

## The Roles of the ECB and the Financial Crisis

The Legal Framework Under which the ECB Currently Operates in the EU and the Evolution of that Framework in the Light of the European Financial Crisis.

By

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The European Central Bank has been and still is a central actor in the financial crisis and its resolution. It has been involved, directly or indirectly, in all the steps taken to counter the crisis – crisis management, substantive law reform and structural changes in the European Union. Moreover, the ECB is not only important for the resolution of the present crisis, but also for preventing any possible future crises of this kind. This is because, during the crisis years, the ECB has received permanent powers and responsibilities which aim at making it capable of tackling any problem at an early stage, before it turns into an EU-wide crisis. This makes the ECB a particularly interesting institution for debates and academic scrutiny. In similar fashion, the present article assesses the ECB and its roles in the EU, through a timeline of the evolution of the ECB's powers from its creation until today. This is done in the light of the European sovereign debt crisis, its consequences and the EU crisis-induced measures.

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## I. INTRODUCTION

The ECB's contribution to the resolution of the crisis is *undeniable*. Nevertheless, that does not make it *unquestionable*. Indeed, the ECB may have played a more important role in the financial crisis than the Treaties allow, thereby undermining the principle of rule of law. Many of its actions were contested before the Court of Justice of the European Union (CJEU) Also, many scholars and academics criticised its actions both from legal and economic perspective<sup>1</sup>. On the other hand, the ECB seemed to be concentrated only on 'saving the euro' and convinced that its policies would bring prosperity and growth once again.<sup>2</sup>

If anything, the ECB was always consistent in its actions and left nothing to chance. It used all of the available powers to mitigate the negative effects of the crisis, but also to prevent the aggravation of the crisis. At times, it even used certain powers to supplement other powers, and in order to facilitate the achievement of other objectives, which is an alarming practice. Such a practice would have been impossible, had the EU legislator and the Member States (MS) not conferred other tasks to the ECB, in addition to monetary policy. In this regard, even monetary policy itself has a considerably broader interpretation today compared to the monetary tasks originally given to the ECB by the Maastricht Treaty. Such reshaping of the monetary tasks and powers of the ECB did not happen overnight. Instead, it was a long process and involved other EU institutions in addition to the ECB, and influence from academics. However, for the purposes of conciseness, this article uses the ground-breaking and highly-criticized *Gauweiler* case<sup>3</sup> as a split point when the mandate of the ECB in monetary policy was formally extended.

In accordance with this, the main part of this article is divided in four points, which substantiate and support the statements made above. The first and the last point focus on the monetary role of the ECB before and after *Gauweiler*, respectively, and the two in between them focus on the supervisory role and the broader, economic role of the ECB.

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<sup>1</sup> *Inter alia* see, Helmut Siekmann, The Legality of Outright Monetary Transactions (OMT) of the European System of Central Banks (2015) Institute for Monetary and Financial Stability Working Paper Series No. 90, p. 18-21 and Ashoka Mody, 'Did the German Court do Europe a favour?' (2014) Bruegel Working Paper 2014/09.

<sup>2</sup> Speech by Jörg Asmussen, Member of the Executive Board of the ECB, The Economist's Bellwether Europe Summit, London, 25 April 2013 <https://www.ecb.europa.eu/press/key/date/2013/html/sp130425.en.html> (Accessed on 20.05.2017).

<sup>3</sup> Case C-62/14 *Gauweiler* [2015] EU:C:2015:400.

## II. MONETARY ROLE OF THE ECB BEFORE GAUWEILER

The ECB is the main actor in the monetary policy of the EU. With the creation of the Economic and Monetary Union (EMU), there was a need for a centralized body, which would define and implement the monetary policy of the Union. Such task was given to the ECB from its creation. However, the ECB, together with the EMU, has evolved throughout the years. It been assigned new roles, but also its existing role in monetary policy has changed. Since the initial mandate of the ECB in monetary policy was mostly influenced by the constellation of the EMU, this point begins with a presentation on the creation of the EMU.

Both the EMU<sup>4</sup> and the ECB<sup>5</sup> were formally created with the Maastricht Treaty in 1992. Regarding the former, after a failed attempt by the *Werner Report*,<sup>6</sup> political will for the creation of the EMU was clearly expressed in the preamble of the Single European Act.<sup>7</sup> However there were two different views as to how the EMU should be created, known as ‘monetarist’ and ‘economist’ view.<sup>8</sup> The monetarist view supported the idea of monetary union as a starting point of a fully integrated EMU – a single currency and common monetary policy would facilitate and lead to further political and economic integration. On the other hand, the economist view advocated the creation of a political and economic union as a precondition for a single currency – they claimed that only in this way the stability of the single currency would be guaranteed.<sup>9</sup> In order to settle this debate and to offer an expert opinion on how the EMU should be created, a special committee was established, chaired by Mr. Jacques Delors, a former President of the Commission. The product of the work of this committee was a report, known as the *Delors Report*.<sup>10</sup> In point 18 of this Report, the need for Treaty change, which would provide for the legal basis for EMU, is stressed. In its next point, the monetarist view is essentially endorsed. It suggested for the creation of the EMU to be carried out in three stages.<sup>11</sup> These suggestions were accepted and expressed in the Maastricht

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<sup>4</sup> Article 2 TEC Consolidated version 1992.

<sup>5</sup> *Ibid*, Article 4a.

<sup>6</sup> Report to the Council and the Commission on the realization by stages of Economic and Monetary Union in the Community, Luxembourg 8 October 1970.

<sup>7</sup> See preamble of the Single European Act OJ L 169/1 29.06.1987.

<sup>8</sup> Jean Pissani-Ferry, *Only One Bed for Two Dreams: A Critical Retrospective on the Debate over the Economic Governance of the Euro area* (2006) JCMS Volume 44, p. 824.

<sup>9</sup> Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press, 2015) p. 184.

<sup>10</sup> Report on economic and monetary union in the European Community by the Committee for the study of Economic and Monetary Union (1988) European Commission Publication.

<sup>11</sup> Francis Snyder, *EMU Revisited: Are We Making a Constitution? What Constitution Are we Making* (1999) EUI Working Paper LAW No. 98/6, p. 25-28.

Treaty, which provided for the legal basis for the EMU.<sup>12</sup> The first stage was closely related to the completion of the internal market and the European Exchange Rate Mechanism which were the preconditions for the creation of the EMU. This was achieved with the signing of the Maastricht Treaty, which provided for the second stage to begin in 1994. The design of the EMU, created in Stage 2, was based on a *division of competences* between economic and monetary policy, which is largely the case today – in accordance with the monetarist views. However, economist views were also present, as the Maastricht Treaty provided for convergence criteria to be fulfilled in order for a MS to be part of the EMU<sup>13</sup> – hence there was some form of economic harmony within the common currency area. The main challenge in Stage 2 was the creation of the EMI and the ECB, which were predominantly influenced by the German *ordo liberal* thought. The main ideas of the Freiburg school were *independent* central bank, which was governed by *experts* and had a narrow mandate to preserve *price stability*. The Bundesbank itself owes its success to the application of these ideas.<sup>14</sup> These ideas were also applied to the ECB and enshrined in the Treaties and the ESCB Statute.<sup>15</sup> Article 130 TFEU and Article 7 ESCB Statute give the independence of the ECB a constitutional status. Such independence is considered to have three aspects. Institutional independence refers to the decision-making process within the ECB, financial independence refers to the ECB having its own budget and personal independence to the status and removal of the members of the ECB Executive Board.<sup>16</sup> Because of such *broad independence*, the ECB was given a *narrow mandate* of preserving price stability, which is today expressly stated in Article 127 TFEU.<sup>17</sup> Stage 3 of EMU began in 1999, as suggested by the Delors Report and finalized the EMU, as the MS who met the criteria became formally part of the Euro area. Stage 3 was mostly concerned with supervising how the MS and the EU implemented the novelties from Stage 2, for example whether MS made their NCB independent and how the newly-created ECB functions and prepares for the first issue of the euro banknotes.

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<sup>12</sup> Article 2 TEC Consolidated version 1992.

<sup>13</sup> Articles 109j and 109k TEC Consolidated version 1992. See also, Protocol on the convergence criteria referred to in Article 109j of the Treaty establishing the European Community. MS not fulfilling these criteria were regarded as ‘Member States with a derogation’.

<sup>14</sup> Jörg Bibow, *How Germany’s Anti-Keynesianism Has Brought Europe to Its Knees* (2017) Levy Economics Institute of Bard College, p. 7-34.

<sup>15</sup> Protocol (no 4) on the Statute of the European System of Central Banks and of the European Central Bank OJ C 326/230 26.10.2012.

<sup>16</sup> For more detailed analysis of ECB’s independence see, Ciara Zilioli, *The Independence of the European Central Bank and Its New Banking Supervisory Competences*, p. 11-14 in Dominique Ritleng, *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2016).

<sup>17</sup> Kathleen R. McNamara, *The Forgotten Problem of Embeddedness* p. 24, in Matthias Matthijs and Mark Blyth, *The Future of the Euro* (Oxford University Press, 2015).

Nevertheless, the EMU was not permanently fixed with the end of Stage 3. Changes in the EMU and in the functioning of the ECB followed even after all the stages were completed. However, one thing remained unchanged - the ECB from its establishment until today is the main actor in the Union's monetary policy, as it is the only body in the Union which can set the key interest rate<sup>18</sup> and can issue euro banknotes.<sup>19</sup> These prerogatives enable the ECB to define and implement the monetary policy. On the other hand, the national central banks (NCB) are acting as agents, as they implement on national level the monetary policy as defined by the ECB, and the ECB for this purpose can give instructions to the NCB.<sup>20</sup> Thus, the ECB and the NCB are in a vertical position, where the ECB is the central bank of the Union and the NCB are its agents when they implement the Union's monetary policy.<sup>21</sup> However, when performing tasks unrelated to the European System of Central Banks (ESCB), they are acting as independent national agencies.<sup>22</sup> Therefore, with the creation of the EMU the NCB of the MS of the Euro area gained a 'dual nature'.<sup>23</sup>

However, not all the MS are part of the Euro area. Clearly, those MS conduct their own national monetary policy and the decisions of the ECB concerning the common monetary policy are not legally binding for them.<sup>24</sup> Still, those MS need to cooperate with the ECB and treat its exchange-rate policy as a matter of common Union interest<sup>25</sup> and ideally, aim to reach the convergence criteria for entering the EMU.<sup>26</sup> Also, the MS outside of the EMU are part of the General Council of the ECB.<sup>27</sup>

The primary objective of preserving price stability was particularly important in times of financial crisis. The ECB has successfully held the rate of inflation at a low level during the crisis, being above 2% only in 2011 and 2012 and the highest being 3.3% in 2008. On the other hand, deflation is also not desired,<sup>28</sup> which seems to be a bigger problem today than inflation, as the EU economy is stabilizing, but there is no growth as the inflation rate in 2015 and

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<sup>18</sup> Article 12 ESCB Statute.

<sup>19</sup> Article 128 TFEU and Article 16 ESCB Statute.

<sup>20</sup> Article 12.1 ESCB Statute.

<sup>21</sup> Ibid, Article 14.3.

<sup>22</sup> Ibid, Article 14.4.

<sup>23</sup> Basil C. Scouteris and Phoebus Athanassiou, National Central Bank Tasks and the Boundaries of the ECB Governing Council's Powers under Article 14.4 Of the Statute: State of Play and Future Prospects (2015) available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2691914](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2691914) (accessed 20.05.2017), p. 9.

<sup>24</sup> Article 139 TFEU.

<sup>25</sup> Ibid, Article 142.

<sup>26</sup> Ibid, Article 140.

<sup>27</sup> Ibid, Article 141(1) and Article 44 ESCB Statute.

<sup>28</sup> Hanspeter K. Scheller, The European Central Bank - History, Role and Functions (2004) ECB Publication, p. 46.

2016 was 0.0 and 0.2, respectively.<sup>29</sup> This task of the ECB is even more complicated, considering the fact that the transmission mechanism of monetary policy may be defective, as national banks may react belatedly or not react at all to the official interest rate set by the ECB. Thus, a central bank, especially a supranational one like the ECB, can never be sure when and what effect its decision will have on national level in times of crisis. In this regard, the task of maintaining price stability was substantially facilitated and simplified, when the ECB was made prudential supervisor and given a role in the economic policy, as will be seen in the next points of this article. Hence, the ECB was able itself to remove any obstacles which cause trouble in the transmission mechanism. However, it is questionable whether such concentration of powers poses a threat to the principle of rule of law, especially to the prohibition of misuse of powers, as a constituent element of that principle.<sup>30</sup>

### III. SUPERVISORY ROLE OF THE ECB

The possibility of prudential supervision being conferred upon the ECB is established in Article 127(6) TFEU, which was added with the Lisbon Treaty amendments. However, it was not until the adoption of the SSM Regulation in 2013 that the ECB was empowered in the field of prudential supervision. It is rather uncommon for preventive measures, like prudential supervision, to be taken in mid-crisis period, because in those times the MS react protectively, reverting to basic ideas of sovereignty.<sup>31</sup> However, the case of prudential supervision is specific, because it is part of the broader process of financial market integration.

The integration process in the internal market for financial services began soon after the creation of the EMU.<sup>32</sup> This is logical, since with the creation of the euro as common currency, the functioning of national commercial banks was not only a national concern of the MS, but became also a common concern of the whole Euro area.<sup>33</sup> Therefore, the process of

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<sup>29</sup> Eurostat, HICP - inflation rate, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tec00118> (Accessed on 20.05.2017).

<sup>30</sup> For a detailed explanation of the principle of rule of law see, The rule of law checklist (2016) European Commission for democracy through law, Venice commission, p. 29-33.

<sup>31</sup> Takis Tridimas, Federalization, crisis management, and law reform in Paul Craig, *The Evolution of EU Law* (Oxford University Press, 2011) p. 796.

<sup>32</sup> See, Financial Services Action Plan (FSAP) - Commission Communication of 11 May 1999 "Implementing the framework for financial markets: action plan" COM(1999) 232 final - Not published in the Official Journal.

<sup>33</sup> In the USA there is also a Division of Banking Supervision within the Federal Reserve System, which supervises individual banks on a central level, see J. Peek, Eric S. Rosengren, and Geoffrey M. B. Tootel, Synergies between

integration of the financial sector in the EU started as early as 2001, and was known as the *Lamfalussy* process. The Lamfalussy committee and its report are outside of the scope of this article. It is relevant, however, that this committee stressed the need for strengthening the cooperation of national supervisors on EU level, regarding macro and micro prudential supervision.<sup>34</sup> Moreover, the EU endorsed the proposals in the Lamfalussy report and implemented them in practice. Nevertheless, as time passed and the economic circumstances worsened, mere cooperation between national supervisors proved to be insufficient. Thus, further integration was required.

The legal basis for such deeper integration was given in the Lisbon Treaty. The first financial difficulties, which were the precursors of the crisis, were felt in 2008. Because of this, even before the entry into force of the Lisbon Treaty, the Barroso Commission started making plans on how to implement its provisions. The main focus was on dealing with the 'obvious mismatch between European and global financial markets and supervision which remains largely national'.<sup>35</sup> Since there was political will for financial integration, it remained for concrete proposals to be made. For this reason, a High Level Expert Group on EU financial supervision was set up by the Commission. Due to its chair, this group is known as the *de Larosière group*. Its task was to give expert opinion and recommendations on how to strengthen the European supervisory arrangements. This task is clearly similar to the one of the Lamfalussy committee. However, there is one fundamental difference - the Lamfalussy committee was requested in order to complete the integration of the financial market, unlike the de Larosière group which was the result of the global financial crisis, which was expected to strike Europe very soon. The product of the Group's work was the Report of the de Larosière group issued in February 2009. There were two main recommendations: reform in the macro-prudential supervision<sup>36</sup> and reform in the micro-prudential supervision<sup>37</sup>. Both are highly relevant and are therefore discussed in separate parts, concentrating on what was *recommended* by de Larosière group and what was *implemented* by the EU. Unlike the changes in macro-prudential supervision, the changes in micro-prudential supervision have attracted quite criticism. Due to this, part on micro-prudential supervision is considerably longer.

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Bank Supervision and Monetary Policy in Frederic S. Mishkin (ed.) *Prudential Supervision: What Works and What Doesn't* (University of Chicago Press, 2001) p. 275.

<sup>34</sup> Lamfalussy Report, p. 17.

<sup>35</sup> European Commission Press Release IP/08/1679, Brussels, 11.11.2008.

<sup>36</sup> De Larosière Report p. 44.

<sup>37</sup> *Ibid*, p. 46.

## A. Macro-prudential supervision

Macro-prudential supervision is aimed at limiting the distress of the financial system *as a whole*, which is caused not by an individual bank but by the flaws of the financial system. Such flaws, if not addressed at an early stage, can be detrimental. Central banks are in the best position for macro supervision, as they have all the relevant data: inflation, credit expansion, interest rates, etc. Macro prudential supervision identifies any imbalance and acts accordingly, or if it is outside of its competences, issues an early warning to the competent authorities. This type of supervision has been a particular problem in the EU.<sup>38</sup>

For this reason, the de Larosière Report, in its Recommendation 16, proposed the establishment of a European Systemic Risk Council, as a European body entrusted with carrying out macro prudential supervision on EU level. For this purpose, the European Systemic Risk Board (ESRB) was created in 2010.<sup>39</sup> Also, the Chair of this Board is the President of the ECB,<sup>40</sup> which ensures the involvement of the ECB in this process. National central banks are also involved<sup>41</sup> and the cooperation and exchange of information between the Board, national and European supervisory authorities is expressly mentioned.<sup>42</sup> Thus, the legislator recognised the link between different types of supervision. Moreover, this Board has the power to issue warnings and recommendations for remedial actions, such as legislative initiatives<sup>43</sup> which is in accordance with the Report. A good example of the work of the Board is given in its report 'Is Europe Overbanked?'. Through this report, the ESRB firstly *establishes* the problem of bank expansion in Europe, then it determines the *causes* of the problem and in the end, offers *solutions* to it. Thus, the macroeconomic proposals in the de Larosière Report were acknowledged.

On the other hand, the ESRB is composed of many members – representatives of ECB, NCB, Commission, European Supervisory Authorities and Committees. Hence, its functioning may be difficult and its decisions may be largely a result of a compromise. Also, the impact of the ESRB has not been particularly evident, since it only received advisory and not regulatory

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<sup>38</sup> Ibid, p. 39.

<sup>39</sup> Regulation (EU) 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, OJ L 331, 15.12.2010, p. 1–11.

<sup>40</sup> Ibid, Article 5.

<sup>41</sup> Ibid, Article 6.

<sup>42</sup> Ibid, Article 15.

<sup>43</sup> Ibid, Article 16.

powers.<sup>44</sup> The body relies mostly on its expertise and reputation in order to influence national and European policies.

Nevertheless, with the creation of the ESRB, the ECB undoubtedly received an extended role in the field of macro-prudential supervision. The ECB is the main actor within the ESRB, the president of the ECB chairs the ESRB and, furthermore, the ECB can influence NCB as part of the ESCB when pursuing its policies within the ESRB. As stated above, the ECB has the most relevant monetary data in order to assess the situation. On the other hand, the involvement of the NCB, the Commission and micro-prudential authorities within the ESRB constrains the ECB and promotes an inclusive process. All of this is supported by the de Larosière Report, which perhaps is the reason for the lack of criticism from legal practitioners and academics regarding this extended macro-economic role of the ECB. The ESRB by fulfilling its tasks makes another crisis less probable and, at the same time accelerates the way out of the current crisis.<sup>45</sup>

## **B. Micro-prudential supervision**

Micro-prudential supervision is aimed at preventing *individual banks* from taking up risky investments or carrying out any unsound action. It is a fact that banks, driven by profit motives, may pursue dangerous policies and end up failing, thereby endangering the whole financial system. Because of this, banks and their functioning are regulated by rules, the compliance of which is overseen by an official authority.

The de Larosière Report recognised the importance of micro prudential supervision in the EU and moreover that the mechanisms existing at that time were insufficient. In this regard, it proposed the creation of a European System of Financial Supervision – a decentralised network of three new European Authorities with enhanced supervisory powers, replacing the than-existing Committees. Such powers include increased coordination of national supervisors, taking part in on-site inspections carried out by national supervisors, adopting standards and legally binding interpretation of financial rules, binding mediation decisions for solving disputes between national

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<sup>44</sup> Chiara Zilioli, The Independence of the European Central Bank and Its New Banking Supervisory Competences, p.32 in Dominique Rittleng, *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2016).

<sup>45</sup> Athanasios Orphanides, Towards a new architecture for financial stability in Europe in Miroslav Beblavý, David Cobham, L'udovít Ódor (eds.) *The Euro area and the Financial Crisis* (Cambridge University Press, 2011) p. 12-14.

supervisors, etc.<sup>46</sup> It also proposed colleges of supervisors within this network, which would supervise all major cross-border credit institutions.<sup>47</sup> Nevertheless, day-to-day supervision should *remain on national level*, as national supervisors are closest to the markets and credit institutions under supervision.

On the other hand, the de Larosière Report expressly states that the de Larosière Group does not support any role whatsoever for the ECB in the field of micro-prudential supervision.<sup>48</sup> Conferring on the ECB such powers would have several negative implications for the ECB itself and for the Union. Firstly, the primary objective of the ECB as part of the ESCB is to maintain price stability. Giving the ECB the task of supervising banks directly could impinge on this fundamental objective – the focus of the ECB would be shared between the monetary and supervisory objective which is contrary to the intention of the creators of the ECB.<sup>49</sup> Secondly, the ESCB/ECB does not have competences outside of the Euro area and the ECB would not be able to supervise banks in those MS. Thus, the ECB as supervisor could not establish an integrated system of supervision within the EU. Thirdly, the members of the ECB may not have the required expertise for supervisory matters. Lastly and most importantly, the ECB in times of crisis would have to interact with the ministers of finance or other competent authorities of the MS, as supervisors are necessarily involved in the process of providing financial support.<sup>50</sup> Such a process is highly-politicized and involves dealing with tax-payers money and/or structural reforms in the economy of the MS. This in turn increases peer pressure on the participants in the process, which could significantly undermine the constitutionally-protected independence of the ECB. Today this is indeed the case, because the ECB is one of the main actors within another international organization, the ESM.

Nevertheless, conferring supervisory powers to body, office or agency of the EU may be in contradiction with the *Meroni* doctrine, which established that only ‘clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria’<sup>51</sup> can be conferred on an EU body. Prudential supervision, on the other hand, necessarily entails a certain amount of discretion,<sup>52</sup> which makes it problematic

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<sup>46</sup> De Larosière Report, p.52.

<sup>47</sup> Ibid, p.48.

<sup>48</sup> Ibid, p.43.

<sup>49</sup> See point II of this article.

<sup>50</sup> De Larosière Report, point 171.

<sup>51</sup> Case 9/56 *Meroni* [1958] EU:C:1958:7, p. 152.

<sup>52</sup> Such discretion is manifested through the available options and ways in which the ECB can act, see, ECB Guide on options and discretions available in Union law (2016) p. 5-38.

if supervisory powers were to be conferred on an EU body not expressly mentioned in the Treaties. In this regard, assigning the ECB as prudential supervisor is preferred.

In addition, it is worth mentioning that there is academic literature that supports the juncture of monetary and supervisory functions in the hands of central banks.<sup>53</sup> Also, several national central banks, *inter alia*, Nederlandsche Bank<sup>54</sup> and Banque de France<sup>55</sup>, are responsible for supervision, in addition to conducting the monetary policy. In this regard, the benefit of vesting both powers in the ECB would be access to better information and better crisis resolution. Since the ECB is *de facto* lender-of-last resort, being able to judge the credit worthiness of the bank in question would help it assess the situation better.<sup>56</sup> Moreover, it could conduct the monetary policy better, as it could remove itself the obstacles in the monetary transmission mechanism caused by individual banks, by using its supervisory powers.<sup>57</sup> This is even truer in times of crisis, when flawed and/or aggressive individual banks can weaken the transmission mechanism, by not reacting properly to the official interest rate set by the ECB. Even though the ECB may benefit from being the main actor in both monetary policy and prudential supervision in times of crisis, nevertheless, as stated previously, its independence could suffer in the long term.

Taking all these issues and arguments into consideration, the EU legislator in 2013 in accordance with the special legislative procedure adopted the SSM Regulation, thereby conferring micro-supervisory tasks to the ECB. Nevertheless, the de Larosière-suggested European Supervisory Authorities were also created, but with significantly smaller micro-supervisory role than the ECB. The purpose of the SSM and the ECB as central to it, is to ensure the safety and soundness of credit institutions, which are essential for the stability of the financial system of the Union.<sup>58</sup> Therefore, the SSM is there to prevent bank failure from occurring in the first place, by overseeing the banks' compliance with prudential rules, *inter alia*, capital requirements or 'fit and proper'

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<sup>53</sup> Tommaso Padoa-Schioppa, EMU and Banking Supervision in Charles Goodhart (ed.), *Which Lender of Last Resort for Europe?* (2000) A Central Banking Publications book, p.15-29.

<sup>54</sup> Fabian Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Hart Publishing, 1999) p. 100.

<sup>55</sup> Ordonnance no 2010-76 du 21 janvier 2010 portant fusion des autorités d'agrément et de contrôle de la banque et de l'assurance, JORF no 18 du 22 janvier 2010, p. 1392, NOR ECEX0929065R.

<sup>56</sup> Thorsten Beck and Daniel Gross, Monetary Policy and Banking Supervision: Coordination instead of separation (2012) CEPS Policy Brief, p. 5-6.

<sup>57</sup> Monetary policy transmission in the Euro area (2000) ECB Monthly Bulletin, p. 50.

<sup>58</sup> Recital 30 SSM Regulation Preamble.

manager requirements. If a bank is in breach of such rules it faces penalties<sup>59</sup> and the enforcement of other supervisory powers<sup>60</sup> against it.

The creation of the SSM was justified and in accordance with the principles of subsidiarity and proportionality.<sup>61</sup> First, the two main reasons of bank failure have been cited as being *inadequate corporate governance* and *weak risk management*.<sup>62</sup> Crucial for both is a strong and independent supervisory authority, which would sanction every breach of the prudential rules. However, different MS had different prudential rules and banks could established themselves, according to the freedom of establishment, in those MS with the most lenient rules. This is known as the '*regulatory race to the bottom*', with MS adopting lower standards to attract companies.<sup>63</sup> Basically, the MS with the lowest prudential standard in the EU had the potential to set the EU-wide standard. With the adoption of the SSM Regulating such practises are significantly reduced, as now there is one prudential standard which applies throughout the whole EU. Moreover, large banks, whose stability is crucial for the overall financial are supervised directly by the ECB.

Second, after the creation of the common monetary policy and currency, the prevention of bank failure is not only a national concern, but a common concern of the whole Euro area. National commercial banks are part of the European EMU and are interconnected with banks in other MS. Those banks are, moreover, an essential source of funding for businesses that are active throughout the EU internal market. Therefore, when one bank fails, it has repercussions in other sectors of the economy, which in turn affects the overall financial stability of the EU. The Court has recognised this phenomenon in the *Kotnik*<sup>64</sup> case, as a 'negative spill-over effect', and later used it in its reasoning in other cases.<sup>65</sup>

It is important to note that the SSM Regulation created a *novel situation* in EU law – the ECB, an EU institution, can apply provisions of national law and can base its supervisory decisions on such provisions.<sup>66</sup> This is because of the following. Many of the powers of the ECB given in the SSM Regulation are broad and for that reason, conditional on a directive, which defines those

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<sup>59</sup> Article 18 SSM Regulation.

<sup>60</sup> Ibid, Article 16.

<sup>61</sup> Article 5 TEU.

<sup>62</sup> Stanley V. Ragalevsky and Sarah J. Ricardi, 'Anatomy of a bank failure' (2009) 126 Banking Law Journal, p. 869.

<sup>63</sup> Case C-212/97 *Centros* [1999] EU:C:1999:126, para. 24-29. Also, case Case C-208/00 *Überseering* EU:C:2002:632, para. 58-82.

<sup>64</sup> Case C-526/14 *Kotnik* [2016] EU:C:2016:570, para. 50.

<sup>65</sup> Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] EU:C:2016:701, para 72.

<sup>66</sup> Article 4(3) SSM Regulation.

powers more precisely.<sup>67</sup> However, an EU directive must be transposed in the legal system of the MS in order to be given full effect. An EU directive can only in exceptional cases be relied on directly,<sup>68</sup> such as against the state,<sup>69</sup> an emanation of state,<sup>70</sup> in conjunction with general principles of EU law,<sup>71</sup> etc. Thus, for unobstructed fulfilment of its day-to-day supervisory tasks, the ECB needed to be able to rely on national law transposing relevant directives. That national law precisely defines the circumstances under which the ECB can act.

Because of the uniqueness of the situation where an EU institution bases its actions on national law, there are some questions that arise. Firstly, what would happen if the MS failed to transpose the directive after the time-limit for implementation has passed? One answer may be that the ECB could benefit from the *Viamex*<sup>72</sup> case. This case established that the provisions of a directive may be applicable when provisions of a regulation are conditional on compliance with that directive. One of the indicators of such conditionality is the express reference to the directive in the regulation. The Court's reasoning was that the purpose of such reference is to ensure compliance with the provisions of the referred directive, for the purposes of implementation of the regulation.<sup>73</sup> Since many of the powers of the ECB are indeed conditional on directives, the ECB could rely on those directives directly. On the other hand, a different answer would be that the principles of rule of law and legal certainty may prevent the ECB from acting in such a case, thereby preventing the ECB from effectively supervising banks in MS which have not transposed the relevant directives. This seems more reasonable as the SSM Regulation states that the ECB can apply either the provisions of a *regulation* or the provisions of *national law* transposing relevant directives i.e. it cannot apply a directive directly. Moreover, the principle of legal certainty requires that private parties are able to 'ascertain unequivocally what their rights and obligations are',<sup>74</sup> which seems troublesome when such rights and obligations are given in a non-transposed EU directive. Therefore, when there is no transposing national law, the ECB will most likely be precluded from acting.

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<sup>67</sup> The reason for regulating this field of law through directives is that the MS could not reach a consensus in the Council regarding the standards of supervision. Thus, many prudential requirements were left to the discretion of the MS.

<sup>68</sup> Paul Craig and Gráinne de Burca, *EU Law Text, Cases and Materials* (Oxford University Press, 2015) p. 220-224.

<sup>69</sup> Case 152/84 *Marshall* [1986] EU:C:1986:84, para. 35.

<sup>70</sup> Case C-188/89 *Foster* [1990] EU:C:1990:313, para. 22.

<sup>71</sup> Case C-144/04 *Mangold* [2005] EU:C:2005:709, paras. 76-77. Also, Case C-555/07 *Küçükdeveci* [2007] EU:C:2010:21, para. 56.

<sup>72</sup> Joined Cases C-37 and 58/06 *Viamex* [2008] EU:C:2008:18, para. 28.

<sup>73</sup> *Ibid*, para. 29.

<sup>74</sup> Case C-345/06 *Heinrich* [2009] EU:C:2009:140, para. 44.

Secondly, does the Court retain exclusive jurisdiction over acts of the ECB based purely on national law, or do national courts have a role to play also? This question is important and relevant, because it has repercussions on access to justice which is part of the broader principle of rule of law. The Court held in *Foto-Frost*<sup>75</sup> that it has sole jurisdiction over acts of EU institution, and subsequent cases<sup>76</sup> proved that the Court is not willing to allow national courts to invalidate EU measures, since that would undermine the effectiveness of EU law. Moreover, the exclusive competence of the CJEU to review acts of the ECB is confirmed in the ESCB Statute<sup>77</sup> and SSM Regulation.<sup>78</sup> However, the Court does not have jurisdiction to review national law under Article 263 TFEU,<sup>79</sup> and a decision based on national law might as well be considered an act of national law in its substance. Thus, there may be a claim that national courts, and not the CJEU, are competent in such a case. Moreover, the SSM Regulation does not expressly state that only the CJEU has jurisdiction to review ECB decisions based on national law. It only timidly mentions Article 263 TFEU without further elaboration, in one recital of the preamble. On the other hand, Article 13(2) SSM Regulation clearly confirms the sole jurisdiction of the Court to review the lawfulness of the ECB supervisory decisions regarding on-site inspections. Presumably, a confirmation of the CJEU's exclusive jurisdiction over ECB decisions based on national law is missing, because the EU legislator itself was uncertain regarding it. Nevertheless, it appears more likely for the Court, if a case regarding its jurisdiction comes before it, to look at the *institutional nature* of the decision i.e. who adopted the decision, instead of looking at the *law applied* therein. Consequently, the Court may eventually decide that it has exclusive jurisdiction to review an ECB decision based purely on national law, under Article 263 TFEU.

These questions will unavoidably come before the Court at a certain point in time. It remains to be seen whether the Court through its case-law, will grant even broader discretion to the ECB in the field of prudential supervision, so it can fulfil its tasks without obstructions from the MS. However, aside from such compelling questions, there are unfortunately real difficulties in the way the SSM functions.

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<sup>75</sup> Case C-314/85 *Foto-Frost* [1987] EU:C:1987:452, paras. 15-17.

<sup>76</sup> Case C-50/00 P *Unión de Pequeños Agricultores* [2002] EU:C:2002:462, para. 40; Case C-362/14 *Schrems* [2015] EU:C:2015:650, para. 61; Case C-370/12 *Pringle* [2012] EU:C:2012:756, para. 39. See also, Miguel Poiares Maduro, Loïc Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) p. 194.

<sup>77</sup> Article 35.1 ESCB Statute.

<sup>78</sup> Recital 60 SSM Regulation Preamble.

<sup>79</sup> Case C-50/00 P *UPA* [2002] EU:C:2002:462, para. 43; C-263/02 P *Commission v Jégo-Quéré* [2004] EU:C:2004:210, para. 33; Case C-64/05 P *Sweden v Commission* [2007] EU:C:2007:802, para. 91; Case C-562/12 *Liivimaa Lihaveis MTÜ* [2014] EU:C:2014:2229, para. 48.

Firstly, the ECB may have a conflict of interests. As the party responsible for both monetary policy and prudential supervision, the ECB could be inclined to use its supervisory powers to achieve monetary objectives, and vice versa. For example, the ECB may require banks to reduce the risk of their activities or to impose liquidity requirements<sup>80</sup> in order to allegedly protect the soundness of the banks in question. However, the real purpose behind such measure could be to reduce inflation, which is a monetary policy objective. This constitutes *misuse of powers*: a measure has been 'taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case'.<sup>81</sup> This is one of the grounds for review and annulment under Article 263 TFEU, however a claim of misuse of powers is *rarely accepted* by the Court. Misuse of powers requires the subjective intention or even the 'moral obligation'<sup>82</sup> of the institution in question to be ascertained, which is particularly troublesome for the applicant to prove in court proceedings. Therefore, it is highly unlikely that a measure of the ECB, as the one mentioned in the example above, is going to be annulled on the basis of misuse of powers, even if in reality it is so. In practice, the ECB has at its disposal both monetary instruments and supervisory powers when pursuing certain objective and, even though this is prohibited under the Treaties, it can go unsanctioned by the Court.

Secondly, this next problem is related to the first. It is very hard to isolate prudential supervision from monetary policy when both of these are vested in the same body. However, such separation is expressly referred to multiple times in the SSM Regulation.<sup>83</sup> It seems that the EU legislator was trying to reconcile the de Larosière recommendation of separate European supervisor with the views of some MS to give supervisory tasks to the ECB. As seen above, the end-result was an internal but detached body of the ECB. This endangers the independence of the ECB in conducting monetary, as supervisory tasks are necessarily more 'politicized'.<sup>84</sup> This is because supervision is crucial for placing an entity under resolution, and resolution can

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<sup>80</sup> These supervisory powers are given in Article 16(2) SSM Regulation.

<sup>81</sup> Case C-331/88 *FEDESA* [1990] EU:C:1990:391, para 24; Case C-146/13 *Spain v Parliament and Council* [2015] EU:C:2015:298, para. 56.

<sup>82</sup> Case 105/75 *Giuffrida* [1976] EU:C:1976:128, para. 17.

<sup>83</sup> Recital 65, 66, 73, 55 and Article 25 SSM Regulation. See also, Interview with Danièle Nouy, Chair of the Supervisory Board of the Single Supervisory Mechanism, published on 7 June 2015 <https://www.bankingsupervision.europa.eu/press/interviews/date/2015/html/sn150607.en.html> (Accessed on 19.04.2017). According to this interview, the separation goes so far that apparently, a bank can be *insolvent* for monetary policy concerns, and at the same time *solvent* for supervisory concerns.

<sup>84</sup> Stefania Baroncelli, The Independence of the ECB after the Economic Crisis in Maurice Adams, Federico Fabbrini, Pierre Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing, 2014), p. 141.

in turn lead to bail-in with private funds and ultimately, bail-out with public funds. This means that the ECB supervisory decisions have long-term effects on the economy of the MS in question and because of this the ECB may need to communicate with other bodies, or even governments of the MS. This inevitably undermines the independence of the ECB as a whole.

Thirdly, the SSM distorts the level-playing field within the internal market for financial services. The SSM Regulation states that it is ‘based on equal treatment of credit institutions with a view to preventing regulatory arbitrage’.<sup>85</sup> Contrary to this, there is *de facto* different treatment of credit institutions supervised on national level and those supervised on EU level. This can be supported with the following example - the power of the ECB to remove members of the management board of a bank which are not ‘fit and proper’, given in Article 16(2)(m) SSM Regulation, is conditional upon transposition of the CRD.<sup>86</sup> This is because the ‘fit and proper’ requirements are not defined by EU law. In this case, the ECB must apply the provisions of national law which transpose the CRD and which define what ‘fit and proper’ means. This basically means that the ECB acts in the same way as the national supervisory authorities.

However, the ECB seems to have only received the *powers* to apply national law, without receiving the corollary *obligations* that fall on the national authorities. Here a reference is made to obligations established in the case-law of the Court, particularly the *Costanzo*<sup>87</sup> and the *Wells*<sup>88</sup> case, which established: in the case of non-transposition or improper transposition of a directive and after the time-limit for transposition has passed, the national competent authorities are under the obligation to apply the provisions of that directive directly and refrain from applying provisions of national law which are contradictory to that directive. If this rule is applied to the example stated above, a national supervisor would have no problem to remove members of a management board of a bank under its supervision, *even when there is no national law* which defines the ‘fit and proper’ requirements. The ECB, however, cannot do so, because ‘the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to

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<sup>85</sup> Article 1 SSM Regulation.

<sup>86</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338–436 (Capital Requirements Directive – CRD).

<sup>87</sup> Case 103/88 *Costanzo* [1989] EU:C:1989:256, para. 31-33.

<sup>88</sup> Case C-201/02 *Wells* [2004] EU:C:2004:12, para. 70.

‘each Member State to which it is addressed’.<sup>89</sup> Therefore, as stated above, the ECB cannot act when there is no national law transposing the CRD, whereas national supervisors can. Obviously, there is a difference in treatment between banks supervised by national supervisors and those supervised by the ECB.

This can be resolved by *expanding* the *Costanzo* and *Wells* doctrines, so they would apply to all authorities, national and European, who have the power to apply provisions of national law. In this way, the ECB would as well have the obligation and possibility to set aside contradicting national provisions and apply the directive directly. Nevertheless, this is in contradiction to the previously cited paragraph from *Marshall* and moreover contrary to Article 288 TFEU. Not to mention the consequences that this would have on the cherished distinction between a regulation and a directive when it comes to direct effect.<sup>90</sup> Another solution would be to define the powers of the ECB and the conditions under which they can be used in directly applicable EU law, such as a regulation.<sup>91</sup> This would, of course, require complicated negotiations between the MS in the Parliament and Council, but nevertheless seems more reasonable than constitutional changes and overruling case-law. Until then, there will be different treatment of credit institutions, which goes contrary to the very purpose of the SSM Regulation.

Lastly, it is the Supervisory Board, an internal ECB body, which drafts the supervisory decisions. The Governing Council of the ECB formally adopts those supervisory decisions by applying ‘reverse majority voting’ - the decision is adopted as long as the Governing Council does not object to its adoption by simple majority. In practice, this means that many draft decisions of the Supervisory Board will be “rubber stamped” by the Governing Council, since there is no formal voting requirement for their adoption. Such a procedure of *tacit approval* is at odds with the ESCB Statute, which states that ‘save as otherwise provided for in this Statute, the Governing Council shall act by simple majority of the members having a voting right’.<sup>92</sup> The ESCB Statute does not provide for exemptions regarding the adoption of supervisory decisions. Thus, it is debatable whether the SSM Regulation, as secondary EU law, is in accordance with an act of primary EU law.<sup>93</sup> Consequently, the principle of rule

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<sup>89</sup> Case 152/84 *Marshall* [1986] EU:C:1986:84, para. 48. Also, Case C-425/12 *Portgás* [2013] EU:C:2013:829, para. 22.

<sup>90</sup> Opinion of AG Slynn in Case 152/84 *Marshall* [1985] EU:C:1985:345, p. 734.

<sup>91</sup> In this regard, see Impact Assessment of the CRD, SEC(2011) 952 final, p. 146. The Commission had plans to introduce *enhanced* “fit and proper” test, which would be included in Binding Technical Standards developed by the EBA. However, the MS did not accept this reform. At the time of the writing of this thesis, there is not EU consensus on what ‘fit and proper’ means.

<sup>92</sup> Article 10.2 ESCB Statute.

<sup>93</sup> Paul Weismann, *European Agencies and Risk Governance in EU Financial Market Law* (Routledge, 2016) p. 118-119.

of law, which requires every act to be based in law and in accordance with the higher legal norms, can be undermined.

To sum up, supervision on European level brings many benefits, both to the stability of the individual MS and the stability of the EU. The SSM was established when the time was ripe for deeper integration, even if this was mid-crisis period. However, there are problems when it comes to the functioning of the SSM which can undermine the rule of law or other established principles. It remains to be seen whether those problems will be fixed, either through legislative action or judicial review.

#### IV. BROADER, ECONOMIC ROLE OF THE ECB

As the global financial crisis worsened, there was political will for certain mechanisms to be established which would preserve the financial stability. Since there was no legal basis in the Treaties for the creation of such mechanisms, the MS had to act through Intergovernmental Agreements. Nevertheless, the presence of the EU and its institutions in this field has increased as time passed.

Firstly, in 2010, a European Financial Stability Facility was created by the MS through the Council.<sup>94</sup> This was a temporary solution which would offer financial relief to the MS which were worst hit by the crisis. Among those were Greece, Ireland and Portugal. The procedure was the following: a Euro area MS had to submit a request for financial assistance to the EFSF. Then the so-called Troika - the Commission, in liaison with the International Monetary Fund and the ECB, negotiated a Memorandum of Understanding with that MS, which had to be approved by the Eurogroup.<sup>95</sup> Thus, the Eurogroup, consisting of all the finance ministers of the Euro area MS, and the Commission, were the main actors in the EFSF.

Such a temporary mechanism was indeed necessitated by the crisis, to mitigate its negative consequences. However, in order to prevent future crises from escalating and to safeguard financial stability, a permanent firewall

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<sup>94</sup> Extraordinary Council meeting 9596/10 (Presse 108).

<sup>95</sup> EFSF Framework Agreement 6.7.2010 (amended with effect from the Effective Date of the Amendments), p. 5.

for the Eurozone was needed which would be always functional and prepared to act at an early stage.<sup>96</sup>

For this reason, the European Stability Mechanism was established in 2012 as a body of public international law.<sup>97</sup> It is an international organization with legal personality and is currently separated from the EU. This is notwithstanding the fact that firstly, the Commission and the ECB are entrusted with carrying out the core tasks of the ESM,<sup>98</sup> secondly, the purpose of the ESM is to safeguard the financial stability of the Euro area as a whole<sup>99</sup> and thirdly, membership in the ESM is conditional on being a Euro area MS of the EU.<sup>100</sup> The ESM took over the tasks of the EFSF, thus today all new financial assistance programmes are granted and covered by the ESM. Similarly as the previous mechanism, financial assistance granted through the ESM is subject to conditionality, *inter alia*, structural and macro-economic reforms, as agreed with the MS in a MoU. The main decision-making body of the ESM is the Board of Governors, consisted of representatives of the ESM MS.<sup>101</sup> This body must approve any MoU, prior to its signing.

The establishment of this new permanent mechanism was authorized under EU law by Article 136(3) TFEU. This paragraph of Article 136 TFEU was added with the European Council Decision 2011/199,<sup>102</sup> which amended the TFEU by using the simplified revision procedure.<sup>103</sup> As seen below, this Decision was challenged in the case of *Pringle*,<sup>104</sup> a seminal case which has been adjudicated by a Full Court.<sup>105</sup> This case demonstrated the Court's view on the division between monetary and economic policy in the EU. Moreover, the Court decided whether the ESM Treaty increased the competences of the EU and whether ESM interferes with the monetary policy of the Union. Another point in *Pringle* - whether the ESM infringes Article 123 and 125 TFEU is outside of the scope of this article. Thus, the text that follows focuses firstly, on the division of competences within the EMU and secondly, on the competences of

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<sup>96</sup> Statement by President of the European Council Herman Van Rompuy on the signature of the European Stability Mechanism Treaty EUCO 19/12.

<sup>97</sup> Treaty establishing the European Stability Mechanism (ESM Treaty) T/ESM 2012-LT 2012.

<sup>98</sup> *Ibid*, Recital 10 and Article 13.

<sup>99</sup> *Ibid*, Article 3.

<sup>100</sup> *Ibid*, Article 2.

<sup>101</sup> *Ibid*, Article 5.

<sup>102</sup> European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91/1 6.4.2011 p. 1.

<sup>103</sup> Article 48(6) TEU, as introduced by the Lisbon Treaty.

<sup>104</sup> Case C-370/12 *Pringle* [2012] EU:C:2012:756.

<sup>105</sup> Article 16 Protocol (No 3) on the Statute of the Court of Justice of the European Union. For other cases decided in Full Court, see Case C-200/02 *Zhu and Chen* [2004] EU:C:2004:639 and Case C-222/02 *Paul and Others* [2004] EU:C:2004:606.

the ECB within this rather unique EU constellation of separate monetary versus separate economic policy, as explained by the Court in the *Pringle* case.

### A. The division between monetary and economic policy in the EU

Currently there is a division of competences in the EMU – monetary union is exclusive competence of the EU, whereas economic policy is left to the MS. Even though the Treaties provide for *clear delineation* of competences between monetary and economic policy, they do not provide for *clear definition* of these policies. Because of this, it was just a question of time when a situation of uncertainty regarding the nature of the measure, and in turn, uncertainty regarding the competence to adopt the measure would arise. This was the subject matter of the *Pringle* case. Before discussing *Pringle*, it is important to note that some academics and economists blame exactly this division of competences for the crisis, stating that it is one of ‘the most unnecessary crisis [they] have ever seen’.<sup>106</sup> In this regard, the lack of a ‘transfer union’ in addition to the monetary union, made fiscal transfers between the MS which would mitigate the differences in national income within the Euro area impossible. Those differences in national income and economic development in the Euro area caused financial imbalances,<sup>107</sup> which were exacerbated by the global financial crisis.

Coming back to the reality in the EU, the Court in *Pringle* stated that there are three relevant criteria for classifying a measure as economic or monetary: the objectives of the measure, the instruments provided in order to achieve those objectives and the link between that measure and other economic or monetary measures.<sup>108</sup> Regarding the first criterion, the objective of the Union’s monetary policy, as implemented by the ESCB, is to maintain price stability i.e. low inflation.<sup>109</sup> Contrary to this, the objective of the ESM is to preserve the financial stability of the Euro area as a whole.<sup>110</sup> Thus, the Court held that the ESM and the ESCB pursued different objectives. However, in doing so, the Court seems to have adopted a narrow interpretation of the monetary policy of the Union and consequently, narrow interpretation on the mandate of the ECB, which is visible from paragraph 56 *Pringle*:

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<sup>106</sup> David J. Powell, *The Trader's Guide to the Euro area: Economic Indicators, the ECB and the Euro Crisis* (Bloomberg Press, 2013) p. 111.

<sup>107</sup> Thomas Mayer, *Europe's Unfinished Currency: The Political Economics of the Euro* (Anthem Press, 2012) p. 75.

<sup>108</sup> Case *Pringle* (n 104), para. 60.

<sup>109</sup> Article 127(1) and 282(2) TFEU.

<sup>110</sup> Case *Pringle* (n 104), para. 56.

*“Even though the stability of the Euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.”*

This reasoning was reiterated in paragraph 97 *Pringle*:

*“As is apparent from paragraph 56 of this judgment, any effect of the activities of the ESM on price stability is not such as to call into question that finding. Even if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted.”*

Indeed, the role of a central bank is supposed to be defined narrowly<sup>111</sup> and focused on price stability,<sup>112</sup> especially when it comes to the ECB, whose status as independent expert body is stressed. This is also in accordance with the intentions of the creators of the ECB in Maastricht, as seen above in point II of this article. Such view of the Court makes it possible for the ESM to exist in parallel with the Union’s exclusive competence in monetary policy. On the other hand, this view may have repercussions on the functioning of the ECB. It may prevent the ECB from claiming that a certain measure interferes with price stability, thus falls within the ECB’s mandate. For example, the ECB’s power to stop the provision of national Emergency Liquidity Assistance (ELA), which is not part of monetary policy<sup>113</sup> but only indirectly affects price stability, may fall within economic policy and go outside of the mandate of the ECB. Nevertheless, the ECB may be enjoying broad discretion under Article 14.4 ESCB Statute<sup>114</sup> when it comes to stalling NCB measures, even though the Court still has not interpreted that Article. In any event, the Court’s narrow definition of monetary policy as a policy concerned with price stability and the definition of economic policy as a broader policy concerned with the overall financial stability seems reasonable and well-founded.

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<sup>111</sup> Alicia Hinarejos, Institutional Responses to the Crisis p.4 in Alicia Hinarejos, *The Euro area Crisis in Constitutional*.

*Perspective* (Oxford University Press, 2015).

<sup>112</sup> Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press, 2015) p. 174.

<sup>113</sup> Article 2(29) of European Parliament and Council Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L173/190. See also, Willem Buiters, Jürgen Michels, Ebrahim Rahbari, ELA: An Emperor without Clothes? (2011) *Global Economics View*, p. 4.

<sup>114</sup> Basil C. Scouteris and Phoebus Athanassiou, National Central Bank Tasks and the Boundaries of the ECB Governing Council’s Powers under Article 14.4 Of the Statute: State of Play and Future Prospects (2015) available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2691914](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2691914) (accessed 20.05.2017), p. 2.

Regarding the second criterion, the instruments of monetary policy are setting the key interest rates for the Euro area and issuing euro currency.<sup>115</sup> On the other hand, the grant of financial assistance to a MS, as envisaged by Articles 14 to 18 ESM Treaty, clearly do not fall within monetary policy, according to the Court.<sup>116</sup> Again, the Court adopts a restrictive interpretation on which instruments fall within monetary policy, making the ECB's broad perception of Article 14.4 ESCB Statute questionable. The ECB has several times interfered with national measures which fall outside of monetary policy, such as ELA or NCB's own investment operations and even though such decisions are undisclosed,<sup>117</sup> they are most likely based on Article 14.4 ESCB Statute. If a person affected by such decision brings an action before the Court and the Court decides to follow its *Pringle* reasoning, it is very likely that such a decision would be annulled as *ultra vires*. This is because, according to *Pringle*, the burden of proof falls on the ECB, which would have to show that the NCB's measure has more than mere 'indirect effects on the stability of the euro'.<sup>118</sup>

The last criterion for classification of a measure as economic or monetary is the link between on the one hand, the measure in question and on the other, the Treaty provisions and the provisions of the EU regulatory framework. This criterion needs to be assessed individually in each case. In the case of ESM, the Court held that that mechanism is closely linked to Articles 120 to 126 TFEU and to the so-called regulatory 'six pack' for strengthened economic governance of the Union. The close link between these provisions of EU law and the ESM is that the EU provisions are *preventive*, as they reduce as far as possible the risk of public debt crises, whereas the ESM is *proactive*, as it regulates the management of financial crises which, notwithstanding the preventive efforts, might nonetheless occur.<sup>119</sup>

The *Pringle* case is the first case to offer some criteria that sheds light on the division between monetary and economic policy, and thus reduces the clash of competences between the MS and the EU. In the end, it may be said that the *Pringle* criteria are, in a way stringent, since they significantly reduce the scope of monetary policy. Because of this, they are unlikely to be applied in the same strict way again, at least not until the crisis completely ends. In this

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<sup>115</sup> Case *Pringle* (n 104), para. 96.

<sup>116</sup> *Ibid*, para. 57.

<sup>117</sup> In accordance with Article 34.2 ESCB Statute, the ECB has discretion to decide whether to publish or not its decisions. The ECB mostly decides not to publish the decisions, but instead presents their substance in a press release.

<sup>118</sup> This was the subject matter of the Case T-368/15 *Alcimos* [2016] EU:T:2016:438, paras 32-33. The applicant claimed that the amount of ELA is insignificant and cannot affect price stability. However, the General Court did not go to the substance, as the case was dismissed as inadmissible.

<sup>119</sup> *Ibid*, para. 58-59.

regard, it seems that the first qualification of the *Pringle* criteria occurred in the *Gauweiler* case,<sup>120</sup> presented in point V below.

## **B. The competences of the EU and the ECB before vs. after the creation of the ESM**

One of the questions referred by the Irish Court in *Pringle*, concerned whether Decision 2011/199, which provided for the compliance of ESM with EU law, increased the competences of the Union. If the decision did so, it would contravene Article 48(6) TEU and would be invalid. However, the more substantial question is whether the tasks conferred on the EU institutions by this mechanism influence their tasks conferred by the Treaties. The Court firstly held that the Decision itself did not create new legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the Decision,<sup>121</sup> thus it was within the limits of Article 48(6) TEU.

Regarding the more substantial question of the role of EU institutions within the ESM, the Court reiterated that the MS are entitled to entrust tasks to the institutions, outside the framework of the Union,<sup>122</sup> provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and the Treaties.<sup>123</sup> The Court established that the role of the ECB within the ESM is in line with the TFEU,<sup>124</sup> particularly Article 282(2) TFEU, which states that the ESCB 'shall support the general economic policies in the Union in order to contribute to the achievement' of monetary policy objectives. The conclusion to be taken from *Pringle* is that the involvement of EU institutions within the ESM is not in any way an impediment for their EU tasks. It is instead beneficial, as their participation ensures that the actions of the ESM are consistent with EU law.

However, such conclusion is questionable. The EU institutions fulfil the *main tasks* of the ESM and are the main actors in the procedure for granting stability support, as regulated in Article 13 ESM Treaty. More particularly, the role of the ECB within the ESM is to: assess the urgency of requests for stability support,<sup>125</sup> participate in the meetings of the Board of Governors and the Board

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<sup>120</sup> Case *Gauweiler* (n 3).

<sup>121</sup> *Ibid*, paras. 71-76.

<sup>122</sup> *Ibid*, para. 158. See also, Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] EU:C:1993:271, para. 22.

<sup>123</sup> Opinion 1/09 of the Court [2011] EU:C:2011:123, para. 75.

<sup>124</sup> Case *Pringle* (n 104), para. 165.

<sup>125</sup> Article 4(4) ESM Treaty.

of Directors as an observer,<sup>126</sup> assess requests for stability support,<sup>127</sup> negotiate a MoU,<sup>128</sup> and monitor compliance with the conditionality attached to the financial assistance.<sup>129</sup> It should be noted that the ECB does not fulfil these tasks alone, but as part of the Troika. The roles of the ECB within the ESM are examined separately, as follows.

Firstly, the ECB has the discretionary power to decide that a decision to grant or implement financial assistance must be granted urgently, if the economic and financial sustainability of the Euro area is threatened. The word 'discretionary power' is used, as the procedure for assessing the threat posed to the stability of the Euro area by a defaulting MS is nowhere defined. Considering that the main decision-making body of the ECB is the Governing Council, it is most likely this body that can adopt such a decision. However, the votes in the Governing Council rotate, and currently the 19 Euro area Governors share 15 votes, whereas the 6 executive members of the Governing Council have 1 vote each.<sup>130</sup> Since the Governing Council adopts decisions with simple majority, the executive members would need only 5 more votes from the Governors, to initiate the emergency voting procedure for granting financial support by the ESM to a MS. Under this ESM emergency voting procedure, a qualified majority of *85% of the votes cast* in the ESM Board of Governors is required in order to provide financial support by the ESM or to give mandate to the Commission and the ECB to negotiate the economic policy conditionality attached to each financial assistance. Contrary to this, under the ESM regular voting procedure, the previous two decisions require *unanimity* in the ESM Board of Governors.

Secondly, the president of the ECB may participate in the meetings of the ESM Board of Governors as observer. It is clear that observers do not have a right to vote, as voting rights are calculated based on the shares of the MS in the ESM.<sup>131</sup> However neither the ESM Treaty nor the Rules of Procedure of the Board of Governors<sup>132</sup> prohibit the president of the ECB from speaking in the debate on the matters under consideration, before the official voting takes place. This enables the ECB to influence the Governors in the Board of Governors. The ECB has the relevant data regarding the monetary situation in the Euro area and moreover, has banking sector information, as it is a prudential supervisor. Because of this, the opinion of the president of the ECB

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<sup>126</sup> Ibid, Articles 5(3) and Article 6(2).

<sup>127</sup> Ibid, Article 13(1).

<sup>128</sup> Ibid, Article 13(3).

<sup>129</sup> Ibid, Article 13(7).

<sup>130</sup> Article 10.2 ESCB Statute.

<sup>131</sup> Ibid, Article 4(7).

<sup>132</sup> Article 5 European Stability Mechanism Rules of Procedure of the Board of Governors, 8 October 2012.

can arguably be seen as reliable and valuable and seems unlikely to be opposed by a Governor of a MS. Thus, the ECB, even though formally not part of the voting process, has its say in the ESM.

Thirdly, the ECB assesses the request for financial support. This is a three-part assessment: the existence of a risk to the financial stability of the Euro area, the sustainability of the public debt of the MS and the actual or potential financing needs of the MS. Undoubtedly, this is one of the few, if not the only task where participation of the ECB in the ESM is fully *justified*. This is because the ECB is best placed to decide on these technical financial matters. As seen in point III of this article, the ECB has the relevant macro-economic data, such as the public debt or the budget deficit, from the ESRB. Also, the ECB, as prudential supervisor for significant banks, has information regarding the liquidity needs of the banks and the real value of their assets. The IMF also has a role to play in the assessment of the public debt, because it has the expertise and data on global imbalances, such as balance of payments.<sup>133</sup> The ECB, as a central bank close to the national and the EU internal financial market, and of the IMF, as actor in the global financial market, complement each other so that a well-supported and thorough examination of the MS in question can be carried out.

Fourthly, the ECB is part of the negotiation process for a MoU. This is the most problematic role of the ECB within the ESM. Exactly as the de Larosière Report warned, the ECB's involvement in the process of providing financial support can be detrimental to its Treaty-protected independence.<sup>134</sup> Participating in the negotiation process means that ECB and the Commission, on the one hand, and the MS concerned, on the other, will define firstly, the financial assistance *instrument to be provided* and secondly, the *conditionality attached* to that assistance.<sup>135</sup> The former can be in the form of cash or cashless disbursement, and the latter in the form of reforms in the banking sector, public finances and markets. The process of negotiating a MoU is highly sensitive both for the one granting the loan and for the one receiving it.

This is because the ESM's capital stock is composed of paid-in shares and callable shares<sup>136</sup> which come from the MS participating in the ESM i.e. from their budgets. Even though the ESM Board of Governors makes the final decision, it is the ECB and the Commission that negotiate the amount and the type of financial support to be provided to the troubled MS. On the other hand,

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<sup>133</sup> Miranda Xafa, Role of the IMF in the Global Financial Crisis (2011) Cato Journal, Vol. 30, No. 3, 2010 available at SSRN: <https://ssrn.com/abstract=2254002> (accessed on 20.05.2017), p. 483.

<sup>134</sup> De Larosière Report, point 171, second subparagraph.

<sup>135</sup> Article 12(1) ESM Treaty.

<sup>136</sup> Article 8 ESM Treaty.

the ECB and the Commission negotiate the structural reforms to be carried out by the MS in its economy, as reciprocity for the loan granted. Such reforms can have different form, but the result is almost always the same - decreasing public expenditure and increasing public revenue. In the short term, this has the effect of lowering the income of the citizens of the MS concerned. Because of this, protests and civil unrest often follow the signing of a MoU.<sup>137</sup> Thus, it can be argued that the ECB and the Commission have at their disposal tax-payers' money and decide under which conditions that money can be given to a MS. Admittedly, the ECB has information regarding the flaws in the economy of the MS and can offer solutions for such problems, however direct involvement in the negotiations is not necessary.

Instead, it can be seen as an undue ECB influence over the economic policies of the MS, since that area is outside of the ECB's competence. Such direct involvement of the ECB in the ESM has several consequences. Most importantly, the independence of the ECB may be jeopardized and its mandate breached. Article 130 TFEU does not apply to the tasks of the ECB within the ESM and clearly, the ECB when fulfilling its tasks within the ESM has to take into consideration the requests of the MS of the ESM and be aware of the political circumstances. On the other hand, that Article applies when the ECB is carrying out the tasks conferred upon it by the Treaties and the ESCB Statute, and requires that the ECB is not influenced by any external body when conducting the monetary policy of the Union. However, it is hard to maintain that the tasks of the ECB within the ESM do not have any repercussions on the conduct of monetary policy. It can be reasonably claimed that the ECB pressured MS, such as Portugal and Spain, into seeking financial assistance from the ESM, by using monetary policy instruments.<sup>138</sup> This, of course, undermines the valued principle of central bank independence and significantly exceeds the narrow mandate of preserving price stability. The high concentration of powers in the hands of the ECB makes it a powerful negotiator within the ESM, but apparently the price for that power is the undermining of the independence of the ECB in monetary policy. Moreover, the reputation of the ECB and the trust in it as an independent EU institution suffer from such interference with the national fiscal or economic policy. The more an expert body, such as the ECB adopts features of a stakeholder or a politician, the more it will lose credibility.<sup>139</sup>

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<sup>137</sup> In this regard see, anti-austerity movements in Greece and Spain.

<sup>138</sup> Thomas Beukers, *The new ECB and its Relationship with the Eurozone Member States: Between Central Bank independence and Central Bank intervention* (2013) CMLR 50, p. 1595.

<sup>139</sup> Kaarlo Tuori, Klaus Tuori, *The Eurozone Crisis, A Constitutional Analysis* (Cambridge University Press 2014), p. 221.

The final task of the ECB within the ESM is to monitor compliance with the MoU. Again, the ECB is in a dominant position as it has at its disposal a wide range of powers. Using the monetary prerogatives granted by the Treaties for the purposes of the ESM must not be allowed, but it is tolerated in practice.<sup>140</sup> Similarly as stated in the previous paragraph, there were cases where the ECB decided to repeal the suspension of the Eurosystem's minimum requirements for credit quality thresholds<sup>141</sup> or to decide to stall the national ELA<sup>142</sup> unless the MS complies with structural reforms in the economy as requested by the signed MoU. Such use of monetary powers in order to coerce a MS into complying with its obligations in the ESM is somewhat justified by the legitimate aim of 'breaking the vicious circle between banks and sovereigns'.<sup>143</sup> National banks buying government bonds in order to prevent sovereign default of the MS, then the government, through the NCB, giving ELA to the same national banks in order to keep them liquid is one of the most aggravating short-term measures to be taken and of course, needs to be stopped. Nevertheless, the ECB and the Court have so far not given *any limit* to the means for achieving such aim, even though the rule of law requires for every action to have its limits.

To sum up, the creation of the ESM and the involvement of the ECB in it, undoubtedly increased the power of the ECB. It is true that a monetary expert body such as the ECB, must have a role to play within an organization the purpose of which is to safeguard the financial stability of the Euro area. However, such role of the ECB should be limited to what is truly necessary. Nevertheless, it seems that the new economic role of the ECB fits it well and the results are obvious, as the crisis is coming to an end, but the repercussions of such new roles to the monetary policy are yet to be seen.

## V. MONETARY ROLE OF THE ECB AFTER GAUWEILER

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<sup>140</sup> Alicia Hinarejos, Institutional Responses to the Crisis p. 6 in Alicia Hinarejos, *The Euro area Crisis in Constitutional*.

*Perspective* (Oxford University Press, 2015).

<sup>141</sup> Decision (EU) 2016/457 of the European Central Bank of 16 March 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus (ECB/2016/5) OJ L 79/41 30.3.2016.

<sup>142</sup> Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus (Press release, accessed on 07.05.2017). <https://www.ecb.europa.eu/press/pr/date/2013/html/pr130321.en.html> (Accessed on 20.04.2016).

<sup>143</sup> Draghi says EU bank union to break 'vicious' circle - <https://euobserver.com/economic/118553> (Accessed on 20.04.2017). Also see, Paul de Grauwe, Design Failures in the Eurozone - can they be fixed? (2013) European Commission Economic Papers 491, p. 9.

Apart from assuming supervisory and economic role, the monetary role of the ECB has also evolved with time. It evolved in sense that the ECB today can act in the field of monetary policy in a way in which was impossible before the crisis. The scope of the monetary policy has significantly broadened during the crisis. Here a reference is made to the *Gauweiler* case,<sup>144</sup> where the Court held, in a very controversial and criticized judgment, that the ECB Outright Monetary Transactions (OMT) programme falls within monetary policy and thus, within the mandate of the ECB. The OMT programme includes purchasing bonds in secondary sovereign bond markets without any restrictions regarding the quantity or the quality of those bonds. The only condition is that the MS must respect the macroeconomic adjustment programme as agreed within the EFSF or ESM. The aim of such a programme is to safeguard the monetary policy transmission and the singleness of the monetary policy.<sup>145</sup> This is clearly a broader aim than the one assigned to the ECB by the Treaties - maintaining price stability.<sup>146</sup> Because of this, the German Constitutional Court (BVerfG) for the first time decided to refer a question to the Court regarding the validity of the OMT programme. Even though the BVerfG is a court 'against whose decisions there is no judicial remedy under national law'<sup>147</sup> and should therefore be obliged to refer a question to the Court, this case cannot be seen as a long overdue normalisation of the relations between the Court and the BVerfG.<sup>148</sup> On the contrary, this case further deepens the troublesome relationship, as it is worded less like a question and more like a statement from the BVerfG. The wording is strict and the claims are well-supported, which makes the Court's task particularly hard, if it is to disagree with the BVerfG. On the other hand, the OMT programme was announced in a press release, which had repercussions on the admissibility of the case.<sup>149</sup> Aside from these procedural aspects, the *Gauweiler* case dealt with important substantial issues for the EMU. The main concerns were whether the OMT programme falls outside of the mandate of the ECB and whether the OMT programme is compatible with Article 123 TFEU.

Firstly, the Court held that the OMT programme falls within the mandate of the ECB, as it is part of the monetary policy of the Union. It defined

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<sup>144</sup> Case *Gauweiler* (n 3).

<sup>145</sup> ECB press release, Technical features of Outright Monetary Transactions, [https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html) (Accessed on 20.05.2017).

<sup>146</sup> Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press, 2015) p. 196-199.

<sup>147</sup> Article 267(3) TFEU.

<sup>148</sup> For the relations between these two courts, see BVerfG [1974] 2 CMLR 540 (*Solange I*); BVerfG [1987] 3 CMLR 225 (*Solange II*); BVerfG [1994] 1 CMLR 57 (*Maastricht* ruling); 2 BvE 2/08, 30 June 2009 (*Lisbon* ruling); BVerfG, 2 BvR 2661/06, 6 July 2010 (*Honeywell*).

<sup>149</sup> Case *Gauweiler* (n 3), para. 23.

monetary policy in accordance with the *Pringle* judgment,<sup>150</sup> by referring to the objectives and instruments of that policy. As mentioned previously, the OMT programme has the objective of safeguarding two elements: the singleness and the transmission of monetary policy. Both of them, even though linked to price stability, are necessarily broader than it. Nevertheless, the Court established that in accordance with Article 119(2) TFEU monetary policy must be 'single', hence the first objective of the OMT programme fell within monetary policy.<sup>151</sup> Even though, such reasoning seems to be tautological and insufficient, the substantial broadening of the ECB's mandate is seen in paragraph 50 *Gauweiler*:

*"The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the 'impulses' which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB's decisions ineffective in a part of the Euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU."*

According to this paragraph, the ECB is able to intervene *in any part of the transmission mechanism*, including the lack of confidence in the markets or the stagnating market for financial services. Such an interpretation of Article 127(1) is clearly at odds with the *ordo liberal* views according to which the ECB was created and the narrow mandate accorded to it by the Maastricht Treaty. The Court continued by stating that any effect of the OMT programme on the stability of the Euro area is 'indirect',<sup>152</sup> even though it may 'increase the impetus to comply with the ESM adjustment programmes'.<sup>153</sup> Thus, in the light of its objectives, in the Court's view the OMT programme falls within monetary policy and within the mandate of the ECB. Moreover, in the light of its instruments, the OMT programme also falls within monetary policy. This is notwithstanding the fact that when the ESM uses the *same instrument* i.e. buying government bonds on the secondary market subject to compliance with

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<sup>150</sup> See point IV of this article.

<sup>151</sup> Case *Gauweiler* (n 3), para. 48.

<sup>152</sup> *Ibid*, para. 52.

<sup>153</sup> *Ibid*, para. 58.

the MoU, it acts within the economic policy.<sup>154</sup> Admittedly, Article 18.1 ESCB Statute enables the ECB and the NCB to ‘operate in the financial markets by buying and selling outright marketable instruments in euro’ and the Court has stressed this in paragraph 54 of *Gauweiler*. The Court distinguished between the ECB and the ESM, again, in light of the different objectives they pursue,<sup>155</sup> thereby giving excessive weight and importance to the objective pursued. As mentioned previously<sup>156</sup>, this puts ECB’s counter party in a court proceeding in a difficult position, as it is difficult to prove that a measure is in fact pursuing a different objective from the one publicly stated.

Secondly, regarding the prohibition of monetary financing contained in Article 123 TFEU, the Court established that there are sufficient safeguards built into the OMT programme that ensure it is in accordance with Article 123 TFEU. The purpose of this Article, seen from its *travaux préparatoires* is to encourage the MS to follow a sound budgetary policy<sup>157</sup> - not to allow a common EMU to lead to ‘moral hazard’ i.e. not to allow the MS to have unsound and reckless budgetary policy, with hope that the Union will bear the cost of such policy, instead of them.<sup>158</sup> The Court held that the OMT programme does not go against such purpose of Article 123 TFEU. The ECB is free to decide if and when to buy government bonds on the secondary markets. It is also free to decide how much it will buy and when to resell those bonds. All this prevents the MS and its creditors to know *with certainty* that the ECB will buy their bonds.<sup>159</sup> Also, the OMT programme applies to the MS which are undergoing a structural adjustment programme. This means that its scope is *restricted*, which minimizes the impact on the financial situation in the Euro area.<sup>160</sup> The fact that ECB ensures a minimum period between the issue and the purchase on the secondary market also helps in this regard.<sup>161</sup>

Thus, the Court, despite the pressure from the BVefrG, decided that the OMT programme is compliant with Union law. It is true that the reasoning in *Gauweiler* may be flawed, however this must not undermine the fact that the OMT programme contributed to the recovery of the EU economy. The famous ‘whatever it takes’ speech by Mario Draghi and the announcement of

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<sup>154</sup> The instruments of the ESM fall within economic policy. See point IV A of this article.

<sup>155</sup> *Ibid*, para. 64.

<sup>156</sup> See page 112.

<sup>157</sup> Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union (1991) Bulletin of the European Communities Supplement 2/91, p. 24 and 54.

<sup>158</sup> For the meaning of moral hazard, Case E-16/11 *EFTA Surveillance Authority v Iceland* [2013], para. 167; See also, Joseph Stiglitz, Incentives and Insurances: The Pure Theory of Moral hazard (1983) 8(26) The Geneva Papers on Risk and Insurance, p. 6.

<sup>159</sup> Case *Gauweiler* (n 3), para. 107.

<sup>160</sup> *Ibid*, para. 116.

<sup>161</sup> *Ibid*, para. 106.

the OMT programme increased confidence in the markets and practically gave them what they wanted to hear.<sup>162</sup> It basically bought time for the troubled MS to reform the economies and become competitive again. With the OMT programme the ECB handled the financial crisis similarly to the Federal Reserve in the USA. In this regard, the Federal Reserve immediately in 2008 announced its Troubled Asset Relief Programme amounting to 700 billion dollars.<sup>163</sup> This calmed the market and made the crisis less severe. In the EU, however, the OMT programme was announced in 2012, when the crisis threatening the very survival of the euro.

## VI. CONCLUSION

The EMU today differs significantly from the EMU before the crisis. The most substantive change is the role of the ECB, which became one of the most influential institutions in the whole EU. This is because the ECB is active in different fields. Firstly, it defines the monetary policy of the EU. Initially, this was the only task of the ECB and it was interpreted narrowly. However, in addition to receiving new tasks, the monetary tasks and powers of the ECB also evolved through the years. The moment when the Court officially sanctioned the expanded mandate of the ECB was the *Gauweiler* case. The Court held that the ECB has a mandate not only to define the monetary policy of the EU by setting the official interest rate, but also to intervene in any part of the transmission mechanism. In this way, the buying of bonds on the secondary market by the ECB was seen as falling within the mandate of the ECB. This broad interpretation of the mandate of the ECB will inevitably have an impact of the functioning of the EMU in the future.

Moreover, the ECB plays a role in the economic policy, through the ESM. Even though the ECB does not have decision-making powers in the ESM, it is very influential as being part of the Troika. The ECB is responsible for, *inter alia*, assessing the request for financial support and negotiating a MoU. By being part of such a process, the ECB can *de facto* influence the economic policy of a MS i.e. adjust the macroeconomic structure of the MS. Before the crisis, the interference of EU institutions with the economic policy of the MS was practically unthinkable. The ECB is a powerful party in the negotiation process,

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<sup>162</sup> Jan Strupczewski, How the sovereign debt crisis changed the euro zone in Harri Kalimo and Max Jansson (eds.) *EU economic law in time of crisis* (Edward Elgar Publishing, 2016) p. 23.

<sup>163</sup> Adelaide D. Lefebvre, *Government Bailout: Troubled Asset Relief Program (TARP)* (Nova Science Publishers, 2010) p. 38. See also, Nicolas Jabko, The Elusive Economic Government and the Forgotten Fiscal Union p. 9, in Matthias Matthijs and Mark Blyth (eds.) *The Future of the Euro* (Oxford University Press, 2015).

as it has at its disposal monetary instruments such as stalling ELA. Such a practise is prohibited under the Treaties as it amounts to misuse of power, however it can rarely be proved in court proceedings.

Lastly, the ECB has supervisory powers in the SSM. This mechanism is flawed both in procedure and in substance. Procedurally, the supervisory decision-making process in the ECB, known as 'reverse majority voting' can be seen as contradicting primary EU law. Substantively, the most troubling aspect of the SSM is the different treatment of banks, which goes contrary to the very purpose of the SSM. This stems from the questionable way in which the ECB was given the power to apply national law, in addition to EU law. This is an unprecedented situation in EU law, and because of this it requires attention and careful regulation. Instead, the SSM Regulation gives the ECB the power to apply national law transposing relevant directives in one single paragraph, without further adjustments or clarifications. Moreover, conferral of supervisory tasks can interfere with the independence of the ECB. When other tasks are conferred upon the ECB, they necessarily influence the implementation of monetary policy. The ECB has exceeded its initial narrow mandate and has correspondingly reduced its independence in monetary policy.

After *Pringle* - where the ECB's participation in the ESM was approved, after *Gauweiler* - where the ECB's mandate was extended, and after the SSM Regulation - where the ECB received supervisory powers and tasks, its main objective was *de facto* revised: from maintaining *price stability* to maintaining *financial stability*. Therefore, it can reasonably be claimed that the ECB today looks more like the Banque de France, than the Bundesbank. The initial influence from the ordo liberal ideas, according to which the only task of a central bank is to preserve price stability and act fully independently, seems to have weakened. The ECB today is a pale imitation of the 1998 ordo liberal ECB, or better said, a paramount version of the original ECB. It is driven by the need for sound economic policy and prudent banking sector, in addition to ensuring a stable monetary policy. Even though this is not necessarily bad, the fact that such shift occurred as a result of a financial crisis and without much debate can be problematic.