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THE EUROPEAN CENTRAL BANK

*Chiara Zilioli and Phoebus Athanassiou**

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I. Introduction

The provisions on Monetary Union (MU),[1] of the Treaty on the functioning of the European Union (TFEU or the Treaty), as well as the Statute of the European System of Central Banks and of the European Central Bank (the Statute), are important in their own right, and are amongst those from which any student of the European Union (EU) can learn a great deal with regard to the EU.

First, MU constitutes the most advanced model of European integration to date. It is an area of exclusive EU competence, exercised by what probably is the best example of a truly supranational body namely, the Governing Council, which acts by simple majority on a 'one member, one vote' basis, and decides solely with the interests of the eurozone in mind. At the same time, MU is a living example of how even policies that are of the essence to the EU and

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[1] Even though contained in the same Treaty chapter, the differences between the provisions on Economic Union (where the competence for economic policy mainly remains at the national level) and those on Monetary Union (where the competences on monetary policy have been transferred by the participating Member States to the ECB, which is to exercise them as an exclusive EU competence) are such that we prefer, in this chapter, to refer only to the provisions on Monetary Union.

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its gradual integration can advance with only some of the EU Member States on board: it is the best and most far-reaching example of differentiated integration (a feature that is inherent in its governance structure) but, also, a benchmark of the strengths and limitations of that particular model of integration. Finally, MU is perhaps the only successful example in history of a voluntary transfer of sovereignty from a number of Member States to a supranational organization that has managed to withstand so profound a financial crisis. The ECB's reputation and credibility have substantially contributed to the success of MU and it is no doubt on account of this reputation and credibility that the EU Council decided, in June 2013, to assign to it yet another very challenging task: that of the prudential supervision of credit institutions in the eurozone and beyond.

Secondly, the ECB is not only the youngest of all the EU institutions but, also, one of its most outstanding. As explained in this chapter, the ECB has a number of institutional differences from other EU institutions, attributable to its special role within the EU but, also, internationally; and it is endowed with strong independence guarantees under the Treaty. Since the advent of the Lisbon Treaty, its cooperation with other EU institutions has been enhanced, but its statutory independence has been preserved.

Last but not least, the Treaty has not assigned the monetary policy tasks to the ECB alone but, instead, to the Eurosystem: this complex construction of, at the moment, twenty legal persons has proven itself capable of working well, despite occasional differences of opinion. Understanding the way in which the Eurosystem works, and the institutional implications for the ECB and the national central banks is both interesting and edifying for any student of EU law.

This chapter will briefly touch upon these issues and more, with a view to providing, for the benefit of the readers, as comprehensive an overview of the ECB and the Eurosystem as the confines of this chapter will allow.

II. Institutional Framework of the European System of Central Banks, the Eurosystem, and the ECB

A. ESCB and Eurosystem

The European System of Central Banks (ESCB) was set up by the Treaty establishing the European Communities (TEC) and by the Statute, annexed to the Treaty as a Protocol and forming an integral part thereof.[2] In contrast to the ECB and national central banks, the ESCB, which is composed of the ECB and of the national central banks of the twenty-eight Member States of the EU, has no legal personality and no decision-making bodies of its own: it is for the ECB to determine, through its supranational decision-making bodies, which 'govern' the ESCB and the Eurosystem,[3] how the various tasks to be carried out through the Eurosystem are to be performed, whether directly by the ECB or through the national central banks, in accordance with the principle of decentralization of operations.[4]

[2] Because the ECB (as well as the Eurosystem and the ESCB) are creations of the Treaty, the powers they enjoy are powers conferred by primary law, granted thereto by the Treaty rather than delegated thereto by other Union institutions. This feature distinguishes the ECB from the various decentralized agencies of the Community (eg the European Environment Agency, European Union Intellectual Property Office etc), which possess their own legal personality but whose competences have been delegated to them by the Union institutions.

[3] Article 8 of the Statute.

[4] This is the principle whereby, to the extent possible and appropriate, the ECB shall have recourse to NCBs to carry out operations which form part of the tasks of the Eurosystem. In order to ensure that decentralization does not hamper the smooth functioning of the Eurosystem, NCBs have to act in accordance with ECB Guidelines and ECB Instructions, as the 'operating arms of the ECB'. Where operations can be carried

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The Treaty has assigned monetary policy tasks only to the ECB and the national central banks of the Member States that have adopted the euro. Therefore, the term 'Eurosystem' has been coined by the Governing Council of the ECB,[5] and subsequently incorporated in the Lisbon Treaty,[6] to describe, in a more transparent way, the more limited composition in which the ESCB performs its tasks under the Treaty and the Statute, ie the composition under which the 'central bank of the euro' operates. The Eurosystem comprises the ECB and the national central banks of the nineteen Member States (since 1 January 2015) that have adopted the euro and transferred to the Eurosystem their sovereignty with regard to the definition and implementation of their monetary policy.

The euro is the currency of the MU.[7] Some of the EU Member States have chosen not to participate in MU, despite participating, as EU members, in the Single Market. The merit of differentiated integration lies in the ability to facilitate a continuous advance towards an ever closer Union of the 'willing', while not damaging the integration achieved through the Single Market with the 'non-willing'. In this case, it is the Treaty that has already established the differentiated governance structure for the two groups, and this has proven to function well. Since monetary policy is only shared among the 'willing', apart from a brief analysis in paragraph II.C(5)(c) of the limited tasks of the General Council, this chapter will focus on the ECB and the Eurosystem. In the remainder of this chapter, the term 'NCB' shall refer, unless otherwise indicated, to the national central bank of a Member State that has adopted the euro, and whose governor is a member of the Governing Council of the ECB.

B. Objectives and Tasks of the Eurosystem

The Treaty and the Statute have conferred specific competences to the Eurosystem.[8] The basic tasks[9] of the Eurosystem, enumerated in Article 127 TFEU, as well as in Article 3 of the Statute, are the basic central banking tasks of: defining and implementing the Eurosystem monetary policy, conducting foreign exchange operations, holding and managing the official reserves of the Member States, and promoting the smooth operation of payment systems. Different provisions of the TFEU and/or the Statute regulate the remaining Eurosystem tasks, which include the issuance of banknotes, the collection of statistical information, international and European cooperation, the ECB advisory function in the drafting of EU and national financial legislation, and the Eurosystem's contribution to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

Article 2 of the Statute states that: '[t]he primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, it shall support the general economic policies in the Community with a view to contributing to the achievement of the

out more effectively if directly handled by the ECB, the ECB will instead act in a centralized manner. It is noted that the principle of decentralization applies to operations only, while decisions and legislative activities remain centralized. Decentralization applies, in particular, to monetary policy operations, which are routinely conducted by eurozone NCBs with their national counterparties. For a detailed account of the principle of decentralization see section III.C.

[5] The term 'Eurosystem' was originally used unofficially, appearing for the first time in the ECB *Bulletin* of January 1999, 7.

[6] The term Eurosystem appears once in the Treaties, in TFEU art 282(1).

[7] Article 3.4 of the Treaty on European Union.

[8] TFEU art 127 talks of the competences of the ESCB. This provision should, however, be read in combination with TFEU art 139.2(c), according to which art 127.1(3) and (5) do not apply to Member States with a derogation. Therefore, it is clearer and more appropriate to refer to the tasks of the Eurosystem.

[9] For practical guidance on the distinction between the basic and the contributory tasks of the Eurosystem, see para 3.1.3 of ECB Opinion CON/2010/48.

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objectives of the Community … The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources …'. It follows that the TFEU gives clear priority to the maintenance of price stability as the basis of the economic conditions conducive to the achievement of the Eurosystem tasks.

Article 14.4, first sentence, of the Statute acknowledges that the NCBs, unlike the ECB, 'may perform functions other than those specified in [the] Statute …'.[10] In so doing, Article 14.4 recognizes that, for reasons of continuity, the NCBs cannot be precluded from pursuing functions that had historically been theirs, prior to the Eurosystem's inception. Article 14.4, which applies to all NCBs, covers a wide range of non-ESCB-related NCB functions. These include the provision by the NCBs of fiscal agency services to their respective home Member State,[11] the conduct of own portfolio investment operations, banking supervision, and the provision of emergency liquidity assistance to their counterparties.[12] However, the NCBs' freedom to perform functions 'other than those specified in this Statute' is subject to the Governing Council's right to veto their pursuit if and to the extent that these functions interfere with the performance of their Eurosystem tasks. When pursuing their non-Eurosystem functions, the NCBs act as national agencies rather than as agents of the ECB, within the meaning of Article 14.3.[13] Read in conjunction with Article 14.3 of the Statute, Article 14.4 underlines the limited functional autonomy of the eurozone NCBs.

C. The ECB

(1) The ECB's Legal Status and Its Implications

The ECB was established on 1 June 1998. It has legal personality under primary EU law (Article 282(3) TFEU) and it may, therefore, conclude agreements in matters within its fields of competence as well as participate in the work of international organizations such as the International Monetary Fund (IMF), the Bank for International Settlements (BIS), or the Organisation for Economic Cooperation and Development (OECD). A corollary of the ECB's legal personality is the ECB's own liability[14] (differently from other EU institutions, where it is the EU budget that will cover any damages that they or their employees may have caused to third parties). The acts and omissions of the ECB can be reviewed and challenged before the Court of Justice of the European Union (the Court or the ECJ), in line with the

[10] It follows from art 42.1 of the Statute that art 14.4 applies also to Member States with a derogation. However, art 14.4 does not apply to the United Kingdom. See art 7 of Protocol No 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

[11] This function is specifically preserved by art 21.2 of the Statute. The services that central banks have traditionally carried out, in their 'fiscal agent' capacity, encompassed the holding of bank accounts for the government and its various branches or departments; the conduct of specific transactions, on account of the government (eg the sale or purchase of foreign currencies); the extension of temporary (typically, intraday) credit to the government, to be offset by tax-money or by special holdings of liquid government assets with central banks, 'earmarked' for the purpose of offsetting central bank claims arising from the extension of temporary central bank credit to the government; and the raising by central banks of loans, from the public, for the benefit of the government, in exceptional circumstances (including in the event of war or other emergencies).

[12] It is also worth noting that some NCBs may own companies (eg partial ownership of printing works, as in the case of the Banco de España) or real estate (for example the Banca d'Italia, the Bank of Greece and, more recently, the Central Bank of Cyprus); they may perform law enforcement tasks (with an emphasis in the area of banknote counterfeiting); or they may offer limited banking services (eg hold accounts for employees).

[13] Article 14.3 of the Statute provides that: '[T]he national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it'.

[14] TFEU art 340.3.

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third paragraph of Article 340 TFEU, while the ECB also has *jus standi* before the Court for the protection of its prerogatives. In addition, in each of the Member States, the ECB enjoys the most extensive legal capacity accorded to legal persons under national law. It follows that the ECB may, for instance, acquire (or dispose of) movable and immovable property, and be party to legal proceedings. Moreover, the ECB enjoys, in the territories of the Member States, the privileges and immunities necessary for the performance of its tasks, under the conditions laid down in the Protocol on the Privileges and Immunities of the European Communities[15] (as further elaborated, with regard to the Federal Republic of Germany, where the seat of the ECB is located, in the Headquarters Agreement between the ECB and Germany).[16]

(2) The ECB's Place within the EU

The fact that, at the time of its establishment, the ECB had legal personality and a share capital subscribed by, and divided amongst, the NCBs while not being recognized as a fully-fledged Union institution (see below) had, in the early days of the ECB's institutional existence, raised the question of determining its place within the EU legal order.[17]

The ECB differed from the Union institutions in a number of ways. Legally, and unlike the Union institutions, the ECB had its own legal personality. Organically, it was not listed among the Union institutions of former Article 9 of the Treaty on European Union (TEU). Institutionally, its role was distinct from that of the institutions of the supranational 'EC pillar' and specific within that pillar; the ECB had no formal involvement in any of the remaining two 'pillars';[18] on the other hand, both conceptually and functionally, the ECB was a creature of primary Union law, connected to the Union through its pursuit of the same overall policy goals as those pursued by the Union institutions and, like them, a legislator, entitled to adopt, within its fields of competence, regulations and decisions (as well as other legal instruments). Relying on the fact that the ECB owed its existence to the Treaty, the Court concluded in the *Olaf* case[19] that: '[t]he ECB … falls squarely within the Community framework'.[20] The thorny issue of determining the ECB's place within the EU was finally

[15] See OJ L152 (13 July 67) 13, as amended by the Treaty of Amsterdam and the Treaty of Nice.

[16] See https://www.ecb.europa.eu/ecb/legal/pdf/en_headquarters_agreement_final.pdf.

[17] On this debate see C. Zilioli and M. Selmayr, 'The External Relations of the Euro Area: Legal Aspects' (1999) 36 *Common Market Law Review* 273; R. Torrent, 'Whom is the European Central Bank the Central Bank of? Reaction to Zilioli and Selmayr' (1999) 36 *Common Market Law Review* 1229; C. Zilioli and M. Selmayr, 'The European Central Bank: An Independent Specialized Organization of Community Law' (2000) 37 *Common Market Law Review* 591.

[18] The reference is to the two intergovernmental cooperation pillars namely, the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs. The struggle against counterfeiting was probably the only area where there was an overlap between the activities of the ECB and those of some of the institutions of the 'EC pillar'. The pillar structure introduced by the Maastricht Treaty has been eliminated, with the EU having replaced and succeeded to the EC (TEU art 1). Although the parallel existence of several legal frameworks has been eliminated, special decision-making procedures are maintained in certain areas, eg the CFSP.

[19] Case C-11/00 *Commission of the European Communities v European Central Bank* [2003] ECR I-07147. The Court upheld the Commission's action and annulled Decision ECB/1999/5 of 7 October 1999 on fraud prevention. For commentaries on the Court's ruling in the *Olaf* case see O. Odudu, 'Annotation of Case C-11/00 *Commission of the European Communities* v *European Central Bank*, Judgment of 10 July 2003, Full Court' (2004) 41 *Common Market Law Review* 1073; and F. Elderson and H. Weenink, 'The European Central Bank Redefined? A Landmark Judgment of the European Court of Justice' (2003) *Euredia* 273.

[20] The ECJ's reasoning in para 92 of its judgment was that: 'As regards more specifically the ECB, it may be noted in that respect that it is clear from art 8 EC and art 107(2) EC that the ECB was established and given legal personality by the EC Treaty. Furthermore, under art 4(2) EC and art 105(1) EC, the primary objective of the ESCB, at the heart of which is the ECB, is to maintain price stability and, without prejudice to this objective, to lend support to the general economic policies in the European Community, with a view to contributing to the achievement of the objectives of the Community as laid down in art 2 EC, which include an economic and monetary union and also the promotion of sustainable and non-inflationary growth. It follows that the ECB, pursuant to the EC Treaty, falls squarely within the Community framework'.

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resolved with the adoption of the Treaty of Lisbon, which elevated the ECB to the status of a fully-fledged Union institution, on a par with the remaining Union institutions appearing in Article 13 TEU.[21] The duty of mutual sincere cooperation between the Union institutions has, since, unambiguously applied also to the ECB.[22] However, the entry into force of the Treaty of Lisbon has not changed the ECB's legal personality, which remains independent of that of the EU.

(a) The ECB's place in the international arena Article 282(3) TFEU attributes legal personality to the ECB, as a precondition for its participation, with own rights and obligations, in international relations. As a matter of international law, international legal personality of legal persons depends on formal or implicit recognition by other international legal persons. It is therefore not sufficient that within the ECB's 'domestic' legal order (EU law), its claim to international legal personality is largely undisputed.[23] The scope of the ECB's international activities rather depends on whether central banks in third countries, third countries themselves, international organizations, and financial institutions accept to deal directly with the ECB by entering into contracts or agreements with it or by maintaining other forms of cooperative relations with it.

International monetary, financial, and economic relations are, to a large extent, based on pragmatism, and the ECB is, therefore, the natural and sole counterpart for all those who want to deal, whether operationally or politically, with those responsible for Europe's single currency, which is presently the second most important currency in the world.[24] This explains why, very quickly, the ECB has become a party to international agreements with the central banks of third countries, and has assumed the role of contact point and cooperation partner. The ECB has also sent its own representatives on several diplomatic missions to third countries for the purpose of training and technical assistance, it has advised on the technical and economic aspects of MU,[25] and it has also participated in the various financial support programmes for some of the MU Members States of the periphery, as a member of the Troika. The importance of the latter aspect of the ECB's external activities was recognized by the Advocate General in his Opinion in *Gauweiler*[26] and, before that, by the ECJ, in its judgment in *Pringle*,[27] a preliminary reference ruling from the Supreme Court of the Republic of Ireland, and the first ECJ decision to assess the legality of the eurozone response mechanisms to the sovereign debt crisis. The ECJ did not detect, in *Pringle*, any conflict between the ECB's statutory tasks and those allocated to it under the Treaty establishing the European Stability Mechanism (the ESM Treaty), which were 'in line with the various tasks which the FEU Treaty and the Statute of the ESCB [and of the ECB] confer on that institution', given the ECB's primary law task of supporting the general economic policies in the Union, and its right, under Article 23 of its Statute, to establish relations with international

[21] Although mentioned in the TEU, all the actual provisions on the ECB are to be found in the TFEU.

[22] As this duty is without prejudice to the powers of each institution and the procedures set out in the Treaties, its formal application to the ECB post-Lisbon represents no change (see Frankal and others, 'How Will the Treaty of Lisbon Affect EMU' (2007–2008) 2 *European Banking and Financial Law Review* 121, 148). It has been argued that the principle of sincere cooperation (*cooperation loyale/loyale Zusammenarbeit*) among institutions, under TEU art 4(3), could endanger the independence of the ECB. See J. V. Louis, 'The Economic and Monetary Union: Law and Institutions' (2004) 41 *Common Market Law Review* 575, 602.

[23] For the authors that have recognized the international legal personality of the ECB see C. Zilioli and M. Selmayr, 'Recent Developments in the Law of the ECB' [2006] *Yearbook of European Law* 1, fn 362.

[24] ECB, 'The International Role of the Euro' (2014) https://www.ecb.europa.eu/pub/pdf/other/euro-international-role-201407en.pdf?ee5b8a0c0066ecec80924d94524859e8.

[25] For example, the countries of the Gulf Cooperation Council.

[26] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400, Opinion of Cruz Villalón.

[27] Case C-370/12 *Pringle* ECLI:EU:C:2012:756.

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organizations (para 165). In upholding the compatibility with EU law of the tasks allocated to the Commission and the ECB under the ESM Treaty, the ECJ stated 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' (para 161), and that, 'the tasks conferred on the Commission and ECB do not alter the essential character of the powers conferred on those institutions by the EU and the FEU Treaties' (para 162).

The recognition of the international legal personality of the ECB in the United States of America (US) is well developed. The ECB has, since 1998, a permanent representation in Washington DC to maintain contacts with the US authorities, in particular the Federal Reserve System, and the IMF. In 2000, the Board of governors of the US Federal Reserve System formally amended an interpretation of its regulations to confer on the ECB the status of a 'supranational entity', such that US depository institutions receiving deposits from the ECB do not need to hold reserves against those deposits. The most significant development with respect to the recognition of the ECB as an international legal person by the US authorities came on 29 May 2003, when the US president issued an Executive Order, granting to the ECB the privileges, exemptions, and immunities provided to public international organizations, in accordance with the International Organizations Immunities Act of 1945.[28] This was made possible by a law adopted by the US Congress in November 2002[29] to allow for the application of the abovementioned Act to the ECB.

The international legal personality of the ECB has also been recognized in international organizations and fora. The ECB has, since December 1998, an observer status at the IMF, based on Article X of the IMF Articles of Agreement ('Relations with Other International Organisations').[30] Since February 1999, it has also participated in the relevant works of the OECD on the basis of an agreement under Protocol No 1 of the OECD Agreement.[31] Since December 1999, the ECB is also a full member of the BIS.[32] Moreover, the president of the ECB participates regularly on the basis of informal agreements, in all the meetings of finance ministers and central bank governors.[33]

(3) ECB Independence

A credible monetary policy is a necessary precondition for the control of inflationary expectations and the achievement of price stability. One of the prerequisites for a credible monetary policy is central bank independence (CBI),[34] the fundamental tenet of which is that a central bank independent from the political power will 'favour the long term over the short term in its monetary policy decisions',[35] thereby minimizing the possibility of interference

[28] Cf https://www.gpo.gov/fdsys/pkg/FR-2003-06-03/pdf/03-14117.pdf.

[29] 22 USC § 288, 288 f-5.

[30] IMF's Executive Board's Decision No 11875-(99/1) of 22 December 1998, replaced by Decision No12925-(03/1) of 27 December 2002, amended by Decision No 13414-(05/01) of 22 December 2004 http://www.imf.org/external/pubs/ft/sd/index.asp?decision=12925-(03/1).

[31] Cf ECB, 'Annual Report' (1998) 93 and 'Annual Report' (1999) 84.

[32] Cf BIS Press Release No 40/1999E of 8 November 1999 http://www.bis.org/press/p991108.htm.

[33] The president of the ECB is invited to attend meetings of G7, G10, G20, and G30.

[34] 'The Treaty's requirement of 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 precisely defined mandate' (ECB Opinion CON 2010/91, para 2.1). In this regard see also ECB Opinion CON/2007/14, para 2.1.

[35] C. Randzio-Plath and T. Padoa-Schioppa, 'The European Central Bank: Independence and Accountability' Center for European Integration Studies (University of Bonn (2000) Working paper B16-2000) 4. On the complementary function in a democracy of independence and accountability see C. Zilioli, 'Accountability and Independence: Irreconcilable Values or Complementary Instruments for

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by myopic and transient political administrations in the definition and implementation of a 'depoliticised' and credible monetary policy. The gradual 'constitutionalisation' of CBI, reflected in the growing number of countries around the world, where legal guarantees of CBI have, in recent years, been introduced or strengthened,[36] is linked to the singular advantages that empirical research associates with the insulation of central banks from the vagaries of the political process.[37] The well-documented relationship between CBI and financial stability draws on the finding that inflation and CBI are inversely proportional. The same finding also explains the overwhelming consensus that, the more independent from political power a central bank is, the more remote the risk that the cycle of its policy preferences will fluctuate frequently or unpredictably, to the detriment of the credibility of its monetary policy.

The principle of CBI, enshrined in Article 130 TFEU and in Article 7 of the Statute, applies to all the NCBs in the EU with the exception of the Bank of England,[38] and it is central to the philosophy and *modus operandi* of the ESCB and to its pursuit of price stability as its primary objective. These articles stipulate that, when exercising their powers and carrying out their tasks and duties, neither the ECB nor the NCBs, nor any member of their decision-making bodies shall seek or take instructions from Union institutions or bodies, from any Member State government or from any other body. The limited jurisdiction of the European Court of Auditors over the ECB, confined to the examination of the operational efficiency of the management of the ECB (with the actual ECB accounts being audited by independent external auditors),[39] and the power given to the ECB to adopt its own staff rules, separate from the ones applicable to the staff of the other EU institutions,[40] can be considered as reflections of the prohibition of giving and taking instructions.

The concept of CBI has been analysed and dissected since over eighteen years in the ECB convergence reports,[41] which classify it into institutional, functional, financial, and personal.[42] Concerning financial independence, the ECB has its own budget, which is independent from that of the Union, and its own financial means, which are not part of the Union's budget.[43] The personal independence of the members of the ECB decision-making

Democracy? The Specific Case of the European Central Bank' in G. Vandersanden (ed), *Mélanges en homage à Jean-Victor Louis* (ULB 2003) 395–422.

[36] Until relatively recently central bank independence was the exception rather than the rule even within the old Continent. Of the 'old' Member State NCBs, only the Deutsche Bundesbank enjoyed, under section 12 of the Law on the Deutsche Bundesbank, a degree of independence comparable to that currently guaranteed under the Treaty and the Statute. For a comparison of the relevant provisions of national legislation and the statutes of the NCBs of the 'old' Member States see C. C. A. Van den Berg, *The Making of the Statute of the European System of Central Banks* (Dutch University Press 2005) 90–91.

[37] On CBI see eg A. Alesina and L. H. Summers, 'Central Bank Independence and Macroeconomic Performance' (1993) 25(2) *Journal of Money, Credit and Banking* 151; O. Issing, 'Central Bank Independence: Economic and Political Dimensions' (2006) 196 *National Institute Economic Review* 66; F. Papadia and G. Ruggiero, 'Central Bank Independence and Budget Constraints for a Stable Euro' (1999) 10 *Open Economies Review* 63; R. Smits, *The European Central Bank: Institutional Aspects* (Kluwer 1997) 154 ff.

[38] Protocol No 15 to the Treaty on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland art 4.

[39] Article 27 of the Statute.

[40] Article 36 of the Statute.

[41] See eg ECB, 'Convergence Report' (2016) 20 https://www.ecb.europa.eu/pub/pdf/conrep/cr201606.en.pdf.

[42] C. Zilioli, 'The Independence of the European Central Bank and its New Banking Supervisory Competences' in D. Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Collected courses for the EUI Summer Academy 2012 (2016) 125–79.

[43] These are mainly (a) the ECB's share capital, paid up by NCBs, (b) the foreign reserves transferred to the ECB by the NCBs, and (c) the monetary income accruing from the monetary policy function of the Eurosystem.

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bodies[44] is strictly protected by a number of primary law provisions: obviously, since institutions operate through persons, these persons are those who need to be independent in the first place, to be able to take the decisions that are best for the institution. The rules deal with the appointment, term of office, dismissal, professional competence requirements, and incompatibilities specific to the members of the ECB's decision-making bodies, including the governors of all NCBs. The reference is, in particular to (a) Article 10.4 of the Statute, which states that the proceedings of the meetings of the Governing Council of the ECB are confidential,[45] while allowing for publication of the outcome of its deliberations; (b) Article 14.2, first paragraph, which provides for a minimum five-year term of office for all the NCB governors; this five-year term is to be understood as a de minimis rule, while there is nothing to preclude a longer term of office;[46] (c) Article 14.2, second paragraph, which stipulates that all NCB governors are not to be dismissed for reasons other than those specifically laid down in it, subject to their individual locus standi[47] before the ECJ, for the unlawful removal of an NCB governor from office;[48] (d) Article 11.2 of the Statute, which provides for a non-renewable eight-year term of office for the ECB Executive Board Member;[49] and (e) Article 11.1 of the Statute, according to which the ECB Members of the Executive Board are to 'perform their duties on a full-time basis' and 'shall not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Governing Council'.[50] Comparing the relevant rules, it would appear that a higher level of protection from external interference has been granted to the ECB Executive Board Members than to the NCB governors, testifying to the importance of the role of the former for the definition and implementation of the single monetary policy, and to the perceived need for stronger independence

[44] On the personal independence of the Members of the ECB decision-making bodies, with an emphasis on the NCB governors see P. Athanassiou, 'Reflections on the Modalities for the Appointment of the NCB Governors' (2014) 39(1) *European Law Review* 27.

[45] The confidentiality of the proceedings serves the objective to protect an open and frank debate and the independence of the individual members of the Governing Council, who could otherwise be subject to pressures (especially at national level).

[46] At the time of writing, several NCB statutes provided for a term of office longer than five years. Until relatively recently, the statute of the Banca d'Italia *did not* provide for a finite term of office.

[47] Also, the Governing Council may refer an illegal dismissal to the ECJ. The fact that individuals (ie the governors themselves) have locus standi before the Court is exceptional, and demonstrates the high level of protection of their personal independence that is granted by the Statute.

[48] Article 14.2 is to be read in conjunction with TFEU art 130 and art 7 of the Statute. Because these two provisions do not refer to the NCB governors, as such, but, instead, to 'any members of [the NCBs'] decision-making bodies', it can be argued that the rules laid down in art 14.2 also apply to those of the members of the NCBs' decision-making bodies, other than the NCB governors, who are involved in the performance of ESCB-related tasks such as NCB governors' alternates (see Smits, *The European Central Bank—Institutional Aspects* (n 37, reprinted with corrections 2000) 166–67. This interpretation of art 14.2 has been favoured by the ECB in its Convergence Reports, where it has been stated that: 'only a person who is subject to the same rules for security of tenure and grounds of dismissal as the Governor should be appointed to deputise for the Governor' (see eg ECB Convergence Report, May 2012).

[49] The mismatch between the term of office of the NCB governors and the ECB Executive Board Members has given rise to critical comments in the literature. See eg J. Endler, *Europäische Zentralbank und Preisstabilität* (Richard Boorberg Verlag 1997) 440–41.

[50] Unlike in the case of the ECB Executive Board Members, no provision in the Statute addresses the issue of incompatibilities with the exercise by an NCB governor of his or her tasks. Writing in 1997, Smits noted that there was no formal regulation of incompatibilities of ECB Board membership with functions assumed after the term of office of an Executive Board member has expired (see Smits (n 37) 164–66, and nn 70 and 71). The Code of Conduct for the Members of the Governing Council (2002/C 123/06) (OJ C123 (24 May 2002) 9), which also applies to the Executive Board Members, as members of the Governing Council, provides, in para 6 thereof, that: '[D]uring the first year after their duties have ceased, the members of the Governing Council shall continue to avoid any conflict of interests that could arise from any new private or professional activities. They shall, in particular, inform the members of the Governing Council in writing whenever they intend to engage in such activities and shall seek their advice before committing themselves'.

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guarantees in their case compared to those applicable to the remaining Members of the Governing Council.

(4) ECB Transparency and Accountability

The Treaty and the Statute contain several provisions the aim of which is to promote transparency and to ensure the ECB's accountability for its actions, not least to the European public and its elected representatives in the European Parliament. Accordingly, the ECB and its decision-making bodies have a number of reporting commitments under Article 15 of the Statute: they must publish a weekly consolidated financial statement for the ESCB; they must produce and publish quarterly reports on the ESCB's activities; and they must prepare an annual report on the Eurosystem's monetary policy and other activities, to be presented to the European Parliament by the president of the ECB.

In practice, the ECB goes far beyond these legal reporting requirements, reflecting its commitment to inform the public of its decisions and of their economic rationale. Since the ECB's inception, its president has regularly issued public statements disclosing and explaining the Governing Council's decisions. Beginning in January 1999, immediately following the first Governing Council meeting of every month, a press conference is held during which the president and the vice-president present the Governing Council's view of the economic situation and the motivation for its monetary policy decisions, and take questions from the press. The text of the president's introductory statement is released immediately following the press conference.

The ECB also publishes a detailed evaluation of economic developments in the eurozone and an assessment of the monetary policy stance in the ECB Monthly Bulletin, along with articles on various issues relevant to the ESCB and the Eurosystem.

Since 2004, the ECB has published, twice a year, a 'Financial Stability Review', which provides an overview of the possible sources of risk and vulnerability to financial stability in the eurozone.[51] While this publication does not relate to the core tasks of the ECB, it contributes to clarify the benchmark against which the actions of the ECB are to be assessed, thereby increasing the level of accountability of the ECB.

Since January 2005, as part of the Governing Council's policy of transparency with regard to national consultations, all ECB opinions have been published on the ECB's website immediately after their adoption and transmission to the consulting authority, unless there are specific grounds to refrain from immediate publication.[52] Finally, the ECB publishes working and occasional papers to disseminate its thinking, and stimulate debate on policy issues relevant to its tasks.

The minutes of Governing Council meetings which had formerly been subject to a thirty-year rule, have been published since January 2015.[53]

(5) ECB Decision-making Bodies

The Eurosystem decision-making processes are centralized. The Eurosystem is governed by the decision-making bodies of the ECB, namely the Governing Council and the Executive Board. The General Council is a temporary body that relates to the ESCB. The functioning

[51] See https://www.ecb.europa.eu/pub/pdf/other/financialstabilityreview201605.en.pdf?b7c4d8d8e66d1c7c4851d64c37c72f38.

[52] If there are such specific grounds, the practice is for the opinion to be published at the latest six months after its adoption.

[53] See https://www.ecb.europa.eu/press/accounts/2015/html/mg150219.en.html.

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of the decision-making bodies is governed by the Treaty, the Statute and the relevant Rules of Procedure. Although decision-making within the Eurosystem is centralized, the ECB and the NCBs jointly contribute to attaining the Eurosystem objectives, since 'to the extent deemed possible and appropriate … the ECB shall have recourse to the NCBs to carry out operations which form part of the tasks of the Eurosystem' (Article 12.1, para 3 of the Statute).

(a) Governing Council The Governing Council is the primary decision-making body of the ECB.[54] It is composed of the members of the Executive Board and of the governors of the NCBs (defined, earlier in this chapter, as the central banks of the Member States that have adopted the euro as their national currency).

It follows, inter alia from Article 12 of the Statute, that the Governing Council (a) formulates the Eurosystem monetary policy, including deciding on intermediate monetary objectives, key interest rates, and the supply of reserves in the Eurosystem; (b) adopts the guidelines and takes the decisions necessary to ensure the performance of the tasks entrusted to the Eurosystem; (c) takes the necessary steps to ensure compliance with its guidelines and instructions, and to define any necessary information to be provided by NCBs; (d) fulfils the advisory role of the ECB; (e) adopts its Rules of Procedure; and (f) authorizes the issuance of euro banknotes and regulates the volume of euro coins circulating within the eurozone. In the context of the competences newly attributed to the Governing Council relating to the prudential supervision of credit institutions, the Governing Council has the competence to adopt decisions on the general framework under which supervisory decisions are to be taken, and on the micro-prudential and macro-prudential supervisory tasks conferred on the ECB under the SSM Regulation.[55]

The Governing Council meets, as a rule, every three weeks[56] at the ECB's premises in Frankfurt am Main, Germany (external meetings are also possible). In addition to these meetings, the Governing Council may also hold teleconferences or take decisions by written procedure. When taking decisions on monetary policy and on any of the other tasks of the Eurosystem, the members of the Governing Council do not act as national representatives, but in a fully independent, personal capacity.[57] This is reflected in the principle of 'one member, one vote' and in the provision that the right to vote shall be exercised in person (Article 10.2 of the Statute).

(b) Executive Board The Executive Board is the primary operational body of the ECB. It comprises the president and the vice-president of the ECB, and four other full time members appointed amongst persons of recognized standing and professional experience in monetary and banking matters by the European Council, acting by qualified majority, after consultation of the European Parliament and the ECB. In accordance with Articles 11.6 and 12.1 of the Statute, the main responsibilities of the Executive Board, assigned to it directly by primary

[54] As a result, whenever any competence has been attributed to the ECB by the Treaty or the Statute, without such competence being clearly allocated it to the Governing or the General Council or to the Executive Board, it is the Governing Council that is competent to exercise it.

[55] 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 L287 (29 October 2013) 63).

[56] Significantly, art 10.5 of the Statute only provides that the Governing Council is to hold 'at least ten meetings a year'.

[57] On the voting regime of the ECB Governing Council see B. Krauskopf and C. Steven, 'The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the First Ten Years of its Existence' (2009) 46 *Common Market Law Review* 1143–75, 1162–69.

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law, are to (a) implement the monetary policy of the eurozone in accordance with the guidelines and decisions of the Governing Council,[58] also giving the necessary instructions to the NCBs; (b) prepare the meetings of the Governing Council; (c) manage the current business of the ECB. In addition, the Executive Board can exercise certain powers delegated to it by the Governing Council.

The current practice is for the Executive Board to meet at least once a week at the ECB's premises. Regarding its voting modalities, the Executive Board acts by a simple majority of the votes cast by the Members who are present in person. In the event of a tie, the president has a casting vote.

(c) **General Council** The General Council is composed of the president and the vice-president of the ECB and the governors of the NCBs of all twenty-eight EU Member States. Unlike the Governing Council, the General Council is a transitional body, the status of which is dealt with under Chapter IX of the Statute ('transitional and other provisions for the ESCB'). In particular, the General Council mainly carries out those tasks taken over from the European Monetary Institute that still need to be performed because not all the Member States have adopted the euro.

The General Council's responsibilities are exhaustively enumerated in Article 47 of the Statute. The Governing Council's tasks include strengthening cooperation between all central banks, supporting the coordination of the monetary policies of the Member States, with the aim of ensuring price stability, and monitoring the functioning of the second stage of the Exchange Rate Mechanism (ERM II). Moreover, the General Council reports—in the form of the ECB's Convergence Report—to the EU Council on the progress made by Member States that have not yet adopted the euro in fulfilling their obligations towards the achievement of MU. It also contributes to the advisory functions of the ECB (for instance, it must be consulted before the Governing Council adopts an ECB recommendation or an ECB opinion), to the preparation of the ECB's quarterly and annual reports and weekly consolidated financial statements, and to the necessary preparations for irrevocably fixing the exchange rates against the euro, of the currencies of those Member States with a derogation. In addition to the responsibilities listed in Article 46 of the Statute, the General Council can take decisions in two other cases, namely, adopt its own Rules of Procedure (Article 45.4 of the Statute, by way of derogation from Article 12.3) and the measures necessary for the paying-up of the ECB's capital by the non-participating Member State NCBs (Article 47 of the Statute, by derogation from Article 28.3).

Every year the General Council holds four quarterly meetings, as well as one meeting for the adoption of the ECB's Convergence Report.

(6) ECB Regulatory Powers

The Treaty and the Statute confer to the ECB the power to adopt certain legal acts and instruments. In line with the principle of conferred powers,[59] the regulatory power of the ECB is restricted to the adoption of those legal acts and instruments that are necessary to fulfil the tasks assigned to the ESCB and the Eurosystem.

[58] It is important to note that this implementing power is an own-power conferred by the Treaty, not a power delegated by the Governing Council.

[59] The reference is to the principle whereby the ECB, the Eurosystem and the ESCB are to act within the limits of the powers conferred upon them by the Treaty and the Statute. In this regard, see also TEU arts 2–6.

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The regulatory powers of the ECB reflect the particular status of the ESCB/Eurosystem within the Union. A distinction is to be made between two different kinds of ECB legislation, namely ECB legal acts and ECB legal instruments. The former consist of ECB Regulations, Decisions, Recommendations, and Opinions, which are addressed to and/or bind also third parties outside the Eurosystem. In addition, the ECB is empowered to adopt ECB legal instruments, which are of *internal* relevance to the Eurosystem, and are not meant to directly affect third parties. These are ECB Guidelines, Instructions and Internal Decisions (without addressees). Taking into account the unique structure of the Eurosystem, where each of the constituent parts retains its own legal personality, internal legal instruments are necessary to bind the functionally subordinated NCBs to the ECB instructions, and to allow the Eurosystem to operate efficiently as a single entity. As the Eurosystem is subject to the rule of law, all measures taken by the ECB that are intended to have legal effects are open to judicial review by the Court, while the Eurosystem itself is bound by all legal measures it has adopted.

ECB legal acts and ECB legal instruments do not confer any rights or impose any obligations on Member States with a derogation or on their central banks. However, in accordance with Article 10 of the Treaty, 'Member States shall take all appropriate measures … to ensure fulfilment of the obligations arising out of this Treaty'. It is, therefore, possible to argue, specifically in respect of ECB Regulations, that these are of at least persuasive authority and they will not, as a matter of course, be lightly disregarded either by Member States they are not legally binding on or by their central banks.

(a) ECB legal acts It follows from Article 132 TFEU and Article 34 of the Statute that the ECB makes Regulations to the extent necessary to implement its statutory tasks and, in specific cases, as determined by the EU Council; it takes Decisions necessary to enable the tasks of the ESCB/Eurosystem to be carried out; it makes Recommendations; and it delivers Opinions. Each of these types of ECB legal acts is touched on below.

(i) Regulations As with the Regulations adopted by the EU legislative bodies, ECB Regulations are of general application, binding in their entirety, and directly applicable throughout the Eurosystem,[60] and they must state the reasons on which they are based. They must be published in the Official Journal (OJ) in all official EU languages. Unless otherwise specified, ECB Regulations enter into force twenty days following the date of their publication. ECB Regulations are adopted by the Governing Council, and are signed on its behalf by the ECB President. The Governing Council may decide to delegate its authority to adopt ECB Regulations to the Executive Board.[61]

(ii) Decisions ECB Decisions are binding in their entirety upon their addressees, they must state the reasons on which they are based, and take effect upon notification. The ECB may decide to publish its Decisions in the OJ, in which case they are published in all official EU languages. ECB Decisions may be addressed to any legal or natural person, including participating Member States. ECB Decisions may be adopted by the Governing Council or the Executive Board in their respective spheres of competence.

[60] See eg in the field of statistics, Regulation ECB/2013/33 of 24 September 2013 concerning the balance sheet of the monetary financial institutions sector (recast), OJ L297 (7 November 2013) 1, which imposes direct reporting obligations on specified reporting agents.

[61] However, in so doing, the Governing Council must specify the limits and scope of the powers thus delegated. In matters having legal effects on third parties, notification of such delegation must be given to the parties concerned or details of the delegation published, as appropriate.

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(iii) Recommendations and Opinions ECB Recommendations and Opinions are non-binding legal acts, adopted by the Governing Council or the Executive Board in their respective spheres of competence. ECB Recommendations and Opinions may be published in the OJ, in which case they are published in all official EU languages.

There are two types of ECB Recommendations: instruments whereby the ECB initiates EU legislation in its field of competence (which correspond to the 'proposal' of the Commission)[62] and ECB 'Recommendations' in the lay sense of the term (policy instruments whereby the ECB provides the impetus for action to be taken by Union institutions, Member States, NCBs, or national authorities, notwithstanding that such action will be, more often than not, of a legal nature).[63]

Turning to ECB Opinions, these are delivered on draft legislation either when the ECB is consulted by the Union institutions or by Member States, in accordance with the Treaty or the Statute, or on the ECB's own initiative, whenever it deems appropriate in matters falling within its field of competence.[64]

(b) ECB legal instruments ECB regulatory powers are not limited to the adoption of ECB legal acts. As mentioned above, the ECB may also adopt certain (internal) legal instruments, namely ECB Guidelines, ECB Instructions, and ECB (Internal) Decisions. Guidelines and Instructions are mentioned in Article 12 of the Statute as instruments adopted by the Governing Council and the Executive Board, respectively, in defining and implementing monetary policy, while they are mentioned in Article 14.3, which points to their binding nature for the NCBs.

ECB Guidelines and ECB Instructions are special, legally binding, formal legal instruments, the introduction of which was necessary on account of the Eurosystem's decentralized operational structure, to ensure that all NCBs will act in compliance with ECB decisions. As they are part of EU law, ECB Guidelines and Instructions will prevail over contrary pre-existing or subsequent national legislation. The formal requirements for the adoption of ECB Guidelines and Instructions are not specified in the Treaty or the Statute; instead, the modalities for their adoption are laid down in the ECB Rules of Procedure,[65] and follow the general principles of EU law. Given their nature as instruments, the legal effects of which are internal only, there is no obligation under EU law to publish ECB Guidelines and Instructions. However, in the interests of transparency, the ECB has published most of its Guidelines, since these are of interest to market operators, and to the general public at large.

(i) ECB Guidelines ECB Guidelines are internal legal instruments, addressed to the NCBs, through which the monetary policy of the Eurosystem is defined or implemented. In particular, Guidelines lay down the general framework and rules according to which the NCBs are to conduct operations nationally. The aim of ECB Guidelines is, therefore, to ensure that the decentralized execution of monetary policy operations fully respects the singleness of the Eurosystem's monetary policy.[66] Depending on the legal regime

[62] TFEU arts 129(3) and (4)and arts 40 and 41 of the Statute.

[63] The term 'Recommendation' is used in section IV.A, below, in its former, legal sense.

[64] TFEU art 127(4). ECB Opinions are examined in more detail in section IV below.

[65] Decision of the ECB of 19 February 2004 adopting the Rules of Procedure of the ECB (ECB/2004/2), OJ L80 (18 March 2004) 33.

[66] Legal acts of similar nature existed for the relationship between the Deutsche Bundesbank and the Landeszentralbanken: following that example, it was felt that it was necessary to have legal instruments internal to the Eurosystem with binding effect on the NCBs, but which are non-binding for third parties.

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applicable in each of the participating Member States, Guidelines are to be implemented either by means of contracts to be concluded between the NCBs and their counterparties or by means of NCB regulatory acts addressed to their counterparties (often accompanied by some sort of contract).

In practice, in the first fifteen years of the ECB's existence, Guidelines have been the Eurosystem's preferred legal instrument given that, compared to Regulations and Decisions, they allow the NCBs to continue acting at the national level through their own contractual instruments, which, to ensure the singleness of monetary policy, need to fully embody the obligations and rights imposed on NCBs under the relevant Guidelines. The prime example of an ECB Guideline is Guideline ECB/2014/60 (the 'General Documentation'),[67] which sets out in detail the Eurosystem's monetary policy procedures and instruments, and the manner in which the participating NCBs are expected to implement the Eurosystem's single monetary policy. The General Documentation forms the backbone of the Eurosystem's legal framework for the conduct of monetary policy operations, providing counterparties with the necessary information for their access to monetary policy instruments.[68] One of the main objectives of the General Documentation is to ensure that the Eurosystem's monetary policy operations are executed uniformly across the eurozone, through the NCBs, in their capacity as the ECB's 'operating arms', and in line with the principle of decentralization of operations (see below).

ECB Guidelines are adopted by the Governing Council[69] and, thereafter, notified to the NCBs.[70] The Governing Council may decide to delegate to the Executive Board its regulatory power to adopt ECB Guidelines, in which case it must also specify the limits and scope of the delegated competences.

(ii) ECB Instructions ECB Instructions are designed to ensure the implementation of monetary policy Decisions and/or Guidelines by giving specific and detailed instructions to the participating Member State NCBs. ECB Instructions are legally binding on the NCBs of the Eurosystem, and judicially enforceable. ECB Instructions are adopted by the Executive Board, which, as mentioned earlier, is responsible for implementing the monetary policy of the eurozone in accordance with the Guidelines and Decisions of the Governing Council.

(iii) ECB Internal Decisions In addition to ECB Guidelines and Instructions, the ECB has the competence to adopt Internal Decisions of normative value for the Eurosystem address matters of an internal organizational or administrative nature. While Internal Decisions have no addressees, they are legally binding on all the members of the Eurosystem. The ECB has, until now, adopted several such Decisions, some of which have been published in the OJ.

[67] Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60), OJ L91 (2 April 2015) 3.

[68] The General Documentation neither confers rights nor imposes any obligations on counterparties: the legal relationship between the Eurosystem and its counterparties is established in the national regulatory or contractual arrangements between each of the participating Member State NCBs and its counterparties.

[69] Article 12.1 of the Statute.

[70] Article 12.2 of the ECB Rules of Procedure. Where an ECB Guideline is intended for publication, this will be on the website of the ECB as well as in the OJ in all official EU languages.

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III. Eurosystem Governance, Structure, and the Relationship between ECB and NCBs

A. Introductory Remarks

Despite their separate legal personality, the NCBs are integral parts of the Eurosystem, and are to act as its 'operating arms' by carrying out the tasks conferred upon the Eurosystem, in accordance with the rules established by the ECB (see below on the principle of decentralization of operations). As integral parts of the Eurosystem,[71] the NCBs are subject to the regulatory power of the Governing Council, to which they are functionally subordinate,[72] having to comply with the internal legal instruments adopted by the Governing Council or the Executive Board (as the case may be). It also follows from Article 35.6 of the Statute that the ECB has the power to bring an NCB before the Court if it considers that the said NCB has persistently failed to fulfil its obligations under the Statute, and failed to comply with the reasoned opinion originally delivered by the ECB on the matter. Besides, because of the Treaty requirement of legal convergence, the NCB statutes and/or national laws relevant to the NCBs have been amended in order to be compatible with EU law (in particular, with the requirements of CBI).

B. Structure and Governance of the Eurosystem

As mentioned earlier, the Eurosystem consists of the ECB and the NCBs (defined as the central banks of the eurozone Member States). All eurozone NCBs are legal entities established under the laws of their Member State of origin, and their ownership structure differs from one Member State to another. The ECB also has legal personality, attributed to it under Article 282(3) TFEU.[73] Although consisting, at the time of publication, of twenty separate legal persons, the Eurosystem is required to act as one. As already mentioned, this has been achieved through the integration of the eurozone NCBs into the Eurosystem, with its single, central decision-making structure. To the extent that they perform their Eurosystem tasks, the NCBs do not act as national authorities but, instead, as integral parts of the Eurosystem.

It has been observed[74] that there are certain parallels between the Eurosystem and a 'group structure' within the meaning of commercial law. In common with a corporation, the Eurosystem brings together several legal entities (namely, the NCBs, which are the ECB's sole shareholders) under a common corporate structure and name. However, the Eurosystem's equation to a group structure is misleading, first because the NCBs do not enjoy over the ECB the rights normally vested in a shareholder,[75] secondly, because the Eurosystem is governed by the decision-making bodies of the ECB,[76] which are under a legal obligation to ensure due performance of the Eurosystem tasks, whether through the ECB's own activities

[71] Article 14.3 of the Statute.

[72] As mentioned earlier, art 14.4 of the Statute allows the NCBs to continue to perform non-Eurosystem functions, unless the Governing Council finds that such functions interfere with the objectives and tasks of the Eurosystem.

[73] As mentioned earlier, the ECB is unique amongst Union institutions in having legal personality. Some commentators have expressed concerns that the 'institutionalization' of the ECB would favour a centralization to the detriment of NCBs. See Krauskopf and Steven (n 57) 1149; and Louis (n 22) 602.

[74] See Smits (n 37) 94.

[75] The one exception is the NCBs' right to receive the net profits of the ECB, in line with art 33 of the Statute.

[76] See art 129(1) TEC and art 8 of the Statute. See also C. Zilioli and M. Selmayr, *The Law of the European Central Bank* (Hart Publishing 2001) 72–73.

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or through those of the NCBs,[77] and thirdly because, unlike in the case of normal shareholders, the NCBs neither appoint[78] nor supervise[79] the ECB's managing body.[80]

It follows that, although made up of the ECB and the NCBs, all of which have legal personality, the Eurosystem is a centralized system in terms of its legal construction, governed exclusively by the decision-making bodies of the ECB, and empowered to take decisions by simple majority.[81] The participating Member State NCBs' integration into the Eurosystem, and their subordination to the 'guidelines and instructions of the ECB', ultimately serve as guarantors of the Eurosystem's institutional existence, and of its continuing ability to pursue, in unison, the ESCB's primary objective of price stability.

C. Decentralization of Operations

The 'decentralisation of operations' pervades every aspect of the Eurosystem's day-to-day operation,[82] despite the natural tension between the centralized governance structure of the Eurosystem and the decentralized execution, by the NCBs, of the tasks attributed to the Eurosystem under the Treaties.

While decision-making within the Eurosystem is centralized at the level of the ECB decision-making bodies, Article 12.1, third sub-paragraph of the Statute provides that, 'to the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB'. Despite expressing a preference for the decentralized execution of Eurosystem operations, at least where the implementation of specific tasks has not been assigned specifically[83] to the ECB (as, for instance, with regard to the authorization of the issuance of banknotes), there is nothing in the Statute to question the ECB's legal capacity to directly take up the performance of the Eurosystem tasks. While, in practice, the scope of operations carried out by the ECB is limited compared to those carried out by the NCBs, Article 9.2 of the Statute clearly provides that it is the ECB that, 'shall ensure that the tasks conferred upon the [Eurosystem] … are implemented either by its own activities or through the national central banks'. Indeed, it is mainly as a practical matter, rather than for legal reasons, that decentralization has been the norm for the performance of the Eurosystem tasks.

Decentralization applies, in particular, to monetary policy operations, which are routinely conducted by the participating Member State NCBs with their national counterparties.

[77] See art 9.2 of the Statute, read in conjunction with art 12.1 thereof.

[78] Although the NCBs are represented in the supreme decision-making body of the ECB (the Governing Council where the governors of the Eurosystem NCBs sit as *ex officio* members) they have no role in the appointment of the ECB Executive Board Members, who are appointed by the European Council (effectively, the Member State governments), in line with art 11.2 of the Statute.

[79] In accordance with art 11.6 of the Statute, the management of current business is an own competence of the Executive Board, over which the NCBs exercise no control.

[80] The members of the Governing Council have no role in the appointment of the ECB Executive Board Members, who are appointed by the European Council (effectively, the Member State governments), in line with art 11.2 of the Statute.

[81] See art 10.2, third sub-para, second sentence, of the Statute and art 11.5, second sentence thereof.

[82] The term de-concentration is, perhaps, more apposite. See Zilioli and Selmayr, *The Law of the European Central Bank* (n 76) 118 ff; and Louis (n 22) 587.

[83] The following provisions of the Statute provide for the possibility of implementing specific Eurosystem tasks through the ECB and/or the NCBs: art 17 (opening of accounts for market participants and acceptance of assets as collateral); art 18.1 (operation in financial markets and conduct of credit operations); art 19.1 (maintenance of the minimum reserve accounts of credit institutions); art 22 (provision of facilities to ensure efficient and sound clearing and payment systems); and art 23 (conduct of operations with central banks and financial institutions in other countries and with international organizations).

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NCBs also provide payment settlement facilities and, subject to the authorization of the ECB, put into (and withdraw from) circulation euro banknotes. Thus, even if one would consider that the Statute creates a 'presumption' in favour of the execution of the ESCB tasks through the NCBs, this is, at best, a rebuttable one:[84] the ECB maintains the discretion to decide whether or not to resort to the NCBs for the performance of the Eurosystem tasks,[85] as well as the responsibility to steer the overall implementation process, and to ensure the uniform implementation of all ECB decisions.

D. The Principle of Specialization

Based on Article 9.2 of the Statute, the ECB has the power to decide how a specific task is to be implemented, whether by the ECB only or with the involvement of all participating Member State NCBs or by a sub-set only of the NCBs ('principle of specialization').[86] There is no obligation, when decentralizing operations, to have recourse to all NCBs. On the contrary, the principle of the efficient use of resources, to which the ECB is bound under Article 127 TFEU, pleads in favour of specialization. The most prominent example of specialization within the Eurosystem is the TARGET2 payment system, which has replaced TARGET, the former technical infrastructure of thirteen distinct real-time gross settlement systems.[87] TARGET2 is run by three Eurosystem NCBs acting as service providers to the Eurosystem, under the ultimate responsibility of the Governing Council.[88] The pooling in the field of banknote production is another example of specialization.

E. Guidelines and Instructions: The NCBs' Duty of Compliance

Article 14.3 of the Statute establishes that the NCBs are an integral part of the Eurosystem.[89]

There are essentially two complementary 'pillars' to the governance structure of the Eurosystem: first, the hierarchical subordination of the NCBs to the ECB; and second,

[84] A specific case is art 5.2 of the Statute on the collection of statistical information, which provides that: '[T]he national central banks shall carry out, to the extent possible, the tasks described in Article 5.1'. Even here, the judgment on the 'extent possible' is for the ECB.

[85] See Zilioli and Selmayr, 'Recent Developments in the Law of the ECB' (n 23) 44–47 and fn 289; Zilioli and Selmayr, *The Law of the European Central Bank* (n 76) 112–21. Cf Louis, who has argued inter alia that: '[T]he Statute provides, in our view, for a clear bias for decentralization of operations. It is one of the most convincing of the justifications for the existence of a System of *Central Banks* and not just a Central banking system. But there is a test of effectiveness provided by art 12.1, which is equally important, and the decision on centralization or decentralization lies with the ECB's decision-making organs'. See Louis (n 22) 590–91. Krauskopf and Steven have argued that: 'While the EC Treaty makes it clear that decision-making on the fulfilment of the Eurosystem tasks is centralized in particular at the Governing Council of the ECB … the Statute designates a clear preference for decentralized implementation of tasks through the NCBs of the System, where the implementation of a specific task has not been assigned specifically either to the ECB or the NCBs'. See Krauskopf and Steven (n 57) 1159.

[86] In this regard see Zilioli and Selmayr, 'Recent Developments in the Law of the ECB' (n 23) 65–66; Krauskopf/Steven (n 57) 1161; and Louis (n 22) 591–93.

[87] TARGET was initially developed to provide the common large value payment and settlement infrastructure necessary for the further integration of Europe's financial market. Although TARGET proved a success, two main weaknesses became apparent over time: first, TARGET's decentralized technical structure and, secondly, a lack of consistency across the constituent components of TARGET in terms of technology and services. As a result, TARGET was unlikely to meet future demands in an efficient and effective manner.

[88] The Deutsche Bundesbank, the Banque de France and the Banca d' Italia jointly provide the single technical platform of TARGET2, which they operate for all Eurosystem NCBs, pursuant to a contractual agreement between them and the remaining NCBs. Although the single platform is operated by the three aforementioned NCBs, all NCBs participating in TARGET2 continue to maintain their legal and business relationship with their clients and to conduct business with them.

[89] Article 14.3 does not, however, apply to the NCBs of Member States with a derogation (art 42.1 of the Statute): this is logical, as they are not involved in the execution of the single monetary policy.

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their functional integration, reflected in the decentralization of Eurosystem operations, to be undertaken, whenever possible and appropriate, by the NCBs. This structure reflects a conscious policy decision to limit the scope for autonomous action by the eurozone NCBs as of the entry into the Third Stage of Economic and Monetary Union (EMU), which would have jeopardized the singleness of the monetary policy, except in the limited areas covered by Article 14.4. Decentralization of operations is hardly a monolithic concept: its scope depends on the ad hoc decisions of the ECB, and on the need to ensure efficiency in the performance of the Eurosystem tasks. It is largely thanks to Article 14.3 of the Statute that the Eurosystem has not been exposed to the centrifugal forces often associated with decentralized ('confederate' or loosely federal) structures.

Article 14.3 of the Statute also enshrines the participating Member State NCBs' legal duty to act in conformity with the 'guidelines and instructions of the ECB', as well as the power (and duty) of the ECB to 'take the necessary steps to ensure compliance with the guidelines and instructions of the ECB'. While the generic meaning of the term 'guidelines' refers to policy guidance, and not to binding legal acts, we have seen that ECB Guidelines and Instructions are legally binding. By providing that the NCBs shall 'act in accordance' with them, and that the Governing Council is to 'ensure compliance' with them, Article 14.3 clarifies that Guidelines and Instructions are binding legal acts.[90] Significantly, the ECB itself is also bound by those 'guidelines and instructions', in line with the principle of *patere legem quam ipse fecisti*.[91]

By clarifying the meaning attributed to the eurozone NCBs' 'integration'[92] into the Eurosystem, Article 14.3 formalizes the hierarchically superior position of the ECB vis-à-vis the eurozone NCBs as a key feature of the Eurosystem's governance structure. Interestingly, Article 14.3 is not the only primary law provision reflecting the hierarchical subordination of the NCBs to the ECB. Other relevant provisions include Article 8 (on the ESCB's governance by the decision-making bodies of the ECB), Article 9.2 (on the ECB's power and obligation to ensure that the tasks conferred by the Treaty upon the ESCB are implemented either by its own activities or through the NCBs), Article 12.1 (on the powers of the ECB Governing Council and the Executive Board in the centralized decision and in the conduct of monetary policy), Article 31.2 (on the requirement for the ECB's clearance of the foreign exchange operations still conducted by the NCBs), and Article 35.6 (on the ECB Governing Council's powers to refer to the Court an NCB that violates its obligations under the Statute).[93]

F. Status of the NCBs When Performing Eurosystem Tasks

Some writers have expressed the view that, despite their integration into the Eurosystem—and, possibly, because of the principle of decentralization—the participating Member State NCBs remain *national authorities*, responsible for the exercise of national competences.[94]

[90] As Louis has aptly observed, 'the favourite legal instrument of the ECB is not the directly applicable regulation but the guideline of article 14.3'. See Louis (n 22) 587.

[91] Ibid.

[92] For the same reason an NCB's integration into the Eurosystem becomes relevant as of the adoption by its Member State of the single currency and the relevant NCB's entry in the Eurosystem.

[93] It is TFEU art 271(d) and art 35.6 of the Statute that vest in the ECB the power to take enforcement action against an NCB, in the same way as the Commission can initiate infringement procedures against Member States. In this regard see Zilioli and Selmayr, 'Recent Developments in the Law of the ECB' (n 23) 44–47; Louis (n 22) 589; and Zilioli and Selmayr, *The Law of the European Central Bank* (n 76) 73–80.

[94] This view is presented by M. Weber, 'Das Europäische System der Zentralbanken' [1998] *WM* 1465, 1472; cf also M. Weber, *Die Kompetenzverteilung im Europäischen System der Zentralbanken bei der Festlegung und Durchführung der Geldpolitik* (1995) 52 ff. The view that the NCBs are national authorities is corroborated by reference to the observation that it is for the Member States to organize, at their discretion, the structure of their respective NCBs. Those subscribing to this view have sought to draw

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Other writers have taken a more nuanced position, referring to the NCBs as 'acting in a dual capacity', ie as 'the operational arms of the ESCB when carrying out operations that form part of the tasks of the ESCB' and as 'national agencies when performing non-ESCB functions'.[95] The first president of the ECB had, for his part, famously referred to the ECB as 'the hub of the [Euro]system', and to the NCBs as 'its spokes'.[96]

In the authors' view, it is misleading to compare the Eurosystem to a federal structure. Instead, the NCBs act as the ECB's agents when performing their ESCB tasks.[97] This is because, as argued above, the Eurosystem is characterized by decisional centralization,[98] while Eurosystem operations and the execution of Eurosystem tasks are decentralized. Although the implementation of federal tasks does not transform the constituent components of a federation into agents of the federal authorities, inter alia because of their separate legal personality, the execution of operations decided centrally by the Governing Council casts the NCBs in an agent capacity. It is to be noted that the Court has not treated the legal personality of an actor to be decisive when attributing liability; instead, the Court has adopted a functional approach, the focus of which is less on legal formalities and more on where the final say lies in each particular case.[99] In considering national authorities as agents of the Union institutions, provided that they have acted upon the instructions of those institutions, the Court follows the doctrine of functional duplication (*dédoublement fonctionnel*).[100] The Court's functional approach helps explain the legal position of the eurozone NCBs vis-à-vis the ECB. Even though the NCBs are national authorities by virtue of their national law-derived legal personality, they are functionally disconnected from the institutional framework of their home Member States whenever they act to perform their Eurosystem tasks since, in carrying out these tasks (conferred upon them by primary law), the NCBs are not allowed to seek, nor to take instructions from the government or from any other body, while the governments of the Member States are obliged not to seek to influence the members of the decision-making bodies of the NCBs in the performance of their tasks. At the same time, the ECB can adopt binding guidelines and instructions addressed to eurozone NCBs, it is responsible to ensure that its guidelines and instructions

analogies with federal systems of government, the constituent parts of which retain their autonomous legal personality, as do not qualify as federal agents even when implementing federal legislation. This distinction would also hold true in the case of the EU, where neither the Member States nor their national authorities become agents of the Union when applying EU law. Weber mentions this as a general principle of EU law, which would also apply to the ESCB as there was no indication to the contrary to be found in the Treaty. See Weber (n 94) 1472.

[95] R. M. Lastra, 'The Division of Responsibilities between the European Central Bank and the National Central Banks within the European System of Central Banks' (2000) 6(2) *Columbia Journal of European Law* 167, 168.

[96] Wim Duisenberg, address on the occasion of an audience by Dr Carlo Azeglio Ciampi, President of the Italian Republic in the context of the meeting of the Governing Council of the European Central Bank in Rome (2 April 2003).

[97] It has been observed that: 'in so far as they perform functions in the ESCB, [the NCBs] will be taken "out of the realm" of State responsibility and be subjected to review by the ECB instead of the Commission', and that: '[N]o longer will a State be legally responsible for the conduct of "its" central bank in terms of compliance with the EMU provisions in Community law'. See Smits (n 37) 329–30.

[98] Article 9.2 of the Statute.

[99] Case 175/84 *Krohn & Co. Import–Export GmbH & Co. KG v Commission of the European Communities* [1986] ECR 753, paras 18 and 19. *Krohn* has been cited by the Court in subsequent cases, without any suggestion that its facts were special or that the Court's conclusion was of narrow application. See eg Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, para 9.

[100] This doctrine, which applies to all multi-level organizations, unitary or federal, essentially provides that, within such organizations, officials of the constituent entities may simultaneously qualify as officials of the higher or the lower organizational level, depending on the functions they perform.

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are complied with, and it may even bring the NCBs to court in case of violation of their legal obligations.

Instead of being connected to the institutional framework of their Member State of origin, the NCBs are, as explained above, 'an integral part' of the Eurosystem, operating subject to 'the guidelines and instructions of the ECB'. Since the possibility of giving instructions is considered by the Court as a decisive criterion for allocating responsibility to the issuer of such instructions, the prohibition on taking instructions must be interpreted, from a functional perspective, as circumscribing the NCBs from the authorities of their home Member States. The NCBs' integration into the Eurosystem, within the meaning of Article 14.3 of the Statute, has therefore led to a 'denationalisation' of most of the NCBs' functions, and to their 'communautarisation'.[101] It is only exceptionally that the NCBs will act as genuinely national authorities: this will be the case when they perform functions 'other than those specified in this Statute', within the meaning of Article 14.4 of the Statute.[102]

IV. The ECB's Involvement in the Legislative Process

There are two distinct aspects to the involvement of the ECB in the legislative process. First, the ECB's right of initiative, ie its right to initiate amendments to the Statute and to recommend the adoption of EU legislation, and, secondly, the ECB's advisory role in the drafting of EU and national legal acts within the ECB's fields of competence. The following paragraphs examine each of these aspects in turn.

A. The ECB's Right of Initiative

As a general rule, the right of legislative initiative in the EU resides with the Commission. However, in a few cases enumerated in the Treaty, the Commission shares its right of initiative with other Union institutions (including the ECB) or with the Member States.[103] It follows from Article 129(3) and (4) TFEU, and Articles 40 and 41 of the Statute, that the ECB has the right to initiate the amendment of specific articles of the Statute and to make recommendations with regard to the adoption of EU legislation within the Eurosystem's fields of the competence.[104] The ECB exercises its right of initiative through the adoption and submission to the Council of ECB Recommendations.[105]

The Commission may, in theory, submit proposals in all areas where the ECB has also the power to make recommendations (and, in this case, the ECB would be consulted by the Council) but, so far, it has generally refrained from doing so. However, because of the Commission's role as the 'initiator' and 'driving force' behind the EU legislative process, the Council is to consult the Commission when it is the ECB, rather than the Commission, which recommends the adoption of EU legislation.

[101] See Zilioli and Selmayr, *The Law of the European Central Bank* (n 76) 79.

[102] See section II.B above.

[103] Post Lisbon, TEU art 11.4 has introduced a right of initiative for EU citizens by enabling them, through the gathering of at least one million signatures from a significant number of Member States, to put forward proposals to the Commission. Member State initiatives are also possible in some cases, with Member States being allowed to refer issues to the European Council where their vital national interests are at stake.

[104] The ECB's right of initiative relates to areas such as, for instance, statistics, accounting, open market and credit operations, minimum reserves, clearing and payment systems, and external operations.

[105] Where the legislative initiative belongs to the Commission, the instrument whereby this is undertaken is a 'proposal' rather than a 'recommendation', a term proper to the ECB. For an account of ECB Recommendations see section II.C(6)(a)(iii) above.

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B. The ECB's Advisory Role

(1) The ECB's Advisory Role with Regard to EU Legal Acts

The EU legislative bodies are required to consult the ECB in respect of any proposed EU act within its field of competence.[106] The aim of the ECB's advisory role is to ensure that no EU legal act within its fields of competence is adopted without the ECB's prior involvement. Referring, in the *Olaf* case, to the duty of the Union institutions to consult the ECB on proposed EU acts, the Court clarified that the objective of Article 127(4) TFEU is 'essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned, and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged'.[107]

(2) The ECB's Advisory Role with Regard to Draft National Legislative Provisions

The national authorities of the EU Member States have to consult the ECB on any draft legislative provision falling within the ECB's fields of competence.[108] This includes draft legislative provisions relating to the prudential supervision of credit institutions, and to the stability of the financial system.

The procedural aspects of the ECB's advisory role with regard to draft national legislative provisions are set out in Council Decision 98/415/EC on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (the 'Decision').[109] The Decision applies to all Member States (according to Article 2(1) of the Decision),[110] as well as to all provisions intended to become legally binding (according to Article 1(1) of the Decision),[111] excluding acts transposing EU directives into national law (Article 1(2) of the Decision).[112] The main objective of the Decision is to enable the ECB to provide national legislators with timely and expert advice on draft legislative provisions concerning matters within its fields of competence. This advice is intended to ensure that the national legal framework is compatible with the EU and the Eurosystem legal framework, thereby contributing to the achievement of the objectives of the Union in the field of monetary policy. For that

[106] This follows from the first indent of TFEU art 127(4), as reproduced in art 4 of the Statute. On the duty to consult the ECB with regard to EU legal acts see K. Würtz, 'The Legal Framework Applicable to the ECB Consultation on Proposed Community Acts' (2005) 4 *Euredia* 283; and A. Arda, 'Consulting the European Central Bank: Legal aspects of the Community and national authorities' obligation to consult the ECB pursuant to Article 105(4) EC' (2004) 1 *Euredia* 111.

[107] Case C-11/00 *Commission of the European Communities v European Central Bank* [2003] ECR I-7147, paras 110 and 111. The judgment is significant for its clarification of the ECB's advisory role since the Court, in response to a request by the ECB, examined the objectives of former TEC art 105(4) for the first time.

[108] This follows from the second indent of TFEU art 127(4), as reproduced in art 4 of the Statute. On the duty to consult the ECB with regard to draft national legislative provisions see, generally, S. Lambrinoc, 'The Legal Duty to Consult the European Central Bank—National and EU Consultations' ECB Legal Working Paper Series 9/2009; and S. Kerjean, 'L'impact de l'obligation de consultation de la Banque Centrale Européenne sur les projets de réglementation nationale: l'exemple français' (2005) 99 *Banque et Droit* 3.

[109] See OJ L189 (3 July 1998) 42.

[110] The one notable exception is that of the UK, which is exempt from the obligation to consult the ECB under the terms of the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland annexed to the Treaty.

[111] The duty of consultation is not limited to draft legislative provisions which will be adopted by a national parliament as primary legislation but covers all types of legally binding provisions, including secondary legislation such as governmental or ministerial decrees, as well as binding acts of general applicability of the NCBs or supervisory authorities.

[112] The rationale for this exemption is that the ECB will already have been consulted on the proposed EU legal act, in line with TFEU art 127(4), making it unnecessary to extend the ECB's advisory role to draft national provisions purely transposing that EU legal act.

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reason, consultations must take place when the legislative provisions are still at a draft stage, when the ECB Opinion can usefully be taken into consideration by the national authorities involved in the preparation and adoption of the legislation concerned. Having said that, ECB Opinions have no binding force: the consulting national authorities are not bound to follow an ECB Opinion. However, national legislators have generally agreed to amend (or even to withdraw) envisaged legislative provisions rather than adopt legislation that conflicts with the ECB's views. In this way, due to their authoritativeness, ECB Opinions play an important role in the convergence of national financial legislation.

Moreover, it follows from Article 3(1) of the Decision, read in conjunction with Article 4 thereof, that the 'authorities' in question are those 'preparing a legislative provision' and that the consulting authority can be different not only from 'the adopting authority' but also from 'the authority initiating the draft legislative provision'.

When is a legislative proposal within the ECB's fields of competence, according to Article 2(1) of the Decision? Article 2(1) is satisfied with regard to (a) the matters explicitly listed in Article 2(1) of the Decision as being within the ECB's fields of competence;[113] (b) draft legislative provisions affecting the basic tasks to be carried out through the Eurosystem; (c) draft legislative provisions affecting a variety of other tasks attributed to the Eurosystem under the Treaty (eg the issuance of banknotes and the approval of the volume of coins issued by Member States pursuant to Article 128 TFEU and the collection of statistical information pursuant to Article 5 of the Statute); and (d) draft legislative provisions concerning the instruments of monetary policy (Article 2(2) of the Decision).[114]

What are the consequences of a failure to consult the ECB on a draft national legislative provision within its fields of competence? Such failure is an infringement of the Decision and it could, therefore, lead to infringement proceedings before the Court brought by the European Commission against the Member State concerned, in accordance with Article 258 TFEU.[115] As the duty of consultation under the Decision is precise and unconditional, also individuals can rely on it before national courts. To date, there has only been one precedent of a national court having been confronted with arguments against the validity and enforceability of national provisions adopted without an ECB consultation,[116] and no request for a preliminary ruling in this matter has so far been addressed to the Court. However, the Court has repeatedly been asked to rule on the enforceability of a national provision adopted without prior notification to the European Commission, as required by certain EU acts[117] and it has held that a national provision adopted in breach of a substantial procedural requirement is unenforceable against individuals. Moreover, it is trite law

[113] The reference is to currency and means of payment matters, NCBs, the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics, payment and settlement systems, and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets.

[114] Recital 5 of the Decision clarifies that the latter does not include decisions taken by these authorities in the context of implementation of their monetary policy.

[115] If the failure to consult, in accordance with Decision 98/415/EC, is that of an NCB endowed, under national law, with regulatory powers, the ECB can *itself* commence infringement proceedings under TFEU art 271(d) and art 35.6 of the Statute.

[116] See judgment of the Supreme Court of Cyprus (15 September 2015) in Joined Cases No 1551-1571/2011 *Kouselinis Demetris and Others v Central Bank of Cyprus* [2015].

[117] See inter alia Case 174/84 *Bulk Oil* [1986] ECR 559; Case 380/87 *Enichem Base* [1989] ECR 2491; Case C-194/94 *CIA Security International* [1996] ECR I-2201; Case C-226/97 *Lemmens* [1998] ECR I-3711; Case C-235/95 *AGS Assedic Pas-de-Calais* [1998] ECR I-4531; Case C-443/98 *Unilever* [2000] ECR I-7535; and Case C-159/00 *Sapod Audic* [2002] I-5031.

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that all remedies normally available under national law must be open to litigants seeking to enforce claims under EU law.[118] It follows that, in those Member States where individuals have locus standi to initiate proceedings in order to annul a national legislative provision on the grounds of a serious procedural defect, individuals should also have the right to request their competent national courts to annul national legislative provisions adopted in breach of an essential procedural requirement of EU law, such as a prior consultation of the ECB.

V. The Evolving Role of the ECB Since the Start of the Financial Crisis

A. ECB Crisis-related Response

One of the more notable features of the policy landscape since the outbreak of the global financial crisis in Europe in October 2008 has been the recourse to central banks to guarantee financial stability by providing liquidity to dysfunctional market segments or by contributing in a technical capacity to international initiatives in support of distressed sovereigns. Nowhere has the key role of central banks in combating the consequences of the financial crisis been more apparent than in the eurozone, where the ECB has been at the forefront of Europe's efforts to stem the rising tide of challenges to the stability of financial institutions and sovereigns, and to maintain trust in the single currency.

As mentioned earlier, the Maastricht Treaty has equipped the ECB with a number of monetary policy instruments through which to achieve its tasks and objectives, with an emphasis on its primary objective of maintaining price stability for the eurozone.[119] Article 18.1[120] of the Statute requires that all Eurosystem liquidity-providing operations are adequately collateralized by securities provided by the counterparties.[121] Since the Eurosystem's inception, the single monetary policy has been implemented on the basis of a standardized, rules-based approach: as mentioned earlier, the terms and conditions subject to which the Eurosystem is prepared to enter into monetary policy operations with counterparties appear in the General Documentation.[122] By the start of the global financial crisis the need to broaden, be it only temporarily, the universe of eligible collateral so as to provide for the flexibility necessary to combat the crisis had become clear. To address the fallout of the financial crisis, the ECB and the Eurosystem undertook a number of unconventional measures, falling, broadly, into two distinct waves:

(a) a first wave of unconventional measures,[123] adopted between 2008 and 2011, which gradually expanded the scope of pre-crisis instruments of monetary policy, and consisted

[118] See eg Case 158/80 *Rewe* [1981] ECR 1805.

[119] More specifically, the ECB conducts open market operations, it offers standing facilities, and it requires credit institutions to hold minimum reserves on accounts with the Eurosystem.

[120] This provides that: '[I]n order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national banks may: … conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral'.

[121] The rationale for this requirement is to protect the Eurosystem from incurring losses in the conduct of credit operations, as these would impact on its credibility and independence, both of which are essential to the achievement of its Treaty objectives.

[122] Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem (recast), OJ L331 (14 December 2011) 1.

[123] For a description of some of the ECB's unconventional measures since the start of the crisis see C. Zilioli, 'The Legal Response to the Financial Crisis Between 2008 and 2010: The Role and Initiatives of the European Central Bank' International Monetary Fund 6/2013 (vol 6).

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of: (i) an increase in the length of allotment maturities ('Long-term Refinancing Operations'); (ii) the introduction of a full allotment policy at a fixed rate; (iii) a relaxation of the rules on collateral eligibility rules;[124] (iv) the provision of liquidity in foreign currencies; (v) the launch of 'Covered Bond Purchase Programme' (CBPP) 1;[125] (vi) the outright purchase of government bonds ('Securities Market Programme');[126] (vii) the conduct of 'Very Long-term Refinancing Operations'.

(b) a second wave of extraordinary measures, broadly qualifying as 'quantitative easing' (QE),[127] consisting of: (i) the announcement of the 'Outright Monetary Transactions' programme (OMT);[128] (ii) the imposition of negative rates;[129] (iii) the launch of a 'Public Sector Purchase Programme' (PSPP);[130] (iv) the conduct of 'Targeted Long-term Refinancing Operations' (TLTRO); (v) the launch of CBPPs 2 and 3;[131] (vi) and the introduction of an 'Asset-backed Securities Purchase Programme' (ABSPP).

The following paragraphs provide more details.

[124] See Regulation (EC) No 1053/2008 of the European Central Bank of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/11), OJ L282 (25 October 2008) 17, followed and replaced by Guideline of the European Central Bank of 21 November 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/18), OJ L314 (25 November 2008) 14, and Guideline of the European Central Bank of 10 December 2009 amending Guideline ECB/2008/18 on temporary changes to the rules relating to eligibility of collateral (ECB/2009/24), OJ L330 (16 December 2009) 95.

[125] See Decision of the European Central Bank of 2 July 2009 on the implementation of the covered bond purchase programme (ECB/2009/16), OJ L175 (4 July 2009) 18. The aim of this programme was to revive the respective segment of the private debt securities market, which had virtually dried up in terms of liquidity, issuance, and spreads.

[126] See Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5), OJ L124 (20 May 2010) 8, with the objective to address the malfunctioning of securities markets, and to restore an appropriate monetary policy transmission mechanism (see recital (3) of the Decision). Apart from purchases of government bonds on the secondary market, the scope of the interventions also covered purchases, in the primary and secondary markets, of securities issued by private entities incorporated in the eurozone.

[127] For a description of some of the ECB's unconventional measures since the start of the crisis see C. Zilioli, 'Legal aspects of extraordinary/unconventional monetary policy instruments of the ECB (the so-called 'quantitative easing')' Speech given at the BIS Central Bank Legal Experts Meeting on Recent Developments in Central Bank Activities (4 February 2016).

[128] 'The Governing Council, within its mandate to maintain price stability over the medium term and in observance of its independence in determining monetary policy, may undertake outright open market operations of a size adequate to reach its objective. In this context, the concerns of private investors about seniority will be addressed. Furthermore, the Governing Council may consider undertaking further non-standard monetary policy measures according to what is required to repair monetary policy transmission. Over the coming weeks, we will design the appropriate modalities for such policy measures.' See Mario Draghi, 'Introductory Statement to the Press Conference' Frankfurt am Main (2 August 2012) http://www.ecb.europa.eu/press/pressconf/2012/html/is120802.en.html.

[129] Adjusting monetary policy rates is the key instrument of monetary policy in the hands of any central bank. However, negative deposit facility rates are a novel, non-standard measure, which had only marginally been tried before. In substance, instead of remunerating deposits held with it, the central bank would be charging money on the deposits it holds. The reason for that is to create incentives for banks to lend more instead of keeping the deposits in safety, at the central bank. If this happens, further down in the economy, economic agents could also be stimulated to spend more than keep deposits.

[130] See recital (3) of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L121 (14 May 2015) 20.

[131] The objective of CBPP3 was to 'further enhance the transmission of monetary policy, facilitate credit provision to eurozone economy, generate positive spill-overs to other markets and, as a result, ease the ECB's monetary policy stance, and contribute to a return of inflation rates to levels closer to 2%'. See recital 2 of Decision of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme (ECB/2014/40), OJ L335 (22 November 2014) 22.

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(1) Temporary Broadening of the Eurosystem Collateral Eligibility Rules and Enhanced NCBs Collateral Policy Discretion

The concept of monetary union requires the definition and implementation of a single monetary policy throughout the eurozone. Since operations are decentralized at the level of the NCBs, only a very narrow room for discretion and only in specific, well-defined cases (relationship with counterparties and acceptance of collateral) is allowed to the NCBs, to ensure the singleness of the monetary policy.[132] In the original version of the General Documentation,[133] discretion was limited to the possibility for the participating NCBs to (a) suspend or exclude their counterparties' access to monetary policy instruments on grounds of *prudence*[134] (see first paragraph of section 2.4 of Annex I to the General Documentation) or, in certain cases, falling within the notion of 'default', (b) accept, as eligible collateral for Eurosystem credit operations, 'tier two' assets, provided that these fulfilled certain minimum criteria,[135] and (c) apply certain risk-control measures to assets accepted as eligible collateral.[136] Except for the acceptance, by participating Member State NCBs, of 'tier two' assets (including non-marketable assets), which postulated a considerable degree of discretion for individual NCBs[137] but was merely temporary (removed, as of the introduction, on 1 January 2007, of the so-called 'single-list' of collateral), the remaining institutionalized opportunities for the use of discretion by the participating CBs were of lesser significance. The 'inclusive' nature of the General Documentation and the limited scope for discretion left to NCBs to ensure the singleness of monetary policy, continue to be reflected in sections 1.4 and 1.5 of Annex I thereto. More specifically, section 1.4 inter alia provides that: '[T]he Eurosystem's monetary policy framework is formulated with a view to ensuring the participation of a broad range of counterparties', while section 1.5 states that: '[T]he Eurosystem accepts a wide range of assets to underlie its operations'.[138] Read in conjunction with Article 18 of the Statute, these provisions indicate that, in setting the rules on the basis of which the single monetary policy is to be implemented,[139] the Eurosystem needs to maintain a broad scope for the counterparties and the assets eligible for its monetary policy operations.

[132] This lack of discretion is counterbalanced by loss-sharing amongst the NCBs for monetary policy operations.

[133] The reference is to Guideline of the ECB of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem (ECB/2000/7), OJ L310 (11 December 2000) 1.

[134] While the term 'prudence' is not defined in the General Documentation, it is deemed to refer to a counterparty's 'financial soundness', one of the three counterparty eligibility criteria under section 2.1 of Annex I to the General Documentation (alongside a counterparty's subjection to minimum reserves and its fulfilment of certain operational criteria for participation in monetary policy operations). 'Financial soundness' is also not a defined term in the General Documentation, with its assessment depending on the competent domestic banking sector supervisor. Financial soundness is broadly understood in terms of an eligible counterparty being (a) subject to harmonized EU/EEA supervision, (b) raising no prudence-related concerns and (c) not being in 'default'.

[135] Ibid s 6.3 and Table 4 thereof. This was considered to be a transitional provision only.

[136] Ibid s 6.4 and Box 7 thereof.

[137] Fn 18, on p 42 of the 2004 version of the General Documentation is revealing of the degree of discretion afforded to the participating CBs with regard to the acceptance of tier two non-marketable assets: 'For non-marketable tier two assets and debt instruments with restricted liquidity and special features, national central banks may decide not to disclose information on individual issues, issuers/debtors or guarantors in the publication of their national tier two lists'.

[138] In this respect, the collateral framework of the Eurosystem differs from that of the Federal Reserve and, to a lesser extent, the Bank of England. The approach of the Eurosystem is linked to the specificities of Continental Europe's less developed capital market, and to the fact that the eurozone is characterized by a more traditional bank-based financial system, with relatively under-developed private sector bond markets.

[139] Article 18.2 of the Statute provides that: '[T]he ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions'.

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The crisis rendered necessary the making of certain adjustments to the General Documentation, to facilitate the provision of the liquidity necessary for the market to operate in stress conditions. In October 2008, the ECB decided, first by means of an ECB Regulation[140] and, thereafter, through an ECB Guideline,[141] to broaden, temporarily, the rules relating to the eligibility of collateral for Eurosystem credit operations through the acceptance, as eligible collateral, of (i) non-euro denominated marketable instruments, (ii) English law-governed syndicated loans, (iii) debt instruments issued by credit institutions, which are traded on certain non-regulated markets, (iv) collateral with a 'BBB-' credit assessment and above, (v) subordinated assets with adequate guarantees and (vi) fixed-term deposits, within the meaning of section 3.5 of the General Documentation.

In addition, the crisis years have seen a gradual but appreciable (even though temporary) shift towards more discretion in the participating NCBs' implementation of the single monetary policy. While this development could be seen as prejudicial for the singleness of monetary policy, it has allowed for a temporary compromise between the need for broadening the eligible collateral basis, on the one hand, and the need to allow more flexibility for the NCBs, on the other, to enable them to limit their credit risk. In this vein, several amendments have been made to the General Documentation. First, in section 2.4 of Annex I to the General Documentation, the possibility was introduced for the Eurosystem to reject or limit the use by *specific* counterparties of eligible assets and to introduce supplementary haircuts. While the possibility to 'exclude certain assets from use in [Eurosystem] monetary policy operations' already featured in the original version of the General Documentation,[142] its application in cases involving *specific* counterparties was a novelty that enhances considerably the scope for the *targeted* use of discretion. Secondly, the restructuring of section 2.4 to reflect the growing importance of enhanced discretion as a *stable* feature of the single monetary policy, while at the same time emphasizing the importance of ensuring that discretionary measures are 'applied and calibrated by the Eurosystem in a proportionate and non-discriminatory manner', and that: '[A]ny discretionary measure taken vis-à-vis an individual counterparty will be duly justified'.[143] Thirdly, a number of *significant* adjustments to the Eurosystem's credit risk and risk control frameworks (see sections 6.3.1 and 6.4, as well as Box 7 of the General Documentation), place more emphasis on the use of discretion to ensure adequate risk protection for the Eurosystem, in line with Article 18.1 of the Statute.[144] Most importantly, the adoption, by the Governing Council, of Decision ECB/2011/25 of 14 December 2011 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral has marked a paradigm shift in the implementation of the single monetary policy.[145]

[140] Regulation (EC) No 1053/2008 of the ECB of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/11), OJ L282 (25 October 2008) 17. The adoption of this Regulation marked the first time that this form of legal act was used by the ECB in the field of monetary policy.

[141] Guideline of the ECB of 21 November 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/18), OJ L314 (25 November 2008) 14.

[142] See Box 7, 'Risk control measures'.

[143] See section 2.4.3 of Annex I to the General Documentation. Section 2.4.3 represents an attempt to temper the enhanced discretion imported into the ECB's rule book by the recent amendments to the General Documentation.

[144] See Box 7, 'Risk control measures'. These include the application of limits to the use of unsecured debt instruments and of supplementary haircuts as well as the targeted exclusion of certain assets from use in monetary policy operations, where a *specific* counterparty's credit quality appears to exhibit a high correlation with the credit quality of the collateral submitted by that counterparty.

[145] See OJ L341 (22 December 2011) 65, as amended by (i) Decision of the ECB of 21 March 2012 amending Decision ECB/2011/25 on temporary measures relating to eurosystem refinancing operations and eligibility of collateral (ECB/2012/4), OJ L91 (29 March 2012) 27, (ii) Decision of the ECB of 28 June 2012 amending Decision ECB/2011/25 on temporary measures relating to eurosystem refinancing operations and

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Article 4(1) thereof was to allow individual participating NCBs an unprecedented level of discretion to accept, as collateral, additional credit claims that *do not* meet all of the Eurosystem's eligibility criteria. The decision of the Governing Council to allow—however temporarily—individual departures from the hitherto, uniform approach to the Eurosystem's collateral policy is not tantamount to a 'renationalisation' of monetary policy, as some have argued,[146] nor does it herald the first major inroad into the General Documentation's monopoly as the unique source of rules on the implementation, by the participating NCBs, of the single monetary policy.[147] This, perhaps the most significant deviation to date from the single monetary policy, was achieved through a *temporary* measure, one that is external to the General Documentation, so as to mitigate its interference with the conceptual integrity of the single Eurosystem framework for monetary policy operations. The fact that seven participating NCBs[148] are to provide liquidity to commercial banks partly on their *own* terms and conditions is mitigated by the requirement of the *prior approval* of the Governing Council for such terms and conditions (Article 4(2) of the Decision).

Finally, more recently, the Governing Council decided that the NCBs were to no longer be under an obligation to accept as collateral, for Eurosystem credit operations, (eligible) bank bonds guaranteed by Member States under an EU/IMF programme or whose credit assessment does not comply with the minimum Eurosystem standards applicable to the issuers and guarantors of marketable assets under sections 6.3.1 and 6.3.2 of Annex I to the General Documentation.[149] Both of the above-mentioned Governing Council decisions (which have since been replaced) are telling of the importance of discretion, especially at times of crisis, when it is necessary to restore an appropriate monetary policy transmission mechanism, as a condition for broadening the universe of eligible collateral and with a view to helping manage the balance-sheet risks of central banks. It also serves as a reminder of the margin for discretionary decision-making and of the dangers this could pose for the singleness of the monetary policy, even in the context of a supra-national monetary policy framework (such as the Eurosystem), where uniformity and standardization have so far been (and are bound to remain) the norm.

(2) Provision of Liquidity in Leading Foreign Currencies

Bilateral swap agreements have been concluded since 2008 between the ECB and the US Federal Reserve Bank, the Bank of Japan, and the Swiss National Bank to ensure that

eligibility of collateral (ECB/2012/11), OJ L175 (5 July 2012) 17, (iii) Decision of the ECB of 3 July 2012 amending Decision ECB/2011/25 on temporary measures relating to eurosystem refinancing operations and eligibility of collateral (ECB/2012/12), OJ L186 (14 July 2012) 38, and repealed by Decision of the ECB of 2 August 2012 repealing Decision ECB/2011/25 on additional temporary measures relating to eurosystem refinancing operations and eligibility of collateral (ECB/2012/17), OJ L218 (15 August 2012) 19.

[146] See eg S. Balling, 'Ende des Eurosystems' *Börsen-Zeitung* (10 February 2012); M. Jones and E. Kuehnen, 'New rules seen Balkanising euro zone' *Reuters* (10 April 2012).

[147] Several temporary measures and derogations have been adopted by the Governing Council since the start of the crisis, including Regulation ECB/2008/11 of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral; Guideline ECB/2008/18 of 21 November 2008 on temporary changes to the rules relating to eligibility of collateral; and Decision ECB/2010/3 of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek government, to name only some of the more prominent examples.

[148] See 'ECB's Governing Council approves eligibility criteria for additional credit claims' ECB press release of 9 February 2012, available on the website of the ECB.

[149] See art 1 of Decision ECB/2012/4 of 21 March 2012 amending Decision ECB/2011/25 on additional temporary measures relating to eurosystem refinancing operations and eligibility of collateral. Recital (3) to the amending Decision inter alia provides that 'such a measure may be applied temporarily'. The Deutsche Bundesbank was to be the first of the 17 eurozone central banks to refuse to accept as collateral bank bonds guaranteed by the governments of the programme countries.

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counterparties in the eurozone are able to provide their market participants with sufficient liquidity in the relevant foreign currencies.[150] This instrument, unprecedented in central bank history but necessary in an increasingly globalized and financially integrated world, proved to be very effective in stabilizing markets by averting shortages in the four leading business currencies.

(3) The Covered Bonds Purchase Programmes

The first CBPP was launched in July 2009 pursuant to an ECB Decision[151] motivated by the realization that, in view of the exceptional circumstances prevailing, at the time, in the covered bond market, a purchase programme was necessary to promote a decline in money market term rates, ease funding conditions for credit institutions and enterprises, encourage credit institutions to maintain and expand their lending to clients, and improve market liquidity in important segments of the private debt securities market. The programme was implemented by the NCBs and the ECB, in direct contact with counterparties, through outright purchases in the primary and secondary markets of eligible covered bonds[152] with a targeted global nominal amount of €60 billion (shared among NCBs and ECB, in accordance with the ECB's capital key). The programme, which expired on 30 June 2010, was a success: it revived the sluggish covered bond primary market, triggering a substantial tightening in secondary market spreads across the different covered bond categories and helping restore confidence in one of the most important segments of Europe's privately issued bond markets, amounting to an estimated 20 per cent of outstanding all residential mortgage loans in the EU.

On 6 October 2011, the Governing Council decided to launch CBPP2, the technical modalities of which were published on 3 November 2011.[153] The purchases of covered bonds commenced in November 2011. The aim of the programme was to contribute (a) to easing funding conditions for credit institutions and enterprises, and (b) to encouraging credit institutions to maintain and expand their lending to customers. The initially targeted total nominal amount of purchases was €40 billion, and the purchases were expected to have been carried out in full by 31 October 2012. The CBPP2 ended as scheduled on 31 October 2012.

On 4 September 2014, the Governing Council decided to launch a new covered bond purchase programme (CBPP3), the technical modalities of which were published on 2 October 2014.[154] The aim of the programme was to enhance the functioning of the monetary policy transmission mechanism, to support financing conditions in the eurozone, to facilitate credit provision to the real economy and to generate positive spillovers to other markets.

(4) Securities Markets Programme and Outright Monetary Transactions

The fourth, and somewhat controversial, crisis-motivated initiative of the ECB in the field of collateral policy was the establishment and implementation of the Securities Markets

[150] See eg 'ECB extends the swap facility agreement with the Bank of England' ECB press release of 12 September 2012, available on the website of the ECB.

[151] Decision ECB/2009/16 of 2 July 2009 on the implementation of the covered bond purchase programme, OJ L175 (4 July 2009) 18.

[152] In general, only covered bonds issued in line with the conditions laid down in art 22(4) of the UCITS Directive were eligible for CBPP. However, structured covered bonds that an NCB, at its sole discretion, considered to offer safeguards similar to those of UCITS-compliant covered bonds were also eligible.

[153] See https://www.ecb.europa.eu/press/pr/date/2011/html/pr111103_1.en.html.

[154] See https://www.ecb.europa.eu/press/pr/date/2014/html/pr141002_1_Annex_2.pdf.

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Programme (SMP),[155] pursuant to Decision ECB/2010/5 of 14 May 2010 establishing a securities markets programme.[156]

On 10 May 2010, the Governing Council of the ECB decided on several measures to address the severe tensions in certain market segments that hampered the monetary policy transmission mechanism and the effective conduct of monetary policy, one of which was the SMP. The aim of the SMP was to cater for the conduct of outright purchases of eligible marketable debt instruments, to be implemented by the eurozone NCBs, according to their allocated share (directly related to the key for subscription of the ECB's capital), and the ECB. The objective of the SMP was to address the malfunctioning of securities markets and to restore an appropriate monetary policy transmission mechanism, so as to ensure depth and liquidity in those market segments that had become dysfunctional by early May 2010. The scope of the interventions, which were implicitly made subject to the fulfilment by some of the eurozone governments of their commitment to accelerate fiscal consolidation and to ensure the sustainability of their public finances, covered the purchase, in the secondary market, of eligible market debt instruments issued by the central governments or public entities of the eurozone Member States (with an emphasis on Portugal, Ireland, Greece, and Spain) and, on the primary and secondary markets, of eligible marketable debt instruments issued by private entities incorporated in the eurozone. To neutralize the impact of the above interventions, which were of temporary but indefinite duration (unlike those conducted under the CBPPs), specific operations were conducted to immediately reabsorb the liquidity injected through the SMP (through the ECB deposit facility) thereby ensuring that the monetary policy stance is not affected.

The last SMP purchases took place in February 2012 and the Governing Council announced the end of the programme on 6 September 2012, together with the announcement of the decision on Outright Monetary Transactions (OMTs).[157]

OMTs refer to proposed Eurosystem outright transactions in the secondary sovereign bond markets, the aim of which would be to safeguard an appropriate transmission of monetary policy and the singleness of the Eurosystem's monetary policy. OMTs are to be conducted in accordance with a specified framework, which is to include strict compliance with effective conditionality attached to the EU/IMF programme to which OMT purchases' beneficiaries are to be subject. It would be for the Governing Council to decide, following a thorough assessment, on the possible start, continuation, and suspension of OMTs in full discretion and acting in accordance with its monetary policy mandate under the Treaties. OMTs had not been launched, at the time of writing, and no legal act which would serve as the legal basis for these transactions has yet been adopted by the Governing Council. However, recent research suggests that the mere commitment of the Eurosystem to purchase, if need be, bonds through OMT is to be credited with success for decreasing the Italian and Spanish two-year government bond yields by about two percentage points, while leaving unchanged bond yields of the same maturity in Germany and France.[158] This demonstrates that the part of

[155] For an account of the legal basis for the SMP see P. Athanassiou, 'Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What is Legally Possible and What Not' (2011) 36(4) *European Law Review* 558.

[156] See OJ L124 (20 May 2010) 8.

[157] See http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

[158] C. Altavilla, D. Giannone, and M. Lenza, 'The Financial and Macroeconomic Effects of OMT Announcements' ECB Working Paper Series 1707/2014. The paper further suggests that the reduction in bond yields due to the announcement of the intention to conduct OMTs was associated with a significant increase in real activity, credit, and prices in Italy and Spain, with only muted spill-overs in France and Germany.

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the spread which decreased, following a simple announcement by the ECB, did not reflect economic fundamentals but only irrational fears and, therefore, was itself a distortion in the market, which the ECB announcement has helped redress.

The validity of the ECB's purchases of government bonds under the SMP was challenged by a number of German citizens before Germany's Federal Constitutional Court. The scope of the lawsuit was, thereafter, extended to include the announcement of the Outright Monetary Transactions, leading to the judgment of the European Court of Justice (ECJ) in Case C-62/14 (*Gauweiler*).[159] Germany's Federal Constitutional Court had, in its preliminary reference request (the first ever in its history), expressed reservations as to the legality of OMTs, which, in its view, risked going beyond the monetary policy mandate of the ECB, and circumventing the monetary financing prohibition. In a nutshell, the view held by the Federal Constitutional Court was that OMTs *complemented* the financial assistance provided by the Member States and, subsequently, the ESM, to troubled eurozone Member States and, to that extent, they were economic policy measures, therefore ultra vires; in addition, they violated Article 123 TFEU. Accordingly, the ECJ divided the substantive part of its judgment in two distinct components, to address each of the two main reservations of the referring Court.

One of the core issues that the referring Court expressed concerns about in its preliminary reference request was whether OMTs qualified as monetary policy—rather than economic policy—measures (the former are the exclusive competence of the ECB, under Article 127 TFEU, while the latter are the preserve of the Member States, under Article 119 TFEU). According to the ECJ, both the *objectives* of a measure, and the *instruments* employed to achieve them, are relevant for its classification as a monetary policy measure or otherwise (para 46). Starting with the *objectives* of a measure, the fact that this may also serve goals other than price stability (the primary objective of the Eurosystem) or have indirect effects on the stability of the eurozone (which is a matter of economic policy) did not, in the ECJ's view, detract from its classification as a monetary policy measure (paras 51 and 52).[160] Turning to the choice of *instruments* employed to achieve the objectives of a monetary policy measure, the ECJ judgment in *Gauweiler* confirms that the ECB can legitimately engage in secondary market government bond purchases, as monetary policy measures, where their objective is to restore the smooth operation of the monetary policy transmission mechanism, and to safeguard the singleness of the monetary policy in the eurozone (paras 53–56). The targeted nature (selectivity) of OMTs, which, in the referring Court's view, was a feature typical of economic (rather than monetary) policy measures *did not* invalidate OMTs as legitimate instruments of monetary policy: to achieve, through OMTs, its monetary policy objective of restoring the monetary policy transmission mechanism, the ECB was free to act selectively, where the disruption it sought to restore was, as in this case, localized (paras 55 and 89). Besides, the conditionality attaching to the proposed OMTs did not equate them to economic policy measures: it did not, in other words, subordinate the implementation of OMTs, as monetary

[159] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400. On the Court's ruling in *Gauweiler* see N. Xanthoulis and T. P. Tridimas, 'A Legal Analysis of the Gauweiler Case', cited in F. Fabbrini (ed), 'The European Court of Justice, the European Central Bank and the Supremacy of EU Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 1; P. Craig and M. Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) 41 *European Law Review* 1; D. Adamski, 'Economic Constitution of the Euro Area After the *Gauweiler* Preliminary Ruling' (2015) 52 *Common Market Law Review* 1485; and F. Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2005) University of Copenhagen Faculty of Law Research Paper 2015-11.

[160] In this respect, also see para 56 of the Court's ruling in Case C-370/12 *Pringle* (n 27), where the Court argued, mutatis mutandis, that: 'an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro'.

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policy measures, to economic policy considerations, linked to a bond-issuer's compliance with the terms of an economic adjustment programme. On the contrary, the element of conditionality built into OMTs ensured that the latter would 'not work against the effectiveness of the economic policies followed by the Member States' (para 60). Moreover, compliance with conditionality was a necessary but not sufficient condition for OMT purchases, as disruptions in the operation of the monetary policy transmission mechanism were also necessary (para 62).[161] Finally, the effects of bond purchases on the issuer's impetus to comply with the terms of such programme were only *indirect* (paras 58–59).

Having determined that OMTs qualified as genuine monetary policy measures, the ECJ proceeded to examine their proportionality. Applying its settled case law, the ECJ divided its proportionality analysis in two parts: first, were OMTs appropriate to attain their legitimate monetary policy objectives and, second, were they necessary to achieve those objectives? In terms of the appropriateness of OMTs, the ECJ noted that these were accompanied by an adequate statement of reasons (paras 70–71), and that the policy decision to launch them was based on a reasoned analysis of the economic situation in the eurozone and on a thorough exchange of different views. The resulting decision, while not unanimous, was not vitiated by manifest errors of assessment (paras 72–74) despite the challenges against it (para 75). It followed that it was within the policy discretion of the ECB to adopt the OMT decision so as to achieve its legitimate monetary policy objectives (para 77), and that this measure was appropriate to achieve them, a view that was proven correct by the stabilizing impact on the eurozone of the announcement of the *mere intention* to launch OMTs (para 79). Turning to the test of necessity, the ECJ took note of the various constraints built into OMTs: their temporary nature, their quantitative limits, the narrow scope of eligible bonds and eligible issuers, and, by implication, the limited amount of commitments that the Eurosystem would undertake by purchasing OMT-eligible bonds. Given these constraints, OMTs did not, in the ECJ's view, go beyond what was necessary to achieve the legitimate objectives of the Eurosystem (paras 81–91).

The second core issue that the referring Court had expressed concerns about was that of the compatibility of OMTs with the monetary financing prohibition, citing the risk of the programme possibly circumventing the prohibition. The ECJ found that sufficient safeguards had been built into the prospective OMTs to avert the risk of its implementation generating effects equivalent to direct purchases. These included first, the discretionary nature of purchases under OMTs, secondly, the observance of a 'black-out' period before any purchases could be conducted to allow for market price formation, thirdly, that no prior public announcement would precede the purchase of bonds nor would any information be divulged with regard to the volumes to be purchased (para 106), fourthly, the *temporary* nature of OMTs, conditional on the need to restore the monetary policy transmission mechanism and safeguard the singleness of the monetary policy of the eurozone, and their selectivity, both of which limited the OMTs' impact on the financing conditions of the beneficiary states (paras 113–16), fifthly, the ECB's option to sell the purchased bonds at any time (para 117), sixthly, the restriction of purchases to bonds issued by Member States already en route to recovery (ie

[161] In this respect, the ECJ parted company with the Opinion of Advocate General Cruz Villalón. In his assessment of whether the ECB's decision to launch OMTs was reconcilable with its monetary policy mandate, the Advocate General reasoned that, because the ECB played an active part in the design of financial assistance programmes, and because OMTs were unilaterally linked, through conditionality, to those programmes, making the purchase of government bonds subject to compliance with conditions set by the ECB itself, rather than by a third party, could be an instrument to enforce those conditions and their macroeconomic (rather than monetary policy) rationale, detracting 'from or even distort[ing] the monetary policy objectives that the OMT programme pursues' (para 145).

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Member States having regained—or in the process of regaining—market access (para 119)), and, seventhly, the OMTs' conditionality element, which precluded the risk of the prospect of bond purchases dis-incentivizing Member States from proceeding with fiscal consolidation (para 120). Finally, while the ECJ acknowledged that OMTs 'could expose the ECB to a significant risk of losses', such risks were inherent in open market operations (which is why the Statute provides for a method of sharing losses), and did not weaken the Article 123 compliance guarantees built into OMTs. In the ECJ's view, the design of the proposed OMTs was 'likely to reduce the risk of losses to which the ECB is exposed', without the need for the ECB to shield itself from the risk of losses by claiming a privileged creditor status (paras 123–26).

What does *Gauweiler* tell us about the limits to the ECB's monetary policy powers at times of crisis, the EU law constraints on the exercise of those powers, and the features of any supervening or future ECB bond purchase programmes?[162] First, it tells us that trying to separate monetary from economic policy can be both artificial and misleading: the dividing line between the two is far from clear, not least because the ECB monetary policy powers by design have an impact on the economy.[163] Secondly, it tells us that one needs to look at the objectives and the instruments of a policy to decide whether the measure in question qualifies as one of monetary policy. Thirdly, it tells us that the selectivity of a legitimate monetary policy measure is not necessarily an indication of an ultra vires economic policy measure, rather it could be an application of proportionality. Fourthly, it tells us that the broader the room for discretion is in deciding on an institution's policy instruments, the stricter the application of the proportionality test needs to be: duty to provide an adequate statement of reasons; assessment of adequateness; necessity of adopting the measure to achieve the objective. Fifthly, and finally, it tells us that a legitimate monetary policy measure might need safeguards to ensure there is no circumvention of the monetary financing prohibition: what those safeguards would need to be will, to some extent, depend on the specificities of the monetary policy measure in question.

It is against the above benchmark that the validity of other, present or future, ECB monetary policy non-standard measures is to be judged: it is for that reason that *Gauweiler* is such a crucial judgment for the ECB, and for the future of its monetary policy action, especially at times of crisis.

(5) ABS Purchase Programme and Public Sector Purchase Programme

The ABSPP, established in November 2014, forms part of the extended asset purchase programme. The legal parameters and eligibility criteria for the ABSPP are set out in Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the implementation of

[162] On the Court's conclusions see also C. Zilioli, 'The ECB's Powers and Institutional Role in the Financial Crisis: a Confirmation from the Court of Justice of the European Union' in F. Fabbrini (ed), 'The European Court of Justice, the European Central Bank and the Supremacy of EU Law' Special Issue (2016) 23 *Maastricht Journal of European and Comparative Law* 1171.

[163] In this respect see TFEU art 127, para 1, second sentence. We would read *Pringle* to corroborate this proposition: the Court's finding, in *Pringle*, that the establishment of the ESM fell within the area of economic policy and did not violate the exclusive competence of the Union, under art 3(1)(c), in the area of monetary policy, despite the fact that its objective was to 'safeguard the stability of the euro area as a whole' (*Pringle* (n 27) para 56), does not point to the existence of a hard dividing line between monetary and economic policy. Indeed, in para 56 of its judgment in *Pringle*, the Court explicitly acknowledged that economic policy measures may have an indirect impact on monetary policy. What is crucial to the ultimate classification of an act is a comparison of the objective or objectives it purportedly serves against the actual instruments chosen for its pursuit. Both in *Pringle* and in *Gauweiler*, the instruments of choice matched the purported objectives, even if, in *Pringle*, the Court seemed to place the main emphasis on objectives, as a means of determining the nature of a measure as one of legitimate monetary policy (*Pringle* (n 27) para 53, as compared with para 60 thereof).

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the asset-backed securities purchase programme (ECB/2014/45), OJ L 1 (6 January 2015) 4 and Decision (EU) 2015/1613 of the European Central Bank of 10 September 2015 amending Decision (EU) 2015/5 on the implementation of the asset-backed securities purchase programme (ECB/2015/31), OJ L 249 (29 May 2015) 28.

The PSPP, which was launched on 9 March 2015,[164] targets marketable debt instruments issued by eurozone central governments, certain agencies located in the eurozone or certain international or supranational institutions (referred to in legal texts as 'international organisations and multilateral development banks') located in the eurozone. The PSPP's compliance with the monetary policy mandate of the ECB is, in the authors' view, beyond dispute: both its objective (to target persistently low inflation) and the instruments used for its pursuit (purchases, on the secondary market, of government bonds) are consistent with those expected of a genuine monetary policy measure; the PSPP is proportionate to the monetary policy objectives it pursues; finally, the PSPP does not violate the monetary financing prohibition, given the black-out periods it sets to guarantee that transactions are not tantamount to purchases in the primary market, its purchase limits, its rules on portfolio allocation and its transparency requirements. Besides, unlike OMTs, the PSPP encompasses *all* eurozone Member States bonds, hence, its launch raises no selectivity issues, while it also contains no overarching reference to the issuer's compliance with economic adjustment programme conditionality, given that its objective is a eurozone-wide issue.

(6) Concluding Remarks

The new instruments introduced in the height of the crisis have been praised for addressing, in a flexible yet responsible way, the urgency of the moment, allowing the financial markets to continue functioning and the Eurosystem monetary policy to continue being delivered despite the disruption of the global financial crisis. These measures, which are intended as temporary,[165] have nevertheless not escaped criticism for leading, effectively, to the creation of money, for diluting the 'one-size-fits-all' rationale of the Eurosystem's monetary policy, and for raising concerns from the point of view of their compliance with the monetary financing prohibition laid down in Article 123 TFEU.[166] These criticisms do not appear to attribute the appropriate weight to the countermeasures implemented to absorb the excessive liquidity

[164] Decision (EU) 2015/774 of the ECB of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L121 (14 May 2015) 20.

[165] The ECB has constantly reminded markets that it is planning an 'exit policy' to terminate these exceptional measures in due course, once market conditions have been normalized.

[166] Under TFEU art 123(1), mirrored in art 21.1 of the Statute, overdraft facilities or any other type of credit facility with the ECB or with the NCBs in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, or other bodies governed by public law, or public undertakings of Member States, shall be prohibited. Under art 1(b)(ii) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in TFEU arts 123 and 125(1), any 'other type of credit facility' is defined to include inter alia 'any financing of the public sector's obligations vis-à-vis third parties'. The monetary financing prohibition is of essential importance to ensuring that the primary objective of the ESCB (namely to maintain price stability) is not impeded. The ECB Governing Council, which under TFEU art 271(d) has the same powers in respect of the fulfilment by NCBs of obligations under the Treaties and the Statute as those conferred upon the Commission in respect of Member States by TFEU art 258, has consistently stated that the financing by an NCB, granted independently and at its full discretion, of solvent credit institutions in connection with central banking tasks (such as monetary policy, payment systems, or temporary liquidity support operations such as ELA) is compatible with the monetary financing prohibition, and conversely, that the financing, by an NCB, of solvency support operations (eg the provision of capital) is a prohibited form of monetary financing. See eg ECB, 'Convergence Report' (June 2013) 29; ECB, 'Convergence Report' (May 2010) 25. The two legally relevant criteria, as endorsed by the Governing Council, in determining whether central bank lending under national law could potentially qualify as prohibited monetary financing under TFEU art 123 are (i) the solvency of the credit/financial institution, and (ii) the independence of the central bank when providing the funding.

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that the Eurosystem has provided the market with, nor to the fact that these initiatives were not directed towards financing the deficits of a specific Member State but, instead, towards making dysfunctional segments of the markets operate more smoothly so as to restore the monetary policy transmission mechanism, and render possible the delivery of the single monetary policy in all the eurozone. Taking into account the gravity of the situation, the limited means that, at the height of the crisis, the ECB had at its disposal to support capital markets,[167] and the good results achieved, the adoption and implementation of these instruments, within the legal limits of the powers conferred to the ECB under EU primary law, appear to have been constructive and salutary.

B. ECB and Macro-prudential Supervision

Another of the consequences of the financial crisis for the ECB has been the greater emphasis it has placed on the general mandate of central banks as guarantors of financial (or, more accurately, 'systemic') stability, as reflected in their macro-prudential supervisory role.

In the run up to the crisis, supervisors had focused mostly on the health of individual financial institutions. Less attention had been paid to the stability of the financial system at large, possibly leading to an underestimation, by micro-prudential supervisors, of the risks to the financial sector as a whole. One of the lessons of the global financial crisis has been that, while negligible for individual institutions, financial stability risks may add up to something very substantial and highly disruptive when viewed from a system-wide perspective. Given the lessons of the global financial crisis, the focus has since shifted to overall ('macro-prudential') stability, both in Europe and around the world, in a bid to overcome the concerns arising from the fact that different components of the financial system often fall under the supervisory remit of different authorities, rendering more difficult a thorough analysis of systemic risk.[168] The crisis has seen the ECB and the Eurosystem NCBs (including those NCBs whose mandate may not have explicitly included the preservation of financial stability) becoming more closely involved in macro-prudential supervision, first through the European Systemic Risk Board (ESRB) and, more recently, through the SSM. The ESM Treaty[169] has also emphasized the ECB's financial stability preservation mandate.[170] The remainder of this section briefly touches on the role of the ECB in the ESRB and on the macro-prudential supervisory competences attributed to it under the SSM Regulation and the ESM Treaty.

The establishment of the ESRB (the legal basis for which was Article 114 TFEU)[171] was one of Europe's early responses to the financial crisis. The essential task of the ESRB is to supervise the overall financial system in order to detect potential risks, apt to affect the financial

[167] At the material time, the ECB had been attributed no supervisory powers, nor any new regulatory or other powers in the field of financial stability.

[168] These considerations have served as motivation for the strengthening of the macro-prudential powers of existing institutions (eg the Bank of England has been assigned full responsibility for macro-prudential policy), or the establishment of new ones to monitor financial stability (in the EU, the ESRB; in the US, the Financial Stability Oversight Council).

[169] Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, and the Republic of Finland, concluded in Brussels on 2 February 2012 http://www.esm.europa.eu/.

[170] Financial stability preservation is a contributory task of the ECB under TFEU art 127(5), which, however, does not apply to Member States with a derogation, nor to Member States with an opt-out.

[171] TFEU art 114 addresses issues relevant to the harmonization of rules for the establishment and functioning of the internal market.

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system and the real economy. Whenever risks are detected, the ESRB may issue warnings and address recommendations to the Member States and other EU bodies. However, the ESRB lacks both legal personality and the competence to issue binding decisions (neither the Member States nor the EU bodies are obliged to act upon the ESRB's warnings and recommendations). In its present configuration, the ESRB has sixty-seven members of which thirty-eight have voting rights.[172] The NCBs' role in the ESRB is prominent, although other institutions (non-NCB financial supervisors) are also represented in it. As regards the ECB's role in the ESRB, the ECB is to provide, first, the human and financial resources (including the analytical support) necessary for the fulfilment of the ESRB's tasks, in the form of the ESRB Secretariat. In *substantive* terms, the ECB's position in the ESRB is strong: the ECB President is the ESRB's Chairman, while the General Board (the ESRB's supreme decision-making instance) comprises the ECB President and vice-president as well as the governors of all NCBs.[173] The emergence of the SSM, and the assumption by the ECB of supervisory powers, has seen the role of the ECB in the ESRB increase further.

The SSM Regulation (see below) also refers to macro-prudential supervision in Article 5. This provides that it is the national supervisory authorities, rather than the ECB, which remain vested with the authority to apply macro-prudential tools.[174] However, where necessary, the ECB is conferred the authority to apply higher capital buffers to credit institutions and impose more stringent measures upon them, subject to close coordination with national authorities. Article 5 of the SSM Regulation raises the key issue of the very nature of the ECB's competences in macro-prudential supervision: under that provision, these competences appear to go beyond those that the ECB has assumed under the ESRB (which, however, lacks the competence to make decisions that are binding on their addressees); however, they can only be exercised in addition to the national ones. While these competences are anchored in secondary law, it remains the case that their attribution to the ECB reinforces considerably the ECB's mandate as a macro-prudential supervisor.

C. ECB and Micro-prudential Supervision

The possible inclusion of prudential supervision among the basic tasks of the ECB or the Eurosystem was extensively debated prior to the adoption of the Maastricht Treaty and the Statute. The proposals of the Committee of Governors to include prudential supervision among the basic tasks of the Eurosystem[175] were nevertheless rejected.[176] As a result, the

[172] Voting members comprise representatives of all Member States, the president and vice-president of the ECB, and other representatives of EU bodies.

[173] The situation is very different in the US, where the Federal Reserve participates in the FSOC with nine other members, but has no privileged role in it (except perhaps indirectly, through its reputation for macro-economic and financial analysis).

[174] The premise for leaving the application of macro-prudential tools to the national instances is that they are better placed to assess the circumstances prevailing in each national financial system.

[175] Article 3, fifth indent of the Draft Statute transmitted by the Committee of governors to the president of the ECOFIN Council on 27 November 1990 inter alia provides that: 'The basic tasks to be carried out through the System shall be: … to participate as necessary in formulation, co-ordination and execution of policies relating to prudential supervision and stability of the financial system', as quoted by Smits (n 37) 335.

[176] During the debates preceding the adoption of the Maastricht Treaty, some had argued that there were good reasons to keep supervision separate from monetary policy, including the possible conflict of interest between the protection of depositors and the stability of the financial system, on one hand and the objective of price stability on the other hand, or the temptation of *détournement de pouvoir*, where a single authority is prone to take decisions in one field with an eye on the objectives it pursues in another. The systemic counter-arguments presented by the Committee of Governors did not finally prevail. See Committee of Governors of the Central Banks of the Member States of the European Community, 'Explanatory Note on Certain Articles Contained in the Proposed Statute of the ESCB and of the ECB' (2 September 1991).

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ECB's mandate was the narrowest conceivable for (and possibly atypical of) a central bank. On the other hand, under Articles 127(5) TFEU and 3.3 of the Statute, the Eurosystem is to 'contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system'.[177] Although the Eurosystem was not originally envisaged as the principal bearer of responsibility for prudential supervision, it had been argued that the use of the verb 'to contribute' implied, even prior to the activation of Article 127(6), an important degree of Eurosystem involvement in the field of prudential supervision, where necessary for reasons of financial stability.[178] However, the close connection between central banking and prudential supervision was reflected in Article 127(6) TFEU, which contemplates the possibility for the Council (by unanimity but without the need for an amendment of the TFEU) to 'confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings', as well as in Article 25 of the Statute (on the ECB's advisory functions with regard to prudential supervision).[179]

Despite the recognition, by Article 127(5) TFEU, of the Eurosystem's contributory role in prudential supervision, a distinction is to be made between competence for prudential supervision, which remained a national (rather than a Eurosystem) task and contribution to the supervisory activities of the competent national authorities, which *was* a Eurosystem task. The ECB has consistently favoured the NCB's involvement in prudential supervision, as illustrated in its publications[180] and the relevant ECB Opinions on supervisory reforms in the various Member States.[181] Finally, as already mentioned, the ECB was already involved as of 2010 in macro-prudential supervision, as part of the ESRB, in what was to be a prelude, of sorts, to its subsequent involvement in micro-prudential supervision.

[177] The Eurosystem's 'contribution to' rather than 'participation in' prudential supervision has since been the source of confusion, although some have argued that the two may not, after all, differ. See Smits (n 37) 338.

[178] 'Il faut être considéré à notre avis, que le mot 'contribue' figurant à l' article 3.3 pour qualifier l' intervention du SEBC indique certes que la responsabilité principale du contrôle prudentiel ne réside pas nécessairement (sauf législation nationale en ce sens) dans le chef de la banque centrale nationale, non plus d'ailleurs que dans celui de la BCE, mais n'exclut pas une intervention importante de cette dernière et des BCN si besoin est' (J. V. Louis, *Commentaire Mégret 6* (Editions de l'Université de Bruxelles 1995) 94).

[179] This provision inter alia provides that the ECB may 'offer advice to and be consulted by the Council, the Commission and the competent authorities of the Member States on the scope and implementation of Union legislation relating to the prudential supervision of credit institutions …' and that the ECB may 'perform specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions' in accordance with any regulation of the Council under TFEU art 127(6).

[180] 'An institutional framework in which the Eurosystem's responsibilities for monetary policy in the eurozone are coupled with extensive supervisory responsibilities of NCBs in domestic markets, and with reinforced co-operation at an area-wide level, would seem appropriate to tackle the changes triggered by the introduction of the euro' and that "when viewed from a Eurosystem perspective", the attribution of extensive supervisory responsibilities (ie, both and micro-prudential) to NCBs are likely to prove beneficial' (ECB, 'The Role of Central Banks in Prudential Supervision' (2001), 3).

[181] See eg ECB Opinion CON/2004/31 para 9; ECB Opinion CON/2004/21; ECB Opinion CON/2004/16, para 5; ECB Opinion CON/2003/23 para 6; ECB Opinion CON/2001/35 para 5; ECB Opinion CON/2001/32. These opinions illustrate that the ECB has favoured the transfer of supervisory responsibilities to the NCB or the functional involvement of the NCB in supervision even if it's exercised, in principle, by a different competent authority. Moreover, the ECB has argued in favour of the involvement of the NCBs not only in the supervision of credit institutions but, also, of other financial market participants.

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The activation of Article 127(6) through the recent adoption of the SSM Regulation[182] finally put an end to the debate surrounding the nature of the role of the ECB in prudential supervision. With the activation of Article 127(6) TFEU and the establishment of the SSM, the responsibility for the prudential supervision of certain credit institutions was conferred on the ECB, while the performance of certain other prudential supervisory tasks by the national supervisory authorities also became subject to the SSM legal framework. In particular, certain key supervisory tasks, including the licensing of credit institutions, were conferred upon and are directly carried out by the ECB for all banks, while the ECB is also responsible for the supervision of so-called 'significant' banks. Remaining tasks (including consumer protection and the fight against money laundering), as well as the supervision of 'less significant banks' continue to be carried out by the national supervisors on the basis of the SSM rules, although the ECB may, at any time, after consultation with the national supervisors, decide to exercise directly supervisory tasks over an individual bank (or group) defined as 'less significant'.

The view had been expressed that the principle of CBI (in particular, institutional independence) enshrined in Article 130 TFEU and Article 7 of the Statute would not apply to the 'specific tasks' conferred to the ECB under Article 127(6) TFEU, within the context of the SSM.[183] In particular, it has been argued that the scope of the principle of institutional independence as defined in Article 130 TFEU is limited to tasks conferred upon the ECB and the NCBs by primary Union law (ie the tasks listed in Article 127(2) and (5) TFEU and Article 3 of the Statute), and does not extend over the performance of 'specific tasks' conferred upon the ECB by secondary Union legislation (such as the SSM Regulation to be adopted on the basis of Article 127(6) TFEU). The above interpretation of the scope of the principle of institutional independence does not appear to be consistent either with the letter or with the spirit of the Treaty.[184] The better view is that the SSM Regulation establishes a new concept of independence, which leaves more room for accountability towards multiple actors, and which provides for a lower level of independence protection (for example, in what concerns the personal independence of the Chair of the Supervisory Board, if compared to the independence of the NCBs members). Considering the ratio for independence, it would

[182] See 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 L287 (29 October 2013) 63.

[183] See *Häde* in Callies/Ruffert, EUV—AEUV—Kommentar, 4th edn 2011, Artikel 130 para 18 (where it is argued that the principle of independence aims at excluding any political influence over the definition and implementation of monetary policy but is not required for supervisory tasks; and *Gnan/Wittelsberger* in H. von der Groeben and J. Schwarze, 'Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft—Kommentar, 6th edn 2003, Artikel 108, para 40' (where it is argued that it is possible but not necessary to read in the language of the Treaty an extension of the principle of central bank independence to supervisory tasks). See also para 59 of the statement of the German Constitutional Court in the OMT referral to the Court, according to which: 'The constitutional justification of the independence of the European Central Bank is … limited to a primarily stability-oriented monetary policy and cannot be transferred to other policy areas' http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

[184] For instance, the legal basis for conferring specific supervisory tasks upon the ECB is a primary EU law provision (TFEU art 127(6)); it is difficult to understand why the principle of independence should apply to contributory tasks conferred upon the ECB and NCBs (eg under TFEU art 127(5)) but not to tasks conferred upon the ECB under TFEU art 127(6). The formulation of TFEU art 282(3), third and fourth sentences (on the ECB's independence) is broad enough to capture supervisory tasks, however conferred upon the ECB. The exercise of monetary policy, and the performance of supervisory tasks are closely interrelated and should be subject to the same institutional safeguards (including CBI). In this sense see Zilioli, 'The Independence of the European Central Bank and Its New Banking Supervisory Competences' in Collected courses for the EUI Summer Academy 2012, session on the Law of the European Union, Independence and Legitimacy in the Institutional System of the EU (n 42).

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appear that not all of the reasons brought forward in favour of independence in the exercise of monetary policy are equally valid in the context of prudential supervision.

Seen from the point of view of many of the Eurosystem NCBs, the attribution of supervisory responsibility to NCBs was hardly a novelty. Indeed, of the eighteen Eurosystem NCBs, eleven are domestic banking supervisors while, in another three the supervisor is autonomous but operates under the auspices of the NCB. It is only in Germany, Austria, Luxembourg, and Malta that supervision is not—or is not an exclusive—NCB task (in Germany and Austria the NCBs contribute to supervision). It follows that, on a decentralized level, NCBs acting as supervisors is the rule rather than the exception. What is more, even those Eurosystem NCBs that have no responsibility for banking supervision are indirectly drawn into it, through their participation in the deliberations of the Governing Council of the ECB, the ultimate decision-making body of the SSM.[185]

If, from the point of view of the NCBs, the exercise of supervision is not a novelty, the same is not true of the ECB. The transfer to the ECB of supervisory responsibility is having wide-ranging implication for it and its role within the institutional framework of the EU. In particular, the transfer of supervisory responsibilities to the ECB signals an important shift in its accountability, both at the EU level and, to a lesser extent, vis-à-vis national parliaments;[186] moreover, it rekindles the traditional debate on the advisability of separating institutionally monetary policy from banking supervision.[187] The argument in favour of bringing monetary policy and supervision under one roof is that combining financial supervision with monetary policy tasks can lead to synergies, eg through information gains, thereby possibly leading to a more effective conduct of monetary policy and/or to more effective crisis prevention and management.[188] The key argument against combining these two tasks is that a supervisory role might, at times, lead to conflicts among different goals (the classic example being that of the provision of emergency liquidity assistance through a lender of last resort facility), and could entail a risk for the reputation of an NCB, which, in turn, might affect the effectiveness of its monetary policy and the perception that markets have of it.[189] While it is very difficult to take a conclusive stance on this debate, it can be argued that with increased lending and concern about the quality of collateral, NCBs are bound to have more of an interest in the supervision of banks and other financial institutions.[190] Moreover, the skills and expertise developed in the course of supervision may help

[185] This is despite the fact that the role of the Supervisory Board in day-to-day rule-making is more prominent compared to that of the Governing Council.

[186] It follows from art 20(2) of the SSM Regulation that the ECB would prepare and present to other EU institutions an annual report on its supervisory operations. Moreover, the chair of the Supervisory Board of the ECB (the ECB being the de facto decision-making body in matters of supervision) would be obliged to appear at least annually before the European Parliament and the Council (see art 20(3)), which can request an ad hoc hearing of the chair, at their discretion (see art 20(4). The ECB would also have to reply to oral and written questions from the Parliament and the SSM-countries (see art 20(6)). To a lesser extent, the ECB is also accountable to national parliaments, which can address oral and written questions to the ECB, and request that the ECB appears before them, with regard to supervisory matters affecting banks established in their Member State (see art 21).

[187] Under art 25(2) of the SSM Regulation, the ECB is subject to a full separation of the supervisory tasks from other ECB tasks ('principle of separation'). This separation includes both decision-making body and staff-level separation.

[188] ECB, The Role of Central Banks in Prudential Supervision (2001) available electronically.

[189] The latter arguments are all the more relevant to the ECB, given its very high standard of central bank independence, and the perceived risks to that independence once it has assumed its newly attributed supervisory tasks.

[190] As long as lending continues to be an important central banking role, it is crucial that the lender be able to obtain timely information about any potential borrower; in other words, the key reason why central banks should have a role in bank supervision is because the central bank needs to know its customers.

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NCBs innovate in a liquidity crisis, while experience in supervision may be critical for the development of effective systemic risk regulation. What is more, given the financial stability mandate of NCBs (apparent, in the case of the ECB, in the pivotal role it plays in the ESRB—see below), it would seem counter-intuitive that the NCBs should not be equipped with at least *some* measure of micro-prudential supervisory powers, so that they can better exercise their macro-prudential supervisory mandate.[191]

Finally, the transfer of supervisory responsibilities to the ECB inevitably brings to the fore supervisory liability issues that the ECB had not encountered in the past, when its only task was the definition and implementation of monetary policy.[192] Liability risks associated with the exercise of monetary policy are limited, given its different nature, and the stronger element of discretion inherent in monetary policy decision-making.[193] The same is not true of supervision, where the decisions to withdraw a licence or to impose sanctions upon a bank for breaches of its public law obligations (to name but a few examples) are bound to attract litigation.

D. The ECB's Role in Supporting the ESM

Finally, a brief word is apposite on the ESM Treaty and its impact on the ECB's role in the preservation of financial stability. The ESM is an intergovernmental organization, with legal personality under public international law (see Article 32(2) of the ESM Treaty), established outside the Union legal order by virtue of the ESM Treaty. The ESM Treaty allocates various technical coordination and management tasks to the Commission and to the ECB. In particular, Article 13 of the ESM Treaty assigns a clear role to the ECB in the procedure for the provision of financial assistance to Member States by the ESM. The ECB participates in all steps relevant to the design and provision of stability support by the ESM (assessing financial stability and debt sustainability, assessing the fulfilment of the eligibility criteria for ESM financial support; estimating overall financing needs and negotiating and monitoring compliance with programme conditionality). At the same time, it is worth stressing that the ECB's role under the ESM Treaty is purely preparatory and advisory: the ECB is entrusted with certain tasks (Article 13(1) of the ESM Treaty), and with the conduct of negotiations (Article 13(3) of the ESM Treaty) but not with the power of adopting any final decisions.[194] In its landmark *Pringle* judgment, the Court confirmed that the ECB (and the Commission), when acting within the ESM framework (i) do not make decisions of their own, but only provide assistance for decisions taken by the ESM Member States, and (ii) do not exercise their competences under the Union Treaties. It follows that their conduct is not attributable to the Union but only commits the ESM, and does not alter the powers conferred upon them under the Union Treaties.[195] Specifically as regards the role of the ECB under the ESM Treaty,

[191] The fact that the ECB had no role in bank supervision may have, in some respects, hindered it in its response to the eurozone crisis.

[192] This is despite the diffusion of supervisory responsibility among the ECB and the national supervisory authorities within the SSM, which means that liability risks may prove somewhat difficult to pin-down.

[193] See E. Hüpkes and others, 'The Accountability of Financial Sector Supervisors: Principles and Practice' (2005) IMF Working Papers 05/51, 10, drawing attention to the 'greater range of contingencies that can occur in regulation and supervision than in the conduct of monetary policy'. On the issue of supervisory accountability and its relevance to the ECB and the NCBs see, generally, P. Athanassiou, 'Bank Supervisors' Liability: A European Perspective' in T. Tridimas and P. Eeckhout (eds), (2011) 30 *Yearbook of European Law* 213.

[194] Article 13 of the ESM Treaty not only mandates the ECB to participate in the assessment of risks to financial stability in the eurozone but also provides the legal basis for the ECB's participation in the work of the Troika (in conjunction with the Treaty and the Statute's provisions on the ECB's support to economic policies, its contribution to financial stability and its advisory role).

[195] 'Secondly, 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

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and the tasks entrusted to it thereunder, it is recalled that, in her view in *Pringle*, Advocate General Kokott stressed that: 'those tasks are relatively minor in comparison with those of the Commission'; as the Advocate General further explained: '[I]ndividual tasks of assessment are provided for only in the first sentence of the first subparagraph of Article 4(4) and Article 18(2) of the ESM Treaty. For the rest, the Commission is, under Article 13(1), (3) and (7) and Article 14(6) of the ESM Treaty at times to act "in liaison" with the European Central Bank. In those cases therefore it is not so much that tasks are allocated to the European Central Bank but it has a qualified right to be consulted'.[196]

VI. Concluding Remarks

The global financial crisis has seen the ECB temporarily broadening the universe of collateral eligible for Eurosystem monetary policy operations, in response to the liquidity shortage in financial markets, and launching a number of initiatives (including Outright Monetary Transactions), the aim of which was to restore the monetary policy transmission mechanism, following the disruptions caused by the near collapse of several market segments. It has also seen a temporary increase in the NCBs' discretion as collateral-takers, in a bid to mitigate the potentially higher balance sheet risks to which the NCBs are exposed on account of the greater flexibility of the Eurosystem collateral framework. The sovereign default phase of the global financial crisis, and the existential risks that this posed for the future of MU and the single currency, led to a gradual increase in the ECB's powers, reflected, first, in the more prominent role that the ECB has assumed in European macro-prudential supervision, through the establishment of the ESRB, and, second, in the conferral to the ECB of the competence to exercise direct, micro-prudential supervision over commercial banks, under the SSM.

The challenges ahead are likely to be significant: the way in which the ECB will exercise its newly attributed powers is bound to influence European financial and capital markets for the foreseeable future, as well as public perceptions of its institutional credibility and success. The trust that the EU and the Member States' governments have put in the ECB, assigning to it supervisory competences over the eurozone banking sector, is telling. Clearly, much is at stake for the ECB and for Europe as a whole: the next decade of the ECB's institutional existence promises to be at least as exciting as the previous two.

institutions within the ESM Treaty solely commit the ESM. Thirdly, the tasks conferred on the Commission and the ECB do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.' See Case C-370/12 *Pringle v Ireland* (n 27) paras 161–62. The Court of Justice also confirmed that TFEU art 136(3), which was inserted into the TFEU by European Council Decision 2011/199/EU of 25 March 2011 ([2011] OJ L91/1) and entered into force only on 1 May 2013, 'does not confer any new competence on the Union' and 'is silent on any possible role for the Union's institutions in that connection [ie in connection with the ESM]' (see paras 73 and 74).

[196] See para 179 of Advocate General Kokott's Opinion in Case C-370/12 *Pringle* (n 27).

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