSMR. Section 3, looking both at crisis prevention and resolution actions proper, then seeks to explore in greater detail the differences between the SSM and the SRM with regard to the underlying governance structure and procedural framework. Finally, section 4 briefly analyses some areas where future reforms of the SRM as a whole could have implications for the implementation of close cooperation with non-euro area Member States. Section 5 concludes.

2 The legal framework: Article 4 SRMR and beyond

2.1 The relevant content of Article 4 SRMR

2.1.1 Establishment of close cooperation (Article 4(1) SRMR in conjunction with Article 7 SSMR)

With Article 4 SRMR as the only provision addressing close cooperation within the SRM, the treatment of the relevant issues is clearly rudimentary, especially by comparison with the elaborate regime set out in Article 7 of the SSMR and Part IV of the SSM Framework Regulation. With regard to the establishment of close

[14] See, for further details, Ohler (2020), paras. 13-8.

cooperation, Article 4(1) SRMR merely specifies the scope of application of the Regulation, in that it refers to the definition of "participating Member States" and thus incorporates the definition stipulated in Article 2(1) SSMR, whereby the term "participating Member State" means a Member State whose currency is the euro "*or a Member State whose currency is not the euro which has established a close cooperation in accordance with Article 7* [SSMR]."

With no additional requirements defined in the SRMR, the establishment of close cooperation within the SSM thus automatically results in the relevant jurisdiction's qualification as a "participating Member State" for the purposes of the SRMR. The responsibility to decide on requests to establish close cooperation thus rests exclusively with the ECB, within the framework defined by Article 7 SSMR.

As a result of close cooperation entered into under the SSMR, credit institutions (and other entities referred to in Article 2 SRMR) established in the relevant jurisdiction will also be subject to the "uniform rules and a uniform procedure for the resolution of the entities" defined by the Regulation and "applied by the Single Resolution Board (…), together with the Council and the Commission and the national resolution authorities within the framework of the single resolution mechanism".[15] Specifically, as will be explored below,[16] the Single Resolution Board (SRB) will have the same powers vis-à-vis institutions and other relevant entities in participating euro area as in non-euro area Member States and, in principle, its decisions would be taken (and enforced) in the same way under close cooperation as they would vis-à-vis institutions in euro area Member States.

2.1.2 Suspension and termination of close cooperation (Article 4(2)-(4) SRMR in conjunction with Article 7 SSMR)

Pursuant to Article 4(2) SRMR, the suspension and termination of close cooperation, follow directly from corresponding decisions taken pursuant to Article 7 SSMR. Just as with regard to the establishment of close cooperation, the initiative is thus not with the SRB, but exclusively with the ECB. The relevant Member State itself may not unilaterally end the arrangement but only request the ECB to terminate it.[17] Significantly, not just the termination, but also a mere suspension of close cooperation, under Article 4(2) SRMR, results in the inapplicability of the SRMR. However, in order to avoid legal uncertainty and disruptions to ongoing resolution actions, Article 4(4) SRMR stipulates that such actions will not be affected in either scenario.

If close cooperation is terminated, the recoupment of contributions to the SRF will have to be negotiated between the SRB and the relevant Member State. The relevant requirements are defined in Article 4(3) SRMR – the only area where

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15 Cf. Article 1 SRMR.

16 See infra, 3 for a discussion of the implications for preventive measures and resolution actions.

17 Cf., for further details, Article 7(5) (suspension of close cooperation), (6) (termination upon request by Member State) and (7)-(9) (substantive and procedural framework for ECB decision) SSMR.

problems of close cooperation have been addressed in an independent regime rather than by reference to corresponding provisions in the SSMR. In this context, recoupments are to be paid from the non-mutualised part of the relevant Member State's "compartment" of the Fund, with payments from the mutualised part permissible if and to the extent that the former is not sufficient to permit the funding of the relevant Member State's national financial arrangements for resolution funding.[18]

As to the calculation of recoupments, Article 4(3) subpara. (2) SRMR, in rather vague terms, requires that the following criteria be taken into account:

"(a) the manner in which termination of close cooperation with the ECB has taken place, whether voluntarily, in accordance with Article 7(6) of Regulation (EU) No 1024/2013, or not;

(b) the existence of ongoing resolution actions on the date of termination;

(c) the economic cycle of the Member State concerned by the termination."

2.2 What is *not* covered (but ought to be)

The absence of a bespoke institutional and procedural framework for the establishment, for the on-going operation, and for the termination of close cooperation within the SRM is likely to give rise to problems at all stages. While some of these aspects may be addressed through a flexible interpretation of the relevant legal provisions, a realignment of the conditions for close cooperation as defined in the SSMR with the implications for the SRM is clearly desirable.

2.2.1 Problems pertaining to the establishment of close cooperation

The need for reform is obvious, first and foremost, with regard to the framework for the establishment of close cooperation. None of the relevant legal acts (SSMR, SSM Framework Regulation, SRMR) provides for the participation of the SRB in the decision-making process, and issues pertaining to the resolvability of relevant institutions are not required to be considered by the ECB. Significantly, the conditions to be met by the applicant Member State are confined exclusively to compliance with the provisions of the SSMR,[19] and do not even mention compliance with obligations arising from the SRMR (or under any measure adopted thereunder). Specifically, accession to the Intergovernmental Agreement (IGA) on the Transfer and Mutualisation of Contributions to the Single Resolution Mechanism, which complements the constitutional framework for the creation and operation of the SRF in Title V, Ch. 2, especially Articles 67-76 SRMR, is not mentioned as a condition either. While recitals 14 and 15 of the IGA anticipate that it '*should* be ratified' by all

[18] See, for details, Article 4(3) subpara. (2) SRMR, referred to – without further specification – in Article 8(5) of the IGA.

[19] Cf. Article 7(2) SSMR.

participating Member States and that non-euro area jurisdictions '*should* accede to [it]' upon establishment of close cooperation, the absence of a procedural framework to enforce this is clearly to be deplored, especially considering the fundamental relevance of the IGA as part of the constitutional basis for the SRM as a whole.[20]

To be sure, some of these concerns, for the time being, can be addressed by way of a flexible interpretation of Article 7(2) SSMR, to the effect that each applicant Member State be required to fully comply also with any duties arising from the SRMR and decisions or other measures taken thereunder. As soon as possible, however, the relevant provisions in Article 7 SSMR and Part IV of the SSM Framework Regulation should be amended so as to ensure that the conditions for the establishment of close cooperation are realigned with the need to ensure full compliance also with the SRMR. In this context, an institutionalised role for the SRB in the decision-making process would certainly be beneficial.

2.2.2 Problems pertaining to the ongoing operationalisation of close cooperation

With regard to the on-going operationalisation of close cooperation within the SRM, the absence of a specific institutional and procedural framework, at first sight, could be perceived to be less problematic. As mentioned before, the establishment of close cooperation within the SSM, by virtue of Article 4(1) SRMR in conjunction with Article 2 SRMR, will result in the equal treatment of the relevant Member State with participating euro area Member States. Thus, institutions within the relevant Member State should receive exactly the same treatment as a result of the cooperation between the SRB and the national resolution authority (NRA) as they would if the relevant Member State had adopted the euro. To be sure, restrictions on the representation of non-euro area jurisdictions within the ECB's decision-making processes have been a major source of concern with regard to the operationalisation of the SSM.[21] The situation would be altogether different within the SRM, however, where non-euro area jurisdictions, as "participating Member States" would automatically be represented, through their respective NRAs, in the SRB.[22] Likewise, the parliament of the relevant Member State will have the same right to require information as the parliaments of euro area jurisdictions.[23] In implementing resolution actions, the NRA of a non-euro area participating Member State is bound to the same duties and will be monitored by the SRB in the same way as authorities in Member States whose currency is the euro.[24] At first sight, again, the absence of a difference in status between participating Member States from within or outside the euro area in their relationship to the SRB should facilitate the effective implementation of resolution actions in a way that does not discriminate between the interests of either group.

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20 See, generally, Busch (2015), paras. 9.58-9.63.

21 E.g., Ferran and Babis (2013), p. 275; Tröger (2014), pp. 490-1.

22 Article 43(1)(c) SRMR.

23 Cf. Article 46 SRMR.

24 Cf. Arts. 28, 29, 30(2) and 31 SRMR, and see further infra, 3.2.

Still, it is at least conceivable that NRAs in non-euro Member States, especially in controversial cases where political interests of the relevant Member State may be at stake, may have (even greater) incentives to misuse their powers to obstruct decisions adopted by the SRB, if and to the extent that these decisions conflict with national biases or preferences. This would be particularly problematic precisely because the implementation of resolution measures under the auspices of the SRM is more cooperative in nature than the implementation of prudential supervision within the SSM, and because their effectiveness depends on the willingness of NRAs to fulfil their tasks as executors of decisions taken at the European level. Similar conflicts may arise in relation to participating Member States whose currency is the euro. Yet as these do not have the choice to terminate their participation in the Banking Union, their incentives to obstruct potentially could be outbalanced by the need to protect their on-going working relationships with other participating Member States and, indeed, the SRB.

It is in this regard that the absence of SRM-specific formal conditions for close cooperation could potentially be problematic: While the ECB, by virtue of Article 7(5) SSMR, can react to a Member State's non-compliance with SSM-related requirements by suspending or terminating close cooperation, a similar option does not exist with regard to non-compliance with obligations arising under the SRMR or decisions thereunder. It remains to be seen whether or not this sanctions regime will ever become relevant in the future, more specifically: whether Member States which have entered into close cooperation will ever seek to terminate it, or will ever violate their obligations in a way that triggers termination by the ECB. Still, if only to ensure consistency between the respective frameworks for close cooperation, it would appear desirable that the ECB's power to suspend or terminate close cooperation under Article 7(5) SSMR be amended so as to include violations of obligations within the SRM, and that the SRB (and/or the Commission) be provided at least with a formal right to request the suspension or termination in order to be able to react to violations in its (their) own right.

2.2.3 Problems pertaining to the suspension or termination of close cooperation

With regard to the suspension or termination, a refinement of the existing framework would seem desirable, first, in order to provide more guidance as to the calculation of recoupments to the SRF. Among the three criteria to be considered pursuant to Article 4(3) subpara. (2) SRMR,[25] only the second – 'the existence of ongoing resolution actions on the date of termination'[26] – appears to be sufficiently clear-cut to allow its swift application. Given that the suspension or termination of close cooperation does not affect the application of the SRMR to resolution proceedings on-going at the relevant time,[27] it certainly makes sense to ensure that any

[25] See supra, 2.1.2.

[26] Article 5(4)(b) SRMR.

[27] See, again, Article 5(4) SRMR.

contributions by the SRF that may be made in such proceedings are taken into account for the calculation of potential recoupments.[28] By contrast, the notion that recoupments should differ depending on whether or not close cooperation had been terminated voluntarily[29] or depending on the economic cycle of the relevant Member State[30] is far less convincing. While any arrangement for the recoupment of contributions will have to be agreed on by the relevant Member State and the SRF, it is difficult to see how such arrangements could be accomplished without clear-cut guidance with regard to the procedural framework for negotiations and the substantive outcome.

As such, the rule that neither the suspension nor the termination of close cooperation results in the inapplicability of the SRMR to resolution actions on-going at the time of termination is certainly reasonable and should go some way to avoid disruptions during the transition. Given that resolution actions, depending on the circumstances of each particular case, may take several years to conclude, however, the simple rule as such may not be sufficient to ensure that a Member State leaving close cooperation continues to honour its obligations arising from pending resolution actions. It might be necessary, or at least desirable, to specify this further, especially with regard to on-going powers of the SRB vis-à-vis the relevant NRA and the need to give full effect to the SRMR during the transition period.

3 Why (and where) close cooperation is structurally different within the SRM: The division of powers between the European and the national levels

3.1 Prevention: Resolution planning and assessment of resolvability, determination of MREL

As far as preventive measures under the SRMR are concerned, the general regime established by Articles 8-12 SRMR applies.[31] In this regard, the SRB, subject to consultation with the ECB and national authorities, is responsible for the drawing up and adoption of resolution plans and group resolution plans for institutions and entities under the direct supervision of the ECB, to which end the SRB may – and usually will – request the NRAs to prepare and submit draft plans.[32] The NRAs, in this context, have to provide the SRB with all relevant information.[33] For other institutions and entities, the NRAs remain exclusively responsible.[34] In connection with its mandate to develop resolution plans, the SRB is also responsible for the

28 See also Article 9(5) subpara. (2) IGA, which offers further specification in this regard.

29 Article 5(4)(a) SRMR.

30 Article 5(4)(c) SRMR.

31 See, generally, e.g., Singh (2016); de Serière (2015); Rispoli Farina and Scipione (2019).

32 Article 8(1) and (2) SRMR.

33 Article 8(4) SRMR.

34 Article 9 SRMR.

assessment of the resolvability of institutions, other relevant entities, and groups, and takes the lead also with respect to remedial actions in this regard.[35] If and when the SRB concludes that the relevant institution or group has failed to adequately address the shortcomings so identified, it can then instruct the relevant NRA to take remedial action.[36] Similarly, the mandate for the determination of minimum requirements for own funds and eligible liabilities rests with the SRB, but has to be enforced by the NRAs on its instructions.[37]

Already at this stage, the institutional and procedural framework for the operation of the SRM is thus characterised by a division between decision-making powers (which are allocated to the SRB) and implementation powers (which, as a rule, remain at the national level). While the SRB has the mandate to require institutions and groups to develop their own responses to perceived shortcomings, the actual enforcement, by way of administrative measures, remains exclusively with the national level. In order to work effectively, the SRB and the NRAs have to collaborate, and the latter have to implement and enforce the decisions adopted by the SRB in a way that respects their substantive content and is, at the same time, sufficiently sensitive to the factual and legal circumstances of each particular case. This, again, reflects a rather strong position of the NRAs in the governance structure of the SRM – a position that is no different for NRAs operating within close cooperation on the one hand and NRAs in euro area participating Member States.

3.2 Resolution actions

With regard to resolution actions proper, the division between decision-making powers and implementation is, if anything, even more clear cut. For “significant” institutions, decisions as to the initiation and calibration of resolution actions have been centralised at the European level, inasmuch as the SRB is responsible for adopting a resolution scheme, which formally places the relevant entity in resolution and determines both the application of resolution tools and potential contributions of the SRF.[38] The NRAs then have to implement the scheme, using their powers under national legislation transposing the BRRD.[39] Here again, an NRA operating within close cooperation finds itself in no different position vis-à-vis the SRB than its peers from euro area jurisdictions. Moreover, the relevant non-euro area Member State is also equally represented in the Council, whose influence, however, is limited to objections to the content on the grounds that the proposed action fails to meet the

[35] See, for details, Article 10(1) (assessment of resolvability), (7)-(9) (remedial action to be required from institution or group), (10) (assessment of remedial action by the SRB) SRMR.

[36] Article 10(11)-(13) SRMR.

[37] See Article 12(14) SRMR in the original version; the same principle is now stipulated by Article 12(5) SRMR, as amended by Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (OJ L 150, 7.6.2019, p. 225).

[38] See Arts. 18(1) and (6) and 23 SRMR.

[39] See Article 29 SRMR.

so-called “public interest” criterion and to a voting right on objections to the use of the SRF.[40]

3.3 Centralised decision-making, decentralised implementation – shared responsibilities

As discussed before, in view of the functional division between centralised decision-making and decentralised implementation powers, it is obvious that the implementation of measures within the SRM generally is dependent on the quality of cooperation between the European and the national levels. Although they are bound by the SRB’s decisions and instructions, the level of responsibility of national NRAs for the effective implementation of decisions adopted at the European level – and, at the same time, their opportunities to influence, or, indeed, obstruct the outcome of implementation – is high.

It should be noted, in this context, that both the implementation and outcomes of resolution actions are invariably more contingent on circumstances influenced by the national laws applicable to the relevant institutions. Just like ordinary insolvency proceedings, resolution actions, because they are taken in relation to companies, will have to take into account the applicable company (and, as the case may be, group) law. They furthermore have to take into account, and will be influenced by, the applicable contract and property law, both of which will have a bearing on the relevant firm’s financial position. Moreover, resolution actions will be influenced by the applicable insolvency law regime, which will not just have to be taken into account as a benchmark for the calibration of resolution actions,[41] but also, even more importantly, because the allocation of losses in resolution actions is determined by the order of claims under national insolvency laws.[42]

Against this backdrop, effective resolution actions – just as the successful execution of general insolvency law – are hardly conceivable without an intimate knowledge of the relevant legal frameworks on the part of the acting authorities. Given the complexity of both restructuring and liquidation scenarios, the contingency on national law probably is significantly stronger than the enforcement of prudential requirements pertaining to the capitalisation, the liquidity position, or the corporate governance of regulated firms. In this light, the division of powers between the SRB and the NRAs on the one hand, and the fact that the latter remain fully responsible for the implementation of decisions adopted by the SRB on the other hand may be interpreted as reflecting the insight that national authorities, in all likelihood, can be expected to have a superior knowledge of the laws of their jurisdiction than a

[40] See, for details, Article 18(7) SRMR. The “public interest” test is laid down in Article 18(5) SRMR in conjunction with Article 18(1)(c) SRMR. In particular, the former provision prohibits resolution actions in cases where ‘the winding up of the entity under normal insolvency proceedings would not meet [the] resolution objectives to the same extent’ as the proposed action. See, for a detailed discussion and the relevance of the criterion, Binder (2019a), pp. 305-10; id. (2019b).

[41] Not just under the “public interest” test discussed supra, text and n. 40, but also because the SRB must ensure that no ‘creditor incurs greater losses than would have been incurred if [the] entity (…) had been wound up under normal insolvency proceedings (…)’ (Article 15(1)(g) SRMR).

[42] Article 17(1) SRMR.

European body. If this so, the situation between the SRB and the NRAs comes with information asymmetries between the two levels. These leave the latter in a stronger position than national competent authorities within the SSM and which could be difficult to balance out merely by way of instructions from the SRB.

Three findings can thus be noted: *First*, the responsibility for preventive measures – resolution planning and the assessment of resolvability – as well as resolution actions is shared between the European and the national levels. *Second*, intensive and effective cooperation between the two levels therefore is indispensable for the successful application of the SRM. And *third*, the interaction between the SRB and euro area Member States, in this regard, is no different from the relationship between the European and the national levels in cases where close cooperation has been established. The role of NRAs relative to the SRB, and the resulting balance of powers and responsibilities, will thus be identical under both frameworks.

4 Close cooperation and the agenda for SRM reform

4.1 Overview

If close cooperation within the SRM, to a large extent, mirrors general problems of coordination between the European and the national levels, this assumption will have implications also for future reforms of the institutional and legal framework for bank resolution within the euro area. The need for such reforms is becoming more visible with the growing number of cases dealt with under the auspices of the SRM. To be sure, only one such case, the failure of *Banco Popular S.A.* in 2017, so far resulted in the application of the resolution framework on the basis of a resolution scheme adopted by the SRB.[43] In all other cases, the SRB reached the conclusion that, in the circumstances, resolution actions were unnecessary to meet the resolution objectives – in particular, to prevent systemic implications – and that, therefore, the initiation of resolution procedures was not in the "public interest" as required by Article 18(1)(c) and (5) SRMR.[44] Still, the decisions adopted thus far indicate that certain parts of the toolbox, including, for that matter, the interplay

[43] SRB, Decision of the Single Resolution Board in its executive session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., (…) (non-confidential version), available at https://srb.europa.eu/sites/srbsite/files/srb_decision_srb_ees_2017_08_non-confidential_scanned.pdf.

[44] See SRB, Decision of the Single Resolution Board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A. (…) (SRB/EES/2017/11) (non-confidential version), available at https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-11_non-confidential.pdf; id., Decision of the Single Resolution Board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A. (…) (SRB/EES/2017/12) (non-confidential version), available at https://srb.europa.eu/sites/srbsite/files/srb-ees-2017-12_non-confidential.pdf; id., Notice summarising the decision taken in respect of ABLV Bank, AS, available at https://srb.europa.eu/sites/srbsite/files/20180223-summary_decision_-_latvia.pdf; id., Notice summarising the decision taken in respect of ABLV Bank Luxembourg S.A., available at https://srb.europa.eu/sites/srbsite/files/20180223_summary-decision_-_luxembourg.pdf; id., Notice summarising the decision taken in respect of AS PNB Banka, available at https://srb.europa.eu/sites/srbsite/files/20190815_summary_of_non-resolution_decision_pnb_banka.pdf.

between the SRMR and the national insolvency laws, should be reformed.[45] While the full dimension of the relevant aspects cannot be explored in detail, the following subsections single out a number of core aspects in this regard, ranging from the institutional set-up of the SRM (infra, 4.2) through the harmonisation of national insolvency regimes (infra, 4.3) to the realignment of resolution and state aid regimes (infra, 4.4).

4.2 Institutional aspects

4.2.1 EDIS

In institutional terms, the most obvious case where future reforms will inevitably change the position of non-euro area Member States participating in the SRM is the creation of a European Deposit Insurance Scheme as the third pillar of the Banking Union, as set out in a Commission proposal of November 2015, progress on which appears to have stalled for political reasons.[46] While details of the proposal remain outside the scope of the present contribution,[47] it should be noted that its implications on the operation of close cooperation are effectively confined to the recoupment of contributions to the Scheme upon the suspension or termination of close cooperation under Article 7 SSMR. The problem, effectively, is identical with the need to recoup contributions to the SRF following the termination of close cooperation,[48] which explains why it has been addressed exclusively through a proposed amendment of Article 4 SRMR.[49] In this regard, the considerations developed before apply *mutatis mutandis*; whether or not a regime for the recoupment of contributions will be sufficient to address all issues pertaining to the suspension or termination is at least not free from doubt.

4.2.2 Further integration of European and national levels

While proposals for other structural reforms of the SRM have not yet been advanced so far, further steps to integrate the European and the national levels are at least conceivable. One possible example is an expansion of the existing regime with a view to establishing a European framework for the resolution of less significant non-viable banks, for example through the creation of an institutional framework similar to the Federal Deposit Insurance Corporation in the United States.[50] It is obvious that, however such an arrangement would be integrated within the existing institutional

45 See, for further discussion, Binder (2019a), pp. 303-4; and see also Miglionico (2018).

46 COM, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, 24.11.2015, COM(2015) 586 final. And see supra, 2.1.2 for a discussion of Article 4(2) and (3) SRMR as it stands.

47 See, e.g., Brescia Morra (2019).

48 See supra, 2.2.3.

49 Cf. COM Proposal, supra n. 46, Recital 33 and Article 2 (amending Article 4 SRMR).

50 See, e.g., Gelpern and Véron (2019); and cf. Binder et al. (2019).

and procedural framework for the Banking Union, the technical challenges for close cooperation would grow, as would the shift of powers from the national to the European level and the need to coordinate national and European authorities and staff. The same would also be true for a less ambitious reform with a view to strengthening the role of the SRB in the actual implementation of resolution actions, e.g., through the establishment of Joint Resolution Teams consisting of both European and national staff (similar to the arrangements created within the SSM).

4.3 Further harmonisation of national insolvency regimes

For reasons mentioned above,[51] national insolvency regimes play an important role as a determinant for the calibration of resolution actions under the SRM. At the same time, in cases where an institution is failing or likely to fail but does not meet the "public interest" test, it has to be liquidated under the applicable national insolvency law.[52] Both aspects indicate that the operation of the toolbox, not just within the SRM but within the EU more generally, requires a certain level of harmonisation of the applicable national regimes. In order to ensure that less significant institutions are liquidated effectively, much will depend on the quality of national law, both in institutional and in procedural terms, e.g., with regard to the availability of effective triggers for liquidation and robust institutions.[53] While it remains an open question whether there is a case for a full harmonisation of national approaches to dealing with the insolvency of less significant banks, an important objective, in this regard, should be to avoid the pitfalls triggered by national differences, especially with regard to the hierarchy of claims under national laws.[54]

As these problems are not confined to the Banking Union, most such reforms would probably be extended to the EU as a whole, by way of adjustments to the Bank Recovery and Resolution Directive (BRRD) of 2014.[55] This, in turn, would mean that non-euro Member States in close cooperation would be affected in the same way as euro area jurisdictions, which, if anything, could ease the adjustment of procedures and substantive laws if such a Member State enters into close cooperation with the SSM and, consequently, the SRM.

4.4 Realignment of resolution and state aid regimes

Yet another aspect where practical experience thus far illustrates a need for further reform is the interplay between the SRMR and the State Aid regime for banks applicable under Article 107 TFEU. While public financial support to the financial

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51 Supra, nn. 41 and 42 and accompanying text.

52 Article 18(8) in conjunction with Article 18(1)(c) and (5) SRMR.

53 For further discussion, see, e.g., Yoo (2019).

54 See, again, Binder et al. (2019); Yoo (2019).

55 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (…) (OJ L 173, 12.6.2014, p. 190).

sector and decisions of the Commission in its capacity as competition authority, during the global financial crisis, facilitated the restructuring of failing banks outside the insolvency regimes then in place,[56] the provision of state aid, as part of a strategy to prevent the initiation of resolution actions or within the application of the resolution tools, is now regulated by the BRRD and the SRMR, respectively. While both legal instruments repeatedly refer to the general state aid regime, however,[57] the procedural and substantive principles for the assessment of state aid to the financial sector date back to the late crisis era and have not been adjusted to the harmonised resolution frameworks so far, resulting in a wide range of inconsistencies and loose ends. The functional relationship between the core document in this regard, the Commission's 2013 "Banking Communication",[58] is therefore, to some extent unclear.[59]

While details, again, remain outside the scope of the present contribution, it should be noted that state aid in connection with resolution procedures (or, indeed, the liquidation of credit institutions under national laws, in cases where the "public interest" test is not met) is likely to remain an important part of strategies to deal with bank insolvency, especially in the context of sector-wide systemic crises.[60] The cases of regional Italian banks, which have been liquidated under national law with the use of state aid since the creation of the Banking Union, illustrate the point.[61]

In order to avoid legal uncertainty and to ensure consistency between the two regimes, a reform of the applicable principles on state aid (and, perhaps, the corresponding provisions in the BRRD and the SRMR) is clearly necessary. This, again, would be a matter for the EU as a whole, as the relevant problems are by no means confined to the SRM. Still, the realignment of the resolution and state aid regimes would be particularly important also in order to ensure consistency between euro area jurisdictions and Member States in close cooperation within the SRM.

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56 Cf., generally, Stolz and Wedow (2010); and see, for a discussion of the Commission's approach to state aid decisions during the crisis, Ahlborn and Piccinin (2010).

57 See, e.g., Kokkoris and Olivares-Caminal (2016), paras. 15-26-15.36.

58 Communication from the Commission on the application, of 1 August 2013, on State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1).

59 See, for a detailed analysis, Binder (2020), paras. 24-33 and 63-75.

60 See Binder, ibid.

61 See, for the relevant Commission decisions, COM, 25.6.2017, SA.45664 (2017/N) – Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca — Liquidation aid, (OJ C 236, p. 1); COM., 18.1.2017, SA.47149 (2016/N) – Liquidity support to Banca Popolare di Vicenza (OJ C 140, p. 3); COM., 18.1.2017, SA.45664 (2016/N) – Liquidity support to Veneto Banca (OJ C 140, p. 4); COM., 12.4.2017, SA.47940 (2017/N) – Additional liquidity support to Banca Popolare di Vicenza (OJ C 140, p. 5); COM., 12.4.2017, SA.47941 (2017/N) – Additional liquidity support to Veneto Banca (OJ C 140, p. 5); COM., 4.7.2017, C(2017) 4690 final – State aid SA.47677 (2017/N) – Italy: New aid and amended restructuring plan of Banca Monte dei Paschi di Siena; COM, 17.12.2012 – C(2012) 966 final corr. – State aid n° SA.35137 (2012/N) – Italy: Rescue aid to Monte dei Paschi di Siena S.p.A.; COM., 27.11.2013 – State aid SA. 36175 (2013/N) – Italy: MPS – Restructuring; COM., 29.12.2016, SA.47081 – Request for Liquidity Support by Monte dei Paschi di Siena

5 Conclusions

While close cooperation within the SRM, by virtue of Article 4 SRMR, is triggered (and suspended or terminated) automatically by corresponding arrangements within the SSM, the application of the concept within the SRM clearly comes with its own problems at all stages of the process (establishment, on-going operation, and suspension or termination). The legal basis for the solution of these problems is clearly rudimentary, and should be adjusted in order to address SRM-specific issues. Even if these voids were filled in future reforms, however, the application of the concept within the SRM is likely to differ structurally from close cooperation within the SSM. Although both the SSM and the SRM are built on the same policy, the centralisation of powers at the European level in order to enhance regulatory and supervisory effectiveness by removing national influences, the division of decision-making and implementation powers differs markedly between the two regimes, leaving national authorities in a more important (and stronger) role vis-à-vis the European level within the SRM. In principle, the operation of close cooperation, within the SRM, is therefore likely to reflect more general problems of coordination between the European and the national levels, and will not differ much from the operation of the SRM within the euro area. The statutory treatment of close cooperation within the SRM as a mere "derivative" of decisions taken within the SSM is therefore inadequate and should be amended. This will also have to be taken into account in future reforms of the institutional and legal frameworks for bank insolvency management within the Banking Union (and beyond).

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Part 9
The Administrative Board of Review (ABoR) and the role of independent panels of administrative review


Concetta
Brescia Mo

The ABoR and the role of independent panels of administrative review: an introduction

Sir William Blair[1]

Part 9 focuses on the functions of the Administrative Board of Review (ABoR) of the European Central Bank. As the organisers of the 2019 ECB Legal Conference point out, internal boards tasked with carrying out administrative reviews of acts adopted by EU bodies are not a novelty. Since the financial crisis, the shift within the EU of responsibilities and powers to supranational bodies has been complemented by the creation of independent panels of administrative review. There are three in the field of financial regulation – the ABoR (with its responsibilities in respect of the Single Supervisory Mechanism (SSM) applying to Eurozone banks), the joint Board of Appeal of the three European Supervisory Authorities (ESAs) (in the field of banking, financial services and insurance), and the Appeal Panel of the Single Resolution Board (SRB) within the framework of the Single Resolution Mechanism (which provides a radically different approach to bank failure than previously). Each was set up as part of a regulatory response to a crisis in the financial system.

The contributions in this Part explore the differences and similarities between these bodies in terms of the scope of review and the standard used (legality and/or merits), and how the Court of Justice of the European Union (CJEU) treats the findings of the ABoR and the other quasi-judicial bodies. Does it defer more to their assessments and findings, based on their expert or quasi-judicial nature, and how has the interplay between administrative review and judicial proceedings evolved?

The jurisdiction of the ESA's Board of Appeal is quite limited, reflecting the limited frontline responsibilities of the three authorities. The main responsibility relates to credit rating agencies. The jurisdiction of the SRB Appeal Panel is also quite limited, and does not extend to the adoption of a resolution scheme by the Board (i.e., the decision to liquidate a bank). The scope of the ABoR's work is far more extensive, extending to all the banks within the SSM. Unlike the other two bodies, this is not designed as an appeal body. Its opinions are not binding on the ECB. For a binding appeal, a party must have recourse to the CJEU. The Court has tended to adopt a limited approach based on established routes of judicial review of administrative decisions based on legality. As Professor Concetta Brescia Morra points out, however, taking into account principles such as proportionality and manifest error, this gives more scope to the Court to intervene than the conceptual distinction between a legality-based and a merits-based review might suggest.

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Nonetheless, the greater the powers of financial supervisors, the more important the process becomes, and an independent review is an important part of that process. As Professor René Smits points out, this is an aspect of the rule of law. The advantages of a specialised procedure over the courts in terms of speed, cost and expertise are well understood and clearly identified by Professor Dacian Dragos. But there are questions as to the effectiveness of such a review. To function properly, it needs to be supported by the courts as well as by the supervisory authorities themselves, which must respect a different outcome proposed by the review body (binding or non-binding). At the same time, the review body needs to respect the expertise of the supervisors, and their policy choices. These are familiar issues in administrative review.

The ABoR can be seen as a sophisticated and practical solution to these issues in the particular context of the SSM. It has the potential to influence even to the point of reversing a supervisory decision, whilst leaving ownership of the decision with the supervisor itself. The citing of its reasoning with approval by the CJEU (reasoning which would otherwise remain private) has enhanced its authority.

The structure of the review does not need to be the same – an appeal panel and a review mechanism each has advantages and disadvantages. A common feature of each body are the time limits in their founding instruments, which can pose difficulties in part time bodies, and in any case have to be applied consonantly with fairness. Generally, in the opening years of their operation, what can be said is that each body in its different sphere is perceived to have made a significant contribution with a potential for more.

Ultimately, the success of all these bodies depends on whether they gain the confidence of those affected by supervisory decisions as a means of redress. The key is the independence of the review which is essential for its credibility. Without independence, it simply becomes an extra and potentially expensive step on the way to the courts. Professor Marco Lamandini advocates measures for the strengthening of such independence, among them, placing responsibility for the appointment of members with the European Commission and an element of accountability to the European Parliament. Clearly, as the system of financial regulation continues to develop at the EU level, there will need to be a continuing rationalisation of the various review mechanisms, and a better understanding of their relationship to the courts.

User confidence can be broadened where there is an appropriate vehicle for dialogue. This is demonstrated (for example) by the Users Groups set up by various national courts which enable discussion of procedures as to how they may be improved, and feedback in both directions. The volume of work in the case of the ESAs and SRB appeal panels is not presently sufficient to accommodate easily such a group. However, it could be a useful innovation in the case of the ABoR. Questions from users at the 2019 ECB Legal Conference were already valuable in illuminating some of the issues from practitioners' perspectives.

Nature and role of the ABoR

Concetta Brescia Morra[1]

1 The nature of the Administrative Board of Review and the operating rules: a tricky puzzle

The Administrative Board of Review (ABoR) was established by the SSM Regulation[2] to carry out an internal administrative review of European Central Bank (ECB) decisions in the supervisory field. The ABoR has unique features in the European Union legal framework, despite some similarities with other bodies established for the review of decisions taken by European authorities.

The Chair of the ABoR, in the early days of the mandate, started an interview to explain the ABoR[3] by saying that "it is important that people know what kind of animal we are". Since then, the ABoR has finalised no less than 23 opinions[4], but it still remains difficult to fit this body into well-established legal categories. Indeed, the ABoR is a tricky puzzle, having an administrative nature, but composed of independent people and subject to operating rules typical of a judicial body.

1.1 Why the ABoR is an administrative body and not a judicial or quasi-judicial body

To understand why the ABoR is an administrative body and cannot be deemed a judicial body or quasi-judicial body, it is necessary to refer to the description of the role of this board contained in the SSM Regulation, focusing on the interplay between the procedure for the ABoR's review (set out in Decision ECB/2014/16)[5] and the decision-making process of the ECB in the supervisory field.

The administrative role of the body is expressly acknowledged by the SSM Regulation in the name "Administrative Board of Review", and in the description of the body as being "for the purposes of carrying out an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation" (Article 24(1) of the SSM Regulation).

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2 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

3 Jean-Paul Redouin, 25 March 2015, Explaining the ABoR.

4 ECB Annual report on supervisory activities 2018, section 5.3.3.

5 Decision ECB/2014/16 of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules (OJ L 175, 14.6.2014, p. 47).

In the proceedings the request for review can be filed by any natural or legal person if the decision is addressed to that person, or is of a direct and individual concern to that person, after the decision has been formally adopted by the ECB. The ECB decision-making process in the banking field is complex: the planning and execution of the tasks conferred on the ECB are undertaken by the Supervisory Board, which is established under the SSM Regulation and which proposes to the Governing Council of the ECB a complete draft decision to be adopted by that body. The Governing Council does not formally ratify or approve the draft decision. The decision is deemed adopted unless the Governing Council objects to the Supervisory Board proposal within a period of ten days[6].

The ABoR must express an opinion within two months from the receipt of the request, and remit the case to the Supervisory Board for the preparation of a new draft decision. The opinion is not binding on the Supervisory Board. The latter must take into account the opinion of the ABoR and promptly submit a new draft decision to the Governing Council. The initial decision is abrogated, and it is then replaced either by an identical decision or by an amended decision. The review is without prejudice to the right to bring proceedings before the Court of Justice of European Union (CJEU) in accordance with the Treaties. No action may be brought before the Court of Justice against the opinion of the ABoR.

The ABoR's opinions are not binding on the Supervisory Board or the Governing Council primarily due to the political decision not to change the Treaty to create the single supervisory mechanism (SSM) and to respect the Treaty provisions that lay down that the Governing Council is the only decision-making body of the ECB. Therefore, it was not possible for a new body, established not by the Treaty but by a regulation, to issue opinions that were binding on the Governing Council. Moreover, given the "independence" of the ECB and its special status as one of the European Union institutions, it is difficult to conceive a body composed of "independent experts" binding the decision-making power of the Governing Council[7].

Although it is not binding, the ABoR opinion is a relevant step in the decision-making process of the ECB because the Supervisory Board "shall take into account the opinion" of the ABoR (Article 24(7) of the SSM Regulation) and must in any case promptly submit a new draft decision to the Governing Council. The opinion must propose whether the initial decision should be abrogated, replaced with a decision of identical content or replaced with an amended decision. In the latter case, the opinion must contain proposals for the necessary amendments (Article 16(2) of Decision ECB/2014/16). The new draft decision abrogates the initial decision. Therefore, in the event of a request for review of a decision of the Governing Council, the legal framework of the SSM provides that the decision-making

6 The governance structure of the ECB in the banking field is due to the need to provide tools to address potential conflicts of interest between monetary policy and banking supervision, and to the regulatory constraints imposed by the Treaty which identifies the Governing Council as the only decision-making body of the ECB.

7 See Harlow and Rawlings (2014), p. 294, who in commenting on the procedure for the ABoR review of ECB decisions, state: "Yet another convoluted procedure in the face of the Bank's entrenched constitutional position".

procedure must be repeated and, in this case, the ABoR is part of the process, as clearly shown also on the website of the ECB[8].

The General Court in Case T-122/15 sheds light on the role of the ABoR in the regulatory design of the SSM. In the judgment *Landeskreditbank Baden-Württemberg Förderbank* v *ECB*[9], the General Court acknowledges the opinion of the ABoR "finding the ECB's decision to be lawful" (paragraph 6). The judgment takes into account the arguments contained in the ABoR's opinion on each claim raised by the applicant, as part of the decision-making process of the ECB. For instance, in paragraph 34, the General Court observes: "As stated in paragraph 31 above, a reading of the contested decision, read in the light of the Administrative Board of Review's Opinion, shows that the ECB considered that the application of the Article 70(1) of the SSM Framework Regulation could lead to the applicant's not being classified as a significant entity". The Court concluded that "in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review's Opinion, it is an extension of that opinion" (paragraph 127). Moreover, the General Court deems the ABoR's opinion of great importance in order to assess the applicant's plea alleging an infringement by the ECB of the obligation to state reasons. At paragraph 125 of the judgment, it holds: "in the present case, the ABoR's Opinion is part of the context of which the contested decision forms a part and may, therefore, be taken into account for the purpose of determining whether that decision contained a sufficient statement of reasons". This interpretation has been confirmed by the CJEU judgment of 8 May 2019, deciding about the appeal of *Landeskreditbank Baden-Württemberg Förderbank* [10].

If the opinion of the ABoR is relevant in order to assess whether a decision of the ECB is well reasoned, the outcome of the "internal administrative review" carried out by the ABoR has not only a preparatory and preliminary character in the ECB's proceedings. The CJEU in its judgment of 8 May 2019 added that from the provisions of Article 24 of the SSM Regulation and from the ABoR decision follow that the opinion of the ABoR, the new draft decision and the decision "originate from the same institution, namely the ECB, and are part of the same internal administrative review procedure in relation to decisions taken by that institution in the exercise of the powers conferred on it by Regulation No 1024/2013 and that, consequently, they are, as the Advocate General noted in point 98 of his Opinion, inherently linked"[11]. Therefore, on the basis of the CJEU decisions, we can conclude that the ABoR is an organ of the ECB because it is part, albeit only following a request by a third party, of the decision-making process of the ECB.

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8 See https://www.bankingsupervision.europa.eu/organisation/decision-making/html/index.en.html

9 Case T-122/15, *Landeskreditbank Baden-Württemberg Förderbank* v *ECB*, EU:T:2017:337, paras. 31-34 and 125-127.

10 Case C-450/17 P, *Landeskreditbank Baden-Württemberg Förderbank* v *ECB,* EU:C:2019:372, paras. 85-96.

11 Case C-450/17 P, *Landeskreditbank Baden-Württemberg Förderbank* v *ECB,* para. 92. This view is shared by Clarich (2019), p. 97.

1.2 The structure and the composition of the ABoR

The members of the ABoR enjoy the traditional third-party position that characterises judges

The structure of the ABoR, as outlined by the European legislative bodies, highlights the aim of establishing a body composed of independent experts in the banking supervisory field. The ABoR is composed of five members, who may be replaced by one of two alternates under certain conditions.

The members of the Administrative Board and the two alternates must be individuals of high repute who are Member State nationals and have a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level in the fields of banking or other financial services.

According to Article 24 of the SSM Regulation, the members must act independently and "in the public interest". Rules are provided to ensure that the ABoR's members are independent of the ECB (and of the national competent authorities) as well from potential applicants. To ensure that the members are independent of the authorities, notwithstanding the fact that they are appointed by the Governing Council of the ECB, the SSM Regulation provides that the members may not be current staff of the ECB, nor current staff of competent authorities or other national or Union institutions, bodies, offices or agencies that are involved in carrying out the tasks conferred on the ECB by the SSM Regulation. Moreover, Article 24 expressly underlines the fact that the members of the Board may not be bound by any instructions from the ECB. This latter provision, along with rigorous procedural rules for how the ABoR functions, constitutes a substantial guarantee that the deliberations of the ABoR are free from potential interference from the ECB offices[12].

According to Article 6 of Decision ECB/2014/16, the ABoR has the same secretary as the Supervisory Board. "The Secretary shall be responsible for preparing the efficient examination of reviews, organising the Administrative Board's pre-hearings and hearings, drafting the respective proceedings, maintaining a register of reviews and otherwise providing assistance in relation to the reviews" (Article 6(2) of Decision ECB/2014/16). The role played by the secretariat could raise doubts about the independence of the ABoR. However, the operating rules, as detailed in the next paragraph, limit this risk, ensuring that the decision-making process allows the members to make the final decision based on their own independent assessment.

[12] For a different view, see Lamandini, Ramos and Solana (2017), p. 256, who argue that the ABoR falls short of having "institutional independence" because of the lack of binding powers over the ECB and the lack of "an appearance of independence", given that the Board is part of the ECB's structure.

1.3 The operating rules of the ABoR

The operating rules of the ABoR are typical of those of a judicial body

The operating rules of the ABoR are established by the SSM Regulation, as implemented by Decision ECB/2014/16. The ABoR's proceeding is clearly divided into two parts: the investigation phase, which includes the possibility of holding an oral hearing, and the deliberation phase[13].

Formalising the proceedings into distinct phases and laying down strict procedural rules ensures that the right of due process[14] is respected and that a truly independent assessment is made by the ABoR.

The investigation phase starts with the receipt of a notice of review from an applicant and ends after the oral hearing, if a hearing is called. On receipt of a notice the Chair must designate, from among the Board members, a rapporteur for the review, taking into account the specific expertise of each member of the Board (Article 8 of Decision ECB/2014/16). During the investigation phase the case rapporteur conducts the investigation and all the members of the Board examine in detail the admissibility of the review and the points raised by the applicant in the request.

The first two points examined are the admissibility of the application and the need for suspension. The Board first has to rule on the admissibility of the request, before examining whether it is legally founded. The request must be submitted by a natural or legal person to whom an ECB decision is addressed or for whom such a decision is of direct and individual concern[15].

As in court proceedings, the ABoR's assessment is limited to the examination of the grounds relied upon by the applicant as set forth in the notice of review. By contrast, the Supervisory Board may take other elements into account in its proposal for a new draft decision (Article 17 of Decision ECB/2014/16).

The second point to be examined is the need for suspension. The ABoR may propose to the Governing Council that it suspends its contested decision, if the request for review is admissible and not obviously unfounded and the ABoR

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13 On the procedural rules of the ABoR see more extensively Brescia Morra, Smits and Magliari (2017), pp. 578-580.

14 The ABoR is an administrative body, acting in the public interest (according to Article 24(4), of the SSM Regulation), established by a European Union Regulation and set up by the ECB. Therefore we can conclude that to its proceedings apply Article 41 of the Charts of Fundamental Rights of European Union containing "the right to good administration".

15 Article 24(5) of the SSM Regulation and Article 7 of Decision ECB/2014/16. Given that the rules about standing are the same as those provided by the Treaty for having standing before the CJEU in judicial review cases (Article 263(4) TFEU), the principles established in the case law of the Court are very important for defining the conditions for the admissibility of a request for review made to the ABoR. According to the case law of the CJEU, (see Case 25/62, *Plaumann* v *Commission*, EU:C:1963:17), a contested decision is of direct concern to an applicant if that decision directly affects the legal situation of the applicant or influences his or her material situation or has a foreseeable impact on his or her legal position. The decision is of individual concern when it affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation that differentiates them from all other persons and distinguishes them individually in the same way as the addressee. For an extensive commentary on this issue, see Witte (2015).

considers that the immediate application of the contested decision may cause irreparable damage.

A very important stage of the investigation phase is the oral hearing. Article 14 of Decision ECB/2014/16 specifies that the ABoR may call for an oral hearing where it considers this necessary for the fair evaluation of the request; both the applicant and the ECB will be requested to make oral representations at such a hearing. The hearing is useful to give the applicant the opportunity to be heard by the ABoR and to allow the ECB to provide a more detailed explanation of the reasons underlying the contested decision.

The second phase of the review is the deliberation phase, which starts immediately after the hearing and ends with the adoption by the ABoR members of an opinion. As underlined above, it is crucial that the deliberations, which include the conclusions reached on the request for review and the drafting of and voting on the opinion, are carried out by the ABoR with full independence. The Board decides on the basis of a majority of at least three of its five members.

The many similarities between proceedings before the ABoR and those before a judicial body could lead to the conclusion that the ABoR may be classified as a "quasi-judicial" body.

The non-binding nature of its decisions and the fact that its proceedings are a phase in the ECB's decision-making process, as demonstrated in the previous paragraph, however, should lead one to dismiss this classification. We should therefore conclude that the procedural rules that replicate those for judicial decisions are imposed by the SSM Regulation merely to ensure a fair evaluation of the applicant's request.

Therefore, the ABoR is an administrative body and cannot be regarded as a court or a tribunal, even if the operating procedure adopted is "quasi-judicial".

2 The experience of bodies similar to the ABoR is not useful to understand the role of the ABoR

The structural and operating characteristics of the ABoR are similar to those of other review or appeal bodies set up in the EU regulatory system to safeguard the rights of parties affected by European agencies. The first appeal board was set up within the Community Plant Variety Office (CPVO)[16]. The scheme was reproduced in other regulations as a "standard" in cases where the agency has decision-making powers, in order to grant a right of appeal to interested parties to a board of appeal that is part of the agency but independent of its administrative and regulatory structure. Other boards of appeal were established within the European Chemicals Agency

[16] Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227, 1.9.1994, p. 1).

(ECHA)[17], the European Aviation Safety Agency (EASA)[18], the Office for Harmonization in the Internal Market (OHIM)[19], and the Agency for the Cooperation of Energy Regulators (ACER)[20]. Two more appeal bodies were established in the financial sector: the Board of Appeal of the European Supervisory Authorities (ESAs)[21] and the Appeal Panel of the Single Resolution Board (SRB)[22].

All these review and appeal bodies are similar as regards their composition, the independence of their assessment and their procedural rules.

Each of these bodies is composed of people with relevant knowledge and professional experience. The members are "independent" from the authority whose decision they review and, possibly, revise, and are not bound by any instructions from the agency or authority[23]. Under their procedural rules, the boards have a short period of time within which to make their decisions; the decision is adopted on the basis of a majority of the members; there is the possibility of holding a hearing with the parties; and the decisions/opinions expressed must be reasoned.

Notwithstanding these common features, the appeal bodies of EU agencies in the European legal framework have significant differences, especially with regard to the scope of the review and the capacity to bind or not the administration whose decisions they review. In the majority of cases the appeal bodies are entitled to review the merits of the administrative decisions and can even replace the original decision of the authority with another more favourable to the applicant. This is clearly the case with the Board of Appeal of the OHIM, which, in the words of the CJEU[24],

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17 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

18 Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ L 79, 19.3.2008, p. 1).

19 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ L 78, 24.3.2009, p. 1).

20 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1).

21 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12). Recital 58 of the Regulation states: "it is necessary to ensure that the parties affected by decisions adopted by the Authority may have recourse to the necessary remedies. To protect effectively the rights of parties, and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted a right of appeal to a Board of Appeal."

22 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

23 See on this point Lamandini, Ramos and Solana (2017), p. 257, where the authors underline that Article 58(5) of Regulation (EU) No 1093/2010 provides limits to the ESAs power to remove the members of the Board of Appeal. In contrast, neither Article 24 of the SSM Regulation nor Article 85 of Regulation (EU) No 806/2014 set out express rules for removal.

24 Case T-112/03, *L'Oréal SA* v *Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, EU:T:2005:102, paras. 36-37.

"is called upon to carry out a new full examination on the merits" if necessary by exercising the same power as the agency.

Also the Board of Appeal of the ESAs and the Appeal Panel of the SRB issue decisions that are binding on the relevant authorities. If the Board of Appeal of the ESAs or the Appeal Panel of the SRB does not confirm the decision that is being appealed, it must "remit the case to the competent body" of the authority and that body must adopt an amended decision regarding the case, in compliance with the board's directions. On the basis of these provisions, there is the right to bring proceedings before the CJEU to challenge a decision taken by the Board of Appeal of the ESAs or the Appeal Panel of the SRB or, where there is no right of appeal to the Board of Appeal of the ESAs or the Appeal Panel of the SRB, by the authority[25].

Otherwise, Regulations (EU) No 1093/2010 and (EU) No 806/2014 are more ambiguous about the object of the review by the Board of Appeal of the ESAs and of the Appeal Panel of the SRB. Article 60(4) of Regulation (EU) No 1093/2010 expressly states "if the appeal is admissible, the Board of Appeal shall examine whether it is well-founded" (Article 85(7) of Regulation (EU) No 806/2014 makes analogous provision for the Appeal Panel of the SRB), without specifying whether the board is to carry out an assessment concerning the legality or the merits of the decision. Considering that the Board of Appeal of the ESAs and the Appeal Panel of the SRB can only confirm or remit the decision to the relevant agency, which then has to take a new decision, the reviews by these two boards seem limited to questions of legality[26]. Moreover, an express reference to the scope of the review is contained in the rules regarding the composition of the board, where it is clarified that "the Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its powers" (Article 58(2) of Regulation (EU) No 1093/2010; see also the analogous provision in Article 85(2) of Regulation (EU) No 806/2014)[27].

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25 The wording of the rules does not make it clear whether the appeal to the board is a precondition for judicial review. Article 61(1) of Regulation (EU) No 1093/2010 specifies that "Proceedings may be brought before the CJEU in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority". At the same time, Article 61(2) of Regulation (EU) No 1093/2010 provides that "Member States and the Union institutions, as well any natural or legal person, may institute proceedings before the Court of Justice of the European Union against decisions of the Authority, in accordance with Article 263 TFEU". See Lamandini (2014), p. 293, who considers that the internal remedy of making an appeal should be exhausted by the parties as a condition to filing a request for judicial review before the Court of Justice, considering that this interpretation of the rules is consistent with the principle that administrative recourses should be exhausted, and it is probably advisable for reasons of procedural economy, so that the proceedings that are instituted before the CJEU are filtered in the best way. The same opinion is expressed by Witte (2015), pp. 21-22.

26 See Witte (2015), p. 20. The author argues that "the purpose of this limitation to remittance is presumably to safeguard the competent body's discretionary powers" and states that the assessment made by the Board of Appeal is limited to questions of law. A different opinion is expressed by Chirulli and De Lucia (2015), p. 846. These authors claim that the boards of appeal of the ESAs and of the Single Resolution Mechanism "can review the legal and technical correctness as the merits of the first decision in the light of the specific points raised by the claimants".

27 Wymeersch (2012), p. 295, takes a different view. He states that an appeal before the Board of Appeal of the ESAs is capable of covering different grounds, including a misjudgement on the substance, allowing the Board to re-evaluate the arguments underlying the decisions in the light of applicable EU law. "So for example, could the review be extended to whether the appealed measure is protecting the interests of investors which is essentially a policy issue based on the general objectives in the regulation".

In examining the differences between the ABoR and the Board of Appeal of the ESAs and the Appeal Panel of the SRB, we consider the names of the bodies an important element for the purposes of determining their legal nature.

The use of the word “appeal” for the Board of Appeal and the Appeal Panel highlights the intent of the EU legislative bodies to refer to a “quasi-judicial” body, while the name of the ABoR leaves no doubt that it is an administrative body.

In conclusion, the ABoR exhibits relevant differences in comparison with similar bodies set up by the EU legislative bodies to review the decisions of European authorities. It is an administrative body, part of the decision-making process of the ECB, but whose opinions are not binding on the ECB. Therefore, the ABoR is not a decision-making body of the ECB, unlike the Board of Appeal of the OHIM whose decisions are ascribed to the Office[28], nor can it be qualified as a “quasi-judicial” body like the Board of Appeal of the ESAs or the Appeal Panel of the SRB[29].

3 The scope of the review

The ABoR carries out an internal administrative review pertaining to “the procedural and substantive conformity with this Regulation” of the decision taken by the ECB in the prudential supervisory field (Article 24(1) of the SSM Regulation).

The reference to “substantive conformity” implies that the ABoR’s review is not limited to whether there was an infringement of an essential procedural requirement, which would primarily be the right of the addressee of the decision to be heard, the right of defence during the proceedings, and the duty of the ECB to provide adequate reasons for its decision (see Article 21 of the SSM Regulation on the “due process for adopting supervisory decisions”). The ABoR must also check that, in substance, the decision complies with applicable law, including the prudential provisions contained in the SSM Regulation.

Although Article 24 of the SSM Regulation outlines a broad mandate, the same Regulation establishes certain limits. Recital 64 states that when the decision taken by the ECB involves a margin of discretion, the ABoR should respect “the margin of discretion left to the ECB to decide on the opportunity to take those decisions”.

Having regard to the complex legal framework, the well-known debate regarding the limits of judicial review of discretionary acts of administrative bodies is very useful in laying down the distinction between a review that assesses the “merits of the

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[28] According to the judgment in Case T-63/01, *Procter & Gamble* v *Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, EU:T:2002:317, para. 20, “as the decision of the Board of Appeal is ascribed to the Office, it is an integral part of the Office, so that the Office has no right of Appeal against a decision of the Board”.

[29] See Chirulli and De Lucia (2015), p. 832. Lamandini (2014), p. 290, states that the Board of Appeal of the ESAs displays “quasi-judicial functions ensuring internal enforcement of the rule of law within the Authorities and a final administrative review process for appeals relating to the ESAs decisions”. On this point, see also Blair (2012), who, without taking a position on the judicial or administrative nature of these appeal boards, states that the Board of Appeal of the ESAs “is not a supervisory or policy committee. It is an appeal board with an adjudicative function”.

decision" and a review on the "legality" of a decision, in other words, that the decision should not exceed the legal boundaries and must be based on "a careful and impartial assessment".

In a well-established line of case law, the CJEU has emphasised the meaning of a "limited standard of review". Where the Union Courts review the legality of a complicated "economic assessment" made by the Commission or another institution, and the institution concerned has a "broad discretion", the review will be confined to whether the procedural requirements were complied with, whether the statement of reasons is sufficient, whether the facts were correctly set out, whether there was any manifest error of assessment, and whether there was a misuse of powers[30].

This list includes many non-procedural aspects that are useful for the ABoR to provide a "substantive assessment" of the ECB's decisions under the SSM Regulation, respecting the margin of discretion left to the authority.

Therefore, in line with the case law of the Court of Justice, the ABoR clarified[31] that when the decision taken by the ECB involves a margin of discretion (for instance when a certain level of capital requirements is set for a bank), the ABoR is bound to limit its review to establishing whether the contested decision was vitiated by an error in law, a manifest error of assessment or misuse of power and whether it clearly exceeded the bounds of the ECB's discretion. Furthermore, a review not limited to procedural aspects entails a special attention from the ABoR on whether the ECB took into account all the relevant facts to make a careful and impartial assessment and on whether the decision is not manifestly disproportionate.

The issue of discretion and its controls is complex

The reference to the case law of the CJEU does not solve all interpretative doubts about the boundaries of the ABoR review. Indeed, we should consider that the application of these principles when dealing with a specific case implies a complex assessment.

First, the traditional distinction between "technical assessments" and "value judgements" is not so easy to apply in practice because they are often intertwined[32]. Second, a crucial point concerns the role that the "public interest" pursued by the

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30 See Case C-12/03 P, *Commission* v *Tetra Laval*, EU:C:2005:87, para. 39; Case T-201/04, *Microsoft* v *Commission*, EU:T:2007:289, paras. 87-89; Case C-413/06 P, *Bertelsmann and Sony Corporation of America* v *Impala*, EU:C:2008:392, para. 69; Case T-342/07, *Ryanair* v *Commission*, EU:T:2010:280, para. 30; Case C-386/10 P, *Chalkor* v *Commission*, EU:C:2011:815, para. 54; Case C-199/11, *Otis and Others*, EU:C:2012:684, para. 59; Case C-295/12 P, *Telefonica and Telefonica de España* v *Commission*, EU:C:2014:2062, para. 54; and Case C-67/13 P, *Groupement des cartes bancaires (CB)* v *Commission*, EU:C:2014:2204, para. 46.

31 See the ECB Annual Report on supervisory activities 2016.

32 See Mattarella (2019), p. 39. Moreover, some authors (see Prek and Lefèvre (2019)) have raised serious doubts that the complexity of the assessment, based on economic grounds, *per se* implies that the assessment falls within the sole jurisdiction of the administrative body and that the Court is prevented from exercising a comprehensive review.

administrative body plays[33]. The statement that a decision is grounded on a general objective, for instance in the supervisory field on the need to pursue "financial stability", does not exclude per se any reasoning on the limits established by the legislature to the discretion the authority enjoys when applying a specific rule[34].

In the light of the above considerations, we may conclude that the need to limit discretion depends on many factors, which must be balanced against opposing reasons and evaluated in the context of the relationship between public authorities and the source of legitimacy of their powers[35]. Therefore, the limits to a review of the legality of an administrative decision depend on the degree of discretion conferred on the authority by the legislature; this assessment could be made only on a case-by-case basis.

3.1 The discretion of the ECB in the supervisory field

The discretion that the ECB enjoys has been debated. A useful starting point here is the Court's decision on the limits to the judicial review of the monetary policy decisions of the ECB[36]. Notwithstanding the broad discretion enjoyed by the ECB in this area (because the Treaties confer on the ECB sole responsibility for framing and implementing monetary policy), the Court's review is not limited to verifying whether the ECB has complied with the essential procedural requirements for administrative acts. In assessing whether the ECB complied with the principle of proportionality, the Court underlined the need for an adequate statement of reasons justifying a monetary policy decision (in this case the OMT programme)[37].

This principle is even more important in the banking supervisory field, where the discretion of the ECB is more limited than that which it enjoys in the field of monetary policy; in the latter, the Treaty provides for the attribution of a broad mandate to achieve the objective of maintaining price stability (Article 127 TFEU); how monetary policy should be conducted is not set out by the Treaty or by any other legislative text. In contrast, the banking supervision function is well defined by numerous rules setting out in detail the objectives of the ECB's powers and the conditions for exercising them[38].

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33 Some authors (see Mendes (2016)) argue that the EU Courts have downplayed the role law ought to have in structuring administrative discretion, by overlooking the public interest that the administrative body should pursue.

34 See Case T-733/16, *La Banque postale* v *ECB*, EU:T:2018:477, paras. 61-70.

35 See Mattarella (2019), p. 39.

36 See Case C-62/14, *Gauweiler and Others*, EU:C:2015:400, on the validity of the decision of the Governing Council of the ECB approving the programme of Outright Monetary Transactions (OMTs). In his opinion in the same case (EU:C:2015:7), Advocate General Cruz Villalón argued at point 111 "… the intensity of the judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution".

37 Case C-62/14, *Gauweiler and Others*, para. 69. Dawson, Maricut-Akbik and Bobić (2019) have criticised the application of the proportionality principle in the *Gauweiler* case. They argue that the limited standard of review applied by the Court in this case shows that the judicial review "has so far not proved itself to be a provider of substantive accountability" and that review of the ECB action "…remain[s] within the confines of light procedural checks".

38 See Lehmann (2017).

Moreover, when discussing the amount of discretion the ECB enjoys in carrying out supervision over the banking system, we should consider the recent evolution of the legal framework. In the aftermath of the financial crisis the European legislative bodies have followed two different paths. On the one hand, the objective of harmonising the rules led to an increase in detailed provisions established by directives, regulations, and regulatory technical standards (RTS) and implementing technical standards (ITS) prepared by the European Banking Authority. Therefore, in many cases the legislature has established detailed ex ante limits to the discretion of the authority (see, for example, the granting of authorisation to take up banking activity). On the other hand, the need to avoid a supervisory model based on the "tick box" approach led the legislature to grant the authority more room to assess the "qualitative aspects" (and not only the "quantitative aspects") of conducting a banking business (see Article 16 of the SSM Regulation).

In the first case, the review of the administrative discretion is intense, having to evaluate the correct application of all the conditions that should be met to exercise the power[39]. In the latter case, the ECB's discretion relates to the "supervisory approach" chosen by the legislature. The ex post controls are limited to an assessment of its respect of the duty of care, more focused on procedural aspects.

Examination of the recent case law of the Court of Justice[40] confirms that the application of the "limited standard of review" in the banking supervisory field entails a different intensity of judicial scrutiny depending on how the law shapes the ECB's discretionary powers. The application of this approach by the ABoR allows this body to carry out an effective review, without interfering with the legitimate sphere of discretion of the ECB.

3.2 The "principle-oriented" review

Moreover, we believe that the ABoR's mandate includes an evaluation of the legality of the ECB's decisions having regard in particular to the ECB's compliance with general principles of EU law, such as proportionality, equal treatment, legitimate expectations, legal certainty and good administration[41]. Most of these principles are expressly referred to in the SSM Regulation (recitals 30, 58, 59, 81 and 86; Articles 1 and 22(2)). Additionally, considering this assessment part of the ABoR's scope of review is consistent with the main purpose for which this internal review body was established, which is to prevent the ECB from carrying out acts that are voidable in court. Recital 64 of the SSM Regulation expressly states that the ECB should establish an Administrative Board of Review "for reasons of procedural economy".

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39 See Case T-733/16, *La Banque postale* v *ECB*, paras. 77-97.

40 Case T-712/15, *Crédit Mutuel Arkéa* v *ECB*, EU:T:2017:900; Joined Cases T-133/16 to T-136/16, *Caisse régionale de crédit agricole mutuel Alpes Provence and Others* v *ECB*, EU:T:2018:219; and Case T-733/16, *La Banque postale* v *ECB,* EU:T:2018:477.

41 A different opinion is expressed by Wymeersch (2014), p. 55. He states that, because of the literal wording of Article 24(1) of the SSM Regulation, which limits the scope of the ABoR's review to the "procedural and substantive conformity with this regulation", other grounds, such as conformity with Union law in general, or unequal treatment, discrimination, lack of reasons or ultra vires, "would be excluded from the board's mandate".

The “principle-oriented review” entails, to a certain extent, a review of the merits of the decision without interfering with the legitimate sphere of discretion conferred upon the administrative authority.

4 The role of the ABoR review in the current legal framework

The aim of the ABoR is first to offer to parties who are affected by the ECB’s decision, and who argue that the decision was taken in violation of the law, an additional occasion to be heard and to defend their rights before a body composed of independent experts. In this respect, it is a complementary remedy to the judicial one. Moreover, the administrative review presents the advantage of being completed within a short time, without affecting the time available for bringing proceedings before the Court of Justice[42], and at low cost[43].

Moreover, the ABoR can play a role of “resolving conflicting interests” between the ECB and the addressee of the decision, as highlighted by one of the founding fathers of Italian administrative law, Massimo Severo Giannini, in an article published in 1949[44] about the role played by a commission set up for the “purge” by public administrations of people who had joined the fascist party. As in the case of the ABoR, proceedings before this commission were subject to operating rules similar to those that apply before a court. According to Giannini, this commission could not been considered a judicial body, notwithstanding its status of independence from the public administration (being super partes) and its lack of administrative discretionary powers (this commission had the power to adjudicate in disputes between the public administration and its staff through an assessment limited to an evaluation of the legality of the administrative decision). Giannini then qualified the acts of this commission as “administrative decisions aiming at resolving disputes”. The proceedings of this body were deemed an instrumental phase aiming at protecting the interest of the public administration in a careful exercise of its powers (in other words, a “judicial” body inside the public administration).

These considerations are very useful to better understand the nature and the role of the ABoR. On the one hand, the ABoR offers another opportunity to protect individual rights affected by administrative decisions, although only the Court, having adjudicative powers, can offer the most effective protection of these rights. On the other hand, the ABoR’s review protects the interests of the public administration in operating in full compliance with the law and not implementing acts that are voidable in court. In conclusion, the ABoR is a piece of the bigger picture drawn by the European legislative bodies to ensure the accountability of an institution, on which crucial powers were conferred to ensure public goals.

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42 After the end of the administrative proceedings before the ABoR, the Governing Council takes a new decision, even if identical to the decision challenge, which guarantees the applicant the right to a period of two months within which to bring proceedings before the Court.

43 See the Guide to the costs of the review.

44 Giannini (1949).

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The ECB and the rule of law

René Smits[1]

1 Introduction

It is a pleasure to contribute to this part of the book marking the first five years of functioning of the Administrative Board of Review (ABoR). In this contribution, I would like to start with a brief look back at the history of the rule of law in this place. The focus of my contribution is on the role of the rule of law[2] in a democratic order, a topical issue in these times[3] and on the part that administrative review of supervisory decisions of the European Central Bank (ECB) may play in upholding due process. I will discuss the acknowledgement by the Court of Justice of the European Union (CJEU) of the value of ABoR opinions in assessing the reasoning of subsequent ECB decisions. As an element of the rule of law, transparency is also crucial for the realisation of claims by applicants against decisions of supervisory authorities. In this context, I discuss access to supervisory files, where I introduce a proposal for reform that Nikolai Badenhoop and I have made, based on a trend we discern in recent court cases[4]. Concluding remarks will sum up my findings.

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1 Professor, Law of the Economic and Monetary Union, University of Amsterdam; Alternate, Administrative Board of Review; Assessor, Belgian Competition Authority; Consultant, RS Law & Society Consulting B.V. Several people have contributed to this paper: Lise Simon, Principal Secretariat Official at the ECB, by providing total figures for ECB legal acts; Federico Della Negra, Legal Counsel at the ECB, by commenting on an earlier version and verifying data on court proceedings; Grace Koshie, formerly Chief General Manager & Secretary to the Central Board of the Reserve Bank of India, by providing information on town hall meetings by the Indian central bank; and Jürgen Steinmetz, Visitors'' Guide of Frankfurt''s Jewish Museum who served as my guide to the Memorial on two occasions (in 2015 and in 2019). I note their contributions in gratitude but remain solely responsible for all opinions herein, and for any errors or omissions.

2 Article 2 of the Treaty on European Union (TEU) provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."
See the speech by Commission President-designate Ursula von der Leyen before the European Parliament on 16 July 2019 when, under the caption: "Defending Europe's values", she said: "The cradle of our European civilisation is Greek philosophy and Roman Law. And our European continent went through its darkest period when we were ruled by dictators and Rule of Law was banished. For centuries, Europeans fought so hard for their liberty and independence. The Rule of Law is our best tool to defend these freedoms and to protect the most vulnerable in our Union. This is why there can be no compromise when it comes to respecting the Rule of Law. There never will be. I will ensure that we use our full and comprehensive toolbox at European level. In addition, I fully support an EU-wide Rule of Law Mechanism. To be clear: the new instrument is not an alternative to the existing instruments, but an additional one. The Commission will always be an independent guardian of the Treaties. Lady Justice is blind – she will defend the Rule of Law wherever it is attacked." It interesting to note that this quote does not contain any reference to religious sources of the European civilisation (notably, Judaism, Christianity and Islam, as institutionalised expressions of spirituality).

3 See recent case law of the CJEU mentioned in footnote 21.

4 René Smits, Nikolai Badenhoop, "Towards a single standard of professional secrecy for supervisory authorities – A reform proposal", European Law Review (44) 2019, pp.295-318.

2 History and the rule of law in a democratic order

1941-1945

This building has seen the most horrible violations of the rule of law.[5] I do not refer to the ECB but to what happened in the building that became (part of) the ECB's headquarters some 75 years later. Not all of you may be aware of the fact that the *Grossmarkthalle*, the architectural sensation of the 1920s which has been incorporated in the ECB's Main Building, contains a space that the Gestapo, the Nazi German police, had rented for rounding up Jewish citizens of Frankfurt before their deportation to the death camps. From 1941, citizens of this city who happened to be Jewish were assembled in an underground cellar-like room (around 1,100 people with just standing space), undergoing degrading treatment, including handing over a list of their possessions to be confiscated, a body search, *Entbürgerung* (removal of their German nationality) and paying a fee for the train ticket to their deaths. After long hours of waiting they were moved into trains to the extermination camps and, on one occasion of a 'spontaneous' round-up of citizens, to a Baltic beach to be shot dead as the camps were too crowded to receive them. A memorial (*Erinnerungsstätte*) in this building keeps alive the memory of these horrors[6].

Awareness for visitors and staff

I mention these uncomfortable facts here for two reasons. First, I consider that the ECB, one of the crowning results of European integration which began as a process to ensure that this was "never again"[7] to happen, should give ample attention to this part of the history of its headquarters. I plead for a clear plaque in the visitors' centre on the ground floor describing this part of the history of the ECB's headquarters with an open acknowledgment of the events of the dark years. A stark reminder of the atrocities committed against European minorities only eight decades ago helps to bring to mind, to both staff and visitors, the *raison d'être* for integration among the peoples of Europe[8].

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5 I quote from ECB President Mario Draghi's words on the inauguration of this building: "We are standing here today in what used to be Frankfurt's former wholesale fruit and vegetable market, a state-of-the-art functional building from the 1920s that has largely been preserved and incorporated into the new structure. Between 1941 and 1945, more than 10,000 Jewish people from Frankfurt and nearby were deported from here to the concentration camps. A memorial on the east-side of the building has been built to remind us, and those who come after us, of deeds that cannot and must never be forgotten. An integrated, democratic and peaceful Europe was one of the key lessons from this dark chapter in history. We have come a long way since then – but nothing we have achieved should be taken for granted." Speech by Mario Draghi, President of the ECB, at the inauguration of the New ECB Premises, Frankfurt am Main, 18 March 2015, available at: https://www.ecb.europa.eu/press/key/date/2015/html/sp150318.en.html.

6 See *The ECB Jewish Memorial and the European project*, speech by Vítor Constâncio, Vice-President of the ECB, on occasion of the inauguration of the Jewish Memorial at the ECB Main Building Großmarkthalle, Frankfurt am Main, 22 November 2015, available at: https://www.ecb.europa.eu/press/key/date/2015/html/ecb.sp151122.en.html.

7 "(…) we want to ensure the "*Nie wieder*" (Never again) that is at the core of our hopes", quote from the speech by Vítor Constâncio, ibid.

8 See: https://www.ecb.europa.eu/ecb/premises/intro/memorial/html/index.en.html.

Second, these events are a painful reminder of the importance of the rule of law in the proceedings of European institutions. Even though rule of law breaches possibly effected by the ECB may be minor in comparison to these horrors, a scrupulous adherence to due process, equality before the law and other fundamental rights is needed[9] to guard against slippage from the norms of our European society, and against a slide into dark territory which was only all too easily made by small steps[10].

Initiative to strengthen the rule of law in the EU: the ECB's contribution

In this context, it is worth reflecting on the contribution by the ECB[11] to the stakeholder consultation on the rule of law initiated by the European Commission[12] in the spring of this year[13] which, in July 2019, led to its adoption of an action plan[14]. The ECB begins by stating that "the rule of law escapes a comprehensive definition" and takes a perspective on the rule of law which emphasises enforcement of the law[15], rather than protection on the basis of the law against public authorities' transgressions. Understandably, the ECB then focuses on "domestic rule-of-law deficiencies" as these "may affect the ESCB and the ECB through their impact on national central banks". I cite another part of the ECB's contribution: "Populist, anti-establishment, and anti-expertise approaches that challenge independent institutions, focusing on their lack of direct connection with the "will of the people", often fuel general mistrust against such institutions and target them sweepingly. This generalized challenge to independent authorities may also extend to national central banks".

Noting the specific framework in which the ESCB operates in a "composite constitutional order", namely with a Union institution and national central banks

9 Again, citing Vítor Constâncio in his speech on 22 November 2015 (footnote 6): "The ECB, as one of the true pan-European supranational institutions is attached to the core values of the European project."

10 On the descent by small steps into 'illiberal democracy' in Hungary, a far cry from the horrors of Nazi Germany but a clear deviation from a free and democratic society nevertheless, see: The entanglement of powers – How the government of Viktor Orban hollowed out Hungary's democracy, in The Economist, 31 August 2019, pp. 17-20. See the European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, available at: http://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html.

11 *Commission's Communication on further strengthening the Rule of Law – a central bank perspective*, the ECB's contribution to the rule-of-law stakeholders discussion, available at: https://www.ecb.europa.eu/pub/pub/legal/html/index.en.html, p. 1.

12 To which the current Finnish Presidency of the Council added support; see: *Common values and the rule of law: cornerstones of EU action*, available at: https://eu2019.fi/en/priorities/values-and-the-rule-of-law.

13 See: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en#stakeholder-contributions.

14 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union: A blueprint for action, COM/2019/343 final, at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN.

15 "At any rate, the rule of law requires that public authorities act in accordance with constitutional norms, including fundamental rights, and general rules that have been laid down by democratically elected organs, as well as that they actively ensure that the law is observed by private actors" (emphasis added).

mandated to operate as a coherent whole, the ECB emphasises the need for observance by national authorities of the pursuit of the public good of price stability[16]. Since "domestic rule-of-law deficiencies may affect the ESCB and the ECB through their impact on national central banks", the specific measures which the Treaty and the Statute provide may assist in pursuing this objective effectively. The ECB mentions as part of the toolbox to guarantee the independent pursuit of price stability the annulment of a national measure relieving an NCB Governor from his functions[17], elaborates on the specific infringement proceedings that the ECB may initiate against a deviant NCB[18] and includes the instruments of ECB opinions[19] and Convergence Reports[20].

Support and critique

While all this is certainly valuable in the context of the rule of law, the emphasis is on enforcement of public law of a constitutional nature which seems to overlook the issue of protection against the exercise of public functions. Such protection is also afforded by an independent judiciary, which is an indispensable element of the rule of law, as set out in recent case law[21]. From my perspective, two vital elements in upholding the rule of law in the area of central banking are absent from the reflections in the ECB's 'rule of law' contribution: the protection against the ECB itself through administrative and judicial review of ECB acts and an open attitude of accountability. A word on each.

Administrative and judicial review may assist in ensuring that the ECB acts in observance of the highest standards of public conduct. I would like to cite a legal act recently adopted by the ECB itself, in the area of systemic payments systems

16 I would have liked to see mentioned, additionally, financial stability.

17 Judgment of 26 February 2019 in Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* EU:C:2019:139 and Opinion of AG Kokott of 19 December 2018 in the same case, EU:C:2018:1030. See my blogpost of 5 March 2019: *ECJ annuls a national measure against an independent central banker*, available at: https://europeanlawblog.eu/tag/case-c%E2%80%91202-18-ilmars-rimsevics-v-republic-of-latvia/.

18 Article 271(d) of the TFEU and Article 35.6 of the Statute of the ESCB and of the ECB.

19 For all opinions given by the ECB under its advisory powers on draft Union and national legislation (Article 127(4) of the TFEU and Article 4 of the ESCB Statute and, also Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (98/415/EC) (OJ L 189, 3.7.98, p. 42). See, also: *The ECB's advisory role – Overview of opinions (1994-2008)*, May 2009, available at: https://publications.europa.eu/en/publication-detail/-/publication/1dfe9f3b-8f21-4a4d-8081-9ce562fc45a1.

20 For the Convergence Reports issued by the ECB on the basis of the provisions on accession to the Euro Area which is subject to qualification by the relevant Member State under the convergence criteria (Article 140(1) of the TFEU), available at: https://www.ecb.europa.eu/pub/convergence/html/index.en.html.

21 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117; Judgment of 25 July 2018 in Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586; Order of 17 December 2018, EU:C:2018:1021, and Judgment of 24 June 2019 in Case C-619/18 R, *Commission v Poland*, EU:C:2019:531.

oversight – an area in which ECB has elaborated an entire system of oversight[22], including a sanctions methodology[23] on the basis of Articles 22 and 34 of the ESCB Statute[24] – to give a definite description of what this would entail: "a competent authority should exercise [its powers] […] in accordance with, and subject to, the general principles of proportionality, equal treatment, effectiveness, efficiency, transparency and procedural due process"[25]. Even if a positive definition of the rule of law escapes us, this enumeration of principles of good conduct for a public authority qualify its behaviour as in conformity with requirements of the rule of law. Independent outside review of its legal acts may foster this high level of conduct by the central bank.

As for **accountability**, the ECB's contribution mentions "legitimate reflections on the scope and limits of central bank independence", to be contrasted with undermining of independence by the forces of populism. I would like to see this scope for true debate expanded from reflections on the independence of central banks to substantive discussions of their role and their policies. After all, for "independent institutions [to act] as checks and balances to executive and legislative power"[26], these independent institutions need themselves to be subject to checks and balances, including challenges from parliaments and courts. This requires flexibility in thinking by the central bank to achieve true responsiveness to the society it

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22 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117; Judgment of 25 July 2018 in Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586; Order of 17 December 2018, EU:C:2018:1021, and Judgment of 24 June 2019, in Case C-619/18 R, *Commission v Poland,* EU:C:2019:531. This payments systems oversight regime is set out in: Regulation of the European Central Bank (EU) No 795/2014 of 3 July 2014 on oversight requirements for systemically important payment systems (ECB/2014/28) (OJ L 217, 23.7.2014, p. 16), as amended by Regulation (EU) 2017/2094 of the European Central Bank of 3 November 2017 amending Regulation (EU) No 795/2014 on oversight requirements for systemically important payment systems (ECB/2017/32) (OJ L 299, 16.11.2017, p. 11); Decision (EU) 2017/2098 of the European Central Bank of 3 November 2017 on procedural aspects concerning the imposition of corrective measures for non-compliance with Regulation (EU) No 795/2014 (ECB/2017/33) (OJ L 299, 16.11.2017, p. 34); Decision (EU) 2017/2097 of the European Central Bank of 3 November 2017 on the methodology for calculating sanctions for infringements of the oversight requirements for systemically important payment systems (ECB/2017/35) (OJ L 299, 16.11.2017, p. 31); Decision (EU) 2019/1349 of the European Central Bank of 26 July 2019 on the procedure and conditions for exercise by a competent authority of certain powers in relation to oversight of systemically important payment systems (ECB/2019/25) (OJ L 214, 16.8.2019, p. 16). Also relevant is:European Central Bank Regulation (EC) No 2157/1999 of 23 September 1999 on the powers of the European Central Bank to impose sanctions (ECB/1999/4), OJ L 264/21, 12.10.1999, lastly amended by Regulation (EU) 2017/2095 of the European Central Bank of 3 November 2017 (OJ L 299, 16.11.2017, p. 22); consolidated text is available at: https://www.ecb.europa.eu/ecb/legal/pdf/celex_01999r2157-20171206_en_txt.pdf.

23 Decision (EU) 2017/2097 of the European Central Bank of 3 November 2017 (ECB/2017/35) (OJ L 299, 16.11.2017, p. 31).

24 The oversight of systemic payment systems is not affected by the issues surrounding the limits of the ECB's competences in the area of settlements; see footnote 52 below.

25 The quote is from recital 9 of the preamble to Decision (EU) 2019/1349. This ECB legal act specifies how competent authorities are to exercise powers in respect of systemically important payment systems (SIPS), based on a previous legal act of the ECB on how oversight of SIPS is to be conducted, in turn based on CPSS-IOSCO principles. For the CPSS-IOSCO – Principles for financial market infrastructures of April 2012, available at: https://www.bis.org/cpmi/publ/d101a.pdf. CPSS stands for Committee on Payment and Settlement Systems of the Bank for International Settlements (BIS) and IOSCO for the International Organization of Securities Commissions. The powers covered by this legal act published in the Official Journal on the 16th birthday of our eldest grandson Justin Smits, 16 August 2019, concern the right to obtain information, to require an independent expert report and to carry out on-site inspections with a SIPS (Article 21 of Regulation (EU) No 795/2014 (ECB/2014/28) as amended). Note that corrective measures and sanctions may also be imposed pursuant to Articles 22 and 23 of Regulation (EU) No 795/2014, as amended.

26 As the ECB's stakeholder contribution on the rule of law correctly describes independent central banks.

serves, and an open attitude towards unconventional approaches, something the ECB itself – rightly, so – demands of more conservative audiences in the euro area. There is a clear distinction between, on the one hand, populist anti-expert negativism and, on the other hand, alternative approaches and non-conformist reflections. Openness to the latter is what a central bank should adopt.

A case in point is the current debate on what banks and central banks should do to avoid a climate change[27] catastrophe[28]. The ideas about their role in this respect[29] have evolved quickly[30]. Also, the role of central banks[31] in fostering the achievement of the Sustainable Development Goals (SDGs)[32] has lately evolved. On climate change, a Network for Greening the Financial Sector (NGFS)[33] has been established, to which the ECB acceded. Even more generally, there is an ongoing discussion about the appropriate role for central banks in the area of human rights[34]. These are signs of the changing debate and of the speed with which mainstream thinking may shift.

The ECB may wish to adopt a more inclusive vision on the rule of law, including protection against the exercise of public authority by independent central banks, and encompassing accountability, responsiveness and transparency which, together, form the ART of central banking in a democracy[35]. I will come back to the

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27 The seminal contribution by Bank of England Governor Mark Carney needs to be mentioned: Mark Carney: *Breaking the tragedy of the horizon – climate change and financial stability*, speech by Mr Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board, at Lloyd's of London, London, 29 September 2015, available at: https://www.bis.org/review/r151009a.pdf.

28 For an inspiring view on sustainability issues facing the financial sector and its supervisors, see *Springtij* Opening address by Frank Elderson, Executive Director of De Nederlandsche Bank (DNB), Terschelling, 28 September 2018, available at: https://www.dnb.nl/en/binaries/Springtij%20Opening%20address_tcm47-379653.pdf.

29 See Dirk Schoenmaker, *Greening monetary policy*, Bruegel Working Paper No. 2, 19 February 2019, available at: https://bruegel.org/2019/02/greening-monetary-policy/; and Margherita Giuzio, Dejan Krusec, Anouk Levels, Ana Sofia Melo, Katri Mikkonen and Petya Radulova, *Climate change and financial stability*, *Financial Stability Review*, May 2019, available at: https://www.ecb.europa.eu/pub/financial-stability/fsr/special/html/ecb.fsrart201905_1~47cf778cc1.en.html.

30 See Sabine Lautenschläger: "In the area of banking supervision, this year the ECB has formally identified climate-related risk as one of the key risks facing the banking sector": Central Bankers, Supervisors and Climate-Related Risks, panel remarks by Sabine Lautenschläger, Member of the Executive Board of the ECB, at the Network for Greening the Financial System Conference, Paris, 17 April 2019, available at: https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190417~efcf14da2a.en.html.

31 See the speech by Frank Elderson at the *Sustainable Finance Seminar*, held at DNB on 27 November 2015: "With sustainability being at the heart of what we do, De Nederlandsche Bank sees a role for itself as a catalyst in the pursuit of sustainable development goals".

32 The Sustainable Development Goals (SDGs) are a set of 17 global objectives for development for the year 2030, agreed by the United Nations General Assembly Resolution 70/1 (*Transforming our world: the 2030 Agenda for Sustainable Development*) on 25 September 2015, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

33 See: Network for Greening the Financial System *First comprehensive report - A call for action - Climate change as a source of financial risk*, April 2019, available at: https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs_first_comprehensive_report_-_17042019_0.pdf.

34 Daniel David Bradlow, *A Human Rights Based Approach to International Financial Regulatory Standards*, SouthViews, (171) October 2018, available at: https://ssrn.com/abstract=3262463.

35 I have used the acronym ART to define democracy previously, in the wider context of EMU, where 'R' stands for 'representation', an element which is not apposite to use for an autonomous central bank. See: *From Subordinated to Prominent: The Role of the European Commission in EMU. Reflections on Euro Area Democracy*, in: Luigi Daniele, Pierluigi Simone and Roberto Cisotta (eds) Democracy in the EMU in the Aftermath of the Crisis, Springer, Cham, pp 51-71.

requirements of accountability, responsiveness and transparency throughout this contribution.

3 Independent review of ECB decisions

3.1 Introduction: reviewability of ECB measures

In a democratic society, decisions of public law authorities are subject to scrutiny by independent outsiders at the request of affected parties[36]. This scrutiny may take the form of independent administrative review, as in the case of the ABoR, and/or of independent judicial review. Beyond such review, acts by independent agencies are subject to democratic accountability before the legislative and executive functions of government, a subject which is beyond the purview of this contribution[37]. All forms of accountability require a level of transparency about the conduct of public authorities which allows the mechanisms of taking responsibility to work effectively.

Different kinds of decisions of the ECB may affect citizens in a variety of ways. Before focusing on the role of the ABoR, let me briefly explore three areas of activity where ECB measures affect citizens: (a) the ECB's original core mandate; (b) its troika role and (c) prudential supervision.

(i) Original core mandate

The mandate of the ECB includes, as the original and most visible part, core decisions on the course of the European economy: setting interest rates, engaging in standard and non-standard monetary policy operations and engaging in functions in respect of the euro's exchange rate, the official foreign reserves of the Member States of the euro area and the payment system. Such decisions are often generic in nature, are not addressed to individuals or do not affect a person directly or

[36] Assuming these parties have standing, an issue discussed below.

[37] See, with a focus on the ECB, the recent articles in the Maastricht Journal of European and Comparative Law, (26) 2019: Diane Fromage, "Guaranteeing the ECB's democratic accountability in the post-Banking Union era: An ever more difficult task?", pp. 48–62; Fabian Amtenbrink, "The European Central Bank's intricate independence versus accountability conundrum in the post-crisis governance framework", pp. 165–179; Anna-Lena Högenauer, David Howarth, "The democratic deficit and European Central Bank crisis monetary policies", pp. 81–93. See also: Pieter Van Cleynenbreugel, "Confidentiality behind transparent doors: The European Central Bank and the EU law principle of openness", Maastricht Journal of European and Comparative Law, (25) 2018, pp. 52–76; Ton Duijkersloot, Argyro Karagianni and Robert Kraaijeveld, "Political and judicial accountability in the EU shared system of banking supervision and enforcement", *in Law Enforcement by EU Authorities Implications for Political and Judicial Accountability*, Edited by Miroslava Scholten and Michiel Luchtman, 2017, pp. 28–52; Florin Coman-Kund, Anastasia Karatzia, Fabian Amtenbrink, "The Transparency of the European Central Bank in the Single Supervisory Mechanism", Credit and Capital Markets – Kredit und Kapital, (51) 2018, pp. 55–72; Deidre Curtin, "'Accountable Independence'" of the European Central Bank: Seeing the Logics of Transparency", European Law Journal (23) 2017, pp. 28-44; Nicolò Fraccaroli, Alessandro Giovannini and Jean-François Jamet, "The evolution of the ECB's accountability practices during the crisis, ECB Economic Bulletin, 2018, Issue 5, available at: https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201805_01.en.html; René Smits, "Accountability of the European Central Bank", Ars Aequi, January 2019, available at: https://arsaequi.nl/product/accountability-of-the-european-central-bank/.

individually, as the requirement for legality review requires (Article 263 of the Treaty on the Functioning of the European Union (TFEU))[38]. This implies that potential applicants have no standing against such decisions which do not 'directly and individually concern' them. Thus, decisions on monetary policy will not, normally be contested in court, at least not successfully: efforts to challenge decisions are likely to founder on 'standing'[39].

An exception to this lack of justiciability of monetary policy decisions derives from challenges before national courts, notably of a constitutional nature, against ECB policies. These contestations may lead to proceedings that end up before the CJEU and lead it to decide on the legality of monetary policy measures. The *Gauweiler*[40] and *Weiss*[41] cases are well-known examples of such jurisprudence. Yet, in general, the ECB's monetary policy decisions[42] are unlikely to be challenged by individuals in court except, perhaps, in times of severe crisis as the proceedings mentioned above[43] make clear.

Allow me to add a remark about the effects of judicial scrutiny of monetary policy decisions. Such proceedings provide a forum for discussion of a technical issue which many have strong opinions about and, therefore, allow accountability since the protagonist of the policy needs to answer the judicial challenges of the opponents. This accountability aspect should not, however, become a clash about 'sovereignty'

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38 The terms 'individual concern' and 'direct concern' have been elaborated in case law. For 'direct concern', there has to be a direct effect in a person's legal position and no intermediation by any national measure in which the Member State administration has discretion. The term 'individual concern' has been explained, notably in the *Plaumann* udgment: "Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." Judgment of 15 July 1963 in Case 25/62, *Plaumann & Co. v Commission of the European Economic Community*, EU:C:1963:17.

39 Three proceedings initiated during the great financial crisis cum sovereign debt crisis deserve mentioning, the outcomes of which are available in other languages than English only:
1) In December 2011, the General Court turned down Mr. Städter's late challenge of ECB measures to widen the eligibility criteria of collateral to ensure continued use of Greek, Portuguese, and Irish government bonds in the monetary policy operations of the Eurosystem: Order of the General Court of 16 December 2011 in Case T-532/11, *Städter v ECB*, EU:T:2011:768; appeal rejected by Order of the Court of 15 November 2012 in Case C-102/12 P, EU:C:2012:723.
2) In December 2013, the General Court rejected the challenge instituted by applicant Mr. Von Storch and 5,216 other plaintiffs who opposed the ECB's announced Outright Monetary Transactions (OMT), holding that the OMT needed additional legal instruments and decisions subject to the discretion of the ECB to become operative, whereas the applicants were not directly concerned in the sense of the fourth paragraph of Article 263 TFEU: Order of the General Court of 10 December 2013 in Case T-492/12, *Sven A. von Storch and Others v ECB*, EU:T:2016:668.
3) In June 2014, the General Court rejected an action for the annulment of an ECB decision taken in the context of the downgrading of Greek government debt and the Private Sector Involvement (PSI), the write-down of privately held Greek government debt. This case was initiated by Mr. Allessandro Accortini and over 200 fellow plaintiffs from Italy who argued that, as holders of Greek government bonds, they were disadvantaged by an ECB decision that made the eligibility of Greek government bonds for Eurosystem operations conditional upon a credit enhancement: Order of the General Court of 25 June 2014 in Case T-224/12, *Alessandro Accorinti and Others v ECB*, EU:T:2018:366.

40 Judgment of 16 June 2015 in Case C-62/14, *Gauweiler*, EU:C:2015:400.

41 Judgment of 11 December 2018 in Case C-493/17, *Weiss*, EU:C:2018:1000.

42 Published by the ECB at: https://www.ecb.europa.eu/mopo/decisions/html/index.en.html.

43 See footnote 39.

or precedence of norms: without the primacy of Union law over Member State law[44], even of a constitutional nature, the Union cannot function, and monetary policy would be re-nationalised.

As indicated, the form that monetary policy decisions take also plays a role in this avoidance of judicial scrutiny: monetary policy decisions are not couched in an 'administrative act': a decision to set interest rates is an announcement to the market participants and the general public that the Eurosystem stands ready to engage in certain financial operations at a given price (interest rate). A decision to engage in certain financial transactions, again, is an announcement that particular operations will be undertaken. Such operations will be effected based on the General Documentation of the Eurosystem[45], the provisions of the TFEU and the Statute of the ESCB and ECB, and, possibly, on the basis of specific legal acts adopted by the ECB[46]. Such legal acts are of a general nature and, again, will not directly and individually affect potential litigants. However, caution is required: the press release on Outright Monetary Transactions (OMT)[47] was assessed as to its legality under the ESCB's mandate in the *Gauweiler* case, even though the CJEU also referred to the unpublished draft legal acts prepared by the ECB for the implementation of the OMT[48] which was never effected, the press release itself having done its work of assuaging market fears about a break-up of the currency union.

The ECB's 'core mandate' encompasses more than monetary policy. Among the basic tasks entrusted to the ECB[49] are conducting foreign exchange operations consistent with the provision on the Union's external position on monetary union and exchange rates (Article of the 219 TFEU)[50] and holding and managing the official foreign reserves of the Member States, including gold. Even though these tasks may involve the conclusion of agreements[51] and the adoption of positions which may be contested, they are unlikely to give rise to judicial review. The other 'basic task' of

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44 Established in the *Costa/ENEL* – judgment of 15 July 1964 in Case 6/64; EU:C:1964:66. See, also, Declaration No. 17 attached to the Final Act of Conference adopting the Treaty of Lisbon, which quotes the ruling: "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

45 Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (General Documentation Guideline) (ECB/2014/60) (recast) (OJ L 91, 2.4.2015, p. 3) as most recently amended by Guideline (EU) 2019/1032 of the ECB of 10 May 2019 amending Guideline (EU) 2015/510 on the implementation of the Eurosystem monetary policy framework (ECB/2019/11) (OJ L 167, 24.6.2019, p. 64). See for a consolidated text before the latest amendment https://www.ecb.europa.eu/ecb/legal/pdf/celex_02014o0060-20181001_en_txt.pdf.

46 See the overview of monetary policy instruments at: https://www.ecb.europa.eu/ecb/legal/1002/1014/html/index-tabs.en.html.

47 Press release of 6 September 2012: *Technical features of Outright Monetary Transactions*, available at: https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

48 See Judgment of 16 June 2015 in Case C-62/14, *Gauweiler*, EU:C:2015:400, paragraph 71 where the Court refers to "draft legal acts considered during the meeting of the Governing Council at which the press release was approved".

49 Article 127(2) of the TFEU and Article 3.1 of the ESCB Statute.

50 Article of the 138 TFEU is also relevant in this respect.

51 Notable examples are the Agreement on Net Financial Assets (ANFA), available at: https://www.ecb.europa.eu/ecb/legal/pdf/en_anfa_agreement_19nov2014_f_sign.pdf; and the Central Bank Gold Agreement, to expire on 26 September 2019, available at: https://www.ecb.europa.eu/press/pr/date/2019/html/ecb.pr190726_1~3eaf64db9d.en.html.

promotion of the smooth operation of payment systems has, as noted above, led to an oversight structure for systemically important payment systems which the ECB has elaborated on the basis on international standards and EU law[52]. Probably, this oversight function has not (yet?) given rise to challenges in court by supervised entities.

(ii) The role of the ECB in crisis solution and surveillance

This is not the place to discuss extensively how the ECB's contribution to the solution of the financial and sovereign debt crisis has been reviewed by the courts. Numerous others have written on the issue of the judicial review of conditionality measures[53] which, naturally, have been the outcome of a multi-institutional input and cannot be solely attributed to the ECB. Yet, in the context of the rule of law, it is relevant to note how difficult it has been for affected parties who became applicants against elements of the conditionality they suffered from to hold the originators of these measures to account before the courts. Legally speaking, the ECB may not have been responsible for the measures which Member States' governments adopted in order to comply with the conditions for funding of their budgets or bailing out of their banks, as the Court found in the *Pringle* case[54]. Thus, judicial accountability of the ECB for conditionality measures could not have been achieved[55] even though the principle of liability for damages in case of violation of the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights) has been established[56]. Yet, in situations of distress where normal political discourse is unable to express popular preferences, ex-post recourse to the courts

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52 Notably, Article 22 of the ESCB Statute. On the scope of the ECB's regulatory powers under Article 22, focussing on the exclusion of clearing systems in securities, see paragraphs 86-110 of the judgment of 4 March 2015 in Case T-496/11, *United Kingdom v ECB*, EU:T:2015:133. On the subsequent legislative proposal to amend Article 22, see: http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-financial-services/file-amendments-to-esbc-ecb-statute.

53 Notably: René Repassi, "Judicial protection against austerity measures in the euro area: Ledra and Mallis, Common Market Law Review (54) 2017, pp. 1123–1156; Michael Ioannidis, "EU Financial Assistance Conditionality after "Two Pack"", ZaöRV (74) 2014, pp. 61-104; Anastasia Poulou, "Financial assistance conditionality and human rights protection: what is the role of the EU Charter of Fundamental Rights?", Common Market Law Review (54) 2017, pp. 991–1026.

54 Judgment of 12 November 2012 in Case C-370/12, *Pringle*, EU:C:2012:756, paragraph 161: "(…) the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM".

55 Judgment of 20 September 2016 in Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v European Commission and European Central Bank*, EU:C:2016:702, notably paragraphs 57 and 58: "(…) the fact that the Commission and the ECB participate in the meetings of the Eurogroup does not alter the nature of the latter's statements and cannot result in the statement at issue being considered to be the expression of a decision-making power of those two EU institutions; [n]or is there anything in the statement at issue reflecting a decision of the Commission and the ECB to create a legal obligation on the Member State concerned to implement the measures which it contains". This judgment concerned the Eurogroup statement of 25 March 2013 concerning the restructuring of the banking sector in Cyprus.

56 Judgment of 20 September 2016 in Joined Cases C 8/15 P to C 10/15 P, *Ledra Advertising v ECB*, EU:C:2016:701.

may make the citizens feel heard and acknowledged[57] even if unsuccessful in their original quest[58]. Broader access to the courts for affected individuals may contribute to the sense that the rule of law applies. Bringing the European Stability Mechanism (ESM) into the Union legal framework, as the European Commission has proposed[59] and the ECB endorsed[60], would enhance the democratic accountability and the judicial reviewability of ESM measures to which the ECB has contributed.

(iii) The role of the ECB in prudential supervision

Decisions in the area of prudential supervision, the latest shoot on the ECB's mandate tree, are the most suitable for outside review, and the ones where affected parties are likely to have standing.

Since the activation of Article 127(6) of the TFEU by the Council, when it adopted the SSM Regulation[61], the ECB has adopted slightly more than 9,000 legal acts of a supervisory nature[62]. This number does not include the fee decisions which are annually adopted for each bank in the euro area, whether classified as significant or less significant, i.e. a total of 10,000 up until now. A tiny minority among these 9,000 or 19,000 acts has been contested, either in administrative or in judicial review. Thirty review cases came before ABoR, or around 0,0015% of all legal acts (excluding fee decisions: 0,003%)[63].

Affected parties may be credit institutions to which decisions have been addressed on licensing, capital adequacy, liquidity, risk management or governance (including

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57 The following passage adequately sums up the popular feeling about representation after the great financial crisis (*Democracies need renewal if they are to survive*, Tony Barber, Financial Times, 20 August 2019): "During the 2008 financial crisis and its aftermath, a sense of extreme inequality and unfairness has gripped millions of citizens, coupled with the feeling that their political institutions offered too little scope for doing much about it. As governments bailed out banks, recouping the money by raising taxes and cutting the welfare state, citizens felt they were carrying the can for unaccountable elites who captured the state and business world. Slow-burning frustration was intensified by the feeling that politics is now the preserve of special interests."

58 Judgment of 13 June 2017 in Case C-258/14, *Florescu*, EU:C:2017:448.

59 Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank: *Further Steps Towards Completing Europe's Economic And Monetary Union: A Roadmap*; COM(2017) 821 final, 6.12.2017, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0821&from=EN; and Proposal for a Council Regulation on the establishment of the European Monetary Fund; COM(2017) 827 final, 6.12.2017, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:050797ec-db5b-11e7-a506-01aa75ed71a1.0002.02/DOC_1&format=PDF. For the history and development of this legislative proposal, see: http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-economic-and-monetary-union/file-integration-of-the-esm-into-eu-law-by-creating-an-emf.

60 Opinion of the European Central Bank of 11 April 2018 on a proposal for a regulation on the establishment of the European Monetary Fund (CON/2018/20), OJ C 220, 25.6.2018, p. 2.

61 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

62 Based on the numbers of supervisory decisions published in the ECB's Annual reports on banking supervision: 2104: 120; 2015: ~1,500; 2016: 1,835; 2017: 2,308; and 2018: 1,924. For the first eight months of 2019, 75% of the number for last year has been taken (1,443) to arrive at this sum total.

63 For the percentage of court cases against the number of ECB legal acts, see below.

as a result of the annual SREP exercise[64]) or decisions on the (dis-)qualification of shareholders with a qualifying holding, or putative bank managers and non-executive directors who disagree with the ECB's assessment of applications[65] for their positions. Moreover, there may have been informal 'nods and winks' which may affect parties (proposed members of the management body, shareholders who have purchased a stake beyond the threshold for assessment of qualifying holdings[66], or others), without necessarily granting them standing given the informal nature of such measures. The numbers given above should be assessed in the context of the potentially far greater figure of measures when one includes such 'informal acts'.

The judicial and administrative review hurdle for standing is threefold: if the decision is not addressed to the applicant itself, he or she must be directly and individually concerned and have an interest in the proceedings[67]. This latter requirement may be quite a hurdle in case of a decision which is not addressed to the applicant. The CJEU has consistently reiterated that the interest in bringing proceedings is an essential and fundamental prerequisite for any legal proceeding[68] and it cannot concern a future and hypothetical situation[69]. This interest must be vested and current[70]. Even though the ABoR is not an adjudicating body, the ABoR has considered 'interest' to be a prerequisite for its own administrative review.

3.2 Administrative review

By far the easiest route to a reconsideration of an ECB supervisory decision, or the imposition of the annual fee, is to access the ABoR: a swift procedure, usually involving a hearing of the parties (the applicant and the ECB), resulting in an opinion

64 SREP stands for Supervisory Review and Evaluation Process; see Articles 97- 104 CRD IV (Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338, amended by Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, OJ L 150, 7.6.2019, p. 253).

65 Applications which may have emanated from the credit institution instead of themselves, which opens the question of their standing when challenging an ECB decision. The numbers given here exclude the supervisory fee decisions which, as addressed to supervised banks and imposing a contribution, may also give rise to review requests.

66 Article 22 of CRD IV. Note that such thresholds may be lower under relevant national law which the ECB is to apply pursuant to Article 4(3) of the SSM Regulation.

67 See paragraph 63 of the judgment of 17 September 2009 in Case C-519/07 P, *Commission v. Koninklijke FrieslandCampina NV*, EU:C:2009:556: "According to settled case-law, for an applicant to have an interest in bringing proceedings in the light of the subject-matter of the action, that action must be capable, through its outcome, of procuring an advantage to the party which brought it (see, to that effect, judment of the Court of 25 July 2002 in Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, EU:C:2002:462, paragraph 23; judgment of 3 April 2003 in Case C-277/01 P, *Parliament v Samper*, EU:C:2003:196, paragraphs 30 and 31; Order of 5 March 2009 in Case C-183/08 P, *Commission v Provincia di Imperia*, paragraph 19 and the case-law cited.

68 See, inter alia, paragraph 58 of the judgment of 17 September 2015 in Case C-33/14 P, *Mory SA, Mory Team, Superga Invest* v *European Commission*, EU:C:2015:609.

69 See, inter alia, paragraphs 16 and 17 of the judgment of 20 June 2013 in Case C-269/12 P, *Guillermo Cañas* v *Commission*, EU:C:2013:415.

70 See, inter alia, paragraph 34 of the judgment of 26 February 2015 in Case C‑564/13 P, *Planet AE Anonymi Etaireia Parochis Symvouleftikon Ypiresion v European Commission*, EU:C:2015:124.

to the Supervisory Board on the contested act, within the limits of the grounds for review. This leads the Supervisory Board to submit a new draft decision to the Governing Council. Such a decision may be abrogating the original decision, replacing it with a decision of identical content or adopting a different decision[71].

The ABoR is to provide independent, "internal administrative review", establishing whether, in its opinion, the decision is procedurally and substantively in conformity with the SSM Regulation, "while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions"[72]. Since the SSM Regulation itself is part of Union law, and instructs the ECB to base its decisions on binding Union law[73], the ABoR has taken this instruction to mean that it can assess whether a contested act is in conformity with the SSM Regulation, the Treaty[74], the Charter of Fundamental Rights and any fundamental principles underlying the Treaties[75]. Among the references in the SSM Regulation to the rule of law, recital 58 stands out: "In its action, the ECB should comply with the principles of due process and transparency"[76]. Significantly, the SSM Regulation, in recital 63, instructs the ECB to uphold the rights and freedoms enshrined in the Charter of Fundamental Rights[77]. The Council, when adopting the SSM Regulation, stated, in recital 86, that this basic regulation "respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles".

The ABoR opinion, being part of the ongoing decision-making process at the ECB, is itself not contestable before the General Court but the resulting second ECB decision adopted after administrative review is. This second decision cannot be put

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71 Article 24(7) of the SSM Regulation. See, also, Article 16(2) and Article 17(1) of Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) (2014/360/EU) (OJ L 175, 14.6.2014, p. 47), as amended by Decision (EU) 2019/1378 of the European Central Bank of 9 August 2019 amending Decision ECB/2014/16 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2019/27) (OJ L 224, 28.8.2019, p. 9) (hereafter: ABoR Decision).

72 Recital 64 to the SSM Regulation.

73 Recital 32 to the SSM Regulation: "The ECB should carry out its tasks subject to and in compliance with relevant Union law including the whole of primary and secondary Union law, Commission decisions in the area of State aid, competition rules and merger control and the single rulebook applying to all Member States"; and recital 34: "(…) the ECB should, when adopting guidelines or recommendations or when taking decisions, base itself on, and act in accordance with, the relevant binding Union law".

74 See recital 54 to the SSM Regulation: "(…) the ECB is an institution of the Union as a whole. It should be bound in its decision-making procedures by Union rules and general principles on due process and transparency. The right of the addressees of the ECB's decisions to be heard should be fully respected as well as their right to request a review of the decisions of the ECB according to the rules set out in this Regulation".

75 See also recital 48 to the SSM Regulation on "[l]egal profession privilege [as] a fundamental principle of Union law".

76 See also, recital 61 to the SSM Regulation: "In accordance with Article 340 TFEU, the ECB should, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties".

77 Recital 63 to the SSM Regulation reads as follows: "When determining whether the right of access to the file by persons concerned should be limited, the ECB should respect the fundamental rights and observe the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial".

before ABoR again[78]. An applicant who is dissatisfied with the outcome should go to the General Court.

The ABoR opinion is not public. Even the fact that the opinion has been adopted is not known beyond the affected parties: the applicant and the ECB[79]. It is only through any subsequent judicial proceedings that the opinion may become known. In several cases, the General Court has referred to, and even cited, the ABoR opinion in its reasoning in a follow-up case.

The lack of transparency for third parties about the existence and outcome of administrative review proceedings is an element that the ABoR proceedings share with many national administrative review proceedings but which is regrettable from a transparency perspective nevertheless[80]. The ABoR proceedings are confidential unless the Governing Council authorises the ECB President to make the outcome of the ABoR proceedings public[81]. There is a case to be made for more frequent and more explicit information on the ABoR proceedings and for including in the President's monthly press conference a sentence on administrative review outcomes. More regular information may consist of a quarterly website item on the number of review requests and opinions and the subject matter of the review proceedings.

A sentence on the ABoR review in monthly media information might contain a reference to the actual outcome: a proposal to abrogate the original decision, to replace it with a decision of identical content or to replace it with an amended one which, one assumes, will be better reasoned[82]. One might envision the following information:

(i) Number of review requests;

(ii) Number of ABoR opinions adopted;

(iii) Nature of the ABoR opinions:

I. Declaring the review request inadmissible;

II. Proposing the abrogation of the contested ECB decision;

III. Proposing the confirmation of the contested decision (to be "replaced with a decision of identical content" in the wording of Article 16(2) of the ABoR Decision);

78 Article 24(5), second sentence, of the SSM Regulation in conjunction with Article 24(7).

79 Article 18 of the ABoR Decision (Notification).

80 Note that decisions by the Board of Appeals of the European Supervisory Authorities are in the public domain; see: https://www.esma.europa.eu/about-esma/governance/board-appeal and https://eba.europa.eu/about-us/organisation/joint-board-of-appeal/decisions.

81 Article 22 of the ABoR Decision (Confidentiality and professional secrecy).

82 The three options the ABoR opinion is to set forth pursuant to Article 16 of the ABoR Decision (Opinion on the review). See the similar language in the third sentence of Article 24(7) of the SSM Regulation.

IV. Proposing the replacement of the contested decision with an amended one, including when the ABoR suggested improving the reasoning, as is declared publicly in the ECB' s Annual Reports on supervisory activities;

(iv) Whether suspension of the contested decision has been sought, and granted (or not);

(v) Nature of the contested issue (e.g., significance, SREP, fit and proper assessment, corporate governance, withdrawal of a license, assessment of the suitability of a shareholder, etc.);

(vi) General issue(s) relevant in the review (e.g., the need for harmonisation of national supervisory law, or a banking culture issue such as the importance of good internal governance of credit institutions, as were specified in the ECB's 2015 Annual Report)[83];

(vii) Whether proceedings have been undertaken before the General Court.

For reasons of professional secrecy, the following information must remain internal:

(viii) Names of the applicants, or of their legal representatives;

(ix) Nationality of the applicants;

(x) Member State of origin of the case.

On the transparency and impact of the work of the ABoR, two reflections are in order.

One should note that, even when the ABoR concludes that the original decision is correct in terms of outcome (by respecting the ECB's margin of discretion, as it should)[84], the ABoR is also likely to suggest to the ECB to improve the reasoning (motivation) of the legal act.

Also noteworthy is that administrative review proceedings have an effect beyond the case at hand. When during a hearing, and in contacts with the ECB aimed to obtain background to a case at hand, the ABoR asks specific questions or brings up certain issues, this will lead to reflection on the part of the ECB and may lead to changes in the way supervision is effected in future cases.

[83] *ECB Annual Report on supervisory activities*, March 2016, p. 15, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2015.en.pdf.

[84] Recital 64 to the SSM Regulation.

There are three main reasons why, up until now, the ABoR's work has been undertaken almost completely 'in the dark': making known the outcome of the review may prejudice potential follow-up proceedings (either the applicant or the ECB will be known to have 'lost' in the administrative review phase) and, more importantly, information on the outcome without full disclosure of the opinion only provides limited insight. Moreover, the appeal judgment in the *L-Bank* case (more on this will be said below) clarifies that an opinion of the ABoR is to be attributed to the ECB[85]. Since the ECB's supervisory decisions generally are not public, this argues against dissemination of the ABoR opinions. It is therefore to the Court's judgments that one should look for more insight on the ABoR's reasoning concerning the ECB's original motivation and for information on the occurrence of administrative review.

3.3 Judicial review

The option of going to Luxembourg is always open, instead of, or after, administrative review[86]. Later on, I will discuss the interplay between administrative and judicial review. First, the focus is on the number of relevant banking union-related cases against the ECB before the CJEU[87].

Based on publicly available information, Federico Della Negra and I regularly identify these cases and provide brief insights into them on our list of proceedings at the website of the European Banking Institute (EBI)[88] which distinguishes between the following classes of actions:

(a) Actions for annulment against ECB supervisory decisions

(b) Actions for failure to act against the ECB

(c) Actions against decisions of the Single Resolution Board (SRB)

3.1. Actions for annulment of SRB Decisions on contributions to the Single Resolution Fund (SRF)

3.2. Actions related to the resolution of *Banco Popular Español S.A.*

3.3. Actions related to *ABLV Bank, AS* and *ABLV Bank Luxembourg, SA*

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85 "[The ABoR] opinion, [the ECB's] new draft decision and [its final] decision originate from the same institution, namely the ECB": paragraph 92 of the judgment of 8 May 2019 in Case C-450/17 P, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:C:2019:372.

86 Article 24(11) of the SSM Regulation and Article 19 of the ABoR Decision (Recourse to the Court of Justice).

87 Focused as this paper is on the SSM, instances of judicial review concerning resolution are not covered here.

88 This overview *The Banking Union and Union Courts: overview of cases*, is available at: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/).

(d) Other proceedings on Union banking law (CRR[89], CRDIV[90], SSM Regulation, BRRD[91], FICOD[92], DGS Directive[93])

(e) Judicial proceedings concerning Banking Union legislation and/or acts of Union institutions before national courts

For completeness' sake, it should be noted that banking union-related cases against the ECB on our list may also involve its 'failing or likely to fail' assessments in relation to banks put under resolution. As this contribution focuses on the Single Supervisory Mechanism (SSM), these cases are not included in the current count.

We count 47 proceedings against the ECB[94], which can be arranged as follows:

State of proceedings:

- one case ultimately decided on appeal (*L-Bank*);
- seven cases[95] pending on appeal (*Arkéa* [2 cases][96]; *Trasta* [3 cases][97]; *De Masi and Varoufakis* on access to documents concerning the Eurosystem's (in

[89] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1) as amended by Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p. 1).

[90] See footnote 64.

[91] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190), as amended by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (OJ L 150, 7.6.2019, p. 296).

[92] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

[93] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

[94] The list counts 44 cases (as does the table below). Since the two *Trasta* cases have led to three separate appeals on the preliminary issue of admissibility of shareholders (not on the substantive issue), when counting *proceedings* pending or concluded one comes to a total of 47. Again, there are more proceedings against the ECB in relation to resolution of banks, an issue outside the purview of this paper.

[95] After this paper was presented, judgments were pronounced in several of the pending cases; these are indicated in the footnotes below. The qualification of these cases as 'pending' was not altered.

[96] Judgments of 13 December 2017 in Case T-712/15,*Crédit Mutuel Arkéa v ECB*, EU:T:2017:900 and in Case T-52/16, *Crédit Mutuel Arkéa v ECB*, EU:T:2017:902; judgment of 2 October 2019, in Joined Cases C-152/18 P and C-153/18 P, *Crédit Mutuel Arkéa v ECB*, EU:C:2019:810.

[97] See Order of 12 September 2017 in Case T-247/16, *Trasta Komercbanka and Others v ECB* (renamed as *Fursin and Others v ECB*) EU:T:2017:623, rejecting the claim of Trasta Komercbanka as inadmissible and upholding the shareholders' claim as admissible; appeals by the ECB (C-663/17 P), the Commission (Case C-665/17 P) and by Trasta Komercbanka (Case C-669/17 P) were lodged. A judgment in the appeal cases was delivered on 5 November 2019; EU:C:2019:923.

my view: erroneous[98]) interpretation of Article 14.4 of the ESCB Statute on its lender-of-last-resort (LOLR) or Emergency Liquidity Assistance (ELA) [99] competences; one case on the alleged failure of the ECB to instruct the Banco de Portugal (*Comprojecto-Projectos e Construções and Others v ECB*)[100];

- twelve cases closed:
    - six cases by the French banks acting against the ECB's misuse of its discretion in the application of a CRR provision permitting a zero-weighting for certain assets (namely, *Livret A and Livret de Développement Durable et solidaire* (LDD) accounts) in the calculation of the leverage ratio;
    - four cases by *Crédit Agricole* on the separation of the exercise of executive and non-executive functions within a bank's management body;
    - one case on an ECB preparatory act (*Pilatus Bank v ECB*).
- 27 cases pending.

This classification shows how long it takes to get an end result on SSM-related issues.

The number of proceedings does not give a direct insight into the nature of supervisory issues fought over before the European courts as some issues give rise to multiple proceedings. Therefore, the following classification may be more insightful.

98 See my *Competences and alignment in an emerging future - After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop*, ADEMU WP 2017/077, available at: http://ademu-project.eu/wp-content/uploads/2017/12/0077-Competences-and-alignment-in-an-emerging-future.pdf, pp. 27-29.

99 Judgment of 12 March 2019 in Case T-798/17, *De Masi and Varoufakis v ECB*, EU:T:2019:154 and Case C-342/19 P, *De Masi and Varoufakis v ECB*, pending.

100 Order of 14 February 2019 in Case T-768/17, *Comprojecto-Projectos e Construções and Others v ECB*, EU:T:2019:104 and Order of 2 October 2019 in Case C-251/19 P, *Comprojecto-Projectos e Construções and Others,* EU:C:2019:813.

Table 1

Overview of issues in SSM-related court proceedings against the ECB[101]

Issue	Number of cases	Applicant(s)				
Significance decisions	2	L-Bank	PNB Banka			
Withdrawal of licence (-related)	7	Trasta [3]	Niemelä	Ukrselhosprom [2]	Bernis	Pilatus [3]
Sanctions	4	Banco de Sabadell	Crédit agricole [3]			
Suitability of new shareholders (acquisition of qualifying holdings in credit institutions)	3	Fininvest and Berlusconi	ZZ	PNB Banka		
Governance (group; non-executive director)	5	Arkéa [2]	Crédit Agricole [4]			
Application of capital requirements	16	French banking industry Livret 1 [6]	French banking industry on irrevocable payment commitments (deposit guarantee schemes or resolution funds - 2017) [6]	French banking industry on irrevocable payment commitments (deposit guarantee schemes or resolution funds - 2018) [4]		
Access to documents	4	Aeris Invest [2]	**OCU**	De Masi and Varoufakis		
Issues ECB/ NCA	2	Comprojecto-Projectos e Construções [Portugal]	Triantafyllopoulos [Greece]			
On-site inspection	1	PNB Banka				
Total number of cases	44					

Again, the figures may not tell everything for several reasons. The access to documents cases mainly concern documents related to the resolution of *Banco Popular Español*. Although they are clearly 'cases against the ECB' and the ECB alone[102], they could be excluded here as they beyond the scope of attention in this contribution. One case on access to documents concerns LOLR assistance or, in Eurosystem parlance: ELA[103]. We consider this to be so closely linked to banking supervision that we include it on our list. Others may consider the issue to fall under monetary policy.

[101] Although the Curia website may shield the names of an applicant against a sanction, these can be derived from the information on the ECB's website on supervisory sanctions, see https://www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html.

[102] There are numerous proceedings against the Single Resolution Board currently pending, several among which include the ECB and or the Commission as defendants. See Smits/Della Negra, *The Banking Union and Union Courts: overview of cases as at 19 August 2019*, available at: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

[103] See: *Emergency liquidity assistance (ELA) and monetary policy*, available at: https://www.ecb.europa.eu/mopo/ela/html/index.en.html.

Also, multiple proceedings concerning the same course of events may blur the picture: the revocation of the authorisation of three banks led to various proceedings. Furthermore, the litigious French banks acting together on issues of capital requirements blow up the numbers.

Numbers are not conclusive, however: judgments should not only be counted but, also weighted: even a single judgment may have a noticeable effect on the way the ECB interprets its margin of supervisory discretion. Still, when looking at the figures for the court proceedings, a few patterns may be discerned.

Concerted action by the main banks in a single jurisdiction (France) stands out: sixteen cases were initiated by the French banking industry, concerning two issues, namely the treatment of certain publicly privileged assets in solvency requirements (including this exposure in the calculation of the leverage ratio) and regulatory treatment of commitments in respect of deposit insurance and resolution funds. The judgments in the first six cases mark a resounding victory for the French banks.

Proceedings in the context of the revocation of a banking licence: Seven such cases have been initiated.

A certain specialisation in contesting ECB measures: as one can expect, certain lawyers and law firms return in various cases to challenge the ECB.

Less significant institutions (LSIs) challenging the ECB: as the ECB issues and withdraws banking licences and is responsible for the authorisation of the acquisition of qualifying shareholdings for all euro area banks, it could be expected that proceedings emanate from smaller banks, as well. Their preponderance in challenging ECB legal acts is remarkable even though one needs to recognise that the ultimate contestants may not be 'less significant' parties.

Apparent eagerness to challenge: while the numbers are still relatively small, certainly when put into the perspective of the total number of supervisory acts[104], the tendency to challenge the supervisor is remarkable. Taking a euro area-wide perspective, there is an impression of increased eagerness to confront the supervisor in court compared to the pre-SSM period even though the nationality of contestants varies[105] and, in some Member States, there may not have been any reluctance to challenge supervisory decisions prior to the advent of the SSM.

In the area of prudential supervision, references for a preliminary ruling on elements of the Single Rulebook or contestations of the constitutionality of banking union may provide further instances for judicial review, as the 31 July 2019 judgment of the German Constitutional Court on 'banking union'[106] makes clear. As regards the German Constitutional Court's 're-interpretation' of the CJEU's judgments in the *L*-

[104] Forty-four cases on 9,000 legal acts of a supervisory nature translate into a judicial challenge rate of 0.005% (0.0023% against 19,000 acts, i.e. including fee decisions).

[105] One may note the absence of any judicial challenges of SSM legal acts from the Benelux or Finland thus far.

[106] Judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/07/rs20190730_2bvr168514.html.

Bank case, the same remark applies as I made above on the primacy of Union law. See the Annex for this issue.

4 Due process: the ABoR's role

The intervention by the ABoR implies a new round of discussions, after the initial hearing that the parties usually get in the process leading up to a supervisory decision[107]. The arguments raised against the draft decision can be made again, this time before independent experts, who review the case file and, in many instances, organise a hearing, presided over by the ABoR Chair, allowing the applicant to confront the ECB. Naturally, the hearing also allows the ECB to reiterate its reasoning, or to improve upon it. The whole process is intended to enhance the decision-making by bringing up the issues of relevance for the decision and the procedural steps taken. The ABoR is not an inquisitive body, however, as its review is limited to an examination of the grounds relied upon in the notice of review[108].

Our experience has been that the hearing provides a good opportunity to dig up the underlying issues dividing the applicant and the ECB and, possibly, to make the parties listen better to each other, under the guidance of independent reviewers. Another feature which has helped the ABoR understand the issues and conclude with an opinion on the case is the 'comments table', an annex attached to an ECB decision which summarises the earlier discussion of the ECB with the bank. This annex sets out the comments made by the bank during the right to be heard[109], provides the ECB's assessment thereof and specifies the adjustments to the draft decision (if any) made by the ECB in response to those remarks. The ABoR considers this annex to be a part of the contested decision and may rely on it to assess whether the ECB's reasoning (motivation) for the contested decision has been adequate.

The responsiveness of the ECB to reasonable arguments by the applicant forms, in my view, part of the observance by the central bank of the requirements of the rule of law. It goes without saying that such responsiveness implies openness to reasonable arguments based on a different, more business-centred point of view on the issues. Such responsiveness does not at all imply foregoing the ECB's statutory, indeed constitutional task of supervising banks with a view to their safety and soundness. Thus, firm maintenance of strict prudential standards may never be at variance with the rule of law; inflexible adherence to a demonstrably incorrect perspective on a situation might need to be corrected in administrative or judicial proceedings to ensure the application of the rule of law.

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[107] Article 31 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), (OJ L 141, 14.5.2014, p.1).

[108] Article 10(2) of the ABoR Decision. Note that, afterwards, the Supervisory Board is not bound by the review grounds submitted by the applicant before the ABoR when proposing a new draft decision to the Governing Council: Article 17(1) of the ABoR Decision.

[109] Article 31 of the SSM Framework Regulation.

5 The Court and the ABoR

This brings us to follow-on proceedings in Luxembourg: judicial review of decisions taken after an ABoR opinion. A number of cases proceed to the CJEU after an administrative review, while quite a few other court proceedings are initiated directly without an ABoR review procedure. As already indicated, it is difficult to achieve transparency on which court cases were launched after an ABoR review, given that the ABoR opinions are not in the public domain and their existence only becomes known if made known by the court. A previous ABoR review may become known early on, in case the applicant before the court has mentioned the ABoR opinion in the grounds for its request for annulment of the ECB's decision, or later, when the court issues its judgment and may refer to the ABoR opinion. In rare cases, a keen observer may deduce from a repeated request for annulment of an ECB decision by the same applicant that an administrative review has preceded the second request: the two-month interval between the two court proceedings on the same kind of decision must imply that a second decision on the same subject matter has been issued[110].

In the few cases on which we know from public sources that ABoR proceedings have led to follow-on proceedings in Luxembourg, there have been a couple of noteworthy instances where the General Court welcomed the ABoR's reasoning and even made it its own.

Most noteworthy, in the *L-Bank* case, the first case coming to Luxembourg on banking union, the General Court referred to the ABoR opinion on several instances, and found that "the Administrative Board of Review's Opinion is part of the context of which the contested decision forms a part and may, therefore, be taken into account for the purpose of determining whether that decision contained a sufficient statement of reasons"[111]. The General Court held that "in so far as the contested decision ruled in conformity with the proposal set out in the Administrative Board of Review's Opinion, it is an extension of that opinion and the explanations contained therein may be taken into account for the purpose of determining whether the contested decision contains a sufficient statement of reasons" [112].

The General Court assessed the adequacy of the reasoning in the ECB's second decision also based on the ABoR opinion, noting that it relied on "a combined reading of the contested decision and the Administrative Board of Review's Opinion"[113]. This was confirmed on appeal where the CJEU held in paragraphs 92 to 96 of its judgment[114] that:

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110 See Articles 16 and 17 of the ABoR Decision for the two-month period for an ABoR opinion and the 30 working days period for the adoption of the second decision by the Governing Council of the ECB.

111 Judgment of 16 May 2017 in Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337, paragraph 125.

112 Judgment of 16 May 2017 in Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337, paragraph 127.

113 Judgment of 16 May 2017 in Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337, paragraph 128.

114 Judgment of 8 May 2019 in Case C-450/17 P, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:C:2019:372.

“92 It therefore follows from the provisions of Article 24 of [the SSM Regulation] and from [the ABoR Decision] that that opinion, that new draft decision and [the second] decision [by the Governing Council] originate from the same institution, namely the ECB, and are part of the same internal administrative review procedure in relation to decisions taken by that institution in the exercise of the powers conferred on it by [the SSM Regulation] and that, consequently, they are, as the Advocate General noted in point 98 of his Opinion, inherently linked.

93 Therefore, the General Court was fully entitled, in paragraphs 31, 34 and 128 of the judgment under appeal, to examine the decision at issue in the light of the Opinion of the Administrative Board of Review which, in accordance with Article 24(9) of [the SSM Regulation] and Article 18 [the ABoR Decision], had been notified to the Landeskreditbank.

94 In the present case, the General Court noted that the Administrative Board of Review’s Opinion of 20 November 2014 found that the decision adopted by the ECB on 1 September 2014, which classified the Landeskreditbank as a ‘significant entity’, within the meaning of Article 6(4) of [the SSM Regulation], was lawful, and that, by the decision at issue, the ECB abrogated and replaced that decision, while maintaining that classification.

95 Consequently, after finding, in paragraph 125 of the judgment under appeal, that the Administrative Board of Review’s Opinion was part of the context of which the decision at issue formed a part and could, therefore, under the case-law cited in paragraph 87 of the present judgment, be taken into account for the purpose of determining whether that decision contained a sufficient statement of reasons, the General Court did not err in law when it held, in paragraph 127 of the judgment under appeal, that it necessarily followed from Article 24(1) and (7) of [the SSM Regulation] that, in so far as that decision had ruled in conformity with that opinion, it was an extension of that opinion and the explanations contained therein could be taken into account for the purposes of determining whether the decision at issue contained a sufficient statement of reasons.

96 In that context, the General Court also did not err in law when, for the purposes of determining whether the decision at issue contained a sufficient statement of reasons, in paragraph 128 of the judgment under appeal, it read that decision and the Administrative Board of Review’s Opinion together, from which it held that it was apparent that, first, the ECB had considered that there could be particular circumstances only if attainment of the objectives of [the SSM Regulation] could be better safeguarded through direct prudential supervision by the national

authorities and that, second, the Landeskreditbank had not demonstrated that that condition was fulfilled in that regard."[115]

It is for another reason, that the CJEU's **L-Bank** case is important for the SSM, namely the CJEU's ruling that the SSM Regulation attributes exclusive prudential competences to the ECB which the National Competent Authorities (NCAs) implement in decentralised fashion in respect of LSIs. The following finding by the General Court[116]:

"the logic of the relationship between [Article 4(1) and Article 6 of the SSM Regulation] consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation."

"(…) the Council has delegated to the ECB exclusive competence in respect of the tasks laid down in Article 4(1) of the [SSM Regulation] and that the sole purpose of Article 6 of that same regulation is to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the [SSM Regulation],"

"under the SSM the national authorities are acting within the scope of decentralised implementation of an exclusive competence of the Union, not the exercise of a national competence."

was confirmed by the CJEU[117] in this manner:

"(…) it follows from the wording of Article 4(1) of [the SSM Regulation] that the ECB is exclusively competent to carry out the tasks stated in that provision in relation to all those institutions."

"The national competent authorities thus assist the ECB in carrying out the tasks conferred on it by [the SSM Regulation], by a decentralised implementation of some of those tasks in relation to less significant credit institutions (…)".

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[115] Paragraph 87 of the judgment of 8 May 2019 in Case C-450/17 P, Landeskreditbank Baden-Württemberg – Förderbank v ECB, EU:C:2019:372 sets out the requirements for motivation and reads as follows: "It is also settled case-law that the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 5 December 2013, *Solvay* v *Commission*, C-455/11 P, EU:C:2013:796, paragraph 91, and of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 16)".

[116] Paragraphs 54, 63 and 72 of the judgment of 16 May 2017 in Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337.

[117] Paragraphs 38 and 41 of the judgment of 8 May 2019 in Case C-450/17 P, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:C:2019:372.

The most extensive citations and endorsements of an ABoR opinion by the court can be found in its judgments of 13 December 2017 in the **Arkéa** cases[118]. The General Court[119] strongly confirms the role of ABoR as it imputes to the ECB the reasoning in ABoR opinion in case the second ECB decision is in line with this opinion, and assesses the ECB's motivation for this second decision also on the basis of the ABoR opinion[120]. The Court extensively quotes[121] and endorses[122] the ABoR's findings. Notably, when referring to the ECB's reasons to effect consolidated supervision of the *Crédit Mutuel* group through the central body of this banking group, the *Confédération Nationale du Crédit Mutuel* (CNCM), the General Court notes: "that, if the reasons for which the ECB decided to organise consolidated supervision of the Crédit Mutuel group through the CNCM are not explicitly stated in the contested decision, the [ABoR] provided grounds on this point, which have been transcribed in paragraphs 8 to 10 above"[123].

Other noteworthy proceedings concern *Trasta*[124], where after the ABoR review litigation ensued on the preliminary issue of the standing of shareholders when contesting the withdrawal of a banking license. The outcome of the cases on this point will be decisive for the scope of access to administrative review by shareholders and other parties indirectly affected by a supervisory act.

Finally, in the cases pitting *Crédit Agricole* against the ECB, the General Court judgment[125] contains references to the ABoR opinion preceding judicial proceedings concerning the separation of the exercise of executive and non-executive functions within a bank's management body[126]. The General Court does not, however, follow the ABoR's reasoning and sets out its own rationale for accepting the ECB's stance that a chairman cannot simultaneously also be the CEO of a credit institution: a bank's good governance requires effective oversight of the senior management by the non-executive members of the management body; this necessitates checks and balances within the management body.

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118 Judgments of 13 December 2017 in Case T-712/15, *Crédit Mutuel Arkéa v ECB*, EU:T:2017:900 and in Case T-52/16, *Crédit Mutuel Arkéa v ECB*, EU:T:2017:902; judgment of 2 October 2019, in Joined Cases C-152/18 P and C-153/18 P, *Crédit Mutuel Arkéa v ECB*, EU:C:2019:810.

119 See https://ebi-europa.eu/wp-content/uploads/2019/01/Note-on-the-Arke%CC%81a-judgments-for-publication-final.pdf.

120 Paragraphs 49 and 50 of the judgment of 13 December 2017 in Case T-712/15, *Crédit Mutuel Arkéa v ECB*, EU:T:2017:900, which largely overlaps with the judgment in Case T-52/16, *Crédit Mutuel Arkéa v ECB*.

121 Paragraphs 9-11 of the judgment of 13 December 2017 in Case T-712/15, *Crédit Mutuel Arkéa v ECB*, EU:T:2017:900.

122 Paragraphs 51; 70; 120; 130-131; 147-148; 157-158 of the judgment of 13 December 2017 in Case T-712/15, *Crédit Mutuel Arkéa v ECB*, EU:T:2017:900.

123 Paragraph 51 of the judgment of 13 December 2017 in Case T-712/15, *Crédit Mutuel Arkéa v ECB*, EU:T:2017:900.

124 See footnote 97, Order of 12 September 2017 in Case T-247/16, *Trasta Komercbanka and Others v ECB* (renamed as *Fursin and Others v ECB*) EU:T:2017:623, rejecting the claim of Trasta Komercbanka as inadmissible and upholding the shareholders' claim as admissible; appeals by the ECB (C-663/17 P), the Commission (Case C-665/17 P) and by Trasta Komercbanka (Case C-669/17 P) pending. A judgment in the appeal cases is foreseen for 5 November 2019.

125 Judgment of 24 April 2018 in Joined Cases T-133/16 to T-136/16, *Crédit Agricole v ECB*, EU:T:2018:219.

126 For a summary of the judgments, see: https://ebi-europa.eu/wp-content/uploads/2019/01/Cre%CC%81dit-Agricole-Cases-Summary.pdf.

6 Transparency, exposure to citizens' concerns and access to supervisory files

Transparency as a principle

Transparency is an indispensable element of the rule of law. Without transparency about the conduct of public authorities there can be no accountability: neither in the court of public opinion (parliament, the media), nor before a court of auditors or in a court of law. The Treaty recognises this[127]. As Nikolai Badenhoop and I posit in our joint article discussing recent case law on access to supervisory files[128]: "(…) without adequate information about the conduct to be assessed, whether by the political bodies or the judicial organs, accountability [of the supervisor] is an empty shell". Naturally, transparency needs to be balanced against other public interests[129], including the confidentiality of decision-making on monetary policy[130] and professional secrecy[131] applying to ECB tasks including to prudential information[132]. This secrecy encompasses business secrets of supervised entities and privacy of natural persons involved.

Central banks' transparency: recent steps

On the wider issue of transparency and conversations with the general public on a central bank's tasks, I note several developments. The appearance before national parliaments of the President of the ECB, instituted by Mario Draghi, has widened the scope of accountability and included in direct exposure to 'Mr. Euro' the representatives of national electorates[133]. While the focus of accountability must be at the European level, i.e. principally vis-à-vis the European Parliament, as President Draghi has rightly insisted[134], welcoming others in the process of accountability may

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127 Article 15(1) TFEU: "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible."

128 René Smits, Nikolai Badenhoop, "Towards a single standard of professional secrecy for supervisory authorities – A reform proposal" (footnote 4).

129 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43); Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (2004/258/EC) (OJ L 80, 18.3.2004, p. 42) as lastly amended by Decision ECB/2015/1 of the European Central Bank of 21 January (OJ L 84, 28.3.2015, p. 64) consolidated text at: https://www.ecb.europa.eu/ecb/legal/pdf/cellar_bd68ac81-63eb-44c3-a109-d181b1f0c8ee_en_txt.pdf.

130 Article 10.4 of the ESCB Statute.

131 Article 37 of the ESCB Statute.

132 Article 27 of the SSM Regulation.

133 See: Nicolò Fraccaroli, Alessandro Giovannini and Jean-François Jamet, "The evolution of the ECB's accountability practices during the crisis", ECB Economic Bulletin, Issue 5/2018 (footnote 37).

134 "Never forget that the ECB is accountable to the European Parliament, not necessarily to the national parliaments. We have accepted invitations that national parliaments have kindly extended to us, but the normal counterparty is the European Parliament", Introductory statement to the press conference (with Q&A), Mario Draghi, President of the ECB, Frankfurt am Main, 6 November 2014, available at: https://www.ecb.europa.eu/press/pressconf/2014/html/is141106.en.html.

increase understanding of the central bank's practices and motives, and influence its decision-making.

Further important strides towards more transparency have been undertaken by the ECB in recent years: the publication, since 2015, of discussions in the Governing Council on monetary policy[135], and the publication, in 2018, of the SSM Supervision Manual[136] and the Guide to on-site inspections and internal model investigations[137] are notable improvements of transparency.

Direct exposure to citizens: EU and India

Direct exposure to citizens has been endeavoured on this continent through dialogues with youth[138]. In a different, continent-like jurisdiction with much ethnic, religious and linguistic variation, the central bank has experimented with direct discussions with interested citizens. Under Governor Subbarao's (2008-2013), the Reserve Bank of India (RBI) made intentional use of "annual town hall meetings" to reach out to stakeholders: the Board of Governors would convene in another town than at its seat in Mumbai[139] and a public meeting with local citizens would be organised to give the RBI direct exposure to their voice. Such "town hall meetings" are a way of reaching out to key stakeholder groups. They are still in use by the RBI's Financial Inclusion Department to reach out to small and medium-sized enterprises (SMEs). This direct exposure is an exercise in central bank communication, not "the standard one way oral or written communication but to two way communication between the central bank and its stakeholders, with the central bank remaining largely in a listening mode", as former RBI Governor Subbarao eloquently explained[140].

I consider that such direct exposure, in the local language with instant translation, could be helpful in achieving the two outcomes I mentioned: increasing public understanding of the central bank's tasks and operations and inspiring decision-making here in Frankfurt. The ECB Youth Dialogues are a format that, in my view, could be extended to older people, as well. The recent meeting between the Chair of the Supervisory Board and the Vice Governor of *Banco de Portugal* Elisa Ferreira with young Portuguese financial professionals[141] is an instance of direct communication which deserves to be extended further.

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135 *Monetary policy accounts*, available at: https://www.ecb.europa.eu/press/accounts/2019/html/index.en.html.

136 See: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf.

137 See: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.osi_guide201809.en.pdf.

138 See: https://www.ecb.europa.eu/ecb/educational/youth-initiatives/ecb-youth-dialogue/html/index.en.html.

139 I note that the Governing Council also meets annually outside of Frankfurt, in 2020 it will meet in Amsterdam, see: https://www.ecb.europa.eu/press/calendars/mgcgc/html/index.en.html.

140 Dilemmas in Central Bank Communication - Some Reflections Based on Recent Experience, Second Business Standard Annual Lecture delivered by Dr. Duvvuri Subbarao, Governor, Reserve Bank of India, at New Delhi on 7 January 2011.

141 Lisbon, July 2019, see: https://www.youtube.com/watch?v=kBwe-5QwYIY&feature=youtu.be.

Transparency; access to supervisory files

In this contribution, the focus must be on prudential supervision and accountability for this activity. Openness of supervisory files is needed to give account of supervisory actions[142]. Such openness can only be given partially, and depends on the moment in time it is requested. Nicolai and I discern a careful trend in case law towards more opening of files. Several proceedings, relating to different rules in directives applying in the securities markets and banking sectors, have led to a slight relaxation of the occlusion to supervisory data hitherto predominant. There is not yet a 'paradigm shift', called for by Advocate General Bobek in the *Buccioni* case[143], with transparency much widened in case of 'historic' relevance, i.e. after bankruptcy or resolution of a financial firm. But there is a tendency to consider that, with the passing of a five-year period, documents in a supervisory file lose their secret or confidential nature[144], unless the party defending its confidential nature can show "that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties"[145]. The CJEU has also accepted an exemption to disclosure after five years for "information relating to the supervision methodology and strategy employed by the competent authorities"[146]. It would seem to me that such information belongs to the sort of evidence that outsiders have an interest to see. Such information may be relevant not only when a party challenges supervisory decisions but, also, when a court of auditors or a parliament wishes to hold the supervisor accountable for its activity[147]. I also refer to our colleagues of the Appeal Panel of the SRB who held that an SRB decision rejecting access to information regarding the resolution of *Banco Popular Español* did not fulfil the SRB's obligation to balance confidentiality concerns with overriding public interests[148].

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142 Supervisory Board Chair Andrea Enria has emphasised the importance of transparency, e.g., as regards SREP disclosure to banks: *Public hearing with Andrea Enria, Chair of the ECB Supervisory Board, presenting the SSM Annual Report 2018*; ECON on 21 March 2019, available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2019/634391/IPOL_IDA(2019)634391_EN.pdf and: *On supervisory architecture*, Panel remarks by Andrea Enria, Chair of the Supervisory Board of the ECB, at the Financial Stability Institute 20th anniversary conference, Basel, 12 March 2019, available at: https://www.bankingsupervision.europa.eu/press/speeches/date/2019/html/ssm.sp190312~c16ac0912f.en.html.
On the supervisory dialogue with the European Parliament, see: Fabian Amtenbrink and Menelaos Markakis, *Towards a meaningful prudential supervision dialogue in the Euro area? A study of the interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism*, European Law Review (44) 2019, pp. 3-23.

143 See the opinion of Advocate General Bobek in Case C-594/16, *Enzo Buccioni v Banca d'Italia*, EU:C:2018:425, paras 84-87.

144 Judgment of 19 June 2018 in Case C-15/16, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, EU:C:2018:464.

145 Judgment of 19 June 2018 in Case C-15/16, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister,* EU:C:2018:464, paragraph 54.

146 Judgment of 19 June 2018 in Case C-15/16, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, EU:C:2018:464, paragraph 56.

147 We concur with the authors of *IMF Working Paper* WP/05/51 that while "publication of bank supervisory decisions and required actions need to be treated with circumspection", "the presumption should be that such decisions and the reasoning behind them will be a matter of public record, even if this disclosure occurs well after the event."; Eva Hüpkes, Marc Quintyn and Michael Taylor, "The Accountability of Financial Sector Supervisors: Principles and Practice" (2005).

148 SRB Appeal Panel, Final decision from 19 June 2018 on joined cases 44/2017 and 7/2018, available at https://srb.europa.eu/sites/srbsite/files/case_44_17_7_18_project_decision_20180618_anonymised.pdf

The variability in prudential rules on professional secrecy across the silos of supervision that Europe still applies (banking/securities trading/insurance and occupational pensions), which recent case law made painfully visible, needs to be remedied[149] to ensure similar conduct of supervision across the entire financial sector when it comes to transparency. Harmonising these rules would enable the legislator to modernise the system of access to supervisory files. Hence, our proposal for a single standard of professional secrecy for supervisory authorities.

In our joint contribution, we consider that this standard should "[protect] the confidence between supervisors and supervised, shielding the authorities from having to disclose their considerations in weighing alternatives, and allowing authorities to continue to make use of the surprise effect of supervisory actions", while also introducing "exceptions for cases covered by criminal and tax law and for proceedings that relate to (but do not necessarily constitute) bankruptcy or resolution proceedings." We submit that "a general presumption that information loses its confidential nature after a lapse of five years should be adopted, and a reversal of the burden of proof introduced: only if the party affected by disclosure proves the need for continued secrecy after five years would confidentiality of information be upheld." A single standard of professional secrecy would encompass "the exchange of confidential information not only between different national competent and designated authorities, but also between competent authorities of different subsectors of the financial sector, especially for entities combining banking, investment services and/or insurance business". The standard would specifically include the European Supervisory Authorities (ESAs) and the ECB. It would "introduce a single set of rules for sharing information with, inter alia, auditors and accountants, with clearing houses, with authorities in the area of anti-money laundering and counter-terrorist financing (AML/CTF) and with bodies responsible for deposit insurance and payment services oversight." Especially the exchange of information in the area of combatting money laundering and terrorist financing is a topical element of our proposal.

7 Concluding remarks

Having placed the role of the ABoR in the context of the rule of law, I have recalled the horrors seen in this very building, long before the establishment of the ECB, and called for a clear recognition of these facts prominently visible for those who enter this building, as a stark reminder of what lay at the origin of the European integration process which culminated in the establishment of the ECB and as an invitation to remembrance and vigilance in these times of attacks on the rule of law: a plaque at the entrance recalling this building's dark history. Within the context of the rule of law exercise at Union level, I have pleaded for extending the ECB's input into this on-going process of defending and expanding the rule of law, from enforcement of provisions on its independence to protection of affected parties against its legal acts,

[149] Where sector differences justify variations in applicable texts they should be maintained; it is the largely inexplicable discrepancies between the current professional secrecy regimes that we propose to change.

as a vital element of the rule of law for an institution with wide powers affecting citizens and enterprises across the continent. In a democratic society, a public authority, including a central bank cum supervisory authority, should display accountability, responsiveness and transparency (the ART of democracy) on its activities, duly balanced by its constitutionally enshrined independent status and the interests of confidentiality which are dictated by monetary policy and supervisory concerns as well as consideration of business secrets and privacy of affected individuals. This responsiveness requires an open, listening attitude and a willingness to consider issues from a new angle – the recent shifts in the debate about the role of central banks in the area of sustainable finance has shown how quickly positions erstwhile considered outlandish can enter the mainstream approach. The role of the ABoR is one of independent review, assisting to provide due process where this might have been lacking in full in preceding phases of the supervisory proceedings. Where possible, more transparency on the ABoR proceedings would be welcome even though most of the insight into administrative review may have to come from subsequent judicial review. The interaction with judicial proceedings shows the significance attached to the ABoR's opinions by the CJEU. For such proceedings to be initiated a level of openness, after a certain amount of time, of supervisory files is needed: recent case law provides the prospect of a more open approach on which I would propose to build on in order to establish a financial-sector wide professional secrecy standard. Court proceedings in Luxembourg in banking union-related cases have a wide array of topics as their object. Judicial review is proving to be an indispensable element in the protection of rights under the rule of law.

8 Annex
"Re-interpretation" of the *L-Bank* judgment by the German Constitutional Court

The German Constitutional Court (*BVerfG*) recently found[150] the *L-Bank* judgment of the CJEU compatible with its own reading that the competences of the NCAs remain autonomous national powers and are not derived from European Union competences. It reasoned that a different understanding of the allocation of competences between the ECB and the NCAs would imply that the SSM Regulation would violate the scope of EU integration allowed by the German Constitution and would be contrary to the wording of Article 127(6) of the TFEU and with a systemic reading of the Treaty. This dissimilar interpretation of the legal state of affairs is then aligned with that of the CJEU through a reading of the latter's judgment as "not giving the ECB overall comprehensive supervisory powers over all less significant institutions" – which, with due respect, was never the reading of the CJEU and the General Court which did hold, however, that the powers over LSIs exercised by NCAs are derived and a decentralised exercise of exclusive ECB competences. The *BVerfG* precedes its considerations on the *L-Bank* judgment with strongly worded

[150] Judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14.

arguments against exclusive competences for prudential supervision for the ECB. It is noteworthy that the *BVerfG's* decision relies on the proportionality principle to come to a different reading of the allocation of competences between the ECB and the NCAs, whereas the CJEU had declared the same proportionality principle as not opposing the approach taken by the EU legislature in adopting the SSM Regulation (paragraphs 51-59 of its judgment of 8 May 2019).

The emphasis of the *BVerfG* in its reading of the SSM Regulation, which was challenged before it as an *ultra vires* act of the European legislator which thereby allegedly violated the scope for EU integration that the German Constitution (*Grundgesetz*) allows, is on the shared competences between the Union and the Member States (Article 4 of the TFEU) to which prudential supervision belongs and on the words "specific tasks" in Article 127(6) of the TFEU, which permits conferral to the ECB of supervisory competences (paragraph 186).

A *"Rückdelegation unionaler Verwaltungsaufgaben"* (transfer back of Union administrative tasks), from the ECB to the NCAs, presupposes a complete transfer of prudential competences to the ECB which is not what the SSM Regulation is about and which, moreover, would contradict the primary law basis for this regulation – a different reading of the SSM Regulation would qualify it as an ultra vires act (paragraph 187). Banking supervision does not belong to the exclusive competences of the Union in the sense of Article 3(1)(c) of the TFEU ("monetary policy for the Member States whose currency is the euro") and was an exclusive Member State competence from the beginning of Stage 3 of the EMU (1 January 1999) until the SSM Regulation took effect fifteen years later. The silence of 'Maastricht' (1992) and 'Lisbon' (2008) on ECB competences in the area of prudential supervision leads the German Court to conclude: *"Die Annahme einer ausschließlichen Zuständigkeit der EZB für die Bankenaufsicht liegt deshalb fern"*, or: "Assuming exclusive ECB competences for banking supervision is therefore improbable (or far removed)" (paragraph 190). Strongly worded is the rebuttal of the assumption of derived national prudential competences by the Luxembourg courts: "Therefore, the SSM Regulation does not establish competences of the national supervisory authorities. On the contrary, it presupposes them and restricts them in scope as regulated by Article 4 and Article 6 of the SSM Regulation" (paragraph 191). Remarking as asides that the SSM Regulation shows 'legislative weaknesses' (as exposed in German legal writing which the *BVerfG* cites) and that one needs to rely on the SSM Framework Regulation to precisely identify what it provides, the German Constitutional Court relies on recitals 5 and 15 of the preamble to the SSM Regulation to find that national competences have not been transferred and that the ECB does not exercise original supervisory powers over LSIs (paragraph 192).

Were the SSM Regulation to be read as transferring prudential supervision competences entirely to the ECB, then it would be an obvious and structurally significant transgression of the integration program, which would deprive Member States of a central area of supervision of the economy; such a reading of the SSM Regulation which is methodologically unacceptable would characterise this legal act as *ultra vires* (paragraph 193).

Focussing then on the *L-Bank* judgment, the *BVerfG* distinguishes the Luxembourg judges' decision saying the case solely concerned the interpretation of "special circumstances" in the provision on how a bank could avoid being labelled significant (and, hence, subject to ECB supervision). "The exclusive power to define the term "special circumstances" which the CJEU recognises the ECB to have requires it to have exclusive supervisory powers with respect to all institutions which, in accordance with the criteria set out in Article of the 6(4)(2) SSM Regulation, are considered significant as such" (paragraph 195). "However", so concludes the German Constitutional Court, "it does not require the ECB to have full supervisory powers, even with regard to credit institutions that are deemed to be less significant according to these criteria, as long as the ECB does not exercise its right under Article 6(5) of the SSM Regulation to assume direct supervisory powers itself." It rounds its readings off with a reference to previous and current practice of prudential supervision with the NCAs being dominant: 21 German banks are subject to ECB supervision and 1,700 fall under *BaFin* supervision (paragraph 196). For all these reasons, there is no manifest violation of the principle of subsidiarity (Article 5(3) of the TEU).

The relevant passage of the press release issued by the *BVerfG*[151] and its English translation read as follows:

aa) Die SSM-Verordnung sieht eine Zweiteilung der Bankenaufsicht vor. Dabei verbleibt es im Wesentlichen bei der Zuständigkeit der nationalen Behörden, während der EZB lediglich besondere Aufsichtsbefugnisse zukommen, die für eine kohärente und wirksame Politik der Europäischen Union in diesem Bereich entscheidend sind. Der EZB werden dazu bestimmte Aufgaben übertragen, die sie für alle Kreditinstitute in der Eurozone wahrzunehmen hat. Hinsichtlich der übrigen Bereiche wird ihr grundsätzlich nur die Aufsicht für bedeutende Kreditinstitute zugewiesen, während die nationalen Aufsichtsbehörden regelmäßig für weniger bedeutende Kreditinstitute nach Maßgabe der von der EZB erlassenen Verordnungen, Leitlinien und allgemeinen Weisungen zuständig bleiben. Auch in allen nicht von der SSM-Verordnung erfassten Bereichen der Bankenaufsicht verbleibt es bei der Zuständigkeit der nationalen Aufsichtsbehörden.

bb) Die nationalen Aufsichtsbehörden üben ihre Befugnisse aufgrund originärer Zuständigkeiten aus und nicht infolge einer Ermächtigung durch die EZB. Eine solche Rückdelegation setzte eine vollständige Übertragung der Aufsicht auf die EZB voraus, die die SSM-Verordnung jedoch gerade nicht vorsieht. Andernfalls läge darin eine offensichtliche und strukturell bedeutsame Überschreitung des Integrationsprogramms, die den Mitgliedstaaten einen zentralen Bereich der Wirtschaftsaufsicht entzöge. Eine solche Auslegung der SSM-Verordnung ist weder mit dem Wortlaut von Art. 127 Abs. 6 AEUV vereinbar noch systematisch vertretbar.

Die Entscheidung des Europäischen Gerichtshofs (EuGH) vom 8. Mai 2019 (C-450/17 P Landeskreditbank Baden-Württemberg/Europäische Zentralbank) steht

[151] "If interpreted strictly, the framework for the European Banking Union does not exceed the competences of the European Union", Press Release No. 52/2019 of 30 July 2019, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-052.html.

dem nicht entgegen. Der EuGH bestätigt darin die Auffassung des Gerichts der Europäischen Union (EuG), der EZB sei in Bezug auf die in Art. 4 Abs. 1 SSM-VO genannten Aufgaben eine ausschließliche Zuständigkeit übertragen worden, deren dezentralisierte Ausübung durch die nationalen Behörden im Rahmen des SSM und unter Aufsicht der EZB bei den weniger bedeutenden Kreditinstituten im Sinne von Art. 6 Abs. 4 Unterabs. 1 SSM-VO hinsichtlich einiger dieser Aufgaben durch Art. 6 gestattet werde. Auch sei der EZB die ausschließliche Befugnis eingeräumt worden, den Inhalt des Begriffs „besondere Umstände" im Sinne von Art. 6 Abs. 4 Unterabs. 2 SSM-VO zu bestimmen, so dass der EZB die ausschließliche Aufsicht hinsichtlich aller Institute zusteht, die nach den Kriterien von Art. 6 Abs. 4 Unterabs. 2 SSM-VO grundsätzlich als bedeutend gelten. Eine umfassende Aufsichtskompetenz der EZB auch bezüglich der – zahlenmäßig weit überwiegenden – weniger bedeutenden Kreditinstitute ist damit unbeschadet des Selbsteintrittsrechts nach Art. 6 Abs. 5 SSM-VO jedoch nicht verbunden. Die bisherige Praxis der Bankenaufsicht bestätigt die vom Senat vorgenommene Auslegung.

Da die SSM-Verordnung nur die Aufgaben und Befugnisse auf die EZB übertragen hat, die für eine effektive Aufsicht zwingend erforderlich sind, und angesichts der weiterhin bestehenden umfangreichen Befugnisse der nationalen Behörden, scheidet auch eine offenkundige Verletzung des Subsidiaritätsprinzips aus.

aa) The SSM Regulation provides for a division of banking supervision between the ECB and national authorities. Essentially, national authorities retain their competences; only specific supervisory powers which are crucial to ensure a coherent and effective implementation of the European Union's policy in this domain are conferred on the ECB. To this end, certain tasks are conferred on the ECB that it must perform for all credit institutions in the euro area. In principle, the ECB is competent only for supervising significant credit institutions, while the national supervisory authorities generally remain competent for supervising less significant credit institutions in accordance with the regulations, guidelines and general instructions adopted by the ECB. In areas of banking supervision that are not subject to the SSM Regulation, national supervisory authorities retain their competences.

bb) The national supervisory authorities exercise their powers on the basis of their primary competences, not on the basis of powers conferred by the ECB. Such a re-delegation of powers by the ECB would entail that all supervisory tasks had fully been conferred on the ECB, which is specifically not what Art. 127(6) TFEU allows and what the SSM Regulation provides. A full conferral of all tasks would exceed the limits of the European integration agenda in an evident and structurally significant manner and would deprive Member States of a central part of their economic governance. Such an interpretation of the SSM Regulation is neither compatible with the wording of Art. 127(6) TFEU nor tenable in light of a systematic analysis.

The decision of the Court of Justice of the European Union (CJEU) of 8 May 2019 (C-450/17 P Landeskreditbank Baden-Württemberg v European Central Bank) does not merit a different conclusion. In this decision, the CJEU confirms the view taken by the General Court of the European Union (GCEU) that, with regard to the tasks laid down in Art. 4(1) SSM Regulation, an exclusive competence was conferred on the ECB, the decentralised implementation of which by the national authorities is

enabled by Art. 6 of the Regulation, under the SSM and under the control of the ECB, in relation to less significant credit institutions within the meaning of Art. 6(4) subsection 1 SSM Regulation, and in respect of some of the tasks. The CJEU has held that in addition, exclusive competence is conferred on the ECB for determining the content of the definition of “particular circumstances” within the meaning of Article 6(4) subsection 2 SSM Regulation, granting the ECB exclusive supervisory powers in relation to all institutions that are generally considered significant according to the criteria laid down in Art. 6(4) subsection 2 SSM Regulation. This, however, does not amount to a conferral of comprehensive supervisory powers on the ECB also for the far larger number of less significant credit institutions, the ECB’s right to act on its own initiative pursuant to Art. 6(5) SSM Regulation notwithstanding. Current practice regarding banking supervision confirms the interpretation by the Senate.

A manifest violation of the principle of subsidiarity cannot be found, given that the SSM Regulation only conferred tasks and powers on the ECB which are indispensable for effective supervision, and that national authorities still retain extensive powers.

Appeal bodies of EU financial regulatory agencies: are we where we should be?

Marco Lamandini and David Ramos Muñoz[1]

Are appeal bodies for the European financial regulatory agencies doing a good job? This question has a theoretical as well as a practical dimension. Theoretically speaking, we should agree first on what an "ideal" appeal body should do, at the risk of being bogged down in a conceptual discussion. Yet, if we renounce a full-blown theory, it is easier to agree on some basic aspects: an appeal body should add value to what courts already do. Regardless of other aspects, for the decisions of such appeal bodies: quick is better than slow, clear better than obfuscated; for the system: an independent body is better than one beholden to the authority whose acts it is supposed to review, and decisions that are generally respected by appellants and courts are better than if they are constantly challenged and/or overruled. In this contribution we briefly discuss some of the recent practice of the European Supervisory Authorities' (ESAs) Joint Board of Appeal (BoA) and the Single Resolution Board's (SRB) Appeal Panel (AP) adopting a pragmatic approach and offer reflections on a possible way forward.

This topic is relevant for the Banking Union and the Capital Markets Union, since appeal bodies are an institutional tool of choice to scrutinise agencies' action in financial supervision, and such agencies constitute the stage of a drastic redistribution of competences from Member States towards the European Union. Whilst the largest euro area banks are subject to the direct supervision of the European Central Bank (ECB), their resolution is governed by the Single Resolution Board (SRB); in turn, the Union financial supervisory authorities (European Supervisory Authorities, or ESAs) in banking (EBA), securities markets (ESMA) and insurance and occupational pensions (EIOPA), which now have a reformed

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governance to better represent Union interests[2], directly decide on matters such as rating agencies, trade repositories, benchmark providers and central counterparties (CCPs). These authorities' decisions are reviewed by the BoA for the ESAs and the AP for the SRB. The Administrative Board of Review (ABoR) for the ECB is however distinctively different.

Our approach is practical, i.e. based on the appeal bodies' adopted decisions, and from the inside, since we have participated in the adoption of most of those decisions. We exclude the ABoR from our analysis since, unlike the BoA and the AP, it cannot be characterised as a quasi-court. What drives this approach is not theoretical scepticism but, rather, the need of practice and experience in this field. Recent reforms to the Statute of the Court of Justice have limited the review by the Court of Justice of the European Union (CJEU) in cases decided by appeal bodies in fields such as trademarks[3], plant varieties[4], chemicals[5], or aviation[6], where such bodies have been established for a longer time. Thus, Union lawmakers seem to trust quasi-judicial bodies enough to limit review by the highest court in cases decided by such bodies and reviewed by the General Court, which is tantamount to treating them like courts, or quasi-courts of first instance. Yet, the reform does not encompass appeal bodies in the field of financial services. Since they are no different from "older" bodies as a matter of design (but for a lack of, or at least much less pronounced, functional continuity with the agencies' decision-makers, which however increases their independent adjudicatory nature and their quasi-court role), the only apparent reason is that appeal bodies in the field of financial services are still too "young", and more experience is needed with them. Thus, it is key to discuss such experience. The experience of these appeal bodies, although short in terms of time, is relevant enough in terms of substance to observe the aspects that work, the challenges, and the areas where there is room for improvement.

Our analysis proceeds as follows. In Section 1 we analyse the features of the BoA and the AP, and briefly explain why we exclude the ABoR from our analysis. Section

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2 Amended proposal for a Regulation amending Regulations (EU) No 1093/2010 (EBA Regulation), (EU) No 1094/2010 (EIOPA Regulation) and (EU) No 1095/2010 (ESMA Regulation), COM(2018) 646 final. See recital 21 of the proposed regulation and the paragraph 'Governance' in section 1.5.1. of the Legislative Financial Statement. For the final political agreement between the Council and the Parliament, see the press release: 'Capital Markets Union: European Parliament backs key measures to boost jobs and growth', Brussels, 18 April 2019, https://europa.eu/rapid/press-release_IP-19-2130_en.htm?locale=en

3 Articles 66 to 73 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1).

4 Articles 67 to 74 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227, 1.9.1994, p. 1).

5 Articles 89 to 94 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

6 Articles 105 to 114 of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ L 212, 22.8.2018, p. 1).

2 discusses some of the cases decided by the BoA and the AP. Section 3 points to some institutional weaknesses in the current design of both appeal bodies. Section 4 concludes by offering a possible way forward.

1 Features of financial regulation appeal bodies

The BoA is a body for the administrative review of appeals relating to the three ESAs' decisions, combining elements of internal administrative self-control and judicial review. The BoA is composed of six members and six alternates, all "individuals of high repute with a proven record of relevant knowledge and professional experience" in the relevant fields (banking, insurance, pensions, securities and financial services) excluding current staff of the authorities or national or Union institutions involved in the activities of the authority[7]. The BoA is a joint body of the three ESAs, and each of the authorities (ESMA, EBA and EIOPA) appoints two members and two alternates. Each ESA's Management Board chooses from a short list proposed by the European Commission following a public tender and after consultation with the respective Board of Supervisors. The appointment procedure was recently amended as part of the 2019 ESAs reform. Now, candidates must have relevant knowledge of Union law and, before being appointed by the Management Board of the ESA, may be invited by the European Parliament to "make a statement before it and answer any questions put by its Members"[8].

The other two appeal bodies are part of the euro area banking union and were both inspired by the BoA experience. The AP of the SRB, established by Article 85 of the Single Resolution Mechanism Regulation (SRM Regulation)[9] with five members and two alternates, comprises individuals of high repute and a proven record of relevant knowledge and professional experience, including resolution experience, appointed for a five-year term by the SRB following a public call for expressions of interest published in the Official Journal, with no shortlisting by the European Commission, nor statements before the European Parliament. [10] At the same time, members "shall

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7 Article 58 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12); Article 58 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48); and Article 58 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84), hereinafter collectively referred to as the "ESAs Regulations".

8 New, amended Article 58(3) of the ESAs Regulations.

9 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

10 On the AP, compare Herinckx, Y. (2017), "Judicial Protection in the Single Resolution Mechanism", in Houben, R. and Vandenbruwaene, W. (eds.), *The Single Resolution Mechanism*, Intersentia, pp. 77-118 (subsequent citations of this work refer to paragraph and not page numbers); Silva Morais, L. and Tomé Feteira, L. (2018), "Judicial review and the banking resolution regime. The evolving landscape and future prospects", in *Judicial Review in the Banking Union and in the EU Financial Architecture*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 84, pp. 53-70.

not be bound by any instructions" and must "act independently and in the public interest"[11].

The AP resembles the ESAs' BoA, as it may confirm the contested SRB decision or remit the case, and the SRB is then bound by the AP decision, with an obligation to adopt an amended decision[12]. Although its role is closer to the quasi-judicial, the AP's remit is quite narrow, and comprises only the matters mentioned in Article 85(3) of the SRM Regulation: determinations of the minimum requirement for own funds and eligible liabilities (MREL), impediments to resolvability, and access to documents, but not all SRB decisions (notably, the adoption of a resolution scheme does not fall within its remit).

The ABoR[13] was established by Article 24 of the Single Supervisory Mechanism Regulation (SSM Regulation)[14] and is composed of five members and two alternates, who perform "an internal administrative review" of the procedural and substantive conformity with the SSM Regulation of ECB supervisory decisions[15]. Most of its rules on composition, independence and procedure mirror the rules of the ESAs' BoA.

Yet, there are also crucial differences[16], which can be better understood against the background of the fifth paragraph of Article 263 of the Treaty on the Functioning of the European Union (TFEU) which allows the establishment of pre-judicial control mechanisms (recourse to which would amount to an additional admissibility condition for an action for annulment before the General Court) only for Union agencies, bodies or offices – but not for Union institutions[17]. Also in view of this, and to respect the decision-making power of the Governing Council, the ABoR does not take a "decision" but "express[es] an opinion"[18]. If the ABoR "remits the case", the new draft decision "shall take into account the opinion of the [ABoR]" and is then submitted to the Governing Council, which adopts the final decision. Yet, the new ECB decision can abrogate the initial decision, replace it with an amended decision, and also replace it with a decision of identical content. Moreover, neither the Supervisory Board's new draft decision, nor the new Governing Council decision (adopted via the

11 Article 85(2) and (5) of the SRM Regulation.

12 Article 85(8) of the SRM Regulation.

13 Brescia Morra, C., Smits, R. and Magliari, A. (2017), "The Administrative Board of Review of the European Central Bank: Experience after two years", *European Business Organization Law Review*, Vol. 18, No 3, pp. 567-589; Smits, R. (2018), "Interplay of administrative review and judicial protection in European prudential supervision: Some issues and concerns", in *Judicial Review in the Banking Union and in the EU Financial Architecture*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 84, pp. 29-52.

14 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

15 Article 24(1) of the SSM Regulation.

16 Compare Brescia Morra, C. (2016), "The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field", in *Scritti sull'Unione Bancaria*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 81, pp. 109-132; Silva Morais and Tomé Feteira (2018), op. cit., p. 61.

17 The fifth paragraph of Article 263 TFEU reads as follows: "Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them".

18 Article 24(7) of the SSM Regulation.

non-objection procedure) is subject to further ABoR review. Thus, despite the importance of the ABoR role, the ABoR is closer to a fully internal mechanism than a quasi-judicial body. This impression was confirmed by the General Court and the CJEU in the *Landeskreditbank* case, where the courts considered the arguments presented by the ABoR concerning the justification of the ECB's decision, to be part of the ECB's compliance with the duty to state reasons, i.e. the courts found the ABoR to be a fully internal ECB feature[19]. For these reasons, the ABoR's experience will not be part of this study.

2 The practice of appeal bodies in the field of financial services

2.1 Joint Board of Appeal of the European Supervisory Authorities

The experience of the BoA is still limited in terms of workload, with 11 decisions[20] grouped into two main categories: decisions on breaches of Union law, where the main issue turned out to be the admissibility of the relevant appeals, and decisions concerning credit ratings.

As to the BoA cases on breaches of Union law, the typical case has been one where a (private) party complained of the supervisory conduct by an NCA, the competent ESA decided not to pursue any action, the BoA reviewed the ESA decision, and finally the General Court reviewed the BoA decision. In *SV Capital v EBA*[21], the BoA had to assess an EBA decision not to initiate of its own initiative proceedings for a breach of Union law, after being requested to do so by an applicant. The EBA had decided that Union law requirements on "suitability" apply only to persons who effectively direct the business of the credit institution. However the BoA interpreted the "suitability" criteria to encompass "key function holders", such as heads of EEA branches, and held that, even if a suitability assessment by (national) competent authorities is somewhat discretionary, the suitability of key function holders does not lie exclusively within the ambit of national law. The case was remitted to the EBA to rule on the merits. The EBA rejected the complaint, finding insufficient grounds for initiating an investigation under Article 17 of the EBA Regulation, and a second

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19 Case T-122/15, *Landeskreditbank Baden-Württemberg* v *ECB*, EU:T:2017:337 and Case C-450/17 P, *Landeskreditbank Baden-Württemberg* v *ECB*, EU:C:2019:372.

20 Decisions of 24 June 2013 and of 14 July 2014, *SV Capital* v *EBA I and II*; Decision of 10 January 2014, *Global Private Rating Company* v *ESMA*; Decision of 10 November 2014, *IPE* v *ESMA*; Decision of 3 August 2015, *Onix Asigurari* v *EIOPA*; Decision of 7 January 2016, *Andrus Kluge, Boris Belyaev, Radio Elektroniks OÜ and Timur Dyakov* v *EBA*; Decision of 3 July 2017, *FinancialCraft Analytics* v *ESMA*; Decision of 30 April 2018, *"A"* v *ESMA*; Decision of 10 September 2018, *B.* v *ESMA*; and Decision of 27 February 2019, *Svenska Handelsbanken, Skandinaviska Enskilda Banken, Swedbank, Nordea Bank* v *ESMA*. Access to the full content of all decisions is available on the EBA, ESMA and EIOPA websites, e.g. www.esma.europa.eu/about-esma/governance/board-appeal.

On the Global Rating decision, see Gargantini, M. (2014), "La registrazione delle agenzie di rating. La decisione della Commissione di ricorso delle Autorità europee di vigilanza finanziaria nel caso Global Private Rating Company "standard Rating" Ltd c. Autorità europea degli strumenti finanziari e dei mercati (10 gennaio 2014)", *Rivista di diritto societario*, p. 416.

21 BoA 2013-008.

appeal was lodged before the BoA. The BoA dismissed the appeal, finding the EBA's interpretation reasonable. The BoA nonetheless found that the EBA act was reviewable.

The case was taken before the General Court (Case T-660/14, *SV Capital OÜ* v *EBA*), and the court took a restrictive view of the BoA's jurisdiction. In its judgment[22] the General Court confirmed the EBA's view, but crucially, raised the issue of reviewability of its own motion, mostly to clarify that the EBA decision not to act was not reviewable, meaning that the BoA's view was not correct and hence the BoA decision had to be annulled on grounds of lack of competence.

Quite naturally, in subsequent cases the BoA diligently applied the General Court's approach. In *Kluge* v *EBA*[23], the BoA followed *SV Capital* and found that it lacked competence to decide on an appeal against EBA's decision not to open an investigation into alleged breaches of Directive 2006/48/EC of the European Parliament and of the Council[24] by Finantsinspektsioon (the Estonian Financial Supervisory Authority), in its supervision of AS Eesti Krediidipank, a credit institution. The same rationale was applied in *B* v *ESMA*[25], an appeal against a decision of ESMA's Chair not to open a formal investigation against the Cyprus Securities and Exchange Commission pursuant to Article 17 of the ESMA Regulation for alleged infringements of MiFID[26] and EU rules on capital adequacy. Perhaps the more notable case was *Onix Asigurari* v *EIOPA*[27], where the BoA found that the appellants had brought no appeal against the relevant decision. Rather, the "communication" appealed by the appellants was only "confirmatory" of the earlier decision, which had not been appealed. Thus, Article 17 of the EIOPA Regulation did not apply, and, for this reason, the BoA had no competence.

The BoA cases involving competences directly exercised by ESMA over credit rating agencies offer a more promising context in terms of substance. Here, the BoA has clear competence because ESMA has direct supervisory responsibility. We briefly discuss four cases. The first is *Global Standard Rating* v *ESMA*[28]. In 2012, the UK Financial Services Authority informed ESMA that the appellant appeared to be issuing sovereign credit ratings on its webpage, without being registered as a credit rating agency. Once the appellant applied to register under the Credit Rating Agencies Regulation (CRAR)[29], ESMA's Board of Supervisors refused the application, and an appeal was brought before the BoA against the refusal. The BoA

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22 Case T-660/14, *SV Capital OÜ* v *EBA*, EU:T:2015:608. The appeal against this judgment was dismissed by the CJEU, Case C-577/15 P, *SV Capital OÜ* v *EBA*, EU:C:2016:947.

23 BoA/2016/001.

24 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1).

25 BoA D/2018/02.

26 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

27 BoA 2015/001.

28 BoA 2013-14.

29 Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1).

held that the burden was on the applicant to make sure that the application for registration provided ESMA with all the necessary information and that ESMA was not obliged to raise questions, nor to remedy any deficiencies in the application. In the view of the BoA, there was no breach of registration rules by ESMA: its finding of non-compliance by the appellant was based on a number of grounds, raising significant matters, and ESMA's refusal decision was fully reasoned as required by Articles 16(3) and 18(1) of the CRAR. The appeal was thus dismissed. Similar steps were taken in *FinancialCraft Analytics* v *ESMA*[30], another refusal to register a credit rating agency. ESMA had concluded that an insufficient level of detail, inconsistencies and weaknesses in the application resulted in a failure to comply with the CRAR[31]. Dismissing the appeal, the BoA held that in respect of technical matters about credit rating, such as rating methodologies, ESMA acts as a specialist regulator, and thus is entitled to a margin of appreciation, provided that the decision itself sets out ESMA's reasons in a detailed manner, as required by Articles 16(3) and 18(1) of the CRAR.

Another example is the *Nordic banks* case, concerning appeals by Svenska Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB, and Nordea Bank Abp[32]. The problem was unusual because it involved not an individual institution, but the Nordic debt market, with the key issue being what may be considered a "rating", as opposed to investment research[33]. ESMA's Board of Supervisors found a negligent infringement of the CRAR to the extent that the four banks included "shadow ratings" in their credit research reports. As a result the Board of Supervisors published public notices and imposed fines of EUR 495 000 on each bank. The banks appealed. The main issue of the case concerned the ambiguity of Article 3(2) of the CRAR, which excludes recommendations and "investment research" from consideration as "credit ratings". In all cases, the "shadow ratings" were prepared by the banks' credit analysts and based in whole or in part on the methodology of "official" rating agencies. The documents included an alphanumerical rating in the text, which, in ESMA's view, put them outside the investment research exclusion under the CRAR, and within the definition of "rating", even if the reports themselves could be characterised as MiFID investment research.

The BoA found no evidence of unlawfulness in the decisions having regard to the principles of legal certainty and due process and upheld ESMA's assessment that the activities of the appellants fell within the CRAR provisions. Thus, the banks had to be CRAR registered to undertake the activity, and without such registration would infringe the provisions of the CRAR. In reaching its conclusion, the BoA engaged not only in a literal interpretation of the relevant provisions, but also looked at their

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30 BoA/2017/01.

31 The weaknesses encompassed internal controls, conflicts of interest, independence of the credit rating process from business interests, rating methodology, models and key rating assumptions, credit rating process, and exemptions. Even though the appellant was a small company, which might have benefitted from CRAR exemptions, the arrangements to obtain such exemption had not been made.

32 BoA/2019/01, 02, 03 and 04.

33 The four cases were conducted in parallel, with a single hearing and four simultaneous decisions drafted in a single document. In *Scandinaviska Enskilda Banken AB* v *ESMA*, the Board had decided first to dismiss a request for suspension of the application of the contested decision with a decision of 30 November 2018.

legislative history and purpose. The latter was somewhat enlightening, which led the BoA to hold, in paragraph 262 of the single document dealing with the four separate appeals, that the effect of the banks' interpretation, were the BoA to accept it, would be that market participants could circumvent the CRAR restrictions "simply by including credit ratings in documents containing recommendations or investment research or even opinions about the value of a financial instrument". The BoA concluded, however, that due to the ambiguous wording of Article 3(2) of the CRAR and the unusual circumstances of the practice on Nordic debt markets, which had been carried out for many years without any perception of an infringement of the CRAR, the infringements were not committed negligently. Thus, ESMA's Board of Supervisors could not impose fines, and the cases were remitted for the adoption of amended measures, under Article 60(5) of the ESMA Regulation.

Finally, in *Creditreform AG* v *EBA*[34], the BoA dismissed an appeal filed by a credit rating agency which challenged the adoption by the Joint Committee of the ESAs of certain draft implementing technical standards (ITS) and applied for their suspension. The draft ITS which were subject to appeal proposed amendments to Commission Implementing Regulation (EU) 2016/1799 on the mapping of the credit assessments of external credit assessment institutions in accordance with Article 136(1) and (3) of Regulation (EU) No 575/2013[35]. They included a proposal to amend the correspondence ("mapping" in the terminology of the Capital Requirements Regulation (CRR)[36]) between certain of the appellant's long-term corporate credit assessments and certain credit quality steps as set out in Section 2 of Chapter 2 of Title II of Part Three of the CRR. The appellant challenged the legality of this change. The BoA dismissed the appeal as inadmissible, holding that, under Article 15 of the ESAs Regulations, the European Commission is not bound by the draft ITS submitted by the ESAs and has significant discretion as to the final determination of the content of such ITS at the stage of their endorsement. In the BoA's view, this meant that the draft ITS cannot undergo autonomous and direct judicial or quasi-judicial review, since they form part of a compound procedure and are just an element in the ordinary process of the adoption of the final decision by the European Commission. Those willing to challenge these acts can do so only by filing an application for annulment under Article 263 TFEU against the final decision adopted by the European Commission, asking the General Court to consider also the alleged errors in fact or in law of the ESAs' preparatory act which may vitiate the European Commission's final decision.

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34 BoA/2019/05.

35 Commission Implementing Regulation (EU) 2016/1799 of 7 October 2016 laying down implementing technical standards with regard to the mapping of credit assessments of external credit assessment institutions for credit risk in accordance with Articles 136(1) and 136(3) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (OJ L 275, 12.10.2016, p. 3).

36 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

2.2 Cases decided by the Appeal Panel of the Single Resolution Board

The AP has received 115 appeals in less than four years: a majority were beyond the AP's remit (e.g. appeals against ex ante contributions to the Single Resolution Fund (SRF) or appeals against a resolution decision) and clearly inadmissible and received shortly reasoned inadmissibility orders. The roughly 30 decisions where an appeal on the merits was not clearly inadmissible consisted of decisions on contributions to the administrative costs of the SRB, a decision on MREL determination and decisions on access to documents in the context of the Banco Popular resolution.

(a) While the administrative contributions cases involved many minute details, the underpinning issue was always the identification of the exact scope of application of the contribution obligation under the SRM Regulation. The first decision adopted in November 2016[37] concerned an SRB letter requesting payment of 2015-2016 provisional administrative contributions sent to all banks included in a list of credit institutions published by the ECB on its website on 4 September 2014, which was contested by one bank, which had been subject to resolution measures (in Germany) and ceased to be a bank in July 2015. The AP partially sided with the appellant and remitted the case to the SRB. If an entity originally included in the ECB list of credit institutions had ceased to be a licensed bank during the relevant period, it could not be required to contribute to the SRB administrative costs. The scope of the rules had to be determined in light of their purpose, also because a literal reading requiring entities which are not credit institutions to make contributions to the SRB could make Commission Delegated Regulation (EU) No 1310/2014[38] incompatible with the SRM Regulation (and the latter's clear scope of application). The AP held that, while only the CJEU[39], and not an appeal body[40], has the power to declare a regulation invalid, when two alternative interpretations of a provision of Union law are possible, but one interpretation would make the provision unlawful because it would entail that the provision contradicts the delegating act, the AP should prefer the interpretation that preserves the lawfulness of the delegated provision.

Similarly, in Case 4/2018, the AP held that, even following an ECB declaration that the bank was failing or likely to fail and the appellant entity was subject to liquidation under national law, the bank was required to pay administrative contributions until the date when its banking licence was finally withdrawn. The appellant had argued that it had ceased to be subject to the SRM Regulation

[37] Decision of 23 November 2016, in Case 1/16.

[38] Commission Delegated Regulation (EU) No 1310/2014 of 8 October 2014 on the provisional system of instalments on contributions to cover the administrative expenditures of the Single Resolution Board during the provisional period (OJ L 354, 11.12.2014, p. 1).

[39] Case C-362/14, *Schrems*, EU:C:2015:650, para. 61; Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:2016, para. 54; Case 101/78, *Granaria*, EU:C:1979:38, paras. 4 and 5; Case 63/87, *Commission* v *Greece*, EU:C:1988:285, para. 10; and Case C-475/01, *Commission* v *Greece*, EU:C:2004:585, para. 18.

[40] Case F-128/12, *CR* v *Parliament*, EU:F:2014:38, paras. 35, 36 and 40; Case T-218/06, *Neurim Pharmaceuticals* v *OHIM*, EU:T:2008:379, para. 52; and Case T-120/99, *Kik* v *OHIM*, EU:T:2001:189, para. 55.

and should not pay administrative contributions to the SRB from the date when the SRB had decided that resolution was not in the public interest. The AP found, on the contrary, that the appellant was still a credit institution when the SRB determined the 2018 contributions, which followed strict pre-defined criteria, in a list intended to be exhaustive and non-discretionary. The facts alleged by the entity fell outside these criteria and were not relevant for the decision whether to exempt the entity from the payment of administrative contributions.

(b) On the determination of MREL, the AP gave a decision on 16 October 2018[41]. MREL rules ensure that a bank has sufficient instruments that may be written-down or converted (bailed-in) in order to ensure an orderly resolution. Thus, from the instruments which can be potentially subject to bail-in, the MREL rules identify a narrower sub-set whose characteristics make such bail-in easier[42]. In this case the SRB made an MREL determination that was below 8% of total liabilities including own funds (TLOF). Since resolution rules provide that the SRF resources can be tapped only after capital/liabilities reaching 8% TLOF are bailed-in[43], the appellant alleged that, where an MREL target was set below that level, the authorities might have to implement the resolution strategy without relying on SRF resources. The AP held that the SRB's decision was justified. The MREL requirement was calibrated to ensure that the MREL target set for the relevant credit institution was proportionate, also taking account of the fact that the bail-in of instruments equivalent to 8% TLOF can be achieved using not only MREL instruments but also liabilities that do not qualify as MREL but are not excluded from bail-in[44], e.g. those with a maturity of less than one year.

(c) The largest AP caseload has focused on access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council on access to documents[45] (Public Access Regulation) connected to the Banco Popular resolution. In summary: (i) the overall question was whether the SRB had granted Banco Popular's shareholders and subordinated bondholders adequate access to the documents supporting the SRB's resolution decision; (ii) the AP's first answer was "not nearly enough"; and (iii) the answer became more refined

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41 Decision of 16 October 2018, in Case 8/18.

42 Article 45(4) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190) (BRRD) provides that these are instruments that are issued and fully paid up, not owed to, funded, guaranteed, or funded by the institution, with a maturity of more than one year, and not comprising deposits or derivatives.

43 Article 44(4) and (5) of the BRRD.

44 The liabilities that are eligible for bail-in are specified in Article 44 of the BRRD (the bail-in sequence is set out in Article 48 of the BRRD). The liabilities eligible to fulfil MREL are identified in Article 45(4) of the BRRD. On the organising role of the principle of proportionality in EU banking regulation, compare Zilioli, C. (forthcoming), "Proportionality as the Organizing Principle of European Banking Regulation", in Baums, T., Remsperger, H., Sachs, M. and Wieland, V. (eds.) *Zentralbanken, Währungsunion und stabiles Finanzsystem* (in honour of Helmut Siekmann), Duncker & Humblot, (accessible at SSRN).

45 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

and nuanced as successive rounds of appeals resulted in additional SRB disclosures.

The AP had to examine the SRB's refusal to disclose key resolution documents (e.g. the resolution decision, the valuation report, and the resolution plan) in light of the right to access documents that "any citizen" has under the Public Access Regulation. Key to the AP decisions were the arguments that: (i) the conferral of powers on Union agencies is conditional upon respecting fundamental rights and judicial review; and (ii) administrative safeguards, including access to documents, are instrumental to both. On these grounds, the AP held that the SRB erred in law when refusing to grant access to the valuation report in its entirety. The report was a critical part of the resolution decision, and thus had to be disclosed, at least in part. In turn, the SRB was only partly entitled to refuse access to other documents: the resolution decision, some parts of the resolution plan and other relevant documents could be disclosed in a redacted, non-confidential form, without endangering financial stability, especially since disclosure would take place months after the resolution decision had been taken[46].

In successive rounds of appeals the AP developed a stable framework of analysis to balance the competing interests at stake and adhered to the following principles:

(i) The right of access is a transparency tool of democratic control available to all Union citizens irrespective of their interests in subsequent legal actions[47].

(ii) The principle is that all documents of the institutions should be accessible to the public, since the Public Access Regulation implements Article 15 TFEU, and a fundamental right under Article 42 of the Charter of Fundamental Rights of the European Union, although certain public and private interests are also protected by way of exceptions and the agencies must be able to protect internal deliberations to safeguard their ability to carry out their tasks.

(iii) Exceptions to public access to documents must be applied and interpreted narrowly[48].

(iv) For certain categories of documents the Union institutions, bodies and agencies can rely on a general presumption that their disclosure

[46] The AP agreed with the SRB that documents exchanged with the ECB or the European Commission were protected, as part of the deliberation process, under Article 4(3) of the Public Access Regulation.

[47] Case C-60/15, *Saint-Gobain Glass Deutschland*, EU:C:2017:540, paras. 60-61; and Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, EU:T:2015:361, para. 20.

[48] Case C-280/11 P, *Council* v *Access Info Europe*, EU:C:2013:671, para. 30.

would undermine one of the interests protected by the Public Access Regulation[49].

A balance between similar principles was being drawn in parallel by the CJEU in the successive cases of *Espirito Santo I*[50], *Baumeister*[51], *UBS Europe*[52], *Enzo Buccioni*[53], *Espirito Santo II*[54] and *Di Masi and Varoufakis* v *ECB*[55], which were closely followed by the AP. Another challenge was the difficulty to reconcile the AP's inability to review the legality of the resolution scheme (a matter which is outside its narrow remit) with the fact that the alleged collision of the resolution scheme adopted in the Banco Popular case with fundamental rights was what gave relevance to the access requests. Thus, the AP assumed that the resolution framework respected property rights because resolution decisions were taken only at the point of non-viability and respecting the "no creditor worse off" principle[56] and that document disclosure had to permit the proper scrutiny of whether these two conditions were respected where a resolution decision was adopted.

3 Weaknesses and challenges

The experience accrued so far by the BoA and the AP shows that quasi-judicial review has been delivered on a timely basis, and generally accepted by the appellants in all cases but for one before the BoA and two before the AP[57]. Yet, the system exhibits some design weaknesses, which can be summarised as (a) "compartmentalisation", (b) organisational flaws, and (c) insufficient clarity as to the scope and focus of review.

(a) "Compartmentalisation" is visible and by design. There are three different fora of the European System of Financial Supervision, the Single Supervisory Mechanism and the Single Resolution Mechanism and no complete system. The main reason is that review bodies are construed as organs of their respective Union agencies or institutions (yet not as part of their staff in order to ensure independence). This entails also a lack of clarity over the status of appeal body members, and a dependence on the idiosyncrasy of each agency or institution. For example, the ABoR's decisions are not public and thus cannot be shared nor

[49] Case C-404/10 P, *Commission* v *Éditions Odile Jacob*, EU:C:2012:393; Case C-514/07 P, *Sweden and Others* v *API and Commission*, EU:C:2010:541; Case C-365/12 P, *Commission* v *EnBW*, EU:C:2014:112; Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland* v *Commission*, EU:C:2013:738; and Case C-562/14 P, *Sweden* v *Commission*, EU:C:2017:356.

[50] Case T-251/15, *Espirito Santo Financial* v *ECB*, EU:T:2018:234.

[51] Case C-15/16, *Baumeister*, EU:C:2018:464.

[52] Case C-358/16, *UBS Europe and Alain Hondequin and Others*, EU:C:2018:715.

[53] Case C-594/16, *Enzo Buccioni*, EU:C:2018:717.

[54] Case T-730/16, *Espirito Santo Financial Group* v *ECB*, EU:T:2019:161.

[55] Case T-798/17, *De Masi and Varoufakis* v *ECB*, EU:T:2019:154.

[56] In accordance with Article 20 of the SRM Regulation, creditors cannot obtain in resolution a treatment less favourable than under a hypothetical insolvency.

[57] Pending cases: Case T-16/18, *Activos e Inversiones Monterosso* v *SRB*; and Case T-62/18, *Aeris Invest* v *SRB*.

discussed in detail with other bodies, which breeds opacity[58]. Also, in the absence of a pending case, the BoA meetings are episodic due to budgetary constraints. Participation by appeal bodies in the European agencies' network and other ad hoc liaisons is voluntary, loose and informal, and no substitute for institutional coordination.

Appeal bodies are also compartmentalised from Union courts, which raises many issues. One is whether the administrative appeal must be exhausted before filing a case before Union courts. Although this seems to be the case for the BoA[59] and the AP (but not for the ABoR), since the BoA and the AP remits are narrowly designed, appellants could hesitate as to whether they chose the right remedy at the right time. In turn, it is doubtful whether the authorities can challenge appeal bodies' decisions before the General Court. Another problem is that these appeal bodies apparently cannot make references to the CJEU for a preliminary ruling. Although it is arguable that they would meet the *Vaassen* criteria for being a "court or tribunal" entitled to make a reference for a preliminary ruling (the BoA and the AP would meet the criteria but the ABoR would not[60]), they are not courts or tribunals "of a Member State"[61]. This is particularly significant because, as a result, they cannot make references for a ruling on the legality of Union law provisions central to their decisions, and are bound to "blindly" apply secondary law even in the face of potentially serious doubts as to their legality under primary Union law[62]. In all fairness, this is not new, and also the recent Court reform[63], although it seems to treat boards of appeals of some Union agencies as part of the judicial review system, does not give them the possibility to make references for a preliminary ruling. This is, however, particularly unfortunate for the BoA and the AP, which, unlike those other boards of appeal, adjudicate matters without being in functional continuity with the respective agencies.

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58 See Smits (2018), op. cit., p. 35.

59 Van Rijsbergen, M. and Foster, J. (2017), "'Rating' ESMA's accountability: 'AAA' status", in Scholten, M. and Luchtman, M. (eds.), *Law enforcement by EU authorities: Implications for political and judicial accountability*, Edward Elgar Publishing, Cheltenham, p. 76; Herinckx (2017), op. cit., para. 30; and Blair, W. and Cheng, G. (2018), "The role of judicial review in the EU's financial architecture and the development of alternative remedies" in *Judicial Review in the Banking Union and in the EU Financial Architecture*, Quaderni di Ricerca Giuridica, Banca d'Italia, No 84, pp. 17-28, at p. 24.

60 Case 61/65, *Vaassen (neé Göbbels)*, EU:C:1966:39; Case C-54/96, *Dorsch Consult*, EU:C:1997:413, para. 23; and Case C-517/09, *RTL Belgium*, EU:C:2010:82. See in particular Case C-205/08, *Umweltanwalt von Kärnten*, EU:C:2009:767, paras. 34-39. See also Case C-195/06, *Österreichischer Rundfunk (ORF)*, EU:C:2007:613, paras. 10-13 and 22 and the Opinion of Advocate General Ruiz-Jarabo Colomer in the same case, EU:C:2007:303, points 24-41. The EUIPO Board of Appeal is not considered a "court or tribunal", see Case T-63/01, *Procter & Gamble* v *OHIM (soap bar shape)*, EU:T:2002:317, paras. 21-22. However, unlike the EUIPO Board of Appeal, the BoA and the AP are not "in functional continuity" with the agency, which was the decisive criterion according to the Court.

61 This was the decisive criterion for denying such status to the Complaints Boards of the European Schools. See Case C-196/09, *Miles and Others*, EU:C:2011:388, paras. 37 to 39.

62 Compare Case C-196/09, *Miles and Others*, para. 28, where the Complaints Board of the European School expressed a similar concern.

63 Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 111, 25.4.2019, p. 1). See Alberti, J. (2019), "The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU", *Federalismi.it,* No 3, 6 February 2019, pp. 1-32.

(b) Some features of the administrative organisation of the BoA and the AP show clear causes for concern. First, appointment rules are relevant in determining whether the BoA and the AP qualify as "courts" under the *Vaassen* criteria. In our view, this is possible, but room for improvement remains. The ESAs Regulations and the SRM Regulation require the BoA and the AP members to be independent. Yet, there are shortcomings: (i) the appointment of the members of the BoA and AP is delegated to the authorities' governing body, which also decides on the (once only) extension of their five-year term. This may misplace incentives and might reduce the propensity of some members to challenge the agencies' decisions; (ii) remuneration is based on hourly fees and is thus episodic (absent a continuous workload) with the risk that membership becomes "honorary". In the long run, these and other weaknesses[64] may not jeopardise independence, but may undermine the appearance of such independence.

A second matter regarding membership concerns the best combination of expertise to be available in appeal bodies. Combining lawyers and non-legal experts offers clear advantages, but also raises questions. First, does the presence of a member of a quasi-court with no legal background run against the concept itself of a "court"? However, an absolute requirement of legal background would be beyond necessity and deprive appeal bodies of interdisciplinary expertise and a more precise knowledge of cases. A second, more practical, question is how members of appeal bodies can properly fulfil their duties if they cannot draft in legal terms. While this might pose an insurmountable problem for monocratic courts, collegial work and secretarial support should be enough to handle the difficulty. What matters for members is their understanding of an issue's substance and less their mastery in the arcane art of legal writing.

A mixed expertise only works if a third element is duly acknowledged, which is the support provided to appeal bodies. In relation to this element, there is still room for improvement. The BoA and the AP have secretariats which are functionally independent from other functions of the relevant agencies but without budgetary autonomy. While this may be due to the relevant agencies' youth, it is unfortunate. It is fair to acknowledge that the secretariats to the BoA and the AP have done a lot to suitably assist the members and the resources of the AP secretariat have been strengthened to offer permanent and excellent support, but the contrast with the resources of Union or US courts is striking, especially given the impact of this support on the quality of adjudicatory outcomes.

(c) On the clarity of the review, as was emphasised earlier, the competences granted to the BoA and the AP are specific[65], but this does not dispel all

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64 For data based upon the results of a questionnaire, see Dimitropoulos, G. and Feinäugle, C. (2015), *Organizational Aspects of the Boards of Appeal of the Agencies of the European Union*, MPI Luxembourg (on file with the authors).

65 The BoA may hear appeals against a decision of ESMA, EBA or EIOPA "referred to in Articles 17, 18 and 19 and any other decision taken in accordance with the Union acts referred to in Article 1(2)" (Article 60(1) of the ESAs Regulations). The AP may hear appeals only against a decision of the SRB referred to in Articles 10(10), 11, 12(1), 38 to 41, 65(3), 71 and 90(3) of the SRM Regulation.

interpretative doubts on matters of competence[66] nor does it clarify why certain matters were excluded from the remits of the BoA and the AP[67]. One must add to this the recurring question about the standard, or standards, of review by quasi-courts over supervisory decisions[68], especially in comparison to the standards of the General Court and the CJEU. The BoA seems to have acknowledged, in an obiter dictum fashion[69], that it may push its review of the merits beyond the CJEU-like legality review, given the circumstances. Some authors have gone further and argued that the BoA is vested with unlimited, full review jurisdiction that could lead it to re-assess all aspects of the decision's merits[70]. Others argue that, since an appeal is a very different procedure to judicial review under Article 263 TFEU, market participants can challenge ESMA's failures to act more than is possible in relation to other forms of (in)action by Union institutions and bodies[71]. Another view argues that the AP's review must remain a legality review and the AP cannot merely substitute its own appraisal for that of the SRB. In this regard, the standard of review is that of an "error of assessment", but an error need not be "manifest" as determined in the case-law of the CJEU, because due to its mixed composition the AP can investigate more thoroughly the SRB's economic assessments[72].

While academic opinions are not uniform, in our assessment, no court or quasi-court is willing to second-guess the opportuneness of a supervisor's complex economic assessments, and all of them are keen to check whether errors of fact or errors of law are present. However, it remains unclear where precisely the legality control ends. Without explicit statutory language on this issue, only the CJEU can offer the necessary clarity, and, without it, appeal bodies may conduct a review which sits somewhere between full and marginal, but are not likely to expressly state a specific standard of review of their own.

4 A way forward

The analysis shows that appeal bodies in the field of financial services seemingly offer a quick remedy, with the benefits of procedural flexibility and technical expertise. Our discussion also exposes some weaknesses, however, which, if reformed, would enhance the BoA's and the AP's supporting role to Union courts. If

66 E.g. the AP can review SRB decisions on impediments to resolution, but it is unclear whether this also extends to the preliminary identification of the impediments, which operates as the basis for those measures.

67 E.g. decisions on access to the file by the party affected by the proceedings under Article 90(4) of the SRM Regulation or the decisions on ex ante contributions to the SRF are not reviewable before the AP.

68 Witte, A. (2015), "Standing and judicial review in the new EU financial markets architecture", *Oxford Journal of Financial Regulation*, pp. 1-37.

69 Board of Appeal, 10 November 2014, *Investor Protection Europe* v *ESMA*.

70 Gargantini (2014), op. cit., p. 416.

71 Murphy, R. (2016), "The effective enforcement of economic governance in the European Union: brave new world or a false dawn?", in Drake, S. and Smith, M. (eds.), *New Directions in the Effective Enforcement of EU Law and Policy*, Edward Elgar, Cheltenham, Northampton MA, pp. 285-319, at p. 316, citing *Investor Protection Europe* v *ESMA*, decision of 10 November 2014.

72 Herinckx (2017), op. cit., para. 26.

the reforms are designed as an ambitious overhaul to transform the BoA and the AP (or the ABoR) into specialised courts attached to the CJEU, under Article 257 TFEU, such reforms will likely not be successful in the short to medium term.

A more promising avenue may be the consolidation of the BoA and the AP into a single independent Board of Appeal.

This reform would take these quasi-judicial review bodies out of the internal governance of their four agencies, dispelling any remaining institutional uncertainties about their nature, and bringing organisational and efficiency gains. To our minds, a (de facto) administrative tribunal is currently preferable to specialised courts attached to the CJEU under Article 257 TFEU because it can also be composed of non-legal experts, and its rules of procedure, whilst fully respecting the right to be heard and all procedural fundamental rights, can be designed to deliver a prompt review. A comprehensive reform could also extend the legality review conducted by such review bodies beyond the current CJEU standard – in order to include all errors (and not simply manifest errors). The reform could also require parties to pay fees "balancing the principle of fair access to justice with the objectives of a [at least partially] self-financing court with balanced finances"[73].

Appointment rules should reflect these changes, e.g. by strengthening the role of the European Commission which could select and appoint the members (possibly from a list proposed by the relevant agencies, following a public call for expressions of interest), after a statement before the European Parliament. This would enhance formal independence, which could be accompanied by full status as European Union officials, better-designed remuneration, immunity, budget autonomy and adequate secretarial and law clerk support.

[73] Alberti. J. (2017), "New developments in the EU system of judicial protection: the creation of the Unified Patent Court and its future relations with the CJEU", *Maastricht Journal of European and Comparative Law*, Vol. 24, pp. 6-24, at p. 21 (with reference to the Unified Patent Court).

Administrative appeals – a theoretical framework

Dacian C. Dragos[1]

This contribution looks at different models of administrative appeal in the Member States of the EU and tries to discuss their legal design, legal foundation and even touch upon their effectiveness in keeping parties outside of courts of law. The majority of the legal systems afford a central role to administrative appeals among the remedies available against administrative action. The mandatory ones seem to be quite effective, as they keep the majority of disputes out of courts, while optional ones are harder to evaluate. However, it must be stressed that success rate is not the only criterion to measure effectiveness, so the data must be looked at with necessary precaution.

1 The interplay between the administrative appeal and judicial review

In administrative law, there are two major ways of contesting allegedly unlawful decisions: the administrative appeal and judicial review (court action).

The administrative appeal is a request addressed to a public authority by which the aggrieved person requests administrative measures to be taken regarding an administrative act: annulment, modification or even issuance of a new act (when this has been refused by the administration). Judicial review, on the other hand, is an adversarial proceeding by which an individual transfers the conflict with a public authority to the (administrative) courts.

The administrative appeal can be addressed to the authority that issued the unlawful act – contestation, opposition, recours gracieux, appeal in reconsideration, remonstrance – or to its superior body – hierarchical appeal, recourse. There is also the so called quasi-hierarchical appeal, external appeal or sometimes recours de tutelle[2], addressed to an agency that is not the superior body of the issuer of the act, but has the power to control such decisions, in its quality of specialised control agency or overseeing body. The administrative appeal may be used not just for administrative acts, but for administrative contracts, as well, alongside with conciliation, arbitration or mediation.

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This chapter is a restructured summary and update of the chapter written by Dacian C. Dragos and David Marrani, Administrative Appeals in Comparative European Administrative Law: What Effectiveness? in D.C. Dragos and B. Neamtu (eds.), Alternative Dispute Resolution in European Administrative Law, Springer-Verlag Berlin Heidelberg 2015, pp. 541 ff.

2 Chapus, 2008, p. 581; Van Lang, Goundouin and Inserguet-Brisset, 1999, p. 282.

In principle, the administrative appeal and the judicial review are independent, and the rules for their exercise normally do not interfere with one another.[3] Each action can be exercised separately, and those aggrieved by an administrative decision can opt freely between these two ways of contesting the decisions.[4] In many jurisdictions, however, the applicable law requires that prior to commencing court proceedings, an administrative appeal must be filed. Other jurisdictions, without imposing the exercise of the administrative appeal, still link—in different ways—the administrative appeals to the judicial review.[5]

A chief feature of administrative justice is that it allows parties to resolve their dispute at the administrative level: they have the possibility to challenge the decision before the administration itself prior to resorting to courts. The administrative appeal may be included, in a broad sense, in the category of alternative dispute resolution tools for the realisation of the administrative justice, when compared to the resolution of the disputes by courts; it has been strongly recommended by the Council of Europe[6] and has found its way into most of the jurisdictions as well as in the EU law.

Administrative appeals suggest the existence of a conflict with the administration. Consequently, there has to be an administrative decision or an administrative inaction in order to trigger the administrative appeal; an initial request addressed to a public body to issue, for instance, an authorization, shall not be considered as an administrative appeal. Only the refusal (implicit or explicit) to resolve such a request can be considered an administrative decision, and can be the object of an administrative appeal.

The organisation of the administrative appeal depends on the role that the legal system is granting such pre-trial proceedings in relation to the judicial review. Usually, the administrative appeal is governed by rules that are less strict than the judicial review. In systems where the administrative appeal is optional – France, Italy, Belgium (this last one with regard to the unorganised administrative appeal) –, the person aggrieved by an administrative decision may choose between notifying the issuing authority and going directly to a judge, or to do both simultaneously. In the first scenario, the administrative appeal typically extends the time limit for filing a judicial review with the time needed for solving the administrative appeal (in France 2 months, in Italy 90 days, with the exception of the riscorso straordinario al Capo dello Stato); the judicial review deadline starts again after a decision on administrative appeal is reached expressly or by negative silence. If both remedies are filed at the same time and the matter is resolved in administrative appeal, a further judicial review may be dismissed as lacking object. In the same jurisdictions, on the other hand, organised (or statutory) administrative appeals are usually preventing parties from going to court without exhausting first this remedy. So there are two systems of administrative appeals, with different features.

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3 Auby and Fromont, 1971, p. 215; Darcy and Paillet, 2006, p. 2; Rivero and Waline, 2006, p. 206.

4 Darcy and Paillet, 2006, p. 22.

5 Auby and Fromont, 1971, p. 219.

6 Council Of Europe, Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, adopted on 5 September 2001, available at http://www.coe.int/t/cm/documentIndex_en.asp

On the other hand, in those systems where the administrative appeal is regulated as a mandatory stage prior to the judicial review, the interested person can file an action to court only when the administrative appeal procedure was previously exhausted. This practice applies as a rule in Germany, the Netherlands, Romania, Slovenia, Czech Republic, Poland, Serbia, Spain, Austria, as well as in most of the EU law[7]. Exceptions concern special standing for direct court actions – the public prosecutors, for instance, in Poland and Romania may directly address the court.

The main conclusion here is that all jurisdictions are experimenting with both types of administrative appeals – mandatory and optional, with interchanging preferences for one or the other over the time. Thus, in France in principle the appeal is optional but many statutory provisions are making it mandatory; in Italy, the perceived inefficiency of the administrative appeals finally led to the 1971 reform that abolished the conditionality between the administrative appeal and the judicial review, although maintaining the possibility to use these remedies. In Austria, recently, the 2012 reform states loud and clear the abolition of administrative appeals, only to re-instate them in a different setting.

The relation with the judicial review is of critical significance in terms of justice administration – the number of cases that reach the courts in different systems of administrative appeals. No research is available, at comparative level, regarding this matter. The Council of Europe's Committee of Ministers nevertheless has stressed that the large amount of cases and, in certain states, its constant increase can impair the ability of courts competent for administrative cases to hear cases in a reasonable time, within the meaning of Article 6.1 of the European Convention on Human Rights.

The conditionality between mandatory administrative appeals and judicial review raises also questions about access to justice, so the relevance of art. 6.1 of the ECHR shall be considered. The ECHR has stated repeatedly that mandatory administrative appeals are not in breach of art. 6.1 of the Convention[8], although they are not necessarily conducted by impartial and independent review bodies. The emphasis was put always on the availability, in the end, of the action to court.

2 The legal design of the administrative appeals

From a comparative perspective, there are two major systems of administrative appeals – mandatory and optional.

The first one, adopted by a large number of legal systems (among which are those in Germany, the Netherlands, Hungary, Slovenia, Poland, Serbia, Denmark, Czech Republic and Romania[9]) precludes an action to a court in the absence of a prior administrative appeal. At the level of EU law, in specific areas, administrative appeals are required prior to launching procedures by the Commission – regarding

[7] See the corresponding chapters in Dragos and Neamtu, 2015.

[8] Decision Le Compte and others v. Belgium (1) from June 23rd 1981, par. 51, Decision Ötzurk v. Germany from February 21st 1984, par. 58, Decision Lutz v. Germany from June 25th 1987, par. 57.

[9] See the national chapters in Dragos and Neamtu, 2015.

infringements of Union law by Member States, aids granted by Member States or when it comes to access to Union documents, appeals of servants within the Union civil service and in procedures of EU agencies.

The second type of appeal (recours administratif), promoted by the French legal system and those inspired by it (partially Belgium, Italy), attaches certain effects to the exercise of an administrative appeal (prorogation of the time limits for bringing an action in a court of law) without making it mandatory[10].

Many countries are experimenting with different systems of administrative appeal. Austria, for instance, has completely changed its system from one where the administrative appeals were a mandatory before going to court to one where they will still be mandatory, but during court proceedings[11]. Spain is combining mandatory administrative appeal for administrative decisions that are not final at administrative level with optional appeal for final decisions[12].

It is also noteworthy that no jurisdiction confines itself to only one system of administrative appeals. Even where the appeal is optional, there are instances where special legislation makes its use mandatory.[13] For instance, in France – although the appeal is in principle optional – there are mandatory appeals in fiscal matters,[14] in case of decisions issued by the municipal councils,[15] in litigation relating to university elections,[16] etc. Similarly, in Belgium, the unregulated appeal is optional, while appeals regulated by law are mandatory.[17] In Italy, the reform of 1971 led to the abandonment of the mandatory administrative appeal due to its ineffectiveness; however, the two forms of administrative appeal still subsist: an optional appeal in reconsideration to the issuer and a hierarchical appeal as precondition for the riscorso straordinario al Capo dello Stato[18].

The rules that govern the optional appeal have typically a jurisprudential source and are quite flexible[19]. The claimant does not have to prove that there is a specific interest at stake; there usually is no requirement to conform to formal provisions and, often, there is no time limitation for appeal.

In the case of the mandatory appeal, which is more formalistic than the optional one, the proceedings are to be conducted, within clear time limits, in an adversarial manner and the final decision is subjected to extensive rules of motivation (for instance in Germany, Netherlands, Hungary, Czech Republic, Serbia, Slovenia and Romania[20]). In these jurisdictions, as we have highlighted above, a court action is

10 Van Lang, Gondouin and Inserguet-Brisset, 1999, p. 98.

11 See the chapter on Austria in Dragos and Neamtu, 2015.

12 See the chapter on Spain in Dragos and Neamtu, 2015.

13 Chapus, 2008, p. 350; Isaac, 1968, p. 621; Darcy and Paillet, 2006, p. 22.

14 Dupuis, Guédon and Chrétien, 1999, p .57.

15 Debbasch and Ricci, 2001, p. 307.

16 Darcy and Paillet, 2006, p. 23.

17 See the chapter on Belgium in Dragos and Neamtu 2015, and Schwarze, 2009, p. 172.

18 See the chapter on Italy in Dragos and Neamtu, 2015.

19 See the chapter on France in Dragos and Neamtu, 2015.

20 See the corresponding chapters in Dragos and Neamtu, 2015.

conditioned by the prior exhaustion of administrative remedies by way of administrative appeals.

A variation of the administrative appeal is also the quasi-judicial appeal, regulated by special rules in different fields. It is addressed to a specialized public authority that is a combination of an administrative body and a judicial one. The decision on the appeal is still an administrative decision, issued by an administrative body, but the procedure has also features comparable to court procedures. This is the case, for instance, in Italy, where an appeal to the Presidency is to be resolved only upon the advice of the Council of the State[21]; or in Romania, where there are specialized agencies performing such tasks: for instance, the National Council for Solving Public Procurement Disputes, or the National Council against Discrimination[22].

A fourth type of appeal is the appeal to the supervisory authority (situations where one authority is supervised by another (e.g. a local authority is supervised by a regional or state authority), in connection with decisions issued by autonomous public bodies. For instance, in Belgium, an appeal can be lodged to the supervisory authority in order to obtain the suspension or the annulment of an administrative decision due to a violation of law or a principle of good governance regarding that decision. Also, in Denmark, administrative acts issued by local government may be appealed to the minister only if authorized by statute[23]. In Romania, decisions of autonomous local authorities may be appealed to the Prefect, but this appeal is unregulated[24].

From a comparative perspective, there are several options regarding the legal arrangement of the time frames for exercising the administrative appeal: (a) Fixed versus non-fixed time-limits; (b) Length of time-limits: lowest to highest. These options are then applicable to the time-limit for answering the administrative appeal. First, there is the option of having a fixed time limit, within which the applicant could lodge the appeal, and further maximal limits for resolution of the appeal. A characteristic of the systems analysed in another research[25] is that the public administration receives a better treatment than the citizens: more generous deadlines and rather weak sanctions for non-observance of the time limits. The 2001 Recommendation issued by the Council of Europe's Committee of Ministers on the length of administrative appeal procedures suggests that conclusion of the appeal should be reached within a reasonable time, and this may be achieved by subjecting the appeal to time-limits or otherwise[26].

At the EU level individuals who want to challenge the legality of an act or a failure to act of the institutions may institute proceedings before the EU courts either directly or

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21 See the chapter on Italy in Dragos and Neamtu, 2015.

22 See the chapter on Romania in Dragos and Neamtu, 2015.

23 See the chapter on Denmark in Dragos and Neamtu, 2015.

24 See the chapter on Romania in Dragos and Neamtu, 2015.

25 See for different deadlines Dragos and Neamtu, 2015.

26 Council of Europe, Recommendation Rec (2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, adopted on 5 September 2001.

indirectly – in proceedings concerning an act of general application – in order to have the act declared inapplicable. Administrative appeal is also present, as in certain fields, before seeking protection by the courts the claimant must exhaust the preliminary administrative review mechanisms. Such examples can be found in procedures of the Commission regarding infringements of Union law by Member States, aids granted by Member States, access to Union documents, appeals of servants within the Union civil service and in procedures of EU agencies[27]. Typically, these agencies are competent to make decisions that affect individuals. Until recently, there were only four agencies that had the power to enact binding legal acts: the Office of Harmonization for the Internal Market OHIM[28], the Community Plant Variety Office CPVO[29], the European Chemicals Agency ECHA[30], and the European Aviation Safety Agency EASA[31]. Recently though, new agencies were created in the aftermath of the economic crisis: the three European Supervisory Authorities for the financial market (ESAs): the European Banking Authority EBA[32], the European Insurance and Occupational Pensions Authority EIOPA[33], and the European Securities and Markets Authority ESMA.[34] They share a common Board of Appeal which provides legal expertise for the appraisal of the legality of the authorities´ decisions. Also, the newly established Agency for the Cooperation of Energy Regulators ACER has regulatory powers as well – besides making recommendations to national regulators or market player and providing opinions to the Commission – as it is competent to adopt individual decisions on technical issues and decides about certain regulatory and cross-border infrastructure access issues.[35] Accordingly, a board of appeal was provided for which is competent to deal with appeals by natural or legal persons or the national regulatory authorities against a decision of the agency.[36]

3 Administrative tribunals – the administrative appeal goes to town!

The organisation of the appeal following a judicial model can lead to the formation of an administrative body with quasi-judicial nature, a hybrid that aims at dealing with administrative disputes outside courts of law but still assuring a proper and balanced

27 See for details the EU law chapter in Dragos and Neamtu, 2015.

28 See Articles 25 et seq. Council Regulation 207/2009 on the Community Trademark, OJ L 78, 24.3.2009, p. 1, as amended.

29 Articles 4, 30 et seq. Regulation 2100/94 on Community plant variety rights, OJ L 227, 1.9.1994, p. 1, as amended.

30 Article 75 et seq. Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ L 396, 30.12.2006, p. 1.

31 See Articles 17 et seq. Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ L 79, 19.3.2008, p. 1, as amended.

32 See Regulation 1093/2010, OJ L 331, 15.12.2010, p. 12.

33 Cf Regulation 1094/2010, OJ L 331, 15.12.2010, p. /48.

34 Cf Regulation 1095/2010, OJ L 331, 15.12.2010, p. 84.

35 As provided for in Articles 7(1), 8, 9(1) Regulation 713/2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, p. 1.

36 Article 19 Regulation 713/2009. See also the EU law chapter in Dragos and Neamtu, 2015.

protection of the rights of parties. Their main function is to adjudicate disputes between citizens and governmental agencies. Although tribunals adjudicate many more administrative disputes than courts, their role as 'dispensers of administrative justice'[37] receives relatively little scholarly attention. An effective administrative tribunal addresses in the same time the shortcomings of an administrative appeal procedure (lack of independence) and those of court proceedings (length, associated costs, in some cases lack of specialization), providing for independent review and quick redress in (sometimes) less complex matters, which do not need the intervention of a court. Thus, the effectiveness of such complex institutions should be analysed, from the point of view of their role of alternative review bodies outside courts.

The jurisdictions analysed in a research from 2015 offer a mixed picture[38]. The United Kingdom is by definition the jurisdiction where tribunals have found their place and their effectiveness as a matter of fact[39]. The Dutch system of legal protection against the administration is currently moving from specialized Tribunals, comparable with the tribunal system in England until 2012, to an integration of the legal protection against the government in the Dutch judicial organisation. Article 112 of the Dutch Constitution provides that: "The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary. Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament." In Denmark, the characteristic of the administrative appeal system is the existence of numerous sector-specific boards of appeal that are highly specialized collegiate public authorities whose sole or main purpose is to review administrative acts following an appeal, working independently from traditional hierarchical structures[40]. The procedure used by these boards is a mix between the administrative procedure and the court procedure, involving judges as chairmen. In France, many independent bodies (Autorités administratives indépendantes), combining regulatory powers with adjudicatory ones are considered at least in part as an alternative to courts, as they offer redress before individuals need to consider court action. Among the roughly 40 such authorities some are directly in charge of ADR and solve disputes involving regulations that were not necessarily enacted by them[41] – for instance the Commission on Access to Administrative Documents (Commission d'accès aux documents administratifs – CADA).

Other jurisdictions are wary of recognising such hybridization, although it actually exists in practice: special appeal bodies dealing with appeals against decisions issued by Polish local governments (i.e. local government appeal boards) are

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37 Cane, 2009.

38 Dragos and Neamtu, 2015.

39 See the chapter on UK in Dragos and Neamtu, 2015; see also Cane, 2009, p. 5.

40 ibid.

41 See the French chapter in Dragos and Neamtu, 2015.

working by the rules similar to those applicable to administrative courts[42]. In Romania, the closest to an administrative tribunal is the National Council for Public Procurement Disputes, which in theory is answerable to the Government but in practice has proved to be rather independent in its decisions[43]. In Germany, the Public Procurement Tribunal is also an instrument of legal protection for the tenderers[44] that could be included in the category of administrative tribunals.

4 Effectiveness: are administrative appeals living up to their role?

The legal foundation of the administrative appeal can be found in the citizens' right to address petitions to the government,[45] a fundamental right that has found its recognition in many constitutions or modern legislations. The right to petition is then supplemented with the administrative principle of revocation – according to which administrative decisions may be revoked by their issuer.[46]

An administrative appeal has a threefold rationale. First, from the perspective of public authorities, it offers them a chance to make good on their duty to reconsider allegedly unlawful acts[47]; the prospective lawsuit should make public authorities assess again, perhaps more carefully than before, their initial decision[48]; the appeal avoids formal court proceedings, the costs of a lawsuit and possibly having to pay compensation — not to mention the prospect of having its image affected by losing a lawsuit. Secondly, administrative appeals evidently protect in the same time private parties who have allegedly been aggrieved by the administration; proceedings offer the participants the possibility of having a disputed decision annulled in a simple, fast and free of charge proceeding. In this respect, the administrative appeal is usually much more beneficial for individuals than court trial. On the other hand, if the appeal is flatly rejected by the public authorities, the claimant has an opportunity to re-assess his/her chances of winning in court and make a more informed decision in this direction, based on the reasoning put forward by the public authority – it basically provides a test-run for a full-blown court trial. Thirdly, the court's excessive caseload is sensibly eased when administrative appeals do their job in keeping parties out of court.

The worst case scenario, as far as the rationale for administrative appeals goes, is when the public authority is silent in response to the administrative appeal – administrative silence. In such a case, the claimant will confront the public body for the first time in court, without being able to benefit from a test-run during administrative appeal proceedings. Even in this case, the administrative appeal must

42 See the Polish chapter in Dragos and Neamtu, 2015.

43 See the Romanian chapter in Dragos and Neamtu, 2015.

44 See the German chapter in Dragos and Neamtu, 2015.

45 Auby and Fromont, p. 216; Isaac, 1968, p. 619.

46 Rarincescu, , 1936, p. 118.

47 Serdeen and Stroink, 2002, p. 172; Iorgovan, 2006, p. 453.

48 Dupuis, Guédon and Chrétien, 1999, p. 57.

receive some consideration in the course of the court proceedings, in the sense that the attitude of the public authority could be deemed culpable. The administrative silence should be considered when deciding on the costs of litigation. The judge should address separately the fact that the public authority has not answered the administrative appeal in due time, consequently pushing the claimant to go to court. The other variant is that the party desists altogether because of cost of court litigation, in which case the administrative appeal has not had the envisaged effect.

Besides protecting the public authorities (and, hence, the public interest) and private parties by allowing public authorities to reform allegedly unlawful acts, the second important function of administrative appeals is relieving administrative courts of cases that can be solved at administrative level.

However, there is utility in the administrative appeal even when the case reaches the court. Thus, Auby and Fromont[49] have acknowledged the utility of the mandatory administrative appeal as being twofold: first, it tries to steer the administrative conflict clear of trial as much as possible; if the trial is inevitable, it constrains the parties to define precisely its object, so that the claimant will know exactly what the public body's arguments are, and the latter will analyse the decision and decide if it can be defended in a court of justice.

Another argument as to administrative appeals being more suited for solving administrative disputes than courts comes from the fact that judges may not always have the ability to grasp the full realities of the public administration, especially in the context of the extraordinary development of the tasks performed by public bodies, and that public administrators are better equipped to do this[50].

A noticeable advantage of the administrative appeal in those jurisdictions that pay reverence to the legality principle is its wide scope. The claimant can invoke not only legality aspects, but also opportunity ones, or issues pertaining to the principle of good administration, while as in court the decision will be mainly assessed by applying legality standards[51]. The administrative appeal can resort also to the "benevolence of the administration" in order to resolve the matter,[52] where no strong legality arguments can be put forward.

When analysing the pros and cons of the administrative appeal, it may be argued that an appeal to the issuing authority (recourse in reconsideration) has against it the subjectivity of the issuer in reassessing its decision, but on its side the fact that is "the appeal to the best informed authority"[53].

The hierarchical appeal is justified, on the other hand, by the necessity of a less subjective control of the contested decision; the subjectivity is not excluded[54], but

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49 Auby and Fromont, 1971, p. 42.

50 Prevedourou, 1996, pp. 167-180.

51 See for instance the chapter on Hungary in Dragos and Neamtu, 2015.

52. Brabant, Questiaux andWiener, 1973, p. 272; Darcy, andPaillet, 2006, p. 21.

53 Isaac, 1968, p. 624; Darcy and Paillet, 2006, p. 20.

54 See the chapter on France in Dragos and Neamtu, 2015.

tempered, and the superior body has, supposedly, more diverse means of action than the subordinated body[55].

The critics of the administrative appeal argue that the institution is useless and even obstructive[56]. In case the public authority is silent on the initial petition, or when it rejects it altogether, an administrative appeal is considered as an unnecessary and unreasonable complication of the situation, as it is exposing again the claimant to the same refusal.[57]

Hierarchical appeal attracts similar criticism[58] because, in many cases, the superior would rather try to 'cover' his/her subordinate than to satisfy the grievance of an individual—not to mention the case when the subordinate was following the instructions of the superior when issuing the contested decision. On the other hand, this attitude has the risk, in case of losing the court case, of associating the superior body to the issuer body in paying compensations to the aggrieved person. Such arguments were traditionally used by the French scholars to stress that administrative appeals provide only limited guarantees to those aggrieved by administrative decisions, and thus has a reduced pedagogical importance, while the administrative judge is the main guarantee of the administrative legality and of the rights and interests of individuals.[59]

The appeal to the supervisory authority (recours de tutelle) may feature a more neutral attitude regarding the decision contested and thus such authorities are more likely to annul an illegal decision or to refuse its approval. In Belgium, for instance, this form of appeal is therefore much more effective for the citizen than an appeal in reconsideration or a hierarchical appeal.[60]

Since the legal theory is in approval of the administrative appeals, what about their effectiveness? Well, this is tricky. From the comparative literature, it emerges that there is no easily-accessible empirical research measuring the effectiveness of administrative appeals. Few texts that dare to tackle the issue are just assumptions based on perceptions.[61]

The Council of Europe's Committee of Ministers has recognised their potential role in reducing the caseload of the courts while still securing a fair access to justice.[62] It was also pointed out that court procedures in practice may not always be the most appropriate to resolve administrative disputes, and that the widespread use of alternative means of resolving such disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public.

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55 Isaac, 1968, p .624.

56 See the Italian doctrine preceding the 1971 reform of the administrative appeals, in the chapter on Italy in Dragos and Neamtu, 2015.

57 Ionescu, 1970, p. 374; Iorgovan, 2006, p. 592; Deleanu, 2009, p. 289.

58 Rarincescu, 1936, p. 110.

59 Brabant, Questiaux and Wiener, 1973, p. 280.

60 See the chapter on Belgium in Dragos and Neamtu, 2015.

61 Serdeen andStroink, 2002, p. 174.

62 Council of Europe, Commitee of Ministers, Recommendation Rec(2001)9.

However, the few writings that tangentially touched upon the issue describe only the organisation of the administrative appeals in various jurisdictions, without analysing their influence on the judicial review and their effectiveness as ADR tools. Some authors argue, in a general manner, that administrative appeals are efficient: in Germany, for instance, administrative appeals end, in most cases, with a positive decision, avoiding thus court action;[63] other authors are even mentioning percentages – 9 out of 10 objections are positively answered, but without citing the research which was conducted for this purpose.[64] In the Netherlands, it has been argued that the objection is particularly useful in cases of decisions of a mandatory nature taken in large numbers involving numerous legal parties (social security, rent support).[65]

This is the reason why in the book Alternative Dispute Resolution in European Administrative Law we tried to draw some conclusions based on empirical data, interviews with legal experts and author's own expertise in the field. However, the task has proven to be quite difficult, as little data is compiled by public authorities, and even where such data exists, it is hard to corroborate with data on court proceedings, in order to correlate the findings.

In the Netherlands, for instance, the filtering effect of an objection is affected by the context in which the contested decision was taken. Most financial decisions (taxation law, migration law, students' grants and loans, social insurance benefits, traffic fines) are taken in very large numbers (between 1½ million and 30,000 per agency, annually), therefore the name "decision factories". Due to the fact that such decisions are very often taken in electronic proceedings (on-line applications), administrative mistakes may occur, so the administrative appeal helps the administration to correct its errors or to explain the decision to the citizens in these cases. The effect is quite relevant, as only about 3% of the addressees of all original decisions commence court proceedings after decisions on objections. Other types of decisions, occurring rarely and after a complex procedure (spatial planning, for instance),are less prone to errors that can be righted at administrative level, so the filtering effect of administrative appeal is less obvious.

The assessment of Dutch administrative appeals from an effectiveness point of view is influenced by their perceived role as a legal protection tool, and only secondary as a decision making tool. This gives the administrative appeal a quasi-judicial nature – which is criticised by the authors of the Dutch chapter, who mention also various initiatives designed to make the procedure more informal again. Thus, the government has taken the initiative to stimulate civil servants and citizens to take an active informal approach and to cooperate instead of hiding behind formal rules, also by starting a project that encourages contacts and dialogue between the administration and citizens as opposed to resorting to legal rules and thus allowing conflicts to flourish.

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63 Schwarze, 2009, p. 136.

64 Schröder, 2002, p. 137.

65 Serdeen and Stroink, 2002, p. 174.

Even in countries which are at the forefront of innovation as regards ADR tools, such as the Netherlands, there were at some point attempts to get rid of administrative appeals. Thus, the idea that an agreement between appellants and public bodies to skip administrative pre-trial proceedings might advance the final dispute resolution has not been received with gusto by the doctrine[66].

In Germany, the question whether the administrative appeal is a useful tool for solving disputes or an annoying pre-trial has been discussed for decades[67]. In this context, sort of counterintuitively, public authorities do not compile even now relevant data on objections, their outcome and the consecutive court actions. The same conclusions based on data from between the 50's and 80's are reiterated and held as true: less than 10-20% of cases that have been decided after an administrative appeal by the citizen are then taken to court. The effectiveness of the objection is contested in formalized procedures that include extensive public participation, and held to be more important in other instances. The thousands of authorities on multiple different levels (federal level, Land level, district level, municipal level, tax authorities, social security institutions and other specialized administrative authorities) which may be involved in an administrative appeal make compilation of data a difficult endeavour. However, taking into account that the number of court cases avoided due to the administrative appeal is not the only criterion for judging their effectiveness, the authors of the German chapter stress the fact that based on its ability to ensure effective legal protection, the objection may be considered as generally an effective remedy. The decision to file an objection against an administrative act is more easily to be taken than the one involving a court action (time limits, costs, complexity of the procedure are taken into account). Illustrative for this option is the fact that in a given Land, when given the option to use an administrative appeal and a court action, about 80% of the complainants opted for the objection instead of going directly to court[68]. There is no doubt that sometimes these procedures are used only to buy some more time for reflection towards starting court actions. But this benefits both complainants and public authorities; moreover, public authorities use this intermission in order to "straighten up" their administrative act.

In France, mandatory administrative appeals are often seen as effective since they provide some guarantees to the citizen and avoid the cost and delays of judicial procedures. At some point, the strategic objective of having more pre-litigation ADR mechanisms was included in the law – the law of 31st December 1987 on reforming administrative litigation stated that the Conseil d'Etat would determine by decree the conditions under which administrative litigation or arbitration must necessarily be preceded by prior administrative appeals or conciliation. However, there was no follow-up regarding this provision. A part of the doctrine inclines toward the generalization of mandatory administrative appeals[69], especially in matters such as the invalidation of driving licences, public services, and in laws relating to foreigners

66 See the Dutch chapter in Dragos and Neamtu, 2015.

67 See the German chapter in Dragos and Neamtu, 2015.

68 ibid.

69 See the French chapter in Dragos and Neamtu, 2015.

and to prisons. However, there are still traditional approaches that mandatory appeals add to the procedures and that impartial judicial review is the sole venue where citizens may find their rights and interests duly heard.

In Denmark, the figures presented in the study show that only a very limited number of cases (2-3%) are brought before the courts, and of these the courts uphold the decisions of the boards in up to 95% of the cases. One has to remember that this is a legal system where administrative appeals are quite well organised and they have a tradition in the administration. So the authors conclude that administrative review appears to be effective, "even if a part of the explanation of the low number of cases that are brought before the courts is likely to be attributed to structural and practical barriers, such as the risk of litigation costs and lengthy court processing time"[70]. Another argument working in favour of the effectiveness of administrative appeal is that appellate bodies annul a large number of decisions issued by public authorities, so this form of review is helpful for those interested in contesting decision made in first instance.

A different picture seems to be offered by Italy, where administrative appeals are not a prerequisite for judicial review and are rarely exercised because they are perceived as ineffective. The fault for the ineffectiveness of administrative appeal lies, according to the authors of the Italian chapter, in the administrative culture, which is at odds with trusting public servants to pursue the public interest in their decisions.

The different setting in which administrative appeal work in the United Kingdom does not make them irrelevant. Thus, it is a common feature of an administrative dispute to start with an internal appeal to the relevant public body, or to an external appointed authority, regarding the public authority's 'action, lack of action or standard of delivery'.[71] Moreover, it is a common practice to have more than one-tier system, in which formal complaints are dealt with first by front-line staff, which can be escalated to senior officer or chief executive level[72], or they can just go to the highest level of administration. Internal administrative reviews are an instrument of good administration. However, studies on specific appeal procedures reveal that applicants fail to challenge adverse decisions because of their lack of knowledge about the availability of the appeal, and because of their scepticism regarding how the appeal will be treated.[73] Another frustrating shortcoming of the administrative appeal is its inability to hold public authorities accountable for their actions – citizens often seek to be heard and understood[74]. However, because judicial review is a remedy of last resort, aggrieved citizens may have to exhaust the course of the internal appeal system before being able to approach the court with a request for judicial review, and the justifications behind this rule have to do with relieving the high court of cases that can be solved otherwise and thus saving valuable public

[70] See the Danish chapter in Dragos and Neamtu, 2015.

[71] Law Commission, Administrative Redress: Public Bodies and the Citizen, 2008, esp. p. 12 para 3.28, cited in the UK chapter, in Dragos and Neamtu, 2015.

[72] See the UK chapter in Dragos and Neamtu, 2015.

[73] Cowan and Halliday, 2003.

[74] Hunter and Cowan, 1997.

resources. The authors conclude that internal appeal in public administration may be considered as a common sense procedure in the UK legal system.

Interesting developments in this field are also CHAP and EU Pilot. CHAP or "Complaints Handling – Accueil des Plaignants" deals with management of complaints by European citizens regarding the application of EU law by the Member States; on average, 50% of the complaints are closed by a comprehensive response of the Commission and around 15% on grounds of lack of Union competence, around 15% are examined further via EU Pilot and 10% transferred into infringement proceedings.[75]

EU Pilot is an instrument aimed at improving answers to questions of citizens as well as cooperation between the Commission and the Member States regarding application of Union law, and statistics on its effectiveness can be found on the website of the Commission.[76]

5 Final considerations

Overall, the main conclusion of the research conducted in 2014 was that when organised, administrative appeals are fulfilling their role as ADR tools or pre-trial proceedings[77]. They offer a good venue for seeking legal protection, whilst playing also the role of pre-trial procedures. However, their ability to provide legal protection comes with mixed blessings: there is sometimes reluctance to consider them as ADR tools because their role as legal remedies is well enshrined in the legal tradition of some legal systems and their status is rivalling the courts' (in Germany, Austria, Denmark, Slovenia, Serbia). When compared to other tools of ADR, like Ombudsman and mediation, arbitration, conciliation, they still hold the spotlight in the majority of jurisdictions mentioned here.

Unorganised administrative appeals are nevertheless important, either as a venue for seeking alternative dispute resolution or as informal procedures destined to keep parties out of courts of law. The importance associated with these appeals in countries that in principle reject the need for mandatory administrative appeals (France and Italy) speaks for itself.

The administrative appeal remains the main competitor for courts when it comes to dispute resolution in administrative matters, and the interplay between courts and bodies of administrative appeal deserves further analysis.

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75 Commission, 2018 annual report on monitoring the application of community law, available at https://ec.europa.eu/info/publications/2018-commission-report-and-factsheets-monitoring-application-eu-law_en

76 Commission, 2018 annual report on monitoring the application of community law - https://ec.europa.eu/info/publications/2018-commission-report-and-factsheets-monitoring-application-eu-law_en

77 Dragos and Neamtu, 2015.

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Part 10
The constitution of the Economic and Monetary Union

The Court of Justice and the Economic and Monetary Union: a constitutional perspective

Koen Lenaerts[1]

In a speech reflecting on the "Twenty Years of the ECB's monetary policy", given on the occasion of the European Central Bank's (ECB) Forum on Central Banking that took place in Sintra (Portugal) in summer 2019, President Draghi pinpointed the dichotomy that characterised the two first decades of monetary union: whereas the first decade was a period of calm macroeconomic conditions, with limited volatility and steady economic growth, the second decade was marked by profound shifts in the prevailing environment, including both financial and sovereign debt crises.[2]

The ECB, established as the Economic and Monetary Union's (EMU) independent guarantor, was thus called upon to adapt its monetary policy strategy in order to respond to the global financial crisis in the second decade. It did so in a decisive manner. President Draghi rightly pointed out in his speech, however, that the constitutional limits set by the Treaties require the measures of the ECB to be proportionate and tailored to the specific contingencies that the monetary union faces.[3]

It is against this backdrop that I will focus on the role of the Court of Justice in interpreting the scope and the limits of the Treaty provisions on EMU, by means of which it has contributed to the shaping of the constitutional balance of EMU, in collaboration with the courts and tribunals of the Member States.[4]

To that effect, my contribution is divided into four parts. In the first part, I shall briefly elaborate on the constitutional framework of EMU. The second part relates to financial assistance programmes and the role of fundamental rights. The third part provides an overview of measures adopted in response to the financial and sovereign debt crises by the ECB that were subsequently challenged on legal grounds before both national and European courts. In the fourth part, I shall look at recent case law of the Court of Justice relating to the ECB that was not linked to the financial crisis as such, but was nonetheless considered to be of constitutional importance for the development of European Union (EU) law.

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1 President of the Court of Justice of the European Union. All opinions expressed are personal to the author.

2 Draghi (2019).

3 ibid.

4 Tuori and Tuori (2014); Hinarejos (2015); Huber (2014).

1 The constitutional framework of EMU before and after the crisis

Ever since the adoption of the decision to form an Economic and Monetary Union, taken by the European Council in 1991 and later enshrined in the Maastricht Treaty, the monetary union has remained an 'asymmetric group of policies'.[5]

While the EU was to enjoy exclusive competence to conduct monetary policy for the Member States whose currency is the euro, the Member States retained control of economic policy, including budgetary and fiscal policy.

Unlike other monetary unions, there was no centralised fiscal policy function and no centralised exercise of fiscal power.[6] Member States of the euro area were thus bound to each other through a common currency, but were free to conduct their own national economic and fiscal policies.[7] The euro was not accompanied by a 'community of risk-sharing'.[8]

Since the viability of monetary integration nevertheless required a certain degree of economic co-ordination, the authors of the Maastricht Treaty believed that EMU had to be structured in a way that would limit the policy-making powers of the Member States, notably by means of the obligation to comply with EU rules on fiscal discipline.[9] To that end, the Protocol on the excessive deficit procedure annexed to the Maastricht Treaty specified, on the one hand, that the ratio of the annual government deficit to gross domestic product (GDP) must not exceed 3%, and, on the other hand, that the ratio of government debt to GDP must not exceed 60%.[10] Nevertheless, national decisions on taxation and spending were, in the absence of specific Treaty provisions empowering the EU to act in that regard, 'both legally and politically off-limits for the EU institutions'.[11] It was therefore for the Member States to decide, for example, whether to reform their pension schemes and national health systems, to cut the salaries of civil servants or to increase taxes.

This asymmetric rationale underpinning EMU was called into question by the burgeoning financial crisis, which highlighted the lack of financial solidarity between the Member States. Indeed, given that neither the EU rules on fiscal discipline nor the coordinating guidelines adopted in the meantime were sufficient to provide an immediate and effective response to the crisis, the EU and its Member States were obliged to counterbalance the structural asymmetry by means of the adoption of policy adjustments – both within and outside the framework set out in the Treaties.[12]

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5 Hinarejos (2013), p. 1624.

6 *European Commission*, A blueprint for a deep and genuine economic and monetary union: Launching a European Debate, 30 November 2012, COM(2012) 777 final/2, p. 2.

7 Hinarejos (2015), p. 7.

8 Chiti and Texeira (2013), p. 697.

9 For example, Articles 104b and 104c of the EC Treaty (Maastricht version), currently Articles 125 and 126 TFEU, as well as the rules laid down in the Stability and Growth Pact.

10 Article 1 of the Protocol on the excessive deficit procedure.

11 Dawson and de Witte (2013), p. 824.

12 Ruffert (2011); for a critical account on the responses to the euro crisis, Snell (2016).

Internally, a series of measures was adopted by the EU institutions that aimed at preventing a new financial crisis from arising, including the so-called Six-Pack[13] and the Two-Pack[14].

Externally, a new method of action reinforcing intergovernmental cooperation was deployed in order to reinforce fiscal discipline effectively.[15] This method led, on the basis of an intergovernmental agreement concluded outside the framework of the Treaties, to the establishment of facilities such as the European Stability Mechanism (ESM).[16]

The purpose of the ESM, whose maximum lending volume is set at 500 billion euros, is to mobilise funding and provide stability support under strict conditionality to the benefit of euro area Member States which are experiencing, or are threatened by, severe financing problems, where such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.

The legality of the ESM Treaty was examined in the seminal *Pringle* case, in which the Court of Justice sitting in full court was called upon to decide whether action taken by Member States outside the framework of the EU Treaties, as was the case with the ESM Treaty, was compatible with EU law.[17] The Court's judgment was thus of great importance for the future design of monetary policy.

The Court of Justice replied in the affirmative. First, it held that an international agreement concluded between the Member States whose currency is the euro, such as the ESM Treaty, did not encroach on the exclusive competences of the EU in the field of monetary policy as the establishment of the ESM fell within the field of economic policy.[18]

Secondly, the Court of Justice ruled that the ESM Treaty was compatible with the Treaty provisions relating to economic policy, in particular with the so-called 'no bail-

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13 The *Six-Pack* is composed of the following six measures:
Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23.11.2011, p. 1);
Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306, 23.11.2011, p. 8);
Regulation 1175/2011 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and co-ordination of economic policies (OJ L 306, 23.11.2011, p. 12);
Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances (OJ L 306, 23.11.2011, p. 25);
Regulation 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 306, 23.11.2011, p. 33);
Directive 2011/85 on requirements for budgetary frameworks of the Member (OJ L 306, 23.11.2011, p. 41).

14 The *Two-Pack* is composed of the following measures:
Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L 140, 27.5.2013, p. 1);
Regulation 473/2013 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 L 140, 27.5.2013, p. 11).

15 Maris and Sklias (2015).

16 Treaty establishing the European Stability Mechanism, signed on 2 February 2012.

17 Case C-370/12, *Pringle*, EU:C:2012:756.

18 ibid., paras 55 to 60.

out clause' enshrined in Article 125 TFEU. In that regard, it found that the compatibility with EU law of such financial assistance was subject to three cumulative conditions: (1) the Member State concerned must remain liable to its creditors; (2) the financial assistance provided by the ESM must operate as an incentive encouraging that Member State to adopt a sound budgetary policy; and (3) such assistance must be limited to cases where the stability of the euro area as a whole is put at risk.

Thirdly, it held that the Treaties do not preclude the use of the EU institutions (notably, the Commission and the ECB) outside the EU legal framework, provided that they act in areas which do not fall under the exclusive competence of the EU and that the tasks entrusted to them do not alter the character of the powers conferred on those institutions by the Treaties.[19]

2 Financial assistance programmes and the role of fundamental rights

In accordance with the provisions of the ESM Treaty, any financial assistance provided by the ESM to a Member State that requires assistance must be the subject of an agreement, or Memorandum of Understanding (MoU), between the former and the latter, whose terms are to be negotiated, on behalf of the ESM, by the European Commission and the ECB.[20]

It was the *Ledra Advertising* v *Commission and ECB* case that raised the question whether the depositors of Cypriot banks, who experienced losses following the restructuring of those banks, were able to challenge the validity of the relevant MoU and to seek damages before the EU courts on the grounds that by signing the MoU the Commission had violated their right to property as guaranteed in Article 17 of the Charter of Fundamental Rights of the European Union ('Charter').

The facts of that case were as follows: In 2012, a number of banks established in Cyprus, including Cyprus Popular Bank and the Bank of Cyprus, encountered financial difficulties. The Cypriot Government therefore made a request for financial assistance to the Eurogroup, which resulted in the negotiation of a MoU by the Commission together with the ECB and the International Monetary Fund (IMF), on the one hand, and by the Cypriot authorities, on the other. In a statement of 25 March 2013, the Eurogroup disclosed that the negotiations between the Commission together with the ECB and the IMF, on the one hand, and the Cypriot authorities, on the other, had resulted in a draft MoU on the restructuring of the Cyprus Popular Bank and the Bank of Cyprus ('Eurogroup statement of 25 March 2013'). The Commission, on behalf of the ESM, and Cyprus then signed the memorandum and the ESM granted financial assistance to that Member State.

19 ibid., para 158.

20 Beukers (2013), p. 1588.

A number of Cypriot citizens as well as Ledra Advertising, a company established in Cyprus that had funds on deposit at those banks, brought actions for annulment and claimed damages before the General Court, since the measures agreed with the Cypriot authorities resulted in a reduction in the value of their deposits. In particular, they asked the General Court to order the Commission and the ECB to pay them compensation equivalent to the diminution in value of their deposits, allegedly suffered on account of the adoption of the MoU.

At first instance, the General Court dismissed the actions for annulment and for damages relating to the adoption of the MoU, holding that they were in part inadmissible and in part unfounded.[21] As to the actions for annulment, the General Court pointed out that the Commission signed the MoU on behalf of the ESM and that the activities pursued by the Commission and the ECB in the context of the ESM bind only the latter, given that the MoU in question is not an act that can be imputed either to the Commission or to the ECB since the ESM does not form part of the institutions of the European Union. Thus, the act cannot be contested on the basis of Article 263(4) TFEU. The General Court also held that it did not have jurisdiction to consider the actions for compensation based on the illegality of certain provisions of the MoU, given that it has jurisdiction only in disputes relating to compensation for damage caused by the institutions of the EU or by its servants in the performance of their duties. Finally, the General Court found that the applicants had failed to establish with certainty that the damage they claimed to have suffered had in fact been caused by inaction on the part of the Commission.[22]

On appeal, the Court of Justice concurred with the General Court in so far as the MoU was not a challengeable act.

However, regarding the actions for damages, the Court of Justice held that the fact that the activities entrusted to the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own and commit the ESM alone does not prevent damages from being claimed from the Commission and the ECB on account of their allegedly unlawful conduct in connection with the adoption of a MoU on behalf of the ESM. It stressed that the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by the Treaties. Put differently, the Commission retains, even within the framework of the ESM Treaty, its role of guardian of the Treaties, so that it must refrain from signing a MoU whose consistency with EU law it doubts.[23]

After having set aside the disputed orders of the General Court, the Court of Justice gave a final judgment in the matter. It found, in substance, that “whilst the Member States do not implement EU law in the context of the ESM Treaty, so that the Charter

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21 Case T-289/13, *Ledra Advertising v Commission and ECB*, EU:T:2014:981; Case T-291/13, *Eleftheriou and Others v Commission and ECB*, EU:T:2014:978; Case T-293/13, *Theophilou v Commission and ECB*, EU:T:2014:979.

22 Case T-289/13, *Ledra Advertising v Commission and ECB*, EU:T:2014:981, para 54.

23 Joined Cases C -8/15 P to C -10/15 P, *Ledra Advertising and Others v Commission and ECB*, EU:C:2016:701, paras 57 to 59.

is not addressed to them in that context (…), the Charter is addressed to the EU institutions, including (…) when they act outside the EU legal framework."[24] Consequently, the Court of Justice examined whether the Commission had contributed to a sufficiently serious breach of the appellants' right to property, within the meaning of Article 17(1) of the Charter, in the context of the adoption of the MoU in question. The Court of Justice gave a negative answer and explained in that respect that the disputed provisions of the MoU, adopted with the aim of ensuring the stability of the banking system of the euro area as a whole, in a situation where there was an imminent risk of financial losses to which depositors with the two banks concerned would have been exposed if the latter had failed, did not constitute a disproportionate and intolerable interference impairing the very substance of the appellants' right to property.[25]

Thus, whilst rejecting the action for compensation of the claimants, the Court of Justice nevertheless established an important constitutional principle, namely that the Commission is bound, under Article 17(1) TEU, to ensure that such MoUs are consistent with EU law, particularly with the Charter, even though the acts of the ESM fall outside the scope of EU law. The judgment in *Ledra Advertising and Others* v *Commission and ECB*, decided by the Court of Justice's Grand Chamber, has therefore been called "a milestone case for the protection of human rights in the context of post-crisis European financial assistance."[26]

Other important judgments in this particular context were those in *Mallis and Malli and Others* v *Commission and ECB*. In those cases, several Cypriot individuals brought actions before the General Court for the annulment of the Eurogroup statement of 25 March 2013.[27] The General Court, however, dismissed the actions for annulment of that statement as inadmissible. It held that the ESM could not be regarded as forming part of the institutions of the EU and that the Eurogroup statement of 25 March 2013 could be imputed neither to the Commission nor to the ECB, nor was that statement capable of producing legal effects with respect to third parties.[28]

On appeal, the Grand Chamber of the Court of Justice confirmed that the statement of the Eurogroup of 25 March 2013 cannot constitute a joint decision of the Commission and the ECB.[29]

The Court of Justice ruled that those two institutions were not empowered, as far as their tasks within the ambit of the ESM Treaty are concerned, to take decisions on their own and the activities pursued by them in the context of that Treaty commit the

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24 ibid., para 67.

25 ibid., para 74.

26 Poulou (2017), p. 127.

27 Case T-327/13, *Mallis and Malli v Commission and ECB*, EU:T:2014:909; Case T-328/13, *Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB*, EU:T:2014:906; Case T-329/13, *Chatzithoma v Commission and ECB*, EU:T:2014:908; Case T-330/13, *Chatziioannou v Commission and ECB*, EU:T:2014:904; Case T-331/13, *Nikolaou v Commission and ECB*, EU:T:2014:905.

28 Case T-327/13, *Mallis and Malli v Commission and ECB*, EU:T:2014:909, paras 45-46, 53.

29 Joined Cases C-105/15 to C-109/15, *Mallis and Malli and Others v Commission and ECB*, EU:C:2016:702, para 60.

ESM alone.[30] Moreover, the fact that the Commission and the ECB participate in meetings of the Eurogroup does not alter the nature of the latter's statements and cannot result in the statement of 25 March 2013 being considered to be the expression of a decision-making power of those two EU institutions.[31] In the light of those findings, the Court of Justice concluded that the General Court did not err in law by declaring an action for annulment directed against this statement to be inadmissible.

It is worth pointing out that, while Member States that experience financial difficulties and whose currency is the euro may only request financial assistance at European level through mechanisms such as the ESM,[32] the same is not true for Member States whose currency is *not* the euro. Those Member States may seek balance of payments assistance from the EU on the basis of Article 143 TFEU together with Council Regulation (EC) No 332/2002, which establishes the facility to provide medium-term financial assistance to EU Member States outside the euro area.[33] The grant of financial assistance to such a Member State is thus conditional on the implementation of policies designed to address the underlying economic problems, which are outlined in a MoU.

In *Florescu and Others*, the Grand Chamber of the Court of Justice was required to interpret such a MoU that had been concluded in 2009 between the EU and Romania in the context of the financial assistance programme granted to the latter.[34]

The case concerned five retired Romanian judges who also taught at university level and who challenged legislation, adopted by Romania in order to implement the conditions that the EU had attached to the grant of financial assistance to that Member State, which prohibited the combining of a public-sector retirement pension with income from paid activities carried out in public institutions (such as universities), where that pension was higher than the figure for average income at national level.

At the outset, the Court of Justice found that the MoU entered into by the European Union and Romania had been adopted on the basis of the relevant provisions of EU law that govern the grant of mutual assistance to a Member State whose currency is *not* the euro.[35] It thus ruled that the MoU in question was to be regarded as an act of an EU institution, within the meaning of Article 267 TFEU, which was, therefore, subject to interpretation by the Court of Justice.

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30 ibid., para 53.

31 ibid., para 57.

32 The limitation to such facilities like the ESM is based on Article 125(1) TFEU which states that the Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

33 Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 53, 23.2.2002, p. 1).

34 Case C-258/14, *Florescu and Others*, EU:C:2017:448.

35 Article 143 TFEU and Council Regulation (EC) No 332/2002.

After finding that the law in question implemented EU law within the meaning of Article 51(1) of the Charter, given that the objective of that legislation was to implement the undertakings given by Romania in the MoU, the Court of Justice held that those judges could rely on their right to property, as enshrined in Article 17 of the Charter, in order to challenge the national law's compatibility with EU law.

However, the Court of Justice found that, while that law imposed a limitation on the exercise of the applicant's right to property that was intended to be temporary, it sought to pursue a legitimate objective, i.e. the need to rationalise public spending in the exceptional context of global financial and economic crisis.[36] Moreover, the Grand Chamber concluded, as regards the suitability and necessity of the national legislation at issue, that it must be borne in mind that Member States have broad discretion when adopting economic decisions in such a particular context, and are in the best position to determine the measures likely to achieve the objective pursued.[37] The Court of Justice thus ruled that EU law, more particularly Article 17(1) of the Charter, does not preclude the adoption of national legislation such as that at issue, which prohibits the combining of a net public-sector retirement pension with income from activities carried out in public institutions if the amount of the pension exceeds a certain threshold.[38]

3 Shaping the constitutional balance of EMU: the Court of Justice's judgments in *Gauweiler* and *Weiss*

In addition to the establishment of facilities such as the ESM, budgetary surveillance and economic coordination measures, steps aiming to improve the financial supervision and regulatory standards of the euro area's banking system were taken in order to counterbalance the monetary union's asymmetry and to complete the banking union.[39]

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36 Case C-258/14, *Florescu and Others*, EU:C:2017:448, paras 55 and 56.

37 ibid., para 57.

38 ibid., para 60.

39 Whereas two pillars of the banking union, the single supervisory mechanism (SSM) and the single resolution mechanism (SRM), are in place, a common system for deposit protection has not yet been established. However, the Council adopted in May 2019 a legislative package that contains amendments to the capital requirements legislation (Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).) and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338)), which reinforce the capital and liquidity positions of banks, and strengthens the framework for the recovery and resolution of banks in difficulty (Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190) and Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1)); Hinarejos (2015), p. 46; Howarth and Quaglia (2018).

Thus, the euro area crisis compelled the ECB, in an unparalleled situation of emergency, to play its full part as an independent central bank whose principal objective is to maintain price stability, taking into account,[40] at the same time, the restrictions imposed by the Treaties, for example the prohibition on acting as a lender of last resort in respect of any Member State or the EU institutions pursuant to Article 123(1) TFEU.[41]

One the one hand, the ECB adopted a series of measures that were intended to enhance liquidity support to the banking system of the euro area.[42]

On the other hand, the ECB announced, in a press release issued in September 2012, that it had taken certain decisions setting up a programme that aimed 'at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy', authorising the European System of Central Banks (ESCB) to purchase on secondary markets government bonds of Member States of the euro area, provided that strict conditionality was met.[43]

Even though this programme on Outright Monetary Transactions (OMT) has never been activated, concerns were raised with regard to the compatibility of that programme with the TFEU. Some considered, first, that the purchase of sovereign bonds on secondary markets would bypass the prohibition under Article 123 TFEU to buy government bonds directly. Second, it was argued that OMT's were in conflict with the Member States' powers in the field of economic and fiscal policy.

As a result, a number of German citizens brought an action for annulment against the OMT Programme before the General Court. That court held, however, in a ruling that was upheld on appeal by the Court of Justice,[44] that the OMT programme was not of direct concern to the applicants within the meaning of Article 263(4) TFEU and on that ground it dismissed the action for annulment as inadmissible.[45]

However, the OMT programme was also challenged in the context of constitutional complaints made by a number of individuals and the application for *Organstreit* proceedings – that is to say proceedings relating to disputes between constitutional organs – of a parliamentary group brought before Germany's Bundesverfassungsgericht. The immediate focus of those actions was the participation of the Deutsche Bundesbank in the implementation of the OMT programme and the alleged failure of the Federal Government and the Bundestag to act to prevent that programme. Since the case concerned an admissible challenge to the effect that an act was ultra vires, the Bundesverfassungsgericht stayed the

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40 The independence of the ECB pursuant to Article 130 TFEU is intended 'to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the [TFEU] and the ESCB Statute', Case C-11/00, *Commission v BCE*, EU:C:2003:395, para 134; Zilioli and Selmayr (2007).

41 Beukers (2013), p. 1591; Cour-Thimann and Winkler (2013).

42 Hinarejos (2015), p. 20.

43 ECB Press release on 'Technical features of Outright Monetary Transactions' of 6 September 2012, available at ecb.europa.eu.

44 Case C-64/14 P, *Von Storch and Others v ECB*, EU:C:2015:300.

45 Case T-492/12, *Von Storch and Others v ECB*, EU:T:2013:702.

proceedings and referred its first request for a preliminary ruling to the Court of Justice.[46] It asked, in substance, whether the relevant Treaty provisions permitted the adoption of a programme on outright monetary transactions for the purchase of government bonds of euro area Member States that were subject to a macroeconomic adjustment programme, such as the one announced by the ECB.[47]

In its judgment in *Gauweiler and Others*, the Court of Justice first recalled that the ECB and the central banks of the Member States whose currency is the euro, which constitute together the Eurosystem, are to conduct the monetary policy of the Union, whose main objective is to maintain price stability. Within the framework laid down by the Treaties, it is for the ESCB to define and implement that policy in an independent manner, whilst respecting the principle of conferral. In other words, the ESCB cannot validly adopt and implement a programme which is outside the area assigned to monetary policy by primary law.[48] In its analysis of whether that was the case for the announced OMT Programme, the Court of Justice stressed in particular that measures of monetary policy can – and often do – have incidental effects on economic policy. However, the fact that such measures might be capable of indirectly contributing to the stability of the euro area, which is a matter for economic policy, does not remove such measures from the ambit of the Union's monetary policy.[49] The Court of Justice thus found that the bond-buying programme in question was, in that respect, compatible with EU law since its principal purpose was to achieve genuine monetary policy objectives.

Secondly, the Court of Justice stated that the OMT programme did not infringe the principle of proportionality, mainly because the ESCB could reasonably have taken the view, in the exercise of the broad discretion that it enjoys, that it was appropriate for the purpose of contributing to the ESCB's objectives, and that it did not go beyond what is necessary, given that it was limited to certain types of bonds issued by Member States identified on the basis of precise criteria linked to those objectives.[50]

Thirdly, it held that the programme incorporated sufficient safeguards to ensure that there was no breach of the prohibition on monetary financing laid down in Article 123(1) TFEU because it explicitly authorised only indirect purchases of government bonds on secondary markets.

On the basis of the judgment of the Court of Justice, the Bundesverfassungsgericht found that the complainants' rights had not been violated by the fact that the Federal Government and the Bundestag did not take suitable steps to revoke or limit the effect of the ECB's policy decision concerning the OMT programme. Furthermore, it held that the OMT programme did not impair the Bundestag's rights and obligations with regard to European integration, including its overall budgetary responsibility, as the policy decision on the technical framework conditions of the OMT Programme as

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46 Case 2 BvR 2728/13 of the Bundesverfassungsgericht, BVerfG:2014:rs20140114.2bvr272813.

47 Case C -62/14, *Gauweiler and Others*, EU:C:2015:400.

48 ibid., paras 36 to 41.

49 ibid., paras 50 and 51.

50 ibid., paras 68, 80, 86 and 87.

well as its possible implementation did not 'manifestly' exceed the competences attributed to the ECB.[51]

In the meantime, however, the ECB adopted, inter alia, a decision on a programme for the purchase of government bonds on secondary markets (Public Sector Purchase Programme – PSPP).[52] Its aim was to return inflation rates to levels below, but close to, 2%, in view of the increased risk of a medium-term decline in prices in the context of an economic crisis that might cause deflation. It provided that each national central bank was to purchase eligible securities of central, regional or local issuers within its own jurisdiction.

Again, constitutional complaints were brought before the Bundesverfassungsgericht by several individuals alleging, inter alia, that the ECB's PSPP decision amounted to an ultra vires act exceeding the scope of the ECB's mandate and infringing the prohibition of monetary financing, thereby undermining Germany's constitutional identity.[53]

This led the Bundesverfassungsgericht, one year after the Court of Justice's judgment in *Gauweiler and Others*, to stay the constitutional proceedings and to refer its second request for a preliminary ruling to the Court of Justice.[54]

In its preliminary reference, the Bundesverfassungsgericht pointed out that if the PSPP were to exceed the scope of the ECB's mandate or to infringe the prohibition on monetary financing under the Treaties, then it would have no other choice but to uphold those actions. The same would be true if the sharing of losses arising under the programme were to affect the Bundestag's budgetary responsibilities.

The Court of Justice, however, building on the *Gauweiler and Others* case, found in its judgment in this new case, *Weiss and Others*, that the PSPP was covered by the scope of the ECB's mandate and did not therefore infringe EU law.[55]

It ruled that the programme fell within the area of monetary policy, in respect of which the EU has exclusive competence for all the Member States of the euro area, and that it complied with the principle of proportionality. Indeed, the decision to facilitate a return of inflation rates to levels below, but close to, 2% over the medium term with a view to achieving the objective of price stability did not appear to be vitiated by a manifest error of assessment. The PSPP was also not considered as going manifestly beyond what was necessary to attain that objective, inter alia due to its

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51 Case 2 BvR 2728/13 of the Bundesverfassungsgericht, BVerfG:2016:rs20160621.2bvr272813, paras 174 and 190.

52 Decision (EU) 2015/774 of the ECB of 4 March 2015 on a secondary markets public sector asset purchase programme (OJ L 121, 14.5.2015, p. 20), as amended by Decision (EU) 2017/100 of the ECB of 11 January 2017 (OJ L 16, 20.1.2017, p. 51).

53 On the Bundesverfassungsgericht's judicial control of an ultra vires act, Langenfeld (2019); Gentzsch (2019), pp. 284 ff.

54 Case 2 BvR 859/15 of the Bundesverfassungsgericht, BVerfG:2017:rs20170718.2bvr085915.

55 Case C-493/17, *Weiss and Others*, EU:C:2018:1000.

temporary nature and the limits placed on the volume of bonds that could be purchased under its programme.[56]

In addition, the Court of Justice observed that the PSPP does not infringe the prohibition on monetary financing given that its implementation is not equivalent to a purchase of bonds on the primary markets and does not reduce the impetus for the Member States to follow a sound budgetary policy. Moreover, the Court of Justice recalled that safeguards were built into the PSPP, which ensure that a private operator cannot be certain when it purchases bonds issued by a Member State that those bonds will actually be bought by the ESCB in the foreseeable future.[57] Regarding the Bundesverfassungsgericht's question concerning the sharing of the entirety of losses sustained by one of the central banks following a potential default by a Member State between the central banks of the Member States, which had been allegedly provided under the PSPP, the Court of Justice dismissed that question as inadmissible on the grounds that it was hypothetical since "the ECB decided not to adopt a decision entailing sharing of the entirety of losses made by the central banks of the Member States during implementation of the PSPP."[58]

To date, the BundUN esverfassungsgericht has not yet delivered its subsequent national judgment.

Both *Gauweiler and Others* and *Weiss and Others* illustrate that the ECB enjoys a broad margin of discretion in making monetary policy choices. However, whenever the Court of Justice is called upon to examine the validity of an act adopted by the ECB, it will verify that institution's competence, taking due account of the restrictions imposed by the TFEU on the ECB's actions, notably by Article 123 and 125 TFEU. In so doing, the Court of Justice provides for an important constitutional check on the exercise of the EU's powers in the area of monetary policy, the initial impulse for such a check generally arising from measures taken at national level implementing, or sometime preparing for, acts of the ECB.

4 The jurisdiction of the Court of Justice and that of national courts in EMU matters

The interaction between the decisions of the ECB and such national decisions is of particular interest, since it highlights the division of competences between EU and national courts.

In *Berlusconi and Fininvest*, for example, the question of jurisdiction was raised by the Italian Consiglio di Stato, which asked the Court of Justice whether it is for the national courts or the EU Courts to review the legality of decisions to initiate proceedings, measures of inquiry and proposals for a final decision, adopted by a

56 ibid., paras 56, 57, 78, 84 and 87.

57 ibid., paras 116 and 117.

58 ibid., para 163.

competent national authority, in this case the Banca d'Italia, in an authorisation procedure relating to the acquisition of a qualified holding in a banking institution.[59]

The facts of the case were as follows: In the context of the acquisition of Mediolanum by Banca Mediolanum, as a result of which Fininvest – which already held 30% in Mediolanum before the acquisition – became the owner of a qualifying holding in a credit institution, the Banca d'Italia and the ECB took the view that an application for authorisation to acquire a qualifying holding was necessary. As no application had been submitted, the Banca d'Italia drafted a decision, which contained an adverse opinion as to the reputation of the acquirers and invited the ECB to oppose the acquisition. Subsequently, the ECB adopted a final decision opposing that acquisition. It found, in particular, that there were justified doubts as to the acquirers' reputation because Mr Berlusconi had been convicted of tax fraud and, like other members of Fininvest's management bodies, had committed other irregularities. Mr Berlusconi and Fininvest challenged the ECB's decision before the General Court.[60] At the same time, they challenged that draft decision before the Consiglio di Stato, which requested the Court of Justice for a preliminary ruling.

In its judgment, the Court of Justice held that, in case of an involvement of national authorities in the course of a procedure, such as that at issue in the main proceedings, which leads to the adoption of an EU act, the EU Courts have exclusive jurisdiction not only to rule on the legality of the final decision adopted by the EU institution, in this case the ECB, but also to examine any defects vitiating the preparatory acts of the national competent authority, such as the Banca d'Italia, that could be such as to affect the validity of the final decision.[61]

The recent *Rimšēvičs and ECB* v *Latvia* case is another example of proceedings that were constitutional in nature, and in which the jurisdiction of the Court of Justice to review the lawfulness of an act of national law was at stake.[62]

In that case, Latvia's Anti-Corruption Office had taken the decision to suspend provisionally from office Mr Rimšēvičs, Governor of Latvijas Banka, on the basis of criminal charges brought against him. Both Mr Rimšēvičs and the ECB challenged that decision.

Thus, the Court of Justice was called upon, for the first time, to hear a case based on Article 14, point 2, of the Statute of the ESCB and of the ECB ('Statute').

In order to guarantee the independence of the governors of the national central banks, who are automatically members of the Governing Council of the ECB,[63] that provision grants the governor of a national central bank the right to bring an action before the Court of Justice against a decision of an authority of a Member State to remove that governor from office. The Court of Justice has jurisdiction to verify, in the

59 Case C-219/17, *Berlusconi and Fininvest*, EU:C:2018:1023.

60 The action for annulment brought before the General Court has been stayed pending the outcome of the reference for a preliminary ruling in Case C-219/17.

61 ibid., para 57.

62 Joined Cases C-202/18 and C-238/18, *Rimšēvičs and ECB v Latvia*, EU:C:2019:139.

63 Article 10, point 1, of the Statute of the ESCB and the ECB.

context of such proceedings, the lawfulness of the removal at issue, including its conformity with the conditions for removal set out in Article 14, point 2, of the Statute.

Recalling that 'the ESCB represents a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails',[64] the Court of Justice ruled that 'a decision taken by a national authority relieving one of those governors from office may be referred to the Court',[65] even if that removal is in principle temporary.[66]

In its judgment, the Court of Justice stated that the underlying rationale of the remedy based on Article 14, point 2, of the Statute is the annulment of an act of national law relieving a governor of a national central bank from office. That specific form of action thus derogates from the general distribution of powers between the national courts and the EU courts as provided for by the Treaties and in particular by Article 263 TFEU, in order to reflect the highly integrated system which the authors of the Treaties envisaged for the ESCB.[67]

The Court of Justice further stressed that its own jurisdiction under Article 14, point 2, of the Statute cannot replace that the national courts having jurisdiction to rule on questions of criminal liability of the governor involved, nor can it interfere with the preliminary criminal investigation being conducted by the competent administrative or judicial authorities.

However, the Court of Justice confirmed that it has jurisdiction under Article 14, point 2, of the Statute to verify whether there is sufficient evidence of serious misconduct capable of justifying removal from office of a national central bank's governor.

In that particular case, the Court of Justice noted that Latvia had not provided any evidence supporting the view that the accusations made against Mr Rimšēvičs were well founded.

Consequently, the Court of Justice's Grand Chamber annulled the national decision at issue 'in so far as it prohibits Mr Rimšēvičs from performing his duties as Governor of the Central Bank of Latvia'.[68] The annulment of the national act by the Court of Justice was considered to be a 'constitutional moment' for the development of EU law by one of the lawyers acting on behalf of the ECB in that case.[69]

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64 Joined Cases C-202/18 and C -238/18, *Rimšēvičs and ECB* v *Latvia*, EU:C:2019:139, para 69.

65 ibid., para 70.

66 ibid., para 55.

67 ibid., paras 69 and 70.

68 ibid., para 97.

69 Sarmiento (2019).

5 Conclusion

EMU is a political project of fundamental importance to the European Union that has led to greater integration among those Member States that have participated in it and, in doing so, has generated considerable economic efficiencies within the internal market. The euro area crisis was, however, a severe setback that called into question the very existence of the monetary union.[70] In the context of the EU's response to that crisis, EMU has undergone a rigorous overhaul, the consequences of which have, in certain respects, led to significant institutional developments that go beyond traditional conceptions of the EU's constitutional framework. In particular, the exercise of jurisdiction by the Court of Justice, albeit in certain limited situations, in respect of acts adopted by national authorities is a new departure for EU law, but one which is, in certain circumstances, both necessary and fully justified by the primary law provisions that are applicable.

The Court of Justice, together with the courts and tribunals of the Member States, have also been called up to safeguard respect for EU primary law in the context of that same crisis. This required the Court of Justice, first and foremost, to strike a balance between, on the one hand, the ECB's independence under the Treaties and, on the other hand, its accountability to act in accordance with its mandate to maintain price stability.[71] The focus of the Court of Justice on the proportionality of the policy measures adopted to the contingencies that they were designed to meet was also of pivotal importance to that safeguarding of the constitutional architecture of EMU.

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[71] Dawson, Bobić and Maricut-Akbik (2019), p. 93; Lenaerts (2014), p. 753; Baroncelli (2014).

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Concluding synopsis

Chiara Zilioli[1]

Introduction

The theme of the 2019 ECB Legal Conference and of this volume is **building bridges**. Bridges are a defining element of the Frankfurt landscape, where the ECB has its seat. They connect the River Main, allowing residents and visitors to look up and appreciate the view of the Frankfurt skyline (a sign of financial integration), or look down at the cargo boats bringing goods from the Atlantic to the Black Sea (a sign of economic integration).

Bridges are also the key symbols on euro banknotes. These are not representations of real bridges made of concrete or limestone: they are idealised images showcasing architectural styles from various periods in Europe's history. These "euro bridges" belong to us all and represent the robust links between 19 sovereign states and their diverse legal frameworks that the single currency has built over the twenty years since its inception, supporting the principles of free movement that underpin the Single Market.

The past twenty years have witnessed an intense process of legalisation of European central banking through the Union legislator, through the courts, through academia, through practitioners, through our Legal Committee and through the media. This process of legal integration has been the subject of study and discussion in the 2019 ECB Legal Conference and in this book.

Overview of the contributions

In his contribution, our Executive Board member **Yves Mersch** analyses privately issued currencies, with a particular focus on Libra and the importance of trust in a currency. He recalls two essential points. First, money is a public good. And second, money can only fulfil its key functions if it is backed by an independent and accountable public institution, which itself enjoys public trust. He also cautions against the inevitable conflicts of interest when private institutions get involved in such public goods, particularly those who might hold a questionable track record when it comes to protecting data and democracy. His contribution hints that much of our work over the coming months and years will entail being vigilant that financial innovation does not take us "a bridge too far".

The second part of this volume is dedicated to the standard of review of central bank decisions. **Peter Huber**, Judge at the German Federal Constitutional Court, outlines

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the three key instruments applied by that Court to assess the framework of European integration: identity control, ultra vires control, and fundamental rights control. We learn that, particularly over the past thirty years, the German Federal Constitutional Court has seen its role as an instrument to ensure the democratic legitimisation of the EU and to ensure that independent institutions and bodies can be held to account.

Lars Bay Larsen, Judge at the European Court of Justice, emphasises that the Court of Justice does not have a different standard of review depending on the field of policy. Rather, the standard of review will depend on how prescriptive the Treaty drafters (or the legislators) were when conferring competence on an institution. So where a certain margin of appreciation has explicitly been granted to a Union institution, the Court will seek to respect this discretion. Likewise, when confronted with delicate or complex questions requiring a high degree of technical expertise, or where policy choices have to be made by the authority in charge, then the Court's standard of review will take this into account. By contrast, where private interests and fundamental rights are affected, the Court will engage in more detailed scrutiny. Judge Bay Larsen also mentions that his experience in Denmark and Luxembourg is that judges do not want to gain political power and competences but to focus on their legal scrutiny role only.

Stefanie Egidy encourages us to build a bridge across the Atlantic to apply or at least bring into the discussion the experience from the United States (US) courts. She notes that the US courts adjust their standard of scrutiny depending on the nature of the central bank action. Monetary policy is considered non-justiciable: the US courts employ deliberate and total deference in order to protect the independence of the Federal Reserve System in respect of monetary policy. However, the US courts engage in a more intense review when it comes to the peripheral competences of the Federal Reserve, that is, at the outer bounds of its independence, including in proceedings related to transparency and access to documents. With regard to the Federal Reserve's supervisory and regulatory powers, the US courts' scrutiny focuses on compliance with procedural requirements, rather than intervening on substance, thereby also exercising deference.

The comparative perspective of this part gives us much food for thought and material for further discussion. In particular, putting the different approaches of the different courts, national, EU, and US, under the spotlight shows the relativity and nuances involved in this important issue of the intensity of judicial review of central banking activities.

The third part looks at the autonomy of interpretation of Union law by the Court of Justice of the European Union. This part of the book seeks to build a bridge between the rulings of the Court of Justice in *Achmea*[2] and in Opinion 1/17 on CETA[3], which – at first glance – appear to send mixed messages.

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2 Case C-284/16, Achmea, EU:C:2018:158.

3 Opinion 1/17 of 30 April 2019, EU:C:2019:341.

François Biltgen, Judge at the European Court of Justice, leads us through the development of the concept of autonomy of EU law from Opinion 2/13 (*Accession to the ECHR*)[4] to the rulings of the Court in *Achmea* and Opinion 1/17 (*CETA*). On the one hand, the Court in the *Achmea* case maintained that the dispute settlement mechanism in the bilateral investment treaty could not be compatible with the autonomy of the EU legal order. By contrast, the Court in the *CETA* opinion did not find such concerns when it came to the dispute settlement mechanism in that EU trade agreement.

Panos Koutrakos offers an "anatomy of autonomy", delving deeper into the principle of autonomy from a critical perspective. He selects some basic themes that have determined the development of the principle and shed light on its future. **Aude Bouveresse** adds an additional piece to the puzzle, proposing that bringing the concept of autonomy to its logical conclusion may even result in subordinating the Court itself to its prescriptions.

In brief, it is clear from this part that the rulings of the CJEU in *Achmea* and *CETA* can be reconciled to form a logical strand of Union case-law. First, the two cases had very different underlying factual scenarios. And second, they must be understood in the light of the Court's pragmatism in the context of multilateral trade agreements. In any event, this part contributes a thorough examination of this line of case-law. I expect that these discussions will become all the more relevant as the EU starts to look towards future cooperation with the United Kingdom. Whatever the nature of any post-Brexit trade agreement, ensuring the autonomy of Union law will be essential.

The fourth part discusses the application of national law by the ECB. Vice-President **Luis de Guindos** notes that there are three main sources of national regulatory divergence affecting the functioning of the Single Supervisory Mechanism (SSM) today: (1) the "minimum harmonisation" approach of EU directives; (2) the divergent exercise by the Member States of options and discretions that are explicitly included in EU legislation; and (3) different national legislation that has not been subject to EU harmonisation. From the intense debate surrounding this issue, it is clear that we are trying to build a bridge over troubled legal waters when it comes to the application of directives, and their national implementing measures, by the ECB.

The question of whether the ECB would be obliged to apply a national implementing rule that goes against EU law – or whether it would be possible to directly apply the provision of the respective directive – requires careful consideration. One can even question whether the very reason for the adoption of directives, balancing EU policy with the national room for discretion, still has a raison d'être today, now that banking supervision is conducted at European level and the institution in charge is the ECB. However, even if the silver bullet of replacing directives with regulations might be the ideal solution, it does not come without its own legal challenges. Moreover, it would take time and political will. And banking supervisors cannot wait.

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[4] Opinion 2/13 of 18 December 2014, EU:C:2014:2454.

Until then, and in case a Member State has not implemented an obligation contained in a directive, or has done so incorrectly, is the ECB obliged simply to apply nothing at all in the first case, and the incorrect national provision in the second? **Karen Banks**, in her contribution, investigates these questions from different perspectives. I share the view that Article 4(3) of the SSM Regulation[5] has to be interpreted as meaning that the ECB must apply national law only to the extent that it is compatible with Union law, and where it is not compatible, it must apply those provisions of EU law which are capable of being directly applied or of producing direct effect.

Miro Prek addresses the question of the relevance of the interpretation of national courts for the EU judiciary. Is the General Court entitled to depart from the case-law of national courts, when it needs to interpret national law, if it were found to be contrary to the relevant EU law? According to Miro Prek, the General Court should be entitled, if this is necessary, to depart from the interpretation of the national courts and even to set aside a national legislation if it is contrary to the relevant EU law. However, such powers should be exercised in a manner as deferential as possible towards the competence of national courts.

Fabian Amtenbrink focuses on two aspects linked to the application by a Union institution of national law that touch upon fundamental aspects of European legal doctrine: the direct application by the ECB of directives that have been inadequately implemented into national law and the exercise of public power by the ECB that is at least partially rooted in national law. Starting from these points, he offers a way to revisit basic themes of EU law, such as the democratic legitimacy of supervisory authority.

The fifth part does not discuss the building but the tearing down of bridges. It discusses extraterritorial sanctions, particularly the secondary sanctions imposed by the United States, and how these stretch both the understanding of permissible extraterritoriality under international law and the patience of the United States' global partners. This part also discusses how the United States seek to use the international reliance on the dollar – and the need to settle dollar transactions through the United States – to extend its influence far beyond its shores. **Annamaria Viterbo**, who extensively analyses these issues from the perspective of public international law, even suggests this is like dynamite being strapped to the bridges of global cooperation.

Lucio Gussetti of the European Commission discusses EU re(actions) in this context, such as the EU's Blocking Statute and the recent INSTEX initiative in support of trade exchanges, which can go some way to counteract US sanctions and facilitate the continuation of global trade. But these initiatives can only go so far. Lucio Gussetti makes the tantalising suggestion that the ECB could play a greater role, offering an alternative way to facilitate trade through TARGET2. However, **Benoît Cœuré** underlines the challenges we would face in linking such a foreign policy role to the ECB's mandate.

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5 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

The sixth part of the Book focuses on the topic of transparency, confidentiality and exchange of information between authorities. As also noted by **Christian Kroppenstedt**, one of the key takeaways from this part is the broad agreement that independence and accountability are inseparable and mutually reinforce each other. And that accountability is only truly effective if it is matched with the appropriate level of transparency.

Päivi Leino-Sandberg approaches the principles of accountability, independence and effectiveness through the perspective of public access to documents of the ECB and explores the possible ways of their combination and reconciliation. It is emphasised that the transparency that flows from the ECB's dedicated public access regime should not be reduced to a tool for damage control, as a communication exercise, or as an exercise in managing our public image. It is much more than that, and it is beneficial for both the ECB and the citizens of Europe as an accountability instrument.

Frank Elderson rightly points out that the bridges between Union institutions, and between them and national bodies, are built on the principle of mutual sincere cooperation. His contribution puts the spotlight on the relationship between the ECB, the European Court of Auditors and state auditors, with the European Parliament and national parliaments, as well as with national courts. Hearings before the European Parliament (and national parliaments) offer democratic accountability and allow the President of the ECB or the Supervisory Board Chair to explain the ECB's work and its choices.

Likewise, the ECB's cooperation with the European Court of Auditors – particularly now that we have agreed on information-sharing arrangements through a Memorandum of Understanding[6] – offers a further channel of accountability, as a counterpart to the ECB's independence, as **Francesco Martucci** explains.

Of course, the big challenge the ECB faces when it comes to accountability and transparency is to find the right balance between protecting the highly sensitive data which form the basis for ECB decisions – information that could move markets and impact banking groups – and explaining and giving grounds for our actions. We continue to learn how to conduct this delicate balancing act, and discussions and reflections on this matter help us enormously in that task.

The confidentiality of information was also highlighted in the context of the seventh part, on memoranda of understanding (MoUs) as an instrument of Union law. **Roberto Ugena** notes that, when it comes to MoUs on supervisory cooperation, we have to ensure that information exchanged between authorities is treated with the appropriate care and professional secrecy. This is relevant not only regarding national and EU authorities, but also regarding third-country authorities. In all cases,

[6] Memorandum of Understanding between the ECA and the ECB regarding audits on the ECB's supervisory tasks, 9 October 2019.

the provisions of Union law on professional secrecy – in particular the CRD IV[7] – must be upheld.

Of course, the key discussion on MoUs dealt with the taxonomy of MoUs and their legal nature. Particularly meaningful is **Alberto de Gregorio Merino**'s metaphor of the scientific definition of MoUs as a volatile material, somewhere between a liquid and a gas. He notes that there are different types of MoUs: interinstitutional agreements; MoUs between the Union and its Member States; MoUs between Member States; and MoUs in the field of economic policy and financial assistance. That MoUs are often considered soft law does not mean they always lack normativity. They may be subject to the control of courts, and case-law shows us that MoUs will be subject to a high standard of justiciability by the Court of Justice. Two of his examples are very relevant for MoUs in respect of financial assistance: *Florescu*[8] and *Ledra*[9].

Dariusz Adamski suggests that the standard of review may be less intense when it comes to administrative arrangements entered into by European authorities – either with EU, national or third-country authorities. By contrast, he explains that the courts have intervened in respect of so-called strict conditionality MoUs but nevertheless have given a broad margin of discretion to the authorities which adopted these highly sensitive texts at the height of the financial crisis.

The eighth part of the book is dedicated to the concept of "close cooperation" in the SSM. This topic is in its infancy – indeed, it is like a baby, expected, but not yet born, which will eventually arrive, and we will have to learn how to nurture and care for it. But, as with all babies, it comes with a great promise. As **Andrea Enria** notes, close cooperation bridges the gap between the euro area and the rest of the EU and, by strengthening unity, it better equips Europe to fend off future crises.

In that respect, **Rosa Lastra** emphasises the legal novelty of close cooperation, as set out under the SSM Regulation, which brings with it legal challenges. Her contribution sets the scene, giving an excellent account of the legal framework of close cooperation and also discusses the pros and cons of opting-in and staying out.

Niamh Moloney outlines how the ECB could seek to exercise its responsibilities in its relationship with the authorities of Member States that have entered into close cooperation, highlighting the risks and weakness of the arrangement, including when it comes to questions of legitimacy. She underlines that we should not shy away from finding solutions through good cooperation at peer level, within the joint supervisory teams, and not just at the level of the decision-making bodies.

Jens-Hinrich Binder guides us through the unchartered territory of close cooperation with the Single Resolution Mechanism (SRM). He makes the point that

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7 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176 27.6.2013, p. 338).

8 Case C-258/14, Florescu, EU:C:2017:448.

9 Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising v Commission and ECB, EU:C:2016:701.

the regime is not a “copy paste” of the SSM, and we are not yet there in terms of the maturity of the framework. In that respect, close cooperation with the SRM is an even smaller baby. We will still have a lot of work to do to make it a stable construction.

The ninth part of this book is dedicated to the Administrative Board of Review (ABoR). **Sir William Blair** introduces this Part, discussing the defining elements of the ABoR itself as well as other similar administrative review panels. **Concetta Brescia Morra** elaborates on the nature and role of the ABoR, paying particular attention to the scope of the ABoR review. Her contribution frames the elements that make the ABoR a critical piece of the bigger picture drawn by the European legislative bodies to ensure the accountability of an institution, on which crucial public powers were conferred.

René Smits delves deeper into the aspects of the ABoR review which add overall value to the prudential supervision carried out by the ECB. His contribution connects the ABoR to the intense contemporary debate on the rule of law, discussing the acknowledgement by the CJEU of the value of ABoR opinions in assessing the reasoning of subsequent ECB decisions but also transparency, a critical element of the rule of law, especially in the form of access to supervisory files.

Marco Lamandini and **David Ramos Muñoz** explore other comparable appeal panels established to review decisions of the European Supervisory Authorities and the Single Resolution Board and suggest further improvements in the setup of such quasi-judicial bodies within the Union. Their analysis shows that appeal bodies in the field of financial services do seemingly offer a quick remedy, with the benefits of procedural flexibility and technical expertise. Yet, some weaknesses are also exposed, which, if reformed, would enhance the Board of Appeal’s and Appeal Panel’s supporting role to Union courts.

Finally, **Dacian Dragos** provides a comparative overview of alternative dispute resolution bodies and administrative review boards at national level and discusses their effectiveness in prompt dispute resolution. His contribution adds important insights from national experience into the picture, which are extremely useful when interpreting and assessing the EU experience with these institutions.

The tenth part of this book brings it to a close with the contribution of the President of the CJEU, **Koen Lenaerts**. He offers an authoritative account of the constitutional perspective of the Court and the Economic and Monetary Union (EMU) and an extensive overview of the Court’s contribution to the development of EMU. His contribution brings to the foreground all the important pieces the Court has contributed in building and securing the impressive construction of EMU. Civil engineers may build us bridges of stone and steel, but they cannot compare with the jurisprudence of the Court of Justice, which builds bridges through legal scholarship and intellectual might. The recent judgment in *Rimšēvičs*[10], overcoming the barrier

[10] Joined Cases C-202/18 and C-238/18, Rimšēvičs v Latvia, EU:C:2019:139.

between the EU and the national legal system, is certainly one such important bridge.

Some acknowledgments

This book, and the 2019 ECB Legal Conference on which it is based, would not have been possible without our panellists and contributors and without the participants in the two-day event we hosted in September, who generously contributed their expertise in lively discussions. I would particularly like to thank our patron, Yves Mersch, for his passion and investment in legal issues.

Sincere thanks are due to Michael Ioannidis, who organised this year's Conference and took care of the timely preparation of this book. Michael is not only an excellent lawyer in the ECB's Institutional Law Division, but an excellent academic in his own right. He worked tirelessly to put this programme together and to keep everything running smoothly. Michael was supported in the preparation of the Conference and of the book by two colleagues in the Legal Groups team – Tončica Radovčić and Germán Gómez Ventura. Their dedication, energy and attention to detail always impresses me. The publication of this book in such a short time would not have been possible without the dedicated support of Susanne Buchinger (DGC/WDI).

Last but not least, I would also like to thank a number of other colleagues in Legal Services and in administration who in the two days of the Conference ensured its flawless run and in the process of producing and editing the book contributed their skills and their knowledge – I will not name them all individually, but I am very grateful for their commitment and enthusiasm.


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Contributors

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Karen Banks

Karen Banks is Deputy Director-General of the Legal Service of the European Commission. Prior to that, she was Director responsible for running the Legal Service's AGRI-FISH team. She has also worked in the areas of competition law, social law, intellectual property and the external relations aspects of EU law. Some of the more notable court cases in the area of equal opportunities in which Karen

represented the Commission before the Court of Justice were McDermott and Cotter (Case C-377/89) and Emmott (Case C-208/90). She also represented the Commission in the seminal case of Francovich and Bonifaci (Joined Cases C-6/90 and C-9/90), which established the possibility for an individual to bring an action for damages against a Member State where s/he has been damaged by its failure to implement a directive in national law. Karen was one of the Commission's agents in Case C-73/14, Council v Commission, in which the Court clarified the Commission's role in representing the EU before an international tribunal. Ms Banks took her first law degree in Dublin in 1978 (University College Dublin) and a master's degree at the London School of Economics in 1982. She worked as a solicitor in general practice before joining the Commission.

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Lars Bay Larsen has been a judge at the European Court of Justice since 11 January 2006. Mr Larsen worked at the Danish Ministry of Justice between 1983 and 1985 before moving to the University of Copenhagen, where he began as a lecturer in family law in 1984 and became an Associate Professor in 1991. He was called to the bar the same year. He served as Head of Section at the Danish Bar Association during the years 1985-86, and returned to the Ministry of Justice in 1986 as Head of Section, going on to positions as Head of Division (1991-95), Head of the Police Department (1995-99) and Head of the Law Department (2000-03). He was Denmark's representative on the K4 Committee (1995-2000), in the Schengen Central Group (1996-98) and on the Europol Management Board (1998-2000). He was a judge at the Supreme Court of Denmark from 2003 to 2006. Mr Larsen was born in 1953 and was awarded degrees in political science (1976) and law (1983) from the University of Copenhagen.

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François Biltgen is a judge at the European Court of Justice. Born in 1958, he began his career in 1987 as a lawyer at the Luxembourg Bar after obtaining a master's degree in law (1981) and a diploma of advanced studies in community law from the University of Law, Economics and Social Sciences, Paris II (1982), and graduating from the Institut d'études politiques de Paris (1982). In 1987, he was elected Municipal Councillor of the town of Esch-sur-Alzette. He became a Deputy in the Chamber of Deputies of Luxembourg in 1994, and was elected Deputy Mayor of Esch-sur-Alzette in 1997. In the years 1994-99, he served as alternate member of the Luxembourg delegation to the Committee of the Regions of the European Union. He held a series of ministerial positions in the Government of Luxembourg between 1999 and 2013, including Minister for Labour and Employment, Minister for Justice, Minister for the Civil Service and Administrative Reform and Minister for Higher Education and Research. Before becoming a judge at the European Court of Justice on 7 October 2013, Mr Biltgen was Joint President of the Ministerial Conference of

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Sir William (Bill) Blair is a former Judge of London's Commercial Court whose expertise is in commercial and financial law and dispute resolution. Professor of Financial Law and Ethics at the Centre for Commercial Law Studies, Queen Mary University of London, he served as a High Court Judge in England and Wales for nearly ten years, and was Judge in Charge of the Commercial Court from 2016. He helped to establish the specialist Financial List, and the Standing International Forum of Commercial Courts. He was the first President of the Board of Appeal of the European Supervisory Authorities. In 2018, he was appointed Chair of the Bank of England's Enforcement Decision Making Committee (EDMC) as well as to the International Commercial Expert Committee of the Supreme People's Court of the People's Republic of China. Sir William sits as an arbitrator and is a member of the LCIA and is listed on the BAC's Panel of Arbitrators (Beijing Arbitration Commission). He gives consultative and independent advice, expert evidence on English law, and is a CEDR qualified mediator. He has served on missions for the World Bank, the IMF, and the Asian Development Bank. His current research interests include fintech, financial crime and financial inclusion. He has an interest in the UN Sustainable Development Goals, and chairs the Law and Ethics in Finance Project, an informal group concerned with raising standards in the financial sector.

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Benoît Cœuré has been a member of the Executive Board of the European Central Bank since 1 January 2012. He is responsible for International and European Relations and Market Operations. He has been the Chairman of the Committee on Payments and Market Infrastructures of the Bank for International Settlements since October 2013. Prior to joining the ECB, he served in various policy positions at the French Treasury. He was the Deputy Chief Executive, then Chief Executive, of the French debt management office, Agence France Trésor, between 2002 and 2007. From 2007 to 2009, he was France's Assistant Secretary for Multilateral Affairs, Trade and Development. From 2009 to 2011, he was Deputy Director General and Chief Economist of the French Treasury. Mr Cœuré is a graduate of the École polytechnique in Paris. He holds an advanced degree in statistics and economic policy from the École nationale de la statistique et de l'administration économique (ENSAE) and a BA in Japanese. He is an affiliate professor at Sciences Po in Paris. He has authored articles and books on economic policy, the international monetary system and the economics of European integration; these publications include Economic Policy: Theory and Practice, Oxford University Press, new edition published in 2018 (with Agnès Bénassy-Quéré, Pierre Jacquet and Jean Pisani-

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Luis de Guindos has been Vice-President of the ECB since 1 June 2018. In this capacity he is also a member of the Executive Board, the Governing Council and General Council of the ECB. From 2011 to 2016 he was Minister of Economy and Competitiveness, and from 2016 to 2018 Minister of Economy, Industry and Competitiveness, of Spain, before which he was Secretary of State for Economic Affairs and a member of the Economic and Financial Committee of the EU. Prior to that, he was Secretary General for Economic and Competition Policy (2000-02) and Director General for Economic and Competition Policy (1996-2000). Mr de Guindos was Head of Financial Services at PricewaterhouseCoopers (2008-09) and Director, IE Business School and PwC Center for the Finance Sector (2010-11). He was Chief Executive Officer Iberia at Lehman Brothers and Chief Executive Officer at Nomura Securities (2006-08). He obtained a BSc in Economics from Colegio Universitario de Estudios Financieros (CUNEF) in Spain (1982) and graduated as State Economist and Trade Expert (1984).

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Frank Elderson, born in 1970, has served as an Executive Director of De Nederlandsche Bank since 1 July 2011. In that capacity he is currently responsible for banking supervision, horizontal supervisory functions and legal affairs. He is a member of the ECB’s Supervisory Board. Mr Elderson has participated as an observer in the EU High-Level Expert Group on Sustainable Finance. He is the chairman of the Central Banks and Supervisors Network for Greening the Financial System, and of the Platform for Sustainable Finance in the Netherlands. Before joining De Nederlandsche Bank’s Executive Board, Mr Elderson served as Head of its ABN AMRO Supervision Department (2006-07), Director of its Legal Services Division (2007-11) and its General Counsel (2008-11). He received his professional training as an attorney with Houthoff Advocaten & Notarissen from 1995 to 1998. He studied at the University of Zaragoza, and graduated in Dutch law at the University of Amsterdam in 1994. He obtained an LL.M. degree at Columbia Law School, New York, in 1995.

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Andrea Enria took office as the Chair of the Supervisory Board of the ECB in January 2019. He was previously Chairperson of the European Banking Authority (from March 2011), Head of the Supervisory Regulations and Policies Department at the Banca d’Italia, and Secretary General of the Committee of European Banking Supervisors. He also held the position of Head of the Financial Supervision Division at the ECB. Before joining the ECB he worked for several years in research and in

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ISSN	2467-0049 (print)	DOI	10.2866/45956 (print)
ISSN	2467-0057 (pdf)	DOI	10.2866/14011 (pdf)
ISBN	978-92-899-3968-3 (print)	EU catalogue No	QB-BX-19-001-EN-C (print)
ISBN	978-92-899-3967-6 (pdf)	EU catalogue No	QB-BX-19-001-EN-N (pdf)