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PHOEBUS L. ATHANASSIOU

THE INSTITUTIONAL ARCHITECTURE AND TASKS OF THE EUROPEAN CENTRAL BANK SINCE THE CRISIS – AN OVERVIEW

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ABSTRACT

This paper presents an overview of the impact of the financial and sovereign debt crises on the ECB and the Eurosystem, with an emphasis on some of the main changes they have ushered in for the ECB and the euro area national central banks. The paper is divided in three parts. Part 1 presents an account of the impact of the crisis on the ECB's monetary policy, and an outline of the EU law constraints to the ECB's discretionary monetary policy powers at times of crisis. Part 2 examines the ECB's contribution to the preservation of financial stability, the interaction between the latter and the ECB's monetary policy mandate, and their interplay with the principle of central bank independence. Finally, Part 3 explores the ECB's role in the Troika, and its newly attributed competences in the context of bank recovery and resolution.

Keywords: ECB, crisis, monetary policy, financial stability, central bank independence, bank recovery and resolution

Phoebus L. Athanassiou is Principal Legal Counsel of the European Central Bank (ECB).

The views expressed in this paper are purely personal, and they are not intended to bind the ECB or the Eurosystem.

E-mail: **phoebus.athanassiou@ecb.int**

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Introduction

The European System of Central Banks (ESCB) is composed of the European Central Bank (ECB) and of the national central banks (NCBs) of the twenty-eight Member States of the European Union (EU). Its legal basis consists of the Treaty establishing the European Communities (TEC), and the Statute of the ESCB and of the ECB (hereinafter 'the Statute', which is annexed to the TEC as a Protocol). At the heart of the ESCB lies the ECB, the 'central bank of the euro', which, through its decision-making bodies, defines the monetary policy of the euro area, and implements it, mostly through the NCBs (principle of decentralization).[1] As the TEC only assigns monetary policy tasks to the ECB and the NCBs of the euro area Member States, the ECB Governing Council has coined the unofficial term 'Eurosystem'[2] (enshrined, since, into primary EU law)[3] to denote the limited composition of nineteen euro area Member State NCBs and the ECB, in which the ESCB pursues its objectives and performs its tasks.

The outbreak of the European sovereign debt crisis saw Europe's policy makers resort to the ECB and the NCBs to help guarantee market stability by, *inter alia*, providing urgently needed liquidity to dysfunctional market segments. To provide the necessary liquidity, the ECB adopted a raft of 'unconventional' monetary policy measures, culminating in the implementation of a series of

[1] The reference is to the principle according to which the ECB is to have recourse to NCBs, to the extent possible and appropriate, to carry out, operationally, the Eurosystem tasks. To ensure that decentralization does not hamper the smooth functioning of the Eurosystem, the NCBs have to act in accordance with the ECB's guidelines and instructions. Crucially, the principle of decentralization applies to operations only and, in particular, monetary policy operations, which are conducted by the euro area NCBs directly with their domestic counterparties.

[2] The unofficial term 'Eurosystem' first appeared in the ECB Monthly Bulletin (January 1999) <https://www.ecb.europa.eu/pub/pdf/mobu/mb199901en.pdf> accessed 20 October 2018.

[3] The term 'Eurosystem' now features in Article 282(1) of the Treaty on the Functioning of the European Union, which states that, 'The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union'.

asset purchase (quantitative easing) programmes.[4] Following a decision of the European Council to activate Article 127(6) of the Treaty on the Functioning of the European Union (TFEU or 'the Treaty'), and 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', the ECB was also attributed exclusive competence over certain micro-prudential supervisory tasks, becoming the 'hub' of the Single Supervisory Mechanism (SSM). Important as they are, the adoption of unconventional monetary policy measures and the assumption and exercise, by the ECB, of exclusive competence for certain micro-prudential supervisory tasks are only *some* of the ways in which the European crisis has impacted on the ECB's mission. In recent years, the ECB has also played an important role in European macro-prudential supervision, following the establishment of the European Systemic Risk Board (ESRB); it has participated in the various financial support programmes, as a member of the Troika; and it has been attributed an important role in bank recovery and resolution within the context of the Single Resolution Mechanism (SRM). The resulting enlargement in the scope of the ECB's tasks and functions has had an impact on the institutional balance between the ECB and the NCBs, as well as on its relationship with other EU institutions and the European Stability Mechanism (ESM); it has also created scope for synergies between the original monetary policy-related objectives and tasks of the ECB and the Eurosystem, and its more recently attributed tasks and functions, giving rise to novel challenges, *inter alia* from the perspective of the ECB's independence.

This Paper provides a concise overview of the impact of the financial and sovereign debt crises on the ECB and the Eurosystem, with an emphasis on the lasting institutional changes they have ushered in for the ECB. A caveat is apposite: space constraints compel the author of this Paper to impute to its readers a basic grasp of the institutional set-up of the ECB and the ESCB, of the monetary policy tasks and objectives of the ECB and the Eurosystem, of the ECB's regulatory and advisory powers, and of its role in the SSM. For those who wish to delve deeper into these matters, the extant literature is not short of accounts, some more comprehensive than others, of the institutional framework, objectives, tasks and legal framework of the ESCB and the SSM.[5] What the extant literature is short of are broad-stroke accounts of the impact of the financial

[4] For an account of the ECB's unconventional measures since the start of the crisis, see Chiara Zilioli and Phoebus Athanassiou, 'The European Central Bank' in Robert Schütze and Takis P. Tridimas (eds), *Oxford Principles of European Union Law, Volume 1: The European Union Legal Order* (Oxford University Press 2018) 610-650, 633-644; René Smits, 'A central bank in times of crisis: the ECB's developing role in the EU's currency union', in Rosa Lastra and Peter Conti-Brown (eds), *Research Handbook on Central Banking* (Edward Elgar 2018) 184-209, 185-203; and Chiara Zilioli, 'Legal aspects of extraordinary/unconventional monetary policy instruments of the ECB (the so-called "quantitative easing")' (Speech given at the Bank for International Settlements Central Bank Legal Experts Meeting on Recent Developments in Central Bank Activities, 4 February 2016).

[5] On the ESCB and the ECB see*, ex multi,* Jean-Victor Louis*, L'Union Européenne et sa Monnaie,, 3è éd* (Universite des Bruxelles, 2009); Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank* (Hart, 2001); René Smits, The European Central Bank (Kluwer, 1997). On the SSM, see, *ex multi*, Klaus Lackhoff, *Single Supervisory Mechanism - A Practitioner's Guide* (Beck - Hart - Nomos 2017); Christos V. Gortsos, *The Single Supervisory Mechanism (SSM), Legal Aspects of the First Pillar of the European Banking Union* (Nomiki Bibliothiki 2015); and Eddy O. Wymeersch, 'The Single Supervisory Mechanism: Institutional Aspects' in Danny Bunch and Guido Ferrarini (eds), *European Banking Union* (Oxford University Press, 2015).

crisis on the central bank of the euro.[6] The author's ambition is to provide, within the boundaries of this Paper, precisely such an account. It is for the reader to decide how close this Paper comes to fulfilling its author's ambition.

Part 1 - The ECB and its monetary policy since the start of the crisis

1.1 Introductory remarks

The ECB disposes of a number of monetary policy instruments through which to pursue its objectives and tasks. In the field of monetary policy, the instruments in question, and the modalities of their deployment, are detailed in the 'General Documentation',[7] the ECB Guideline stipulating the terms and conditions subject to which the Eurosystem is to enter into monetary policy operations with counterparties. Article 18.1 of the Statute provides that all NCB monetary policy operations with counterparties are to be adequately collateralised,[8] with the Eurosystem collateral and counterparty frameworks having traditionally occupied much of the General Documentation in its many iterations.

Early into the global financial crisis, it became clear that Eurosystem action was necessary to improve liquidity conditions in the euro area, thereby facilitating the transmission of monetary policy decisions to the real economy. A key element of the action taken by the Eurosystem in response to the liquidity crisis was the temporary expansion of the universe of eligible collateral. The 'unconventional measures' adopted by the Eurosystem included (a) an increase in the length of allotment maturities ('Long-Term Refinancing Operations'), followed by the conduct of 'Very Long-Term' and, subsequently, 'Targeted Long-Term' refinancing operations; (b) the introduction of a full allotment policy at a fixed rate; (c) the provision of liquidity in foreign currencies; (d) the conduct of private bond and asset backed securities purchase programmes; (e) the introduction of negative rates for deposits held with the NCBs; and (f) the adoption of 'quantitative easing' measures, consisting in the outright purchase, on the secondary market, of government bonds under the 'Securities Market Programme' (SMP) and/or in the announcement of the 'Outright Monetary Transactions' (OMT) programme.[9] The latter was to prove amongst the most controversial of the Eurosystem's hitherto unconventional monetary policy measures. Given the controversy surrounding it, and its significance from the perspective of subsequent policy

[6] For a notable exception see Chiara Zilioli, 'The ECB's Powers and Institutional Role in the Financial Crisis - A Confirmation from the Court of Justice of the European Union', (2016) 23 (1) Maastricht Journal of European and Comparative Law, 171-184.

[7] Guideline of the European Central Bank on monetary policy instruments and procedures of the Eurosystem (recast) (ECB/2011/14) [2011] OJ L331/1.

[8] This provides that, 'In 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'.

[9] See ECB, 'Technical features of Outright Monetary Transactions' (Press release, 6 September 2012) <http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 20 October 2018.

measures (with an emphasis on the launch, in early 2015, of the 'Public Sector Purchase Programme' or PSPP),[10] OMTs deserve particular attention.

1.2 Boundaries to the ECB's monetary policy discretionary powers: lessons from Gauweiler

OMTs denote (envisaged but never implemented) Eurosystem outright transactions in the secondary sovereign bond markets of selected sovereign issuers (those subject to an EU or International Monetary Fund (IMF) programme), the aim of which was to restore the monetary policy transmission mechanism and to safeguard the singleness of the Eurosystem's monetary policy. OMTs were to be conducted in accordance with a framework featuring strict compliance with effective conditionality attached to the EU/IMF programmes in place at the time of their announcement. The validity of the ECB's purchases of government bonds, first under the SMP and, then, under the OMTs, was challenged before Germany's Federal Constitutional Court, leading to the Judgment of the European Court of Justice (the 'ECJ' or the 'Court') in the *Gauweiler* case,[11] only the second instance when the legality of the euro area's response mechanisms to the sovereign debt crisis was judicially tested.[12] In its preliminary reference request, Germany's Federal Constitutional Court expressed reservations on the legality of OMTs, which, in its view, risked violating the ECB's monetary policy mandate, on the one hand, and circumventing the monetary financing prohibition of Article 123 TFEU, on the other. In the referring Court's view, OMTs complemented the financial assistance provided to troubled euro area Member States, rendering them *ultra vires* and in breach of the monetary financing prohibition. To address each of these two reservations, the ECJ divided the substantive part of its judgment in two parts.

The first of the core issues that the referring Court expressed reservations about in its preliminary reference request was the extent to which OMTs qualified as monetary, rather than economic, policy measures: the former are the ECB's preserve, under Article 127 TFEU, whilst the latter are that 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 (paragraph 46). In the Court's opinion, the fact that a measure may also serve goals other than price stability (the Eurosystem's primary objective) or have indirect effects on euro area stability (a matter of economic policy) did not detract from its classification as a

[10] See Decision (EU) 2015/774 of the European Central Bank on a secondary markets public sector asset purchase programme (ECB/2015/10) [2015] OJ L121/20.

[11] Case C-62/14 *Gauweiler and others v. Deutscher Bundestag* [2015] ECR EU:C:2015:400. On the Court's ruling in *Gauweiler*, see Napoleon Xanthoulis and Takis P. Tridimas, 'A Legal Analysis of the *Gauweiler* Case', (2016) 23 (1) Maastricht Journal of European & and Comparative Law; Paul P. Craig and Menelaos Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) 41 European Law Review; Dariusz Adamski, 'Economic Constitution of the Euro Area After the *Gauweiler* Preliminary Ruling' (2015) 52 Common Market Law Review 1485; and Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 German Law Journal.

[12] The first was the *Pringle* case (C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012] ECR ECLI:EU:C:2012:756), a preliminary reference ruling from the Supreme Court of the Republic of Ireland, discussed in more detail in Part 3 of this paper.

monetary policy measure (paragraphs 51-2).[13] On the choice of instruments employed to achieve the OMTs' objectives, the Court confirmed that the ECB could legitimately engage in secondary market government bond purchases if their objective was to restore the smooth operation of the monetary policy transmission mechanism and to safeguard the singleness of the euro area monetary policy (paragraphs 53-6). The 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 monetary policy instruments: to achieve its legitimate monetary policy objectives, the ECB was free to act selectively if the disruptions it sought to restore were localised rather than generalised (paragraphs 55 and 89). Besides, the conditionality attaching to the proposed OMTs did not equate them to economic policy measures, first, because the effects of the purchases of bonds on their issuer's impetus to comply with the terms of their EU/IMF programme were only *indirect* (paragraphs 58-9); second, because the element of conditionality built into OMTs counteracted the risk that the later would 'work against the effectiveness of the economic policies followed by the Member States' (paragraph 60); and third, because compliance with conditionality was a necessary but not sufficient condition for OMTs (paragraph 62).[14] Having determined that OMTs qualified as genuine monetary policy measures, the ECJ then examined their proportionality. Applying its settled case law, the ECJ divided its proportionality analysis in two parts (*appropriateness* of OMTs to the attainment of their monetary policy objectives and compliance with the *necessity* requirement). In terms of the appropriateness of OMTs, the ECJ noted first, that these were accompanied by an adequate statement of reasons (paragraphs 70-71), and second, that the policy decision to launch them was based on a reasoned analysis of the economic situation in the euro area, which was not vitiated by manifest errors of assessment (paragraphs 72-4). Turning to the second part of the proportionality test, the Court took note of the various constraints built into OMTs, to conclude that the latter did not go beyond what was necessary to achieve the legitimate objectives of the Eurosystem: the temporary nature of OMTs, their quantitative limits, the narrow scope of eligible bonds and eligible issuers, and the limited volume of the commitments undertaken by the Eurosystem when purchasing OMT-eligible bonds (paragraphs 81-91).

The second core issue that the referring Court expressed reservations about was the compatibility of OMTs with the monetary financing prohibition. The Court found that sufficient safeguards had been built into the prospective OMTs to avert the risk of their implementation generating effects equivalent to direct purchases. These included, first, the discretionary nature of OMTs; second, the observance of a 'black-out' period before the conduct of any purchases; third, the absence of prior public announcements before the purchase of bonds or the divulging

[13] In this respect, also see paragraph 56 of the Court's ruling in *Pringle*, where the Court argued, *mutatis mutandis*, that, '[A]n 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'.

[14] In this respect, the Court parted company with the Opinion of AG Cruz Villalón who, in his assessment of the extent to which the ECB's decision to launch OMTs was reconcilable with its monetary policy mandate, argued 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, to make the purchase of government bonds subject to compliance with conditions set by the ECB itself, rather than by a third party, may be an instrument to enforce those conditions and their macroeconomic (rather than monetary policy) rationale thereby detracting from or even distorting the monetary policy objectives that the OMT programme pursues (para. 145).

of information on the volumes to be purchased (paragraph 106); fourth, the *temporary* nature of OMTs and their *selectivity*, which limited the OMTs' impact on the beneficiaries' financing conditions (paragraphs 113-6); fifth, the Eurosystem's freedom to sell the purchased bonds at any time (paragraph 117); sixth, the restriction of purchases to bonds issued by Member States *en route* to recovery (i.e. Member States having regained or in the process of regaining market access – see paragraph 119); and seventh, the OMTs' conditionality element, which precluded the risk of bond purchases dis-incentivising Member States from fiscal consolidation (paragraph 120). The ECJ acknowledged that whilst 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 loss-sharing) and did not weaken the Article 123 TFEU 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 (paragraphs 123-6).

Gauweiler has a lot to say about the limits to the ECB's monetary policy discretionary powers at times of crisis and the necessary features of any supervening Eurosystem bond purchase programmes. A *first* take-away from *Gauweiler* is that separating monetary from economic policy, as the referring Court purported to do in its preliminary reference request, is difficult: the dividing line between them is, ever so often, unclear, which is part of the reason why the Treaty vests the ECB with both monetary and economic policy powers.[15] Besides, the selectivity of a legitimate monetary policy measure is no more sufficient to turn it into an *ultra vires* economic policy measure than its correlation to compliance with external conditionality: whilst both selectivity and conditionality are, in varying degrees, essential to the assessment of the necessity and proportionality of monetary policy measures, it is of very limited relevance to the assessment of the ECB's *competence* to legitimately take them in the first place. Provided the objectives pursued by a measure match those of the ECB, and the instruments employed coincide with those of EU primary law, the measure in question qualifies as one of monetary policy, whatever other aims it may (also) serve. A second take-away from *Gauweiler* is that ECB monetary policy measures are subject to the Court's established proportionality test. Hence, the ECB is under a duty to provide an adequate statement of reasons for its monetary policy measures, with the assessment of their adequateness being a function of their particulars. However, in line with the established jurisprudence of the ECJ, there are boundaries to the ECJ's powers of judicial review, ultimately linked to its lack of own expertise in matters of monetary policy: provided policy choices are the product of a thorough thought process, and they are accompanied by 'an adequate statement of reasons', the Court will not second-guess the ECB Governing Council in matters of monetary

[15] In this respect, see Article 127(1) TFEU, second sentence. *Pringle* corroborates 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 Article 3(1)(c) TFEU, 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*, para. 56), does not point to the existence of a hard-dividing line between monetary and economic policy. Indeed, in paragraph 56 of its Judgment in *Pringle*, the Court explicitly acknowledged that economic policy measures may have an indirect impact on monetary policy.

policy.[16] A third take-away is that legitimate monetary policy measures will clear the monetary financing hurdle if sufficient safeguards are built into them. The particulars of those safeguards will depend on the specificities of the monetary policy measures each time in question. What is however clear is that because the ECB is both allowed and expected to operate in the open market, the risk of losses is not, in and of itself, sufficient for an ECB discretionary monetary policy measure to be successfully challenged as a violation of the monetary financing prohibition, nor can breaches of Article 123 TFEU be inferred from the mere fact that the ECB has failed to claim a privileged creditor status.

1.3. Concluding remarks

Because *Gauweiler* is the benchmark against which the validity of future ECB monetary policy non-standard measures is to be judged, this ruling is crucially important for an assessment of the ECB's future monetary policy choices, especially at times of crisis.

Significantly, one prominent purchase programme has been launched since the public announcement of the OMTs, and this was, at the time of writing, the object of proceedings before the Court.[17] The reference is to the PSPP. Launched on 9 March 2015, the PSPP targets marketable debt instruments issued by euro area central governments, certain agencies located in the euro area or certain international or supranational institutions also located in the euro area. The PSPP's compliance with *Gauweiler* is, in this author's view, undisputed. This is *first*, because both its objective (the targeting of 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; *second*, because the PSPP is proportionate to the monetary policy objectives it pursues; and *third*, because the PSPP does not violate the monetary financing prohibition, given the black-out periods it sets to guarantee that transactions under it are not tantamount to purchases in the primary market, its purchase limits, its rules on portfolio allocation and its transparency requirements. Besides, whatever the merit of selectivity and conditionality as challengeable aspects of a monetary policy measure, the PSPP is less controversial than OMTs: this is because, unlike OMTs, the PSPP encompasses *all* euro area Member States bonds, and features no overarching reference to the issuer's compliance with economic adjustment programme conditionality.

[16] Parallels can be drawn here with the established jurisprudence of the Court where complex economic assessments are at stake (see, for instance *Commission v Council*, C-121/10, EU:C:2013:784, para. 98; and *Afton Chemical Limited v Secretary of State for Transport*, C-343/09, EU:C:2010:419, para. 28).

[17] The reference is to the *Weiss* case (Case C-493/17 *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin* [2017] ECR ECLI:EU:C:2017:792).

Part 2 - The ECB's new macro and micro-prudential supervisory powers: impact on its mandate and independence

2.1. Introductory remarks

According to Article 127(5) TFEU and Article 3.3 of the Statute, 'The [ESCB] shall 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* (emphasis is ours)'. Article 127(4) TFEU further provides that the ECB is to be consulted on draft legislative provisions, *inter alia* on matters of financial stability. That said, primary law does not define the concept of financial stability, and its promotion is not amongst the basic tasks of the ESCB, whose role in matters of financial stability is, at best, contributory to that of the competent national authorities. Although the ECB and the NCBs' financial stability mandate is subordinate to their core objective of maintaining price stability, as any central bank, also the ECB and the NCBs have a natural interest in the preservation of financial and systemic stability, which are instrumental for price stability (the latter is easier to achieve under conditions of financial and systemic stability, with price and financial/systemic stability tending to mutually reinforce each other, in the long term).[18]

Pre-crisis, the ECB and the NCBs had pursued their interest in financial and systemic stability through a number of different avenues. These included the operation of market infrastructures (notably, TARGET2, the real-time gross settlement system owned and operated by the Eurosystem), the exercise of oversight over financial market infrastructures,[19] the provision (by the NCBs) of emergency liquidity assistance (ELA) to their domestic counterparties in support of (national) financial stability,[20] the periodic publication (by the ECB) of a Financial Stability Review,[21] and the publication of (non-legally binding) ECB Governing Council opinions on draft EU or national legislation on matters of financial stability.

The outbreak of the global financial crisis prompted a shift in the focus of central banks from price to financial and systemic stability, triggered by the realisation that instability factors had been underestimated, and that even long spells of price stability are not sufficient to prevent financial and systemic instability episodes. In response to the financial crisis of 2008, the European Commission (hereinafter 'the Commission') mandated the de Larosière Group to make proposals for the strengthening of supervision within the EU, and the improvement of the Union's financial architecture.[22] In particular, the de Larosière Report recommended that the ECB assumes a key

[18] See, for instance, Otmar Issing, 'Monetary and Financial Stability: Is there a Trade-off?' (Conference on 'Monetary Stability, Financial Stability and the Business Cycle', Bank for International Settlements, Basle, 28-9 March 2003).

[19] Eurosystem oversight covers different types of financial market infrastructures, instruments and entities, including payment systems (systemically and non-systemically important ones), securities settlement systems and central counterparties, payment instruments and other infrastructures and service providers.

[20] ELA is, in essence, exceptional liquidity support, extended by an NCB to temporarily illiquid but solvent credit institutions. The provision of ELA is not centrally regulated by the EU Treaties or the Statute.

[21] See, for example, ECB, Financial Stability Review (November 2016) <http://www.ecb.europa.eu/pub/pdf/other/financialstabilityreview201611.en.pdf> accessed 18 October 2018.

[22] See de Larosière Report ECO/259-EESC-2009-1476 [2009] OJ C318/57-65 <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/de-larosiere-report> accessed 18 October 2018.

role in macro-prudential supervision for the entire EU, but opposed the attribution to the ECB of micro-prudential supervisory tasks, *inter alia*, to spare the ECB from potential conflicts of interest with monetary policy. Following the establishment of the ESRB, which is discussed in more detail later in this Paper, the Commission and the Council of the EU (hereinafter 'the Council') backed the establishment of the SSM and of the SRM, attributing to the ECB a key role in both, notwithstanding some of the de Larosière Group's recommendations.[23]

2.2 Macro- and micro-prudential policy and financial stability

The prevailing wisdom, pre-crisis, was that if micro-prudential supervision succeeded in averting the failure of individual financial institutions, the end-effect would be a stable financial system. As a result, given the supervisors' failure to recognise that vulnerabilities deemed negligible for individual institutions had the potential to generate system-wide negative effects, the supervisors' focus was, mostly, on individual financial institutions rather than on the stability of the financial system as a whole.[24]

As explained further in this Paper, the advent of the crisis was to see greater emphasis placed on the involvement of central banks in macro-prudential supervision, as a precondition for the achievement of financial stability. The close link between macro- and micro-prudential policies became prominent in the post-crisis public debate on a 'macro-prudential toolkit'. Whilst the Capital Requirements Directive (CRD IV)[25] and the Capital Requirements Regulation (CRR)[26] provide for a limited number of dedicated macro-prudential tools (such as the countercyclical capital buffer, the systemic risk buffer and the national competence to take stricter measures aimed at addressing macro-prudential or systemic risks), most of the tools envisaged for macro-prudential supervision derive from the micro-prudential toolkit. As macro-prudential supervision is largely dependent on the enforcement action taken by micro-prudential supervisors, where a central bank is vested with micro-prudential supervisory powers its interest in macro-prudential supervision is bound to be significant.

2.2.1 The ECB and its macro-prudential supervisory role

The establishment of the ESRB, with the ECB at its centre, reflects the European post-crisis emphasis on macro-prudential supervision, and the pivotal role of central banks in its preservation.

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[23] See Report by President of the European Council, Herman van Rompuy, 'Towards a genuine Economic and Monetary Union' EUCO 120/12 (Brussels, 26 June 2012) <https://www.consilium.europa.eu/media/33785/131201.pdf> accessed 18 October 2018; and Communication from the Commission, 'A blueprint for a deep and genuine economic and monetary union' COM(2012) 777 final (Brussels, 28 November 2012) < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013DC0690> accessed 18 October 2018.

[24] Also see Phoebus Athanassiou, 'The evolving role of central banks in banking supervision' in Peter Jung and Jürgen Schwarze (eds), *Finanzmarktregulierung in der Krise* (Mohr Siebeck 2014) 71-81, 77-78.

[25] Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L176/338.

[26] Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms [2013] OJ L176/1.

The mission of the ESRB (established by way of a Council Regulation[27] based on Article 114 TFEU[28]) is to monitor financial sector developments throughout the EU,[29] and to detect potential sources of vulnerability, apt to adversely affect the stability of the financial system as a whole.[30] Once it has detected risks to financial stability, the ESRB may issue recommendations and warnings. However, the ESRB has no enforcement powers, and neither the Member States nor the EU bodies are under an obligation to act on an ESRB recommendation or warning. The NCBs' role in the ESRB is prominent, as the NCB Governors sit on the ESRB alongside representatives from other institutions (including non-NCB financial supervisors). The ECB's role in the ESRB is central, as the ECB provides the analytical, statistical, logistical and administrative support necessary for the fulfilment of the ESRB's mission. Besides, the ESRB's Chairman is the ECB President, while the ESRB's General Board (its supreme governing instance) comprises the ECB President and Vice-President, both of whom have voting rights.

The emergence of the SSM, and the assumption by the ECB of micro-prudential supervisory powers, has seen the role of the ECB in macro-prudential supervision increase further. Under Article 5 of the SSM Regulation (SSMR),[31] the national supervisory authorities remain vested with the authority to apply macro-prudential tools. However, where necessary, the ECB has the authority to apply to credit institutions higher requirements for capital buffers and to impose other, more stringent measures upon them, acting in close coordination with national authorities. The ECB's macro-prudential supervisory competences under Article 5 SSMR go beyond those it has assumed under the ESRB and, although anchored in secondary law, they reinforce considerably the ECB's mandate in the field of macro-prudential supervision.

2.2.2 The ECB and its micro-prudential supervisory powers: a bird's eye view

The possibility of including prudential supervision among the basic tasks of the ECB was extensively debated prior to the adoption of the Maastricht Treaty (formally 'Treaty on European Union') and the Statute. Proposals made by the Committee of Governors of the central banks of the European Economic Community to include prudential supervision among the basic tasks of the Eurosystem[32] were finally rejected, resulting in a (very) narrow ECB mandate, focussed on

[27] Regulation (EU) 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1.

[28] This Treaty provision aims to allow the adoption of measures for the approximation of national provisions aiming at the establishment and functioning of the Single Market.

[29] As explained below, the ECB supervisory mandate in micro-prudential supervision has a more limited geographical scope, being restricted, in principle, to the SSM participating Member States.

[30] Under Article 3 of the ESRB Regulation (Regulation (EU) No 1092/2010 of the European Parliament and of the Council on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1–11), 'The ESRB shall be responsible for the macro-prudential oversight of the financial system within the Union in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system and taking into account macro-economic developments, so as to avoid periods of widespread financial distress.'

[31] Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.

[32] 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, '[T]he basic tasks to be carried out through the System shall be . . . to participate as necessary in formulation, co-ordination and execution of policies relating

price stability. That said, both Article 127(5) TFEU and Article 3.3 of the Statute implied a contributory Eurosystem role in matters of prudential supervision, where necessary for reasons of financial stability.[33] The financial crisis was to serve as catalyst for the activation of the enabling clause of Article 127(6) TFEU, which catered for the direct conferral, by the Council to the ECB, of 'specific supervisory tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings'.[34]

With the activation of Article 127(6) TFEU, the adoption of the SSMR, and the establishment of the SSM, certain prudential supervisory tasks over credit institutions have been conferred on the ECB, whilst the performance, by the national supervisory authorities, of certain other prudential supervisory tasks has also become subject to the SSM legal framework. More specifically, although Article 6(4) SSMR confers upon the ECB exclusive competence for certain supervisory tasks in respect of credit institutions and groups falling within the scope *rationae personae* of the SSM, only those credit institutions classified as 'significant' (SIs) are supervised directly by the ECB. In line with Article 6(6) SSMR,[35] a large range of supervisory powers over 'less significant institutions' (LSIs) remain vested in the national competent authorities (NCAs). The 'significance' of credit institutions is to be determined on the basis of certain criteria (e.g. total value of their assets, the ratio of their assets to national GDP and their relevance for the domestic economy).[36] Interestingly, even if an institution/group fulfils the criteria for classification as significant, Article 6(4) SSMR provides that it may, owing to 'particular circumstances', be considered as less significant.[37] It follows from the foregoing that consumer protection, the fight against money

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to prudential supervision and stability of the financial system' (as quoted by Smits in René Smits, *The European Central Bank, Institutional Aspects* (Kluwer Law International 1997) 335).

[33] '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' (Jean-Victor Louis, *Commentaire Mégret 6* (Editions de l'Université de Bruxelles 1995) 94).

[34] The alternatives were to confer supervisory powers either to the European Banking Authority or to a new euro area supervisory authority. The first alternative was dismissed as incompatible with the constraints imposed by the *Meroni* (Case 9/56 *Meroni v High Authority* [1958] ECLI:EU:C:1958:7) doctrine, while the second alternative would have likely come up against objections similar to those raised in respect of the ESM (see the claimants' argumentation in the *Pringle* case).

[35] The division of tasks between the ECB and the NCAs, which is primarily based on their relative size, economic importance and the scale of their cross-border activities, does not apply to certain tasks (those appearing in Articles 4(1)(a) and (c), 14 and 15 SSMR), which the ECB has *sole* competence to carry out for *all* credit institutions established in the participating Member States.

[36] Art. 6(4) SSMR.

[37] Under Article 70 of the SSM Framework Regulation (Regulation (EU) No 468/2014 of the European Central Bank establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (ECB/2014/17) [2014] OJ L141/1), 'particular circumstances' exist 'where there are specific and factual circumstances that make the classification of a supervised entity as significant *inappropriate*, taking into account the SSM's objectives and, in particular, the need to ensure the consistent application of high supervisory standards'. Under Article 71 of the SSM Framework Regulation, the existence of such circumstances is to be assessed on a case-by-case basis. Finally, under Article 72 of the SSM Framework Regulation, the ECB shall review, at least once a year, whether those 'particular circumstances' continue to apply, and, if they do not, adopt and notify to the relevant institution its decision.

laundering, and the supervision of LSIs continue to be NCA tasks (even if, now, they are to be performed on the basis of the SSM legal framework).[38]

Significantly, the ECB's supervisory mandate covers euro area Member States only and their credit institutions, as defined in Article 4(1)(1) CRR, to the exclusion of insurance companies, central banks, investment services firms (as regulated by Directive 2014/65/EU of the European Parliament and of the Council (MiFID II)[39]), post office giro institutions, as well as the various other institutions listed in Article 2(5) CRD IV on a country-by-country basis. That said, it is possible for Member States with a derogation to enter into so-called 'close cooperation agreements' with the SSM:[40] the reference is to a voluntary (opt-in) regime for non-euro area Member States, the effect of which is to bring credit institutions and groups incorporated in their territory within the remit of the ECB's supervisory authority.[41]

2.2.3 ECB and micro-prudential supervision: institutional impact and concerns

The transfer to the ECB of certain micro-prudential supervisory tasks has wide-ranging implications for the ECB and its role within the EU institutional framework. It is also apt to give rise to a number of concerns, which deserve attention.

To start with, the transfer to the ECB of certain supervisory tasks signals an important shift in its accountability, both at the EU level and, to a lesser extent, vis-à-vis national parliaments.[42] It also

[38] However, the ECB may, at any time, upon prior consultation with the national supervisors, decide to exercise directly supervisory tasks over individual credit institutions (or groups) defined as 'less significant' (Art. 6(5)(b) SSM Regulation). The criteria and procedure for the taking up, by the ECB, of direct supervision over an LSI are fleshed out in Articles 67-69 of the SSM Framework Regulation. These include the fact that the institution or group may be *close* to meeting any one of the significance criteria set out in Article 6(4) of the SSM Regulation or that the NCA has failed to comply with the instructions of the ECB.

[39] Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L73/349–496.

[40] See Article 7 of the SSMR. The legal consequence of the conclusion of a close cooperation agreement is that the signatory Member State is equated to a 'participating Member State', as defined in the SSMR. At the time of writing, no close cooperation agreements had been established, although one non-euro area Member State (Bulgaria) had officially notified the ECB of its intention to enter into a close cooperation arrangement, as part of its euro area membership bid (see Bulgaria's official letter of 29 June 2018 on the Exchange Rate Mechanism (ERM II) and Banking Union participation, available at <https://www.consilium.europa.eu/media/36111/letter-by-bulgaria-on-erm-ii-participation.pdf> accessed 19 October 2018).

[41] One significant difference between supervision in a euro area and a non-euro area country is that the ECB is not allowed to take legally binding decisions directly applicable to (significant) banks in the relevant non-euro area country: the Supervisory Board of the ECB is to take and address its draft decisions to the national competent authority, which will then need to ensure that the supervised bank applies those decisions (Art. 7(1) SSMR, second paragraph).

[42] It follows from Article 20(2) SSMR that the ECB is to 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 *de-facto* decision-making body in matters of supervision) is to appear at least annually before the European Parliament and the Council (*ibid*., Art. 20(3)), which can request an ad hoc hearing of the chair, at their discretion (*ibid.*, Article 20(4)). The ECB is also to reply to oral and written questions from the Parliament and the SSM-countries (*ibid*., Article 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 (*ibid*., Article 21). On the evolution of the ECB's accountability practices in recent years see Nicolò Fraccaroli, Alessandro Giovannini and

has re-kindled the debate on the institutional separation of monetary policy from banking supervision.[43] 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.[44] The main argument in favour of bringing monetary policy and supervision under one roof is that combining the two can lead to synergies.[45] What seems clear is that with increased lending and mounting concerns about the quality of collateral, NCBs are bound to take an added interest in bank supervision.[46] Besides, given the NCBs' financial stability mandate (apparent, in the case of the ECB, in its pivotal role in the ESRB), it seems counter-intuitive that the NCBs should not be equipped with at least some micro-prudential supervisory powers, so that they can better exercise their macro-prudential supervisory role.[47]

The transfer of supervisory responsibilities to the ECB also brings to the fore supervisory liability issues, which the ECB had not been confronted with in the past.[48] Liability risks associated with the exercise of monetary policy are limited, given the stronger element of discretion inherent in monetary policy decision-making.[49] The same is not true of supervision, where the decision to withdraw a licence or to impose sanctions on banks for breaches of their legal duties will often attract litigation.

Without prejudice to the foregoing, the set-up of the SSM, the ECB's interaction with the NCAs, and its application, as supervisor, of national law give cause for multiple concerns. To start with, despite being next to unavoidable, the division of SSM tasks between the ECB and the NCAs is the source of complexity. As mentioned earlier, the NCAs are 'responsible for assisting the ECB' in the

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Jean-François Jamet, 'The evolution of the ECB's accountability practices during the crisis', ECB Economic Bulletin Issue 5/2018 (available on the website of the ECB).

[43] Under Article 25(2) SSMR, 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.

[44] 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.

[45] ECB, 'The Role of Central Banks in Prudential Supervision' (22 March 2001) <https://www.ecb.europa.eu/pub/pdf/other/prudentialsupcbrole_en.pdf> accessed 19 October 2018.

[46] 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.

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

[48] 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.

[49] See Eva Hüpkes et al., '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, Phoebus Athanassiou, 'Bank Supervisors' Liability: a European Perspective' in George Tridimas and Piet Eeckhout (eds) (2011) 30 1 Yearbook of European Law 213-254.

exercise of their supervisory tasks,[50] while retaining their national law supervisory powers in respect of tasks not expressly conferred on the ECB (including the power to address binding decisions to LSIs). The involvement of the NCAs in the ECB's work, as direct supervisor, and the ECB's monitoring role over the NCAs inevitably complicate the task of deciding where the ECB's liability ends and where that of the NCAs begins. Second, following a consultation with the relevant NCA, the ECB may decide to take over direct supervisory responsibility over institutions or groups classified as LSIs, including responsibility for the conclusion of pending supervisory action.[51] The apportionment of liability in such cases need not be crystal clear.[52] Third, the ECB has the power to require national authorities to make use of their own supervisory powers where the SSMR does not confer such powers on the ECB.[53] To the extent that the ECB can 'pull the strings', even in connection with LSIs over which it has no direct supervisory powers, it is legitimate to wonder how supervisory liability is to be shared between the ECB and the relevant LSIs' competent NCAs. Fourth, it is only through the NCAs of the non-euro area Member States that the ECB can act in the case of supervised entities established outside the euro area, where a 'close cooperation' agreement has been established.[54] The pivotal role of the NCAs, as the ECB's interface with supervised entities established outside the euro area, is apt to blur the boundaries between their liability and that of the ECB in the context of the operation of a 'close cooperation' agreement. Fifth, the unprecedented application, by an EU institution (in this case, the ECB), of national law in the exercise of its powers, and in the performance of its supervisory tasks[55] (in the form of the domestic transposition of certain EU directives, including the CRD IV, which, significantly, encompasses a number of options and discretions for the national authorities) is a novelty, the implications of which, *inter alia* on the balance of powers between the EU and its Member States, have yet to be tested.[56] Sixth, the euro area-only scope of the SSM gives one pause for thought. The end-objective of micro-prudential banking supervision is the preservation of financial stability, which may be as much at risk within the euro area as it is within the wider EU. The beneficial effects pursued through centralised micro-prudential supervision risk being outdone by the euro area-only scope of the SSM, and there is a clear risk that the SSM remains limited to the euro area unless the 'close cooperation mechanism' of Article 7 SSMR flourishes. In such a scenario, cross-border banking groups would continue being subject to supervisory fragmentation despite the fact that they represent contagion channels that connect the euro area banking sector with its EU counterpart. The success of the SSM will, a least in part, turn on

[50] Art. 6(3) SSMR.
[51] Art. 48 SSM Framework Regulation.
[52] On the issue of the allocation of liability under the SSM, see Phoebus Athanassiou, 'Non-contractual liability under the Single Supervisory Mechanism: Key Features and Grey Areas' (2015) 30 (7) Journal of International Banking Law and Regulation 382.
[53] Art. 9(1) and Recital (35) SSMR. This power is, presumably, limited to SIs.
[54] *Ibid.*, Art. 7(1), second paragraph.
[55] *Ibid.*, Art. 4(3).
[56] For instance, the application by an EU institution, such as the ECB, of national law for the purposes of the exercise of its tasks may raise the question whether national courts should (also) have jurisdiction over the ECB, when acting as supervisor, and whether the General Court should, at least, take cognizance of national law when adjudicating over a claim in damages against the ECB, for unlawful supervisory acts or omissions. For an insight into some of the legal issues thrown up by the application of national law by the ECB, as supervisor, see Mathias Hanten and Kate Heljula, 'The ECB as the new regulator: a lawyer's perspective', (2015) 4 Butterworths Journal of International Banking and Financial Law, 228-230.

whether the incentives for non-euro area countries to accede to the close cooperation model, despite their lack of voting rights in the ECB Governing Council (the SSM's ultimate decision-making body), will prevail over their incentives to benefit from closing the supervisory integration gap between them and euro area Member States.

2.2.4 Micro-prudential supervision and ECB independence: what trade-off? [57]

Notwithstanding the clear synergies between micro- and macro-prudential supervision, the policy objectives pursued by banking supervision, on the one hand, and monetary policy, on the other, are not fully aligned. While much it is debatable whether full separation between the two is desirable,[58] it is essential that there is, at least, clarity on whether and when monetary policy decisions are influenced by supervisory considerations and when the exercise of banking supervision is affected by monetary policy-driven concerns.

There are two main sources of conflict in the parallel exercise, by a central bank, of monetary policy and prudential supervisory tasks: first, a conflict between preserving price stability while at the same time seeking to ensure the soundness of credit institutions and, by extension, systemic stability; and second, a conflict between the different levels of democratic accountability to which a central bank can legitimately be subject to when pursuing each of these two tasks and, possibly, independence necessary for their pursuit. To guard against the risks arising from these tensions, the ECB is required, under Article 25 SSMR, to uphold a principle of strict separation between its supervisory and its monetary policy tasks. This separation is reflected in a) a separation of the staff involved in the different tasks, with ECB involved in SSM work being subject to functional (as opposed to HR and administrative) reporting to the Chair and Vice-chair of the ECB Supervisory Board *only*, and b) in the decision-making set-up, where supervisory decisions are essentially taken by the ECB Supervisory Board, which has no role to play in other ECB policies. To further ensure the separation between supervisory and monetary policy decisions, the ECB Governing Council is to hold separate meetings (with separate agendas) for monetary and supervisory decisions.[59]

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[57] On the impact of the assumption, by the ECB, of bank supervision tasks on its independence see, *ex multi*, 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* (Collected courses for the EUI Summer Academy 2012, Oxford University Press 2016); and Chiara Zilioli and Antonio Luca Riso, 'New tasks and central bank independence: the Eurosystem experience' in Peter Conti-Brown and Rosa Maria Lastra (eds), *Research Handbook on Central Banking* (Edward Elgar 2018).

[58] Indeed, one of the main weaknesses for the ECB's monetary policy during the financial crisis has been the lack of detailed information on the financial health of the banking system.

[59] These measures notwithstanding, there is no full separation between supervision and monetary policy, either on the national or on the ECB level. On the national level, bank supervision is carried out by the NCBs in most of the Member States, with the organisational separation between supervision and monetary policy not always being very strict. On the ECB level, there is also no full separation in decision-making. The ECB Supervisory Board, which is where decisions are elaborated, is mainly composed of national supervisors (NCBs, in their majority, where, as said above, separation is not always very strict). Furthermore, the ECB Governing Council deals with decisions concerning both bank supervision and monetary policy. Despite the obligation to organise separate meetings for the two policies, it is simply impossible for the members of the ECB Governing Council to strictly avoid that concerns over one matter influence their decision over the other.

The view has been expressed that the principle of central bank independence (in particular, institutional independence) enshrined in Article 130 TFEU and Article 7 of the Statute may not apply to the ECB as supervisor, and that its scope only covers the tasks conferred upon the ECB and the NCBs by primary EU law, to the exclusion of the specific, prudential supervisory tasks conferred upon the ECB by secondary EU law.[60] While it is fair to say that not all of the reasons brought forward to buttress central bank independence in the field of monetary policy will necessarily apply to a central bank's prudential supervisory activities, primary law lends no support to the above interpretation. The better view is that the SSMR 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 ECB Supervisory Board, if compared to the independence of the NCBs members).

Part 3 - The ECB's role in financial support programmes and the SRM

The ECB's new activities since the start of the sovereign debt stage of the financial crisis have not been limited to the adoption of non-standard monetary policy measures (such as the launch of extraordinary bond purchase programmes) or to the assumption of supervisory tasks. The ECB also found itself thrust into an altogether new role: that of its participation in the work of the Troika, as part of the financial support programmes for some of the euro area Members States of the periphery. The importance of this particular aspect of the ECB's crisis-related activities was recognized by the Advocate General in his Opinion in *Gauweiler* and, before that, by the ECJ, itself, in its Judgment in *Pringle*,[61] and it is not diminished by Greece's exit from its third financial assistance programme, in August 2018. Moreover, the ECB was attributed a key role in the operation of the SRM, Europe's solution for ending the 'too big to fail' dilemma within the Banking Union. The remainder of this Paper is dedicated to these two aspects of the ECB's crisis response, and to their impact of the ECB's institutional transformation since the start of the crisis.

3.1 The ECB and the Troika: lessons from Pringle

When the sovereign debt stage of the financial crisis kicked-in, many viewed the ECB's expertise as complementary to that of the Commission and the IMF, in their effort to negotiate and advise

[60] See Ulrich Häde, 'Artikel 130' in Christian Callies and Matthias Ruffert, *EUV – AEUV Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta – Kommentar* (4th edn., C.H.Beck 2011) 1637, 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 Ernest Gnan and Helmut Wittelsberger, 'Artikel 108' in Hans von der Groeben, Jochen Thiesing and Claus-Dieter Ehlermann, *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft – Kommentar* (6th edn. C.H.Beck 2003) 177, 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 paragraph 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> accessed 19 October 2018).

[61] C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012] ECR ECLI:EU:C:2012:756.

on robust EU/IMF financial adjustment programmes. Following a statement of the euro area Heads of State or Government,[62] the ECB took on the task of supporting the Commission in negotiating, at technical level, the various Memoranda of Understanding and corresponding financial adjustment programmes put in place since 2010, and at monitoring Member State compliance with programme conditionality.[63] The legal bases for the different financial assistance facilities put in place since the start of the crisis catered, in similar terms, for the ECB's involvement in the work of the Troika. To take the example of the ESM Treaty,[64] this tasked the ECB with supporting the Commission in its assessment of debt sustainability, the computation of the financing needs of euro area Member States requesting financial support, and in quantifying risks to euro area financial stability. As some of the above were not traditional central banking tasks, it is of interest to briefly consider, below, first, the actual role of the ECB in the Troika, second, whether this created conflicts with its statutory mandate, and third, whether this brought with it new decision-making powers for the ECB, in breach of the principle of conferral.

Starting with the ECB's role in the Troika, the legal basis for each of the different financial assistance facilities put in place since the start of the sovereign debt stage of the financial crisis conferred tasks on the Commission, but with an obligation for it to undertake those tasks 'in liaison' or 'in cooperation' with the ECB (consistently with the principles of central bank independence[65] and conferral[66]). It follows that the ECB's status in the Troika was that of the 'junior partner', tasked with the provision of technical advice.[67] The issue of potential conflicts between the ECB's involvement in the Troika and its monetary policy mandate was the object of ECJ scrutiny in *Pringle*, where the Court ruled that, given the ECB's primary law task of supporting the general economic policies in the Union, and its right, under Article 23 of the Statute, to establish relations with international organisations, the tasks allocated to it under the ESM Treaty 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' (paragraph 165). The extent to which the ECB's role in the Troika was tantamount to the attribution of new decision-making powers to it was, perhaps, the most crucial, institutionally. What is, perhaps, not universally appreciated is that the role of the Troika was not one of decision-making but, instead, of technical analysis and advice: it was the

[62] See Statement by the Heads of State or Government of the European Union on Greece (Brussels, 11 February 2010) <https://www.consilium.europa.eu/media/20485/112856.pdf> accessed 19 October 2018.

[63] For the first Greek programme (financed through bilateral loans), the ECB's involvement is mentioned in the private law inter-creditor agreement between the participating Member States; for later programmes, financed by the European Financial Stability Facility, a private company, the ECB's role is set out in the private law European Financial Stability Facility Framework Agreement; for programmes co-financed by the European Financial Stabilisation Mechanism, an EU instrument financed out of the EU budget, the legal basis of the ECB's involvement is the Council Regulation establishing the European Financial Stabilisation Mechanism; for programmes financed by the ESM, the role of the ECB is established in the ESM Treaty. The ECB's role in official surveillance has been established in EU secondary legislation, notably in the context of the "Six Pack" and "Two Pack".

[64] Consolidated version of the Treaty establishing the European Stability Mechanism <https://www.esm.europa.eu/legal-documents/esm-treaty> accessed 19 October 2018.

[65] Secondary legislation cannot *impose* new tasks on the ECB, as this would violate central bank independence. The case of the SSMR is exceptional, as the legal basis for it is the enabling provision of Article 127(6) TFEU.

[66] No new tasks can be conferred on the ECB without a revision of the EU Treaties.

[67] In this regard, also see paragraphs 179 and 181 of the Opinion of AG Kokott in *Pringle*.

Eurogroup that was the actual decision-making body in matters of financial assistance.[68] Thus, neither the powers of the Commission nor, *a fortiori*, those of the ECB were apt to expand on account of their participation in the Troika. This was confirmed in *Pringle* where, in upholding the compatibility of the Commission's and the ECB's tasks under the ESM Treaty, the ECJ ruled that, 'the duties conferred on the Commission and the ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own' (paragraph 161), adding that, '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 the FEU Treaties' (paragraph 162).

What of the legality of the ECB's participation in the Troika, as technical adviser, in parallel to the activation of bond-purchase programmes, if purchases are conditional on the bond issuers' compliance with programme conditionality? In his Opinion in *Gauweiler*, Advocate General Cruz Villalón expressed the view that, '. . . if exceptional circumstances were to arise which were grounds for activating the OMT programme, it would, for that programme to retain its function as a monetary policy measure, be essential for the ECB to detach itself thenceforth from all direct involvement in the monitoring of the financial assistance programme applied to the State concerned . . . under no circumstances would it be possible for the ECB, in a situation in which a programme such as OMT is under way, to continue to take part in the monitoring of the financial assistance programme to which the Member State is subject when, at the same time, that State is the recipient of substantial assistance from the ECB on the secondary government bond market' (paragraph 150). The Advocate General concluded that, 'the OMT programme is to be regarded as a monetary policy measure, provided that the ECB refrains – once the time has come to put that programme into effect – from any direct involvement in the financial assistance programmes of the ESM or the EFSF [European Financial Stability Facility]' (paragraph 151). In its ruling in *Gauweiler*, the ECJ did not raise the prospect of a conflict of interest for the ECB when simultaneously participating, as technical adviser, in the Troika and activating a bond purchase programme: what the Court saw in conditionality was an instrument through which to ensure that, 'the ECB's monetary policy measures . . . will not work against the effectiveness of the economic policies followed by the Member States'.[69] On the contrary, the Court viewed adherence to programme conditionality positively, as a means through which to avoid the risk that the launch of bond purchases lessens the incentives of beneficiary Member States to follow sound budgetary policies.[70]

To summarise, it follows from *Pringle*, and the legal bases for the ECB's involvement in the Troika, that the ECB only participated in it as an expert technical advisor, without any newly attributed decision-making authority. The heightened visibility of the ECB, as Troika member, was attributable to the weight of its advice rather than to the assumption, by the ECB Governing Council, of any actual decision-making powers. Besides, a lesser degree of engagement, by the ECB, as Troika member, may have been irreconcilable with its duty of sincere cooperation vis-à-vis

[68] It is the Eurogroup that instructed the Commission to negotiate the first Memorandum of Understanding with Greece and set the parameters for that negotiation in a Council Decision addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2010/320/EU) [2010] OJ L145/6.
[69] See *Gauweiler,* paragraph 60.
[70] *Ibid.,* para. 120.

the Commission, which was legally required to liaise and cooperate with the ECB in performing its Troika role.

3.2 The SRM and the ECB's role in it: an overview

In December 2012, the European Council acknowledged that bank supervision and resolution had to be exercised at the same, pan-European level (even if not by the same authority), given the adverse effect of decentralization on the effectiveness of recovery and resolution action, its tension with centralized bank supervision, exercised at the level of the ECB,[71] and the negative feedback loops between sovereigns and banks that its reinforced. The perception that a network of national authorities, even if coordinated at intergovernmental level, was not sufficiently operational to curb uncertainty and prevent bank runs or contagion to other parts of the euro area and the Single Market, provided the impetus for the establishment of the SRM, the second pillar of the Banking Union (after the SSM).

The legal basis for the SRM is the SRMR,[72] adopted on the basis of Article 114 TFEU. For the purposes of the SRM, resolution decisions are to be prepared and monitored centrally by a Single Resolution Board (SRB), an EU agency, whose task is to ensure coherence in the taking of resolution decisions and in the application of resolution rules. The SRB, which became operational on 1 January 2015, is to apply to the banks in the SSM-participating Member States the Single Rulebook on bank resolution provided for in the Bank Recovery and Resolution Directive (BRRD),[73] while national resolution authorities are to apply it in the other Member States. As the SRB is an EU agency, the scope for it to take discretionary decisions would be limited by the *Meroni* doctrine.[74] However, it is the SRB, rather than the Commission, which is to, *de facto*, take resolution decisions under the SRM, with the Commission having twenty-four hours within which to object to a resolution scheme proposed by the SRB.

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[71] European Council Conclusions EUCO 205/12 (Brussels, 13-14 December 2012) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134353.pdf> accessed 19 October 2018.

[72] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L 225/1-90.

[73] Directive 2014/59/EU of the European Parliament and of the Council 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 [2014] OJ L173/190–348. As part of the steps to integrate responsibilities for bank supervision and resolution in the Banking Union, the latter has been complemented by the SRM.

[74] See Case 9/56 *Meroni v High Authority* [1958] ECLI:EU:C:1958:7. The essence of the *Meroni* doctrine, as restated by the Court in the European Securities and Markets Association (Short Selling) case, is that EU law prohibits the sub-delegation of discretionary powers vested in an EU institution. For a critical account of the *Meroni* doctrine, see Merijn Chamon, 'EU Agencies: Does the *Meroni* Doctrine Make Sense?' (2010) 17 (3) Maastricht Journal of European and Comparative Law, 281.

[75] It has aptly been observed that, 'bail-in replaces the public subsidy with private penalty' (Emilios Avgouleas and Charles Goodhart, 'Critical Reflections on Bank-Bail-ins' (2015) 1 (1) Journal of Financial Regulation 3, 4). The argument is that, in a system that renders bail-in mandatory, creditors are incentivised to resume a monitoring function, thereby helping to restore market discipline.

With the establishment of the SRM, the EU legislator has devised a new approach to address bank failures, which, in broad terms, aims to shift their costs from taxpayers to creditors and investors.[75] The key strength of the SRM, as a complement to the SSM, is that, if successful, it will enable the controlled resolution of failing banks, while at the same time establishing a central bail-out fund apt to cover a bank's losses. Several challenges lie ahead, most of them linked to the overall efficiency of the new, centralised bank resolution set-up. It is telling that, prior to the activation of the SRB, only one authority (the national resolution authority) was required to resolve a bank. Since the SRB has become operational, several authorities (one of which is the ECB) are to cooperate before an SI or a cross-border group can be resolved: first, the SRB (which is to determine whether the conditions for resolution are met, and propose a resolution scheme); the Commission (which, given *Meroni's* constraints on the SRB, has to endorse, within twenty-four hours, the SRB's resolution scheme or make a reasoned objection to it, acting both as state aid and resolution authority); the ECB/SSM (which, after consulting the SRB, is to determine whether an institution is failing or likely to fail, and which may also withdraw its licence, depending on the resolution tool opted for by the SRB); and the national resolution authority or authorities (which are to take 'all necessary measures' to implement the resolution scheme proposed by the SRB, making use of their national law powers under the domestic transposition of the BRRD). While the division of resolution competences among the SRB, the Commission, the ECB and the national authorities does not lack in clarity, the new resolution set-up is, certainly, complex, with the competences attributed to the ECB thereunder adding to its range of tasks, in recognition of its know-how and of the inevitable link between bank supervision and bank resolution.

Concluding Remarks

The advent of the European sovereign debt crisis has seen the ECB evolve from a young institution with a relatively narrow mandate (that of the guardian of price stability, through the setting of key interest rates and the control of the supply of the euro) to a central player in Europe's concerted efforts to contain the fallout of the crisis and to avert the emergence of future ones. The ECB has not only taken a raft of unconventional monetary policy measures, as one would, perhaps, have expected of any central bank at a time of acute crisis: it has also assumed primary responsibility for banking supervision, a prominent role in the operation of the SRM and a pivotal role in EU/IMF financial adjustment programmes, as well as a central role in macro-prudential supervision. The attendant expansion in the range of its tasks and functions has not only greatly enhanced the ECB's authority, but it has also brought about what may prove to be a lasting change in the euro area's institutional balance, the implications of which will only

[75] It has aptly been observed that, 'bail-in replaces the public subsidy with private penalty' (Emilios Avgouleas and Charles Goodhart, 'Critical Reflections on Bank-Bail-ins' (2015) 1 (1) Journal of Financial Regulation 3, 4). The argument is that, in a system that renders bail-in mandatory, creditors are incentivised to resume a monitoring function, thereby helping to restore market discipline.

manifest themselves fully in the future. A further expansion of the ECB's powers is not to be excluded.[76]

With greater power and increased visibility come greater responsibility and increased liability, and the case of the ECB is a case in point. The central bank of the euro has seen some of its crisis responses challenged before national and European judicial instances, whilst the assumption, by the ECB, of responsibility for micro-prudential supervision, in particular, has attracted criticism, for compromising its independence and for creating scope for conflicts of interest with its monetary policy objectives and tasks. Although the ECB has, so far, weathered the storm unleashed by the global financial and, subsequent, sovereign debt crises, its decision-makers have often drawn attention to the fundamental flaws in Europe's economic governance and crisis management frameworks that these have brought to light, and to the pressing need for those flaws to be tackled by elected national governments rather than by Europe's central banks. At the time of writing, the obstacles that Europe had to overcome on the road to sustainable economic recovery, fiscal consolidation and social reconciliation were still many, with the prospect of the (unprecedented) loss of one of its Member States only adding to the difficulty of the task and to the urgency of rising up to it. How well and how fast Europe's governments and institutions, including their central banks, will manage to negotiate the remaining obstacles, and navigate around new ones, will largely determine both their legacy and, perhaps more importantly, the future of a project born from the ashes of the Second World War and from the painful realization, sadly lost to Europe's younger generations, that Europe stands – and falls – united.

[76] In June 2017, the Governing Council adopted a Recommendation to amend Article 22 of the Statute. The revised Article 22 would read as follows: ***'****The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems,* ***and clearing systems for financial instruments****, within the Union and with other countries.'* The amendment would provide the ECB with a clear legal competence in the area of central clearing, paving the way for the Eurosystem to exercise the powers reserved for central banks, as currency issuers, under the EMIR review proposed by the European Commission in May 2017.

CENTRO STUDI SUL FEDERALISMO
Piazza Arbarello 8
10122 Torino
Italy

Tel. +39 011 670 5024
Fax. +39 011 670 5081
www.csfederalismo.it
info@csfederalismo.it