

# Accountability of the European Central Bank in a Deepening Economic Monetary Union

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## 1. Two Crises, Five Presidents, One Idea: Completing the Economic and Monetary Union

The financial crisis, which to a great extent originated from the unfettered issuance of subprime mortgages in the US, spilt over to the European continent after the bankruptcy of the Lehman Brothers in autumn 2008. This created an unfavourable financial climate in Europe and worldwide.<sup>1</sup> Plummeting confidence and trust in the ability of credit institutions, primarily banks, to make good on their financial obligations practically ground regular money circulation to a halt. Cross-border interbank lending, which is crucial for a normal functioning of the EU economy by ensuring adequate money supply through the provision of credit to enterprises, was severely restricted.<sup>2</sup> As a result, access to money, needed by states to pay off their public debt and invest, was no longer easily available.

This crisis exacerbated the predicaments caused by Greece's decade-long concealment of genuine public debt levels soon after adopting the euro in 2001, which it did by entering into complex financial deals with large US investment banks, primarily Goldman Sachs, through the use of derivatives and, above all, cross-currency swaps.<sup>3</sup> Since these were not treated as loans but as currency trades, such deals were kept away from the public eye and off the state's balance sheets. This, together with other 'creative' accounting practices, enabled Greece to misreport its deficit statistics to the EU, thus meeting the latter's prescribed targets while at the same time spending beyond its means.<sup>4</sup> These machinations were revealed in October 2009. Fearful that Greece had become unable to pay its sovereign debt due to overwhelming financing difficulties, global capital markets reacted negatively. The price of Greek government bonds plunged and their yield soared, making it ever more expensive for Greece to borrow

<sup>1</sup> Caroline Bradley, 'From Global Financial Crisis to Sovereign Debt Crisis and Beyond: What Lies Ahead for the European Monetary Union?' (2013) 22 *Transnat'l L & Contemp Probs* 9.

<sup>2</sup> Juan Carlos Frutos and others, 'Stressed Inter-bank Markets: Evidence from the European Financial and Sovereign Debt Crisis', ECB Working Paper No 1925, June 2016.

<sup>3</sup> This type of deal allowed Greece to swap government debt issued in US dollars and Japanese yen for euro-denominated debt for an agreed period of time according to a fictional, more favourable exchange rate, which effectively amounted to a loan. On paper, therefore, Greece had more euros to pay its bills and less debt on its accounting books. Beat Balzli, 'Greek Debt Crisis: How Goldman Sachs Helped Greece to Mask Its True Debt' *Der Spiegel (Online International)*, 8 February 2010 <http://www.spiegel.de/international/europe/greek-debt-crisis-how-goldman-sachs-helped-greece-to-mask-its-true-debt-a-676634.html> (last accessed 21 July 2016).

<sup>4</sup> Louise Story, Landon Thomas Jr, and Nelson D Schwartz, 'Wall St. Helped to Mask Debt Fueling Europe's Crisis' *New York Times*, 13 February 2010 [http://www.nytimes.com/2010/02/14/business/global/14debt.html?pagewanted=all&\\_r=0#](http://www.nytimes.com/2010/02/14/business/global/14debt.html?pagewanted=all&_r=0#) (last accessed 21 July 2016).

and repay its lenders.<sup>5</sup> This posed a serious ‘contagion’ risk, which eventually materialized. In different forms, solvency and liquidity problems befell a number of other Member States apart from Greece, thereby precipitating a wholesale sovereign debt crisis in the Eurozone, known as the euro crisis. In the event, not only Greece, but also Portugal, Ireland, and Spain received taxpayer-funded bail-outs, while Cyprus profited from a combination of a bail-out and a bail-in. Following the turmoil caused by the UK’s referendum in favour of ‘Brexit’, Italy, the Union’s oft-touted weak link, considered requesting a waiver from the EU’s state aid prohibitions and bank bail-in rules in order to support its banking sector.<sup>6</sup>

The overarching EU plan for eliminating the Member States’ financial woes that threaten the stability of the euro area as a whole was presented in the so-called ‘Five Presidents’ Report’ of 22 June 2015.<sup>7</sup> This cross-institutional blueprint for a sustainable future of the Economic and Monetary Union (EMU) is based on personal discussions of these presidents, with the aim of achieving four ‘Unions’ by 2025. These are a ‘genuine’ Economic Union, a Financial Union, a Fiscal Union, and a Political Union. These are to be achieved inter alia by: creating a set of national competitiveness authorities and reinforcing the European Semester; completing the Banking Union through a Deposit Insurance Scheme<sup>8</sup> and launching the Capital Markets Union; and establishing an advisory European Fiscal Board and the possibility of setting up a euro area treasury in the future.<sup>9</sup> For all of them, it is acknowledged that public risk sharing has to be accompanied by ‘stronger democratic participation and accountability both at national and European levels’.<sup>10</sup> However, the proposals to this end are rather minor and have rightly been assessed as the ‘weakest’ element of the Five Presidents’ Report.<sup>11</sup> Namely, to secure legitimacy for the completion of the EMU, the report only envisages an enhancement of the economic dialogue between the European Parliament (EP) and the Commission, the Council and the Eurogroup through dedicated time-slots during the course of the European Semester, above all before and after the publication of the Annual Growth Survey and upon the presentation of country-specific recommendations. It also foresees efforts to make interaction with national parliaments (NPs) more efficient. The UK House of Lords correctly observed that the report’s proposals on democratic accountability are ‘largely exhortatory’ and that organizing debates and hearings

<sup>5</sup> Roberto A de Santis, ‘The Euro Area Sovereign Debt Crisis: Identifying Flight-to-Liquidity and the Spillover Mechanisms’ (2014) 26 *J Empirical Finance* 150.

<sup>6</sup> Alex Barker and Rachel Sanderson, ‘Renzi Seeks Help for Italy’s Banks after Brexit Wobble’ *Financial Times*, 27 June 2016. See particularly art 43 ff of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU, and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council (Bank Recovery and Resolution Directive) [2014] OJ L 173/190. See also Karl Philipp Wojcik, ‘Bail-in in the Banking Union’ (2016) 53 *CML Rev* 91.

<sup>7</sup> The document entitled ‘Completing Europe’s Economic and Monetary Union’ was adopted by the following five presidents: Jean-Claude Juncker (European Commission), Donald Tusk (European Council), Jeroen Dijsselbloem (Eurogroup), Mario Draghi (ECB), and Martin Schulz (European Parliament).

<sup>8</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015) 586.

<sup>9</sup> See Nazaré da Costa Cabral, ‘Which Budgetary Union for the E(M)U?’ (2016) 54 *JCMS* 1280.

<sup>10</sup> Five Presidents’ Report (n 7) 5. See also Koen Lenaerts, ‘EMU and the EU’s Constitutional Framework’ (2014) 39 *EL Rev* 753, 768–69.

<sup>11</sup> Dermot Hodson, ‘Eurozone Governance: From the Greek Drama of 2015 to the Five Presidents’ Report’ (2016) 54 *JCMS* 162.

with Commissioners in the EP and NPs is ‘not the same as ... exercising control over the process’.<sup>12</sup>

This chapter examines the democratic dimension of the burgeoning competence of the European Central Bank (ECB or the Bank) in the functioning of the EMU in the aftermath of the euro crisis.<sup>13</sup> It begins by laying out the EU’s general monetary policy framework and the position of the ECB within it (section 2). On this basis, the next section analyses the variety of legal and policy measures that were taken in the aftermath of the crisis to contain the erosion of the Eurozone (section 3). The inquiry then turns to the existing mechanisms for the ECB’s accountability to parliaments, including both the EP and NPs. The chapter first focuses on the accountability practices with respect to the ECB’s monetary policy (section 4) and then on those concerning the Bank’s role in prudential supervision under the rules of Banking Union (section 5). The concluding section outlines both the pitfalls and the advantages that these arrangements carry and highlights how the ECB and the EU’s parliaments, particularly NPs, have adapted to the changed circumstances (section 6).

## 2. General Framework for EU Monetary Policy: Prohibition-based Stability

The primary goal of the EU’s Monetary Union (the ‘M’ in the EMU) is price stability and the secondary goal is to ‘support the general economic policies in the Union’.<sup>14</sup> Central to maintaining stable prices is ensuring that inflation is kept at a healthy level—usually below but close to 2 per cent over the medium term. Ensuring this is the core task of monetary policy. This is conducted by the Eurosystem, which consists of the ECB and the national central banks (NCBs) of the euro area Member States.<sup>15</sup> The ECB has four bodies: the Executive Board (President, Vice-President, and four other members), the Governing Council (Executive Board and euro area NCB governors), a transitional General Council in charge of administering derogations from the euro (President, Vice-President, and all NCB governors),<sup>16</sup> and a newly created Supervisory Board, examined further below.<sup>17</sup> It is the Governing Council that decides monetary policy and does so chiefly by setting a series of interest rates and by granting credit facilities, but also by determining intermediate monetary objectives and reserve supply levels.<sup>18</sup> The Executive Board then implements these in accordance with the Governing Council’s guidelines and decisions.

Fiscal stability in the EMU is ensured by four prohibitions, which are necessary because the EU’s Economic Union is not a single policy like the Monetary Union but

<sup>12</sup> House of Lords, EU Committee, HL Paper 143 ‘“Whatever it Takes”: The Five Presidents’ Report on Completing Economic and Monetary Union’, 13th Report of Session 2015–16 of 12 May 2016, para 186, p. 51.

<sup>13</sup> Renaud Dehousse, ‘Why Has EU Macroeconomic Governance Become More Supranational?’ (2016) 38 *J Eur Integration* 617, 618; Rachel A Epstein and Martin Rhodes, ‘The Political Dynamics Behind Europe’s New Banking Union’ (2016) 39 *WEP* 415; Zdenek Kudrna, ‘Financial Market Regulation: Crisis-induced Supranationalization’ (2016) 38 *J Eur Integration* 251; Thomas Beukers, ‘The New ECB and Its Relationship With the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention’ (2013) 50 *CML Rev* 1579.

<sup>14</sup> TFEU, art 119(2)–(3).

<sup>15</sup> *ibid* art 282(1).

<sup>16</sup> *ibid* art 283.

<sup>17</sup> While the first three ECB bodies are the ‘decision-making bodies’ foreseen in the Treaties, the Supervisory Board is the only one created by secondary law.

<sup>18</sup> Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, art 12.

a collection of coordinated national policies. In addition to the prohibition of excessive deficits and of privileged access by EU and national bodies to financial institutions, two further prohibitions are crucial for the present discussion.<sup>19</sup>

The first one is the *prohibition of bail-outs*, which means that neither the Union nor any Member State is liable for or may assume the commitments and liabilities of any central, regional, or local government or authority existing within the EU.<sup>20</sup> The second is the *prohibition of monetary financing*, which rules out both agreeing any credit or overdraft facility with the ECB or a NCB and direct purchase by these two types of banks of debt instruments (eg bonds) from the said governments or public authorities.<sup>21</sup> These prohibitions aim to ensure that the Member States remain subject to market discipline when they borrow in capital markets, which is only viable if their fiscal situation is sound. The said prohibitions therefore seek to ensure the Member States' budgetary diligence as required by the rules of EU economic governance, which could be frustrated if the Union or one or more Member States were allowed to act as guarantors for another Member State's debt.

### 3. Post-euro Crisis Reshaping of the Economic and Monetary Union: Tighter Economics, Looser Finance

The shape of the EMU has dramatically changed after the euro crisis, with considerable repercussions for democratic participation.<sup>22</sup> To avert the crisis spreading across the Eurozone, the EU took extensive action. For years, the Union has been adopting measures to reinstate financial stability, restore market confidence in the resilience of the euro area economies, and stem the spiralling indebtedness of some, mostly 'peripheral', Member States in Southern Europe. These measures can be divided into four strands: economic governance, lending, the Banking Union, and unconventional monetary policy.<sup>23</sup>

#### 3.1 Economic Governance Reform's Fiscal Inroads

First, the EU overhauled the system of *economic governance*. As explained in the introductory chapter to this volume, the Six Pack, the Two Pack, and the Fiscal Compact resulted in the strengthening of the preventive and corrective components of the Member States' fiscal commitments. These concern the Union's economic policy

<sup>19</sup> Rosa M Lastra and Jean-Victor Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' (2013) 32 YEL 57, 98.

<sup>20</sup> TFEU, art 125. This prohibition proved to be a misnomer in light of the *Pringle* case: Case C-370/12, *Thomas Pringle v Government of Ireland*, judgment of 27 November 2012, ECLI:EU:C:2012:756.

<sup>21</sup> TFEU, art 123(1).

<sup>22</sup> David Howarth and Lucia Quaglia, 'Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and "Completing" Economic and Monetary Union' (2013) 51 (Annual Review) JCMS 103, 119. See also John E Fossum and Agustin J Menéndez (eds), *The European Union in Crises or the European Union as Crises?*, ARENA Report No 2/14; Bruno de Witte, Adrienne Héritier, and Alexander H Trechsel (eds), *The Euro Crisis and the State of European Democracy* (European University Institute 2013).

<sup>23</sup> Most recently, options for debt relief or the so-called 'haircut' involving public creditors have been examined, including the possibility of extending the maturity of loans, reducing interest rates, transforming loans into interest-free bonds, and debt cuts on nominal values. See Armin Steinbach, 'The "Haircut" of Public Creditors under EU Law' (2016) 12 EuConst 223, 225.

coordination, oversight over national budgets through the European Semester, the maintenance of balanced budgets, and the avoidance of macroeconomic imbalances.

In the reformed framework of EU economic governance, the EP's competence has only been marginally strengthened and it thus remains rather limited.<sup>24</sup> By the same token, while NPs have acquired certain new rights of approval, scrutiny, and debate in the domestic budgetary process,<sup>25</sup> their competences are left constrained by more vigorous overarching EU fiscal parameters.<sup>26</sup> The latter are proposed and monitored by the Commission and set by the Council during the European Semester process, with both of them acting based on priorities decided by the European Council. However, it has been submitted that the effects of EU economic policy centralization on national sovereignty have been 'widely exaggerated'.<sup>27</sup>

The EP and NPs have moreover formalized their fiscal policy cooperation through a new interparliamentary conference. This is based on Article 13 of the Fiscal Compact.<sup>28</sup>

### 3.2 Lending Away the Crisis

Secondly, the Union engaged in *lending*. In these exceptional circumstances, the Union and the Member States stepped out of the boundaries of EU law and concluded the European Stability Mechanism (ESM) Treaty, which laid down arrangements for assisting governments in financial distress in order to improve their creditworthiness and thus reduce pressure on their domestic fiscal policies. This resulted in the creation of the ESM on 27 September 2012 as a fund financed by the euro area states and entitled to grant loans to such governments. The ESM then replaced two earlier temporary funds—the European Financial Stabilisation Mechanism (EFSM, created on 10 May 2010) and the European Financial Stability Facility (EFSF, created on 7 June 2010).

To receive a loan, the Member State must conclude a Memorandum of Understanding with the European Commission, the ECB, and the International Monetary Fund (IMF), which imposes strict conditions. These conditions require the recipient state to enact wide-ranging restrictive reforms in areas of law-making where the Union typically does not have competence to act or where it may only support, coordinate, or supplement otherwise national action. These areas encompass taxation, public spending, social welfare, employment, privatization, and healthcare. These are traditionally core areas of national sovereignty. This is salient because such austerity policies, pursued with a view to filling the Member States' budgets with ESM-loaned money to enable them to pay their international creditors, caused unemployment to rise and economic growth to slow down.

The *Pringle* jurisprudence,<sup>29</sup> initiated by an independent Irish left-wing MP Thomas Pringle and relayed to the Court of Justice of the European Union (CJEU) by the Irish Supreme Court by means of a preliminary ruling, epitomizes the tensions surrounding

<sup>24</sup> Cristina Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?' (2014) 20 ELJ 164.

<sup>25</sup> Davor Jančić, 'National Parliaments and EU Fiscal Integration' (2016) 22 ELJ 225.

<sup>26</sup> Mark Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' (2016) 53 JCMS 976, 988.

<sup>27</sup> Dariusz Adamski, 'Economic Policy Coordination as a Game Involving Economic Stability and National Sovereignty' (2016) 22 ELJ 180.

<sup>28</sup> See more in the chapter by Ian Cooper in this volume.

<sup>29</sup> Case C-370/12, *Thomas Pringle v Government of Ireland* (n 20). See the German Federal Constitutional Court's stance on the ESM in Special Section 'The ESM before the Court' (2013) 14 German LJ 1.

the lending dimension of the euro crisis. Among other things, this case challenged the creation of the ESM and the EU's compliance with the 'no bail-out' clause. Unsurprisingly, albeit dubiously, the CJEU relied on a highly formalistic, and for that matter problematic, interpretation of the EU rules to decide that the clause had not been breached. This conclusion was reached because Member States continue to be responsible for their debt, because loans may only be provided where that is necessary to safeguard the stability of the euro area as a whole, and because the disbursement of funds is subject to the fulfilment of strict conditions.<sup>30</sup> The case has important further consequences for the ECB's participation in ESM lending. The CJEU clarified that the ESM Treaty, including conditionality compliance monitoring, does not alter the essential character of the powers that the Treaties confer on the ECB.<sup>31</sup> However, ECB members could 'face conflicts of interests and threats to their independence' if they were to perform tasks within competing institutions.<sup>32</sup> This then negatively impacts both the EP's and NPs' ability to have a grip over the developments oriented at preserving financial stability through inter se agreements.<sup>33</sup>

### 3.3 The Banking Union's Promotion of the European Central Bank

Thirdly, in an act of 'unprecedented transfer of sovereignty',<sup>34</sup> the EU created the so-called *Banking Union*, aiming to decouple the banking sector from the state, thus preventing the use of taxpayers' money to rescue failing banks.<sup>35</sup> This was performed by establishing single EU mechanisms for the prudential supervision and resolution of banks. The third element, the Deposit Insurance Scheme, is currently undergoing legislative procedure.<sup>36</sup>

The Single Supervisory Mechanism (SSM),<sup>37</sup> composed of the ECB and the competent national supervisory authorities, is key for the present analysis because it has significantly empowered the ECB—conferring on it a far-reaching competence to carry out prudential supervision over all euro area credit institutions, predominantly banks (about 6,000 of them). Direct supervision over the largest and systemically most important banks is carried out by the ECB itself (123 of them), while the other ones are supervised by national supervisors. However, the ECB is also entitled to grant or withdraw authorization of all euro area banks, assess acquisition of qualifying holdings, carry out reviews and investigations which include stress tests and on-site inspections, and impose administrative penalties of up to 10 per cent of the total annual turnover.

<sup>30</sup> Case C-370/12, *Thomas Pringle v Government of Ireland* (n 20) para 138. See a positive assessment in Bruno de Witte and Thomas Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism: Pringle' (2013) 50 CML Rev 805.

<sup>31</sup> Case C-370/12, *Thomas Pringle v Government of Ireland* (n 20) para 162.

<sup>32</sup> Steve Peers, 'Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework' (2013) 9 EuConst 37, 70.

<sup>33</sup> Angelos Dimopoulos, 'Taming the Conclusion of *Inter Se* Agreements between EU Member States: The Role of the Duty of Loyalty' (2015) 34 YEL 286, 294.

<sup>34</sup> Kern Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) 40 EL Rev 154, 158.

<sup>35</sup> See Jens-Hinrich Binder and Stefan Grundmann (eds), Special Issue 'The Banking Union and the Creation of Duties' (2015) 16 EBOL Rev 353.

<sup>36</sup> See n 8.

<sup>37</sup> See Gianni Lo Schiavo, 'Single Supervisory Mechanism: Building the New Top-down Cooperative Supervisory Governance in Europe' in Federico Fabbrini, Ernst H Ballin, and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015).



### 3.4 Unconventional or Non-standard Monetary Policy's Economic Effects

Fourthly, the ECB moved towards *unconventional or non-standard tools of monetary policy* in order to ensure its effectiveness in occasioning economic growth. These are last-resort measures when standard interest-rate policies have been exhausted, which is when the ECB's main lending rate is zero or goes into the negative territory. Such policies, it has been argued, have led to an institutional conversion of the EMU away from its pre-crisis constitutional blueprint.<sup>38</sup> Two non-standard monetary policy tools are central here, and both are asset purchase programmes effected by the creation of new money by the ECB. They are the Outright Monetary Transactions programme (OMT) and Quantitative Easing (QE), which are examined in turn.

Announced on 6 September 2012,<sup>39</sup> OMT enables the ECB to buy an unlimited amount of sovereign bonds of troubled Eurozone Member States in secondary capital markets, with a focus on short-term bonds with maturities of between one and three years.<sup>40</sup> While unlimited in volume, this programme is conditional on the country's participation in the EFSF/ESM and on full respect for and implementation of the agreed macroeconomic adjustment or precautionary programmes, failing which OMT could be suspended. The intermediate goal of OMT is thus to help reduce the Member States' borrowing costs in capital markets. This, however, serves the overall objective of restoring both the transmission mechanism of monetary policy and the belief in the irreversibility of the euro, which became necessary to deflate the so-called 'dissolution' or 'convertibility' risk. The incumbent President of the ECB, Mario Draghi, defended this programme in the Spanish Parliament, arguing that: 'OMTs are a back-stop against destructive speculation. They are not a subsidy for government financing. OMTs should remove only the part of the interest rate at which governments borrow that is due to unfounded expectations of destructive scenarios for the euro area'.<sup>41</sup> Although OMT has hitherto not been activated, it replaced its predecessor—the Securities Markets Programme (2010–2012)—which was both limited in quantitative terms and unconditional.

QE relates to a number of asset purchase programmes involving both private and public sector issuers. This complemented the ECB's non-standard liquidity-providing measures: long-term refinancing operations (LTROs, maturity up to three years), targeted longer-term refinancing operations (TLTROs, maturity up to four years), and emergency lending assistance. The ECB began its QE operations in October 2014 through the purchase of covered bonds, which it continued doing with asset-backed securities the following month. The 'shopping list' was extended from these two types of corporate bond-buying programmes to public sector debt in the form of sovereign bonds in March 2015. In a further boost, in June 2016 the ECB expanded the two

<sup>38</sup> Arie Krampf, 'From Transparency to Ambiguity: The Impact of the ECB's Unconventional Policies on the EMU' (2016) 38 *J Eur Integration* 455, 467.

<sup>39</sup> European Central Bank press release, 'Technical Features of Outright Monetary Transactions' [http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html) (last accessed 23 July 2016).

<sup>40</sup> See more on the conception and design of the OMT in Domenico Lombardi and Manuela Moschella, 'The Government Bond Buying Programmes of the European Central Bank: An Analysis of Their Policy Settings' (2016) 23 *JEPP* 851.

<sup>41</sup> European Central Bank, 'Introductory Statement at the Congreso de los Diputados de España', Madrid, 12 February 2013 [http://www.ecb.europa.eu/press/key/date/2013/html/sp130212\\_1.en.html](http://www.ecb.europa.eu/press/key/date/2013/html/sp130212_1.en.html) (last accessed 28 August 2016).

existing categories of corporate bond-buying and undertook new private sector debt purchases. While similar, QE differs from OMT in its nature, breadth, and objective. It is not tied to public policy conditionality within the ESM framework; rather, it is aimed at all Member States and companies, and it seeks not to shore up countries in financial difficulties but to stimulate economic activity and incentivize inflation by injecting the banking system with the necessary liquidity.<sup>42</sup>

Of the two types of non-standard monetary policy programmes, the legality of OMT was strongly questioned by the German Federal Constitutional Court (*BVerfG*) in its first ever preliminary ruling reference to the CJEU. This was prompted by an action brought by Peter Gauweiler, a former *Bundestag* member for the German Christian Social Union, and a number of other applicants.<sup>43</sup> One of the *BVerfG*'s key concerns was that the ECB was transgressing the powers conferred on it by the Treaties and that it was seeking to conduct economic rather than monetary policy, thus encroaching on the legislative and budgetary competences of the *Bundestag*.<sup>44</sup> Democracy was hence of critical importance.<sup>45</sup> When the ECJ replied validating OMT,<sup>46</sup> the *BVerfG* bowed but not before making further democracy caveats.<sup>47</sup> While accepting that OMT does not violate the *Bundestag*'s budgetary authority as long as the conditions prescribed by the ECJ with a view to restricting the scope and use of OMT are met, German constitutional judges warned that the principles of democracy, popular sovereignty, and constitutional identity are indeed affected.<sup>48</sup> Therefore, both the Federal Government and the *Bundestag* are obliged closely to monitor any possible implementation of OMT. This is required in order to ascertain that the ECB fulfils the said conditions and that no threat to the federal budget arises from the volume of, and risks associated with, the purchased bonds.<sup>49</sup> Unconventional monetary policies of the ECB thus carry a potential for agency and democracy slippages.<sup>50</sup>

<sup>42</sup> See the economic operation of QE measures in John Driffill, 'Unconventional Monetary Policy in the Euro Zone' (2016) 27 *Open Econ Rev* 387; Klaus-Jürgen Gern and others, 'Quantitative Easing in the Euro Area: Transmission Channels and Risks' (2015) 50 *Intereconomics* 206; Nuno Cassola and José Jorge, 'The ECB's OMTs: A Tale of Governments, Investors, and the Central Bank' (2016) 65 *J Int'l Money & Finance* 94.

<sup>43</sup> *BVerfG*, 2 BvR 2728/13, Order of the Second Senate of 14 January 2014. See more on this in the chapter by Ingolf Pernice in this volume. See also Special Issue 'The OMT Decision of the German Federal Constitutional Court' (2014) 15 *German LJ* 107.

<sup>44</sup> *ibid* para 78.

<sup>45</sup> Matthias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 *EuConst* 263. See more broadly Russell A Miller, 'Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration' (2014) 54 *Virginia J Int'l L* 579.

<sup>46</sup> Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, judgment of 16 June 2015, ECLI:EU:C:2015:400. See various accounts thereon in Paul Craig and Menelaos Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) 41 *EL Rev* 4; Dariusz Adamski, 'Economic Constitution of the Euro Area After the Gauweiler Preliminary Ruling' (2015) 52 *CML Rev* 1451; Alicia Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' (2015) 11 *EuConst* 563.

<sup>47</sup> *BVerfG*, 2 BvR 2728/13, judgment of the Second Senate of 21 June 2016.

<sup>48</sup> *ibid* para 188. <sup>49</sup> *ibid* para 174.

<sup>50</sup> Anna-Lena Högenauer and David Howarth, 'Unconventional Monetary Policies and the ECB's Problematic Democratic Legitimacy' (2016), manuscript on file with the author.



## 4. Accountability of the European Central Bank for Monetary Policy

### 4.1 Accountability to the European Parliament

The Treaties require that all EU institutions, including the ECB, shall aim to promote the Union's values, one of which is democracy.<sup>51</sup> However, in the case of the ECB, this is watered down by endowing the Bank with legal personality and by 'constitutionalizing' its independence in fulfilling its Treaty mandate.<sup>52</sup> Thus, neither the European nor the national central banks may seek or take instructions from any EU institution, Member State, or any other external body.<sup>53</sup>

Consequently, the Treaty framework for the ECB's accountability is rather thin,<sup>54</sup> geared principally towards an exchange of information and reporting.<sup>55</sup> The ECB shall send an annual report on the activities of the European System of Central Banks (ESCB)<sup>56</sup> and on the monetary policy to the EP, the Commission, the Council, and the European Council. The President of the ECB shall present this report to the Council and the EP. The EP's supervisory function is limited to: (a) holding an optional 'general debate' on this report, which in practice results in the adoption of a resolution; and (b) to organizing a hearing with the President and Executive Board members of the ECB in the EP's Committee on Economic and Monetary Affairs (ECON) at their or the EP's request. These hearings are in practice often followed up by written questions to the ECB, to which it regularly replies.<sup>57</sup> There has indeed been a significant surge in the number of written questions sent by EP members (MEPs): 179 in 2015, compared to fifty-five each in 2014 and 2013, thirty-seven in 2012, twenty-eight in 2011, seventeen in 2010, and ten in 2009. This means that the ECB received more question letters from MEPs in a single year of the 8th legislative term (2015) than in the five years of the 7th term (2009–2014).<sup>58</sup>

Further, unless decided otherwise, the proceedings of Governing Council meetings are confidential and the documents produced by this ECB body are not freely available for thirty years.<sup>59</sup> The outcome of the deliberations may be made public and the ECB does so, albeit not in the form of minutes but rather through press conferences and a monthly bulletin. In January 2015, the ECB began publishing additional data, including notably accounts of deliberations of their monetary policy meetings and decisions on emergency liquidity assistance—all in order to increase the transparency of

<sup>51</sup> TEU, art 13(1) in conjunction with TEU, art 2(1).

<sup>52</sup> See the legal and practical aspects of this in René Smits, 'The European Central Bank's Independence and Its Relations with Economic Policy Makers' (2007) 31 *Fordham Int'l LJ* 1614. See generally on central bank independence Jakob de Haan, Donato Masciandaro, and Marc Quintyn (eds), Special Issue 'Does Central Bank Independence Still Matter?' (2008) 24 *Eur J Pol Econ* 717.

<sup>53</sup> TFEU, arts 130 and 282(3).

<sup>54</sup> Fabian Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Hart Publishing 1999).

<sup>55</sup> TFEU, art 284.

<sup>56</sup> The ECB, the NCBs of the euro area Member States and the NCBs of the non-euro area Member States come together to form the European System of Central Banks (ESCB). This collection of central banks, which is thus larger than the Eurosystem, has price stability as its key objective (TFEU, art 282(2)), but, logically, is not the monetary authority of the Eurozone.

<sup>57</sup> European Central Bank, 'The Accountability of the ECB' *Monthly Bulletin*, November 2002, 54.

<sup>58</sup> European Central Bank, 'Annual Report 2015', April 2016, 91.

<sup>59</sup> See Decision of the European Central Bank of 17 June 2004 adopting the Rules of Procedure of the General Council of the European Central Bank, art 10 (ECB/2004/12) (2004/526/EC), OJ L 230/61.

monetary governance.<sup>60</sup> The ECB, additionally, publishes quarterly reports on ESCB activities and weekly consolidated financial statements.<sup>61</sup>

The relationship of political control between the EP and the ECB, rooted in the so-called monetary dialogue, has evolved over time and has begun encompassing discussions of economic policy, albeit that the effectiveness of EP monitoring as a mechanism for reviewing ECB performance has been questioned.<sup>62</sup> Yet one early study shows that, in the first five years of its existence, the ECB exhibited a ‘high degree of responsiveness to criticism’ within the monetary dialogue, which translated into 71 per cent (five out of seven) of the clearly defined requests of the ECON Committee being heeded by the ECB.<sup>63</sup> Furthermore, while the dialogue has had little effect, or perhaps even a negative one, on the financial markets’ stability during the euro crisis, it has contributed to greater democratic legitimacy of ECB policies.<sup>64</sup> The monetary dialogue has therefore given rise to what has been dubbed ‘accountable independence’ of the ECB, which has ‘considerably widened in scope’ and become ‘especially productive’ during the financial and sovereign debt crises.<sup>65</sup> This stems from the symbiotic convergence of the ECB’s interest in acquiring legitimacy and the EP’s interest in exerting influence on EMU decision-making.

## 4.2 Accountability to National Parliaments

The ECB defines its accountability as the ‘legal and political obligation of an independent central bank to justify and explain its decisions to the citizens and their elected representatives’.<sup>66</sup> It argues that its *input legitimacy* stems from the NPs’ approval of the transfer of monetary policy competences to the Union and from the Member States’ involvement in the appointment of the ECB’s Executive Board and Governing Council. Its *output legitimacy* is derived from the success in its performance of the tasks entrusted to it. Instrumental to this is the Bank’s insulation from the vagaries of the political process. Although formally based on the principal–agent relationship,<sup>67</sup> the ECB’s accountability is not premised on a possibility to remove central bankers from office.<sup>68</sup> This is precluded by the very nature of monetary policy, which requires policy-makers to concentrate on medium-term economic projections in order for changes in interest rates or other measures to be ‘transmitted’ to the real economy and thus affect price levels.

For this reason, the accountability of the Union’s central bank is deemed more appropriate if effected *ex post* through ‘constant scrutiny of the central bank’s actions by the parliament and the public at large’.<sup>69</sup> The main goal of this is to verify that the ECB keeps within the margins of the principle of conferral and only exercises

<sup>60</sup> European Central Bank, ‘Annual Report 2015’ (n 58) 5.

<sup>61</sup> Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, art 15(1)–(2).

<sup>62</sup> Fabian Amtenbrink and Kees P S van Duin, ‘The European Central Bank Before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue’ (2009) 34 EL Rev 561.

<sup>63</sup> Sylvester C W Eijffinger and Edin Mujagić, ‘An Assessment of the Effectiveness of the Monetary Dialogue on the ECB’s Accountability and Transparency: A Qualitative Approach’ (2004) 39 *Intereconomics* 190, 202–203.

<sup>64</sup> Stefan Collignon and Sebastian Diessner, ‘The ECB’s Monetary Dialogue with the European Parliament: Efficiency and Accountability during the Euro Crisis?’ (2016) 54 *JCMS* 1296.

<sup>65</sup> Francisco Torres, ‘The EMU’s Legitimacy and the ECB as a Strategic Political Player in the Crisis Context’ (2013) 35 *J Eur Integration* 287, 295 and 297.

<sup>66</sup> European Central Bank, ‘The Accountability of the ECB’ (n 57) 46.

<sup>67</sup> Robert Elgie, ‘The Politics of the European Central Bank: Principal–Agent Theory and the Democratic Deficit’ (2002) 9 *JEPP* 186.

<sup>68</sup> See Amtenbrink (n 54). <sup>69</sup> *ibid* 47.

those powers that have been transferred to it by the Treaties. However, there is marginal space for *ex ante* scrutiny too. Namely, the ECB's proposals for EU legislation ('recommendations') have to comply with subsidiarity, since they are considered 'draft legislative acts' for the purposes of the early warning mechanism.<sup>70</sup> The Council shall forward them to NPs and the ECB shall review them where they are challenged by a 'yellow card', deciding whether to maintain, amend, or withdraw them and justifying its decision.<sup>71</sup> Conversely, the ECB wields significant *ex ante* influence over national authorities, which have a legal duty to consult it on draft domestic legislation that falls within the Bank's scope of competence.<sup>72</sup> In this case, it is the ECB that exercises a form of oversight. Therefore, for this advisory function of the ECB, there are no specific accountability arrangements.

Furthermore, the ECB argues that there is an important limitation for both the EP and NPs to hold individual NCB governors to account for its decisions. At the EU level, this is because no EU institution participates in the governors' appointment, and, at the national level, because NPs 'lack the legitimacy to judge' the governors' European duties given that in the performance thereof they are prohibited from defending their Member State's national interest.<sup>73</sup> But the euro crisis has revealed the outbreak of individual rifts within the Governing Council, which demonstrates that any difference in the views held by NCBs is likely to be significantly influenced by the national preferences of their Member State. This is evident from the strong opposition of the German central bank (*Bundesbank*) to the second round of LTROs to euro area banks, which the ECB carried out on 29 February 2012.<sup>74</sup>

After the resignations of an influential member of the ECB Executive Board, Jürgen Stark, and the former *Bundesbank* President, Axel Webber, over the ECB's previous purchase of Greek and Portuguese sovereign bonds, the incumbent *Bundesbank* President, Jens Weidmann, protested this course of action explicitly by sending a letter to the ECB President Draghi. In this letter, Weidmann stressed that the cumulative ECB loan of €529.5 billion to 800 euro area banks, at the low interest rate of 1 per cent for three years, was dangerous because it discouraged structural and capital consolidation of these banks and because the ECB was accepting lower-grade collateral to secure these loans. For Weidmann, this posed a concrete and serious risk for the *Bundesbank* because, if the euro area were to disintegrate, the *Bundesbank* would be left with hundreds of billions of bad debt owed by Southern European banks.

This episode shows that although ECB decision-making is formally focused on price stability, in essence it carries important implications for domestic economic and fiscal policy-making. A further consequence is that, in political terms, EU monetary policy is not completely independent of the national economic and financial interests. In fact, despite being an exclusive competence of the Union, monetary policy is subject to

<sup>70</sup> Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, art 3.

<sup>71</sup> Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, arts 4(3) and 7(a), second sentence.

<sup>72</sup> TFEU, art 127(4) in conjunction with Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, [1998] OJ L 189/42. See also the ECB's guide on this at <https://www.ecb.europa.eu/pub/pdf/other/consultationguide201510.en.pdf?cf7d83dc6c3962c3a89bb0c9873739a> (last accessed 28 August 2016).

<sup>73</sup> European Central Bank, 'The Accountability of the ECB' (n 57) 49.

<sup>74</sup> Sven Böll and others, 'Euro Crisis Crucible: Rift Grows Between Germany's Bundesbank and ECB' *Der Spiegel (Online International)*, 6 March 2012 <http://spon.de/adBhX> (last accessed 28 August 2016); Mary Watkins, 'Banks Deposit Record €821 bn at ECB' *Financial Times*, 5 March 2012 <https://next.ft.com/content/29e5c006-66a4-11e1-863c-00144feabd0> (last accessed 28 August 2016).

domestic political pressures striving to protect national identity *qua* monetary policy identity.<sup>75</sup> This, in turn, suggests that the ever-expanding competences of the ECB should not remain entirely unchecked by parliamentary actors.

Addressing this kind of preoccupation, Mario Draghi has since 2012 started appearing in NPs, which his predecessor Jean-Claude Trichet did much less proactively, if at all.<sup>76</sup> Such an approach stems from Draghi's understanding that 'because you are independent, you have to be twice as transparent as anyone else'.<sup>77</sup> Up to now, there have been five such visits, which are examined in turn below.

Following the ECB's announcement of the OMT programme in September 2012, the next month saw Draghi pay a visit to the German *Bundestag*. The two-hour discussion was held behind closed doors with over 100 parliamentarians, including members of the Budget Committee, the Finance Committee, and the European Affairs Committee, as well as the leaders of all parliamentary groups.<sup>78</sup> Recognizing that it was 'rare for the ECB President to speak in a national parliament', Draghi pointed out that the purpose of the gathering was not only ECB accountability but also democratic participation through direct input by parliamentarians. Referring to the OMT programme, Draghi stated:

I am here today not only to explain the ECB's policies. I am also here to listen. I am here to listen to your views on the ECB, on the euro area economy and on the longer-term vision for Europe ... I would like to explain our view of the current situation and the rationale for our recent monetary policy decisions ... I am aware that some observers in this country remain concerned about the potential impact of this policy. I would therefore like to use this opportunity to go through those concerns – one by one ...<sup>79</sup>

In particular, Draghi offered four assurances: (a) that OMTs would not lead to the monetary financing of governments, because government bonds are purchased from investors in secondary markets and not directly from governments and because focus is on shorter maturities (up to three years), which would help ensure the effectiveness of market discipline; (b) that OMTs would not affect the ECB's independence, because the Bank's action would continue to be based on the evaluation of the monetary policy transmission mechanism and the objective of price stability; (c) that excessive risks for taxpayers would be avoided because OMTs are fully dependent on the implementation of macroeconomic reforms required under the Memorandums of Understanding imposed under the ESM; and (d) that OMTs would not cause inflation because so-called 'sterilization' measures are foreseen whereby 'for every euro we inject, we will

<sup>75</sup> See more on national identity in the introductory chapter by Davor Jančić in this volume.

<sup>76</sup> Former ECB President Trichet took part in a French parliamentary inquiry on tax avoidance in 2010, but declined an invitation by the Irish Parliament (*Oireachtas*) to attend an inquiry on the banking crisis invoking the absence of a duty to render account to institutions at the national level. Mark Bovens and Deirdre Curtin, 'An Unholy Trinity of EU Presidents? Political Accountability of EU Executive Power' in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 190–217, 210.

<sup>77</sup> Andreas Framke, Eva Kuehnen, and Sakari Suoninen, 'Special Report: How Mario Draghi is Reshaping Europe's Central Bank' *Reuters*, 9 January 2013 <http://reut.rs/VdstBn> (last accessed 28 August 2016).

<sup>78</sup> Deutscher Bundestag, 'Interventionen der EZB führen nicht zu Inflation', 24 October 2012 [https://www.bundestag.de/dokumente/textarchiv/2012/41171041\\_kw43\\_draghi/209770](https://www.bundestag.de/dokumente/textarchiv/2012/41171041_kw43_draghi/209770) (last accessed 28 August 2016).

<sup>79</sup> European Central Bank, 'Opening Statement at Deutscher Bundestag', Berlin, 24 October 2012 <http://www.ecb.europa.eu/press/key/date/2012/html/sp121024.en.html> (last accessed 28 August 2016).

withdraw a euro'. This *Bundestag* session was mostly positively assessed as contributing to the easing of German concerns. The Governor of the Finnish Central Bank (*Finlands Bank*), Erkki Liikanen, claimed: 'it went down very well ... he should visit other parliaments, too'.<sup>80</sup> So, he did.

In his speech in the Spanish Lower House of Parliament (*Congreso de los Diputados*) in February 2013, Draghi similarly sought to explain the major ECB policies taken in response to the euro crisis. But in addressing the specifics of ECB plans, he made several other important points. In search of a 'good mutual understanding' between the Bank and parliaments, he clarified that NPs are crucial to sustaining the stability and credibility of the EMU because economic interdependence spills over into legislative interdependence:

As the democratically elected representatives of the Spanish people, you are responsible for domestic economic policy. Yet in the exercise of those duties, just like all national parliaments in the euro area, you influence the functioning of our economic and monetary union as a whole. As the President of the European Council Herman van Rompuy has said, national parliaments have become European institutions. It is important that we all recognise these mutual interests ... all national parliaments in the euro area influence the functioning of our economic and monetary union.<sup>81</sup>

This reasoning sheds light on the EMU dimension of the NPs' contribution to the good functioning of the Union.<sup>82</sup> As Draghi underlined, NPs are 'key contributors' to the correction of misalignments of national fiscal policies that is necessary to increase Union-wide economic growth and jobs creation. Alongside the ECB, national governments and the private sector, 'resolute action' by parliaments had a 'pivotal role' in the reduction of credit spreads on sovereign and corporate bonds, the recovery of equity prices and banks' greater access to financial markets. Critical importance, moreover, is attached to the discursive function of parliaments in providing for 'effective communication to the public of the ultimate goals' as part of 'consensus-building efforts within domestic constituencies'.<sup>83</sup> Ironically, however, the Speaker of the Spanish *Congreso* had prevented live broadcast of the debate by ordering the use of inhibitors of wifi and 3G connections, which caused outrage especially among the Socialist parliamentarians.<sup>84</sup>

Over four months later, in June 2013 the ECB President was hosted by the French Lower House of Parliament (*Assemblée nationale*). The meeting was held in a joint session of the European Affairs Committee, the Foreign Affairs Committee, and the Finance Committee. This time, however, Draghi was accompanied by a member of the Executive Board, Benoît Cœuré, and the Governor of the French Central Bank (*Banque de France*), Christian Noyer. Draghi carried on with his 'present, listen, and learn' approach, emphasizing that any further pooling of powers at the EU level needs to be 'matched by greater democratic legitimacy'.<sup>85</sup> Dominating the dialogue were topics related to the ECB's legitimacy, the operation of the OMT programme, banking

<sup>80</sup> Framke, Kuehnen, and Suoninen (n 77).

<sup>81</sup> European Central Bank, 'Introductory Statement at the Congreso de los Diputados de España' (n 41).

<sup>82</sup> See more on the good functioning of the Union in the introductory chapter by Davor Jančić in this volume.

<sup>83</sup> European Central Bank (n 41).

<sup>84</sup> Gonzalo Cortizo, 'El día que Draghi apagó el Congreso' *El Diario*, 12 February 2013 [http://www.eldiario.es/\\_5fc99dd](http://www.eldiario.es/_5fc99dd) (last accessed 28 August 2016).

<sup>85</sup> European Central Bank, 'Introductory Remarks at the French Assemblée Nationale', Paris, 26 June 2013 <http://www.ecb.europa.eu/press/key/date/2013/html/sp130626.en.html> (last accessed 28 August 2016).



supervision, and the orientation of monetary policy (eg towards growth). Answering the questions on the extent of the ECB's Treaty mandate, Draghi stated that:

Central banks are powerful institutions, non-elected and, in the case of the ECB, they fiercely defend their independence. These three characteristics are not necessarily compatible. The only way to achieve that is for the ECB to act within the mandate that you, legislators, have established. That is why we are so concerned and so proud to respect our mandate. That said, the discussion on the breadth of this mandate is primarily in your hands, not in ours.<sup>86</sup>

The ECB's *tour des capitales* went on with a visit to the Finnish Parliament (*Eduskunta*) in November 2014.<sup>87</sup> The meeting was attended by Governor Liikanen, chairpersons of the Parliamentary Supervisory Council, the Finance Committee, and the Grand Committee (which is in charge of European affairs), and other parliamentarians.<sup>88</sup> Draghi took this opportunity to advise that these visits are 'ad hoc interactions' and that NPs' key role is to exercise political control over the national central bank to the extent envisaged under domestic law.

The last such visit was to the parliament of Draghi's country of nationality—the Italian Chamber of Deputies (*Camera dei Deputati*) in March 2015.<sup>89</sup> Unlike in Spain, this meeting, which lasted slightly less than two hours, was televised and is publicly available *in toto*.<sup>90</sup> It was jointly organized by the Budget Committee, the Finance Committee, and the European Affairs Committee.<sup>91</sup>

This incipient tradition of the ECB's informal visits to NPs resembles those that Commission representatives conduct within the framework of the political dialogue between the Commission and NPs called the 'Barroso Initiative', during which they explain EU policies and answer questions of particular concern to the inviting parliament. Through these practices, the ECB is increasing the awareness, publicity and understanding of EU monetary policy. This is significant because it establishes a direct communication link between the EU's monetary authority and domestic lawmakers, who are in charge of adopting fiscal laws that have a bearing on the success and direction of monetary policy. However, the nature of the dialogue between the ECB and NPs is essentially one of exchange of information and not of full-blown political control of the sort maintained between parliaments and governments.<sup>92</sup>

<sup>86</sup> Assemblée nationale, Commission des affaires européennes, Compte rendu no 73 'Audition conjointe sur la politique monétaire, la situation économique de la zone euro et le développement de l'Union économique et monétaire', 26 juin 2013, 23 <http://www.assemblee-nationale.fr/14/europe/c-rendus/c0073.asp> (last accessed 28 August 2016).

<sup>87</sup> European Central Bank, 'Introductory Remarks at the Finnish Parliament', Helsinki, 27 November 2014 <http://www.ecb.europa.eu/press/key/date/2014/html/sp141127.en.html> (last accessed 28 August 2016).

<sup>88</sup> Eduskunta, 'Euroopan keskuspankin pääjohtaja Mario Draghi vieraili eduskunnassa' [European Central Bank President Mario Draghi visited Parliament], 27 November 2014 <https://www.eduskunta.fi/FI/tiedotteet/Sivut/Euroopan%20keskuspankin%20paajohtaja%20Mario%20Draghi%20vieraili%20eduskunnassa.aspx> (last accessed 28 August 2016).

<sup>89</sup> European Central Bank, 'Introductory Statement at the Italian Parliament', Rome, 26 March 2015 <https://www.ecb.europa.eu/press/key/date/2015/html/sp150326.en.html> (last accessed 28 August 2016).

<sup>90</sup> See <http://webtv.camera.it/evento/7695> (last accessed 28 August 2016).

<sup>91</sup> Camera dei Deputati, Commissioni riunite Bilancio, Tesoro e Programmazione (V), Finanze (VI) e Politiche dell'Unione Europea, Audizione seduta di giovedì 26 marzo 2015, Resoconto stenografico <http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/pdf/050614/audiz2/audizione/2015/03/26/leg.17.stencomm.data20150326.U1.com050614.audz2.audizione.0001.pdf> (last accessed 28 August 2016).

<sup>92</sup> Bovens and Curtin (n 76) 214.



## 5. Accountability of the European Central Bank for Prudential Supervision

In performing its new role, which is separate from the conduct of monetary policy, the ECB owes a duty of accountability both to the EP and, to a lesser extent, to NPs.<sup>93</sup>

### 5.1 Accountability to the European Parliament

A first element of the ECB's accountability refers to its leadership in *macro-prudential* oversight of the EU financial system as a whole. The ECB does this through the European Systemic Risks Board (ESRB), which is chaired by the President of the ECB. Regarding its activities, the ESRB shall send a report to the EP and the Council annually or more frequently where warranted by widespread financial distress.<sup>94</sup> The ESRB Chair (ECB President) presents this report in a hearing in the EP, which is distinct and separate from the ECB-EP dialogue on monetary policy. The EP may invite the ESRB to examine other specific issues and to attend a hearing in a competent EP committee. These are complemented by 'confidential oral discussions ... behind closed doors' with the Chair and Vice-Chairs of the EP's ECON Committee, which focus on the ESRB's 'ongoing activity' twice a year or more frequently, where necessary.

A second element of the ECB's accountability concerns *micro-prudential supervision*. To begin with, the EP has the right to approve the appointment and removal of the Chair and the Vice-Chair of the ECB Supervisory Board. Importantly, in case any of these Board officials commit 'serious misconduct' or suffer circumstances bringing their standing into question, the EP may inform the ECB that, in its view, the conditions for their removal have been met.<sup>95</sup>

With respect to accountability, the ECB shall submit an annual report to the EP, the Commission, the Council, and the Eurogroup on the execution of its supervisory tasks and the Chair of the Supervisory Board must present it in public to the EP and to the Eurogroup. Upon the EP's request, the said Chair must appear before the competent EP committee for a hearing and the ECB shall reply orally or in writing to any questions from the EP or from the Eurogroup.

Another channel for the ECB-EP dialogue is the closed-door confidential discussions of the sort held with the ESRB, whereby the ECB Supervisory Board Chair meets the Chair and Vice-Chairs of the competent EP committees upon the latter's request. In all of these instances, the ECB is obliged to 'cooperate sincerely' with EP 'investigations', which may be carried out in the form of committees of inquiry. The objective of these arrangements is to facilitate the 'exercise of democratic accountability and oversight' over the ECB's supervisory powers.<sup>96</sup>

Detailed arrangements for the ECB's accountability to the EP for its prudential supervisory functions are foreseen in an interinstitutional agreement concluded

<sup>93</sup> 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 (SSM Regulation), arts 20 and 21 [2013] OJ L 287/63. See also Luis M Hinojosa-Martínez, 'The Role of the ECB in the Supervision of Credit Institutions' in Luis M Hinojosa Martínez and José María Beneyto, *European Banking Union: The New Regime* (Kluwer Law International 2015) 47–68, 62.

<sup>94</sup> Regulation No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (ESRB Regulation), art 19 [2010] OJ L 331/1.

<sup>95</sup> SSM Regulation, art 26(3)–(4). <sup>96</sup> *ibid* art 20(9).

between these two institutions in November 2013.<sup>97</sup> There have thus far been numerous exchanges between MEPs and Danièle Nouy, the incumbent Chair of the ECB Supervisory Board. From the establishment of this Board on 1 January 2014 until mid-July 2016, the ECB sent a total of fifty-six letters to European parliamentarians: one ‘inaugural’ letter in 2013, ten in 2014, twenty-six in 2015, and nineteen in the first half of 2016.<sup>98</sup>

## 5.2 Accountability to National Parliaments

When it comes to domestic legislatures, the same annual report that the ECB sends to the EP should also be directly submitted to NPs of the euro area Member States. In reaction, these NPs may issue ‘reasoned observations’ and request the ECB to reply in writing. Furthermore, any participating NP may invite the Chair or a member of the ECB Supervisory Board and a representative of the competent national authority for an exchange of views on the supervision of credit institutions in that Member State. The inclusion of NPs in the ECB’s accountability regime has been viewed as ‘a good example of the mixed administration that has been created within the SSM’, whereby the ECB justifies its action not only at the EU level but also at the national level, where the impact of its work is most felt.<sup>99</sup> However, this multiplicity of parliamentary institutions to which the ECB shall give account may create a tension between upholding the Union’s interest and appeasing differing domestic interests.<sup>100</sup>

This, however, is remedied by the fact that the outcome of these accountability practices stays in the realm of political pressure, as neither the EP nor NPs may sanction the ECB for any failures in its supervisory activities. Despite this, the ECB’s accountability for prudential supervision has been evaluated as ‘robust’ and ‘more intrusive’ than its general accountability duty under the Treaties described above.<sup>101</sup> This is appropriate given the potentially formidable impact that supervisory measures may have ‘on public finances, credit institutions, their customers and their employees, and the markets in the participating Members States’.<sup>102</sup> This is also why extensive independence of the ECB in monetary policy sits uneasily with the breadth and incisiveness of its supervisory powers.<sup>103</sup> A group of Dutch Central Bank lawyers nonetheless argue that the ECB’s accountability has been adequately designed because ‘these processes will put pressure on the ECB to properly explain “what it has been doing” and why it considers this the right way to fulfil its supervisory tasks. It leads towards a dialogue, which assures accountability’.<sup>104</sup>

<sup>97</sup> Annex XXI to the EP Rules of Procedure—Interinstitutional Agreement on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, [2013] OJ L 320/1.

<sup>98</sup> Own calculation based on the data taken from the ECB’s website at <https://www.bankingsupervision.europa.eu/press/publications/date/2016/html/index.en.html> (last accessed 22 July 2016).

<sup>99</sup> Gijsbert Ter Kuile, Laura Wissink, and Willem Bovenschen, ‘Tailor-Made Accountability Within the Single Supervisory Mechanism’ (2015) 52 CML Rev 155, 170–71.

<sup>100</sup> Chiara Zilioli, ‘The Independence of the European Central Bank and Its New Banking Supervisory Competences’ in Dominique Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016) 125–79, 178.

<sup>101</sup> Niamh Moloney, ‘European Banking Union: Assessing Its Risks and Resilience’ (2014) 51 CML Rev 1609, 1636.

<sup>102</sup> SSM Regulation, recital (56). <sup>103</sup> Alexander (n 34) 171.

<sup>104</sup> Ter Kuile, Wissink, and Bovenschen (n 99) 169.

## 6. Concluding Remarks

This chapter has queried what could be called the ‘democratic sustainability of the EMU’,<sup>105</sup> as envisioned by the Five Presidents’ Report and as shaped by the relations between the EP and NPs and the ECB. The latter has proven to be the pivotal EU actor in providing a swift policy response to reassure the markets about the economic resilience and agility of the euro area and the aggregate EU economy. The need for a citizen-oriented democratic embedding of economic and monetary policy-making in the EU has led to calls for an increased involvement of parliaments at both EU and domestic levels.<sup>106</sup>

Control over the national government and NCB governors, scrutiny over the ECB’s monetary policy and supervisory measures, and inter-parliamentary liaison—contribute to bringing this to fruition. No illusion, however, should be had that legislatures can and ought to become prime policy-makers supplanting expertise-rich executive and non-majoritarian bodies.<sup>107</sup> On the contrary, their role is one of monitoring and political mediation. Even if the ECB may *prima facie* appear a highly technocratic institution, merely applying economic postulates to achieve the desired monetary policy ends, the euro crisis has shown that even such action is inextricable from the systemic, interdependent and spillover-conducive nature of the EMU evolution that pulls it into the domain of fiscal policy. In addition to monetary policy stewardship, the Banking Union’s investiture of the ECB as the ultimate supervisor of the Eurozone’s credit institutions makes it, in the words of the UK House of Lords, an ‘exceptionally powerful’ institution.<sup>108</sup> For prudential supervision, the ECB’s accountability arrangements, their Lordships’ argument goes, are ‘patently weak’—which makes an ‘overwhelming’ case for a ‘strong accountability mechanism’ to the EP and NPs alike.<sup>109</sup> These factors draw the ECB into the space of politicization.<sup>110</sup>

In this regard, elected representatives have a role to play by debating the ECB’s policies and interventions and by holding its President to account. This helps to augment the level of transparency of monetary policy decisions, which is crucial for their adequate transmission into the real economy. On this note, the ECB President’s political accountability has been appraised as ‘the most developed’ within the EU executive branch.<sup>111</sup> This is usefully explained by Draghi’s aforesaid observation that the ECB’s independence ought to be counterbalanced by reinforced efforts to justify its action. This has given rise to heightened contestation of the ECB and its policies.<sup>112</sup>

The nature of parliamentary oversight over the ECB is determined by its institutional independence, which shields its members from any attempts at capricious,

<sup>105</sup> Iain Begg and others, ‘EMU and Sustainable Integration’ (2015) 37 J Eur Integration 803, 810.

<sup>106</sup> Richard Bellamy and Albert Weale, ‘Political Legitimacy and European Monetary Union: Contracts, Constitutionalism and the Normative Logic of Two-level Games’ (2015) 22 JEPP 257, 270.

<sup>107</sup> See to this end Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016) 192.

<sup>108</sup> House of Lords, EU Committee, HL Paper 88 ‘European Banking Union: Key Issues and Challenges’, 7th Report of Session 2012–13 of 12 December 2012, para 56, p. 22.

<sup>109</sup> *ibid* para 57, p. 22.

<sup>110</sup> Hanspeter Kriesi and Edgar Grande, ‘The Euro Crisis: A Boost to the Politicization of European Integration?’ in Swen Hutter, Edgar Grande, and Hanspeter Kriesi (eds), *Politicizing Europe: Integration and Mass Politics* (Cambridge University Press 2016) 240–75, 246, and 262; Mark Dawson and Floris de Witte, ‘From Balance to Conflict: A New Constitution for the EU’ (2016) 22 ELJ 204, 215.

<sup>111</sup> Bovens and Curtin (n 76) 212.

<sup>112</sup> Nicole Sciicluna, *European Union Constitutionalism in Crisis* (Routledge 2015) 135.

party-political ouster. However, formal and informal dialogues between the ECB and national and European parliamentarians serve as important information-sharing forums, giving publicity to ECB decisions and requiring justification for their adoption. Consequently, democratic oversight over the ECB is above all *ex post*. There is no requirement for the ECB to consult the EP or NPs before it makes policy.

Nevertheless, the combination of the debt crisis, the sluggish Eurozone economy, strong fiscal implications of the ECB's monetary measures, and the Bank's overall pre-eminence in tackling these problems—have prompted its President, Mario Draghi, to embark on a reform of the institution's democratic accountability. He has done so by means of ad hoc appearances in an increasing number of plenary and committee sessions of NPs as well as through greater commitment to monetary and supervisory dialogues with the EP. This may improve the transparency dimension of the ECB's accountability by explaining the data based on which it acts.<sup>113</sup>

The ECB's accountability furthermore differs from that of independent central banks elsewhere in an important foundational aspect. The examples of the US and Japan illustrate the importance of the institution of parliament. In the US, monetary authority is vested in the Federal Reserve System (the Federal Reserve or simply the Fed) by virtue of an act of Congress—the Federal Reserve Act of 1913. In Japan, such authority rests with the Bank of Japan, also thanks to a statute—the Bank of Japan Act (establishment in 1882, reorganization in 1942). Conversely, the ECB is the creation of a Treaty—the TFEU. The US Congress and the Japanese National Diet (*Kokkai*) can legislate to alter the prerogatives of their respective central banks and thereby indirectly exercise significant oversight powers. The EP may not do so with respect to the ECB because this would require a Treaty change, which is the domain of the Member States.

Moreover, parliamentarians have been active in utilizing judicial channels to challenge decisions that imply a significant or exclusive involvement of the ECB. This was the case with Mr Pringle regarding the ESM and with Mr Gauweiler regarding OMT.

The euro crisis has therefore brought about a transformation, albeit not a radical one, in the functioning of the democratic control over the ECB. The Bank has become more responsive to parliamentary sensitivities, while retaining its status as an independent monetary and supervisory authority for the Eurozone.<sup>114</sup> This is the core of the notion of the ECB's 'accountable independence', whose fulfilment hinges on continuing oversight over its operation.<sup>115</sup> A persisting challenge for legislators will be to adjust their scrutiny to these different roles of the ECB and address the redistributive implications of a developing EMU. However, for this to be effective, the EU will need to devise further political ways to 'accommodate citizen concerns while opening up decision-making processes to EU and national parliamentary representation'.<sup>116</sup>

<sup>113</sup> This problem has been diagnosed in Christopher Gandrud and Mark Hallerberg, 'Does Banking Union Worsen the EU's Democratic Deficit? The Need for Greater Supervisory Data Transparency' (2015) 53 *JCMS* 769; Francesco Giavazzi and Charles Wyplosz, 'EMU: Old Flaws Revisited' (2015) 37 *J Eur Integration* 723, 731.

<sup>114</sup> There are economists' views that the ECB's role of lender of last resort should be fortified and that this can only be done by making the ECB 'subordinate to the political power of elected officials'. See Paul de Grauwe and Yuemei Ji, 'Correcting for the Eurozone Design Failures: The Role of the ECB' (2015) 37 *J Eur Integration* 739, 749.

<sup>115</sup> Rosa M Lastra, 'The Evolution of the European Central Bank' (2012) *Fordham Int'l LJ* 1260, 1279–80.

<sup>116</sup> Vivien A Schmidt, 'The Forgotten Problem of Democratic Legitimacy: "Governing by the Rules" and "Ruling by the Numbers"' in Matthias Matthijs and Mark Blyth (eds), *The Future of the Euro* (Oxford University Press 2015) 90, 112.