

# Accountability of the European Central Bank

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- 1 Art. 2 Treaty on European Union (TEU).
- 2 CJEU 10 July 2003, C-11/00, ECLI:EU:C:2003:395 (*Commission vs. ECB re OLAf*), par. 92 and 110.
- 3 Art. 282(1) TFEU.
- 4 Art. 130 TFEU; Art. 7 of the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute).
- 5 Art. 35 and 36.2 ESCB Statute and corresponding provisions of the TFEU: Art. 263 (review of the legality of acts), 265 (failure to act), 268 and 340 (actions for damages), 270 (staff disputes) and 272 (arbitration).
- 6 Art. 24 Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (*OJ* 2013, L 287/63) (SSM Regulation).
- 7 Such as Quantitative Easing (QE) and the announced Outright Monetary Transactions (OMT), discussed below.
- 8 Note the difference between 'setting' and 'implementing': a fully independent central bank both determines monetary policy and implements this policy free from political interference, while a central bank with lesser autonomy is free to *implement* the monetary policy objectives *set* from time to time by the government.
- 9 The original Treaty on European Union, signed in Maastricht on 7 February 1992.
- 10 For an amendment of the Treaties, an inter-governmental conference and the ratification of its outcome by the parliaments of all 28 (after Brexit: 27) Member States is required: Art. 48(2)-(5) TEU. A simplified amendment procedure may apply (Art. 48(6) TEU) to changes in part three of the TFEU (Union

How accountability of its independent central bank has been organised in the European Union is the focus of this contribution. The European Central Bank's accountability mechanisms (political, administrative and judicial review, auditing, and other means) are explained. They serve to make the central bank responsive to citizens and their representatives for its two main tasks: maintaining price stability (low inflation) and providing financial stability (soundness of the banks in the Euro Area).

## 1 Independence and accountability: two sides of the same coin

In a jurisdiction that professes to be subject to the rule of law,<sup>1</sup> any public authority is subject to democratic accountability and subject to judicial review. So, also, a central bank. The European Central Bank (ECB) is no exception: embedded as it is in the Union framework,<sup>2</sup> the central bank of the European Union (EU)<sup>3</sup> has a great measure of independence<sup>4</sup> but, also, has to account for its policies and acts towards the representatives of the people of Europe and its Member States. Furthermore, the ECB is subject to control by the independent judiciary<sup>5</sup> and, where applicable, to administrative review.<sup>6</sup> The role of the ECB in fighting the financial and sovereign debt crisis has led to much criticism of the instruments employed.<sup>7</sup> How responsive to criticism is the central bank and what mechanisms of accountability can be used by critics?

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This contribution sketches the framework of accountability of the ECB, against the backdrop of the independence granted to the central bank and prudential supervisor of banks in the Euro Area. Before doing so, it is necessary to introduce the concept of 'central bank independence' and its rationale, while discussing the commonality with the independence of supervisory authorities. Thus, after two paragraphs devoted to independence under the two main functions (2), and an interim

section on the appearance during the writing of this contribution of an extensive account by the ECB itself (3), I will discuss political accountability (4), administrative and judicial review (5), and further accountability mechanisms, including auditing, fraud prevention and the oversight of the ECB's troika role (6). I will conclude with an outlook on how to make the ECB account for the use of its competences (7).

## The idea of granting independence to central banks, in setting and implementing monetary policy, was firmly implanted in western thinking in the 1980

### 2 Independence of central banks and supervisory authorities

The idea of granting independence to central banks, in setting and implementing monetary policy,<sup>8</sup> was firmly implanted in western thinking in the 1980s, at a time when liberalisation of economic activities, privatisation of public functions and a retreat from day-to-day politics in the steering of an economy gained ground. The rationale is that monetary policy, i.e. the set of measures to maintain the value of a currency and to keep inflation (the decline of the purchasing power of a given currency) low, is best attributed to independent experts who are unlikely to succumb to short-termism and to inflating the money supply ahead of elections. Keeping the guardian of the currency aloof from daily politics would contribute to the provision of the public good of price stability. When the Maastricht Treaty<sup>9</sup> was negotiated, the independence of the newly established central bank was an agreed postulate, also due to its modelling on the most independent and successful of central banks, Germany's Bundesbank. Whereas, in national democracies, such independence is embedded in law and, thus, subject to change by parliament (perhaps with a higher threshold than for ordinary legislation as it may be

considered a constitutional change), in the EU, the central bank's mandate and independence are embedded in the Treaty on the Functioning of the European Union (TFEU), thus elevating its independence to super-constitutional status, given the complexity of altering primary Union law.<sup>10</sup>

The TFEU ensures the independence of the ECB in several aspects. The core provision (Art. 130 TFEU; Art. 7 ESCB Statute) prohibits the seeking or taking of instructions by the ECB, the National Central Banks (NCBs) and the members of their decision-making bodies from any political authority at EU or Member State level. This is mirrored by an injunction, in the same provision, to the latter authorities to respect this independence and 'not to seek to influence the members of the decision-making bodies of the [ECB] or of the [NCBs] in the performance of their tasks'.<sup>11</sup>

The *institutional* independence is grounded in the separate legal personality of the ECB (which, since the Lisbon Reform Treaty,<sup>12</sup> is an institution of the Union and, before, was a separate Community body).<sup>13</sup> The *personal* independence of the central banks is guaranteed by the appointment process,<sup>14</sup> and the protection against dismissal on policy grounds,<sup>15</sup> of members of the Executive Board of the ECB<sup>16</sup> and of NCB Governors,<sup>17</sup> who together constitute the Governing Council of the ECB.<sup>18</sup> The *financial* independence of the ECB is guaranteed by its own finances which are not included in the Union budget. The financial transactions central banks engage in, and the return on the investment of the foreign reserves they hold and manage, produce results which make the central banks autonomous from national or EU budgets. (Since it began its supervisory function, the costs incurred for this task have been borne by the credit institutions under the ECB's supervision. Pursuant to the enabling regulation, the ECB levies annual supervisory fees on the banks which may not exceed the expenditure for the supervisory tasks.<sup>19</sup>) The financial independence is further underpinned by the limited scrutiny by the Court of Auditors, which is to assess the ECB's 'oper-

policies and internal actions); such a revision may not increase the Union's competences. See the *Pringle* judgment of 27 November 2012 (C-370/12, ECLI:EU:C:2012:756), for the application of this distinction in the area of Economic and Monetary Union (EMU).

- <sup>11</sup> Aforementioned Art. 130 TFEU and Art. 7 ESCB Statute. In its *OLAF* judgment, CJEU 10 July 2003, C-11/00, ECLI:EU:C:2003:395 (*Commission vs. ECB re OLAF*), the Court found that '[Art. 108 EC Treaty, currently Art. 130 TFEU] seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute.' In the *Gauweiler* judgment, the Court preceded a citation of these lines with: '[...] it is apparent from Article 130 TFEU that the ESCB is to be independent when carrying out its task of formulating and implementing the Union's monetary policy. It can be seen from the wording of that Article that it is intended to shield the ESCB and its decision-making bodies from external influences which would be likely to interfere with the performance of the tasks which the TFEU Treaty and the Protocol on the ESCB and the ECB assign to the ESCB': CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Gauweiler and Others vs. Deutscher Bundestag*).
- <sup>12</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (*OJ* 2007, C 306/01).
- <sup>13</sup> For the pre-Lisbon status of the ECB, see my inaugural address at University of Amsterdam: R. Smits, *The European Central Bank in the European constitutional order*, Utrecht: Eleven International Publishing 2003.
- <sup>14</sup> See Art. 283(2) TFEU and Art. 11(2) ESCB Statute.
- <sup>15</sup> The CJEU can, under certain circumstances, order compulsory retirement of ECB Directors (Art. 11.4 ESCB Statute); similar grounds may apply under national law with a direct appeal to the European Court against a national measure to dismiss a Governor, a unique feature in EU law (Art. 14.2 ESCB Statute). The suspension of the Latvian central bank governor in the Spring of 2018 in the context of alleged bribery allegations by the owner of a Latvian bank, led the ECB and the NCB Governor (Case C-202/18) to challenge this act before the CJEU. In *ECB vs. Latvia* (C-238/18, ECLI:EU:C:2018:581) an Order was issued on 20 July 2018, instructing Latvia to suspend measures which prevent the Latvian NCB Governor from appointing an alternate to represent him in the Governing Council of the ECB. The Advocate General issued her Opinion in these cases on 19 December 2019; ECLI:EU:C:2018:1030.
- <sup>16</sup> Art. 283(2), second subparagraph, TFEU; Art. 11.2 ESCB Statute.
- <sup>17</sup> Art. 14.2 ESCB Statute.
- <sup>18</sup> Art. 10.1 ESCB Statute.
- <sup>19</sup> Art. 30 SSM Regulation (Supervisory fees).
- <sup>20</sup> Art. 27.2 ESCB Statute. See, also, the lines on the *OLAF* case under *Fraud prevention* below.
- <sup>21</sup> As well as to activation of its own prudential supervisory task: Art. 127(6) TFEU; see the SSM Regulation.
- <sup>22</sup> See Regulation (EC) 2531/98 of the Council of 23 November 1998 concerning the application of minimum reserves by the European Central Bank (*OJ* 1998, L 318/1); Regulation (EC)



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2533/98 of the Council concerning the collection of statistical information by the ECB (*OJ* 1998, L 318/8); Regulation (EC) 2532/98 of the Council of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions (*OJ* 1998, L 318/4). Note that there are also ECB regulations on minimum reserves, statistics and sanctions. In my thesis, I have argued for deeper involvement of the European Parliament in the adoption of the Ecofin Council regulations than foreseen by Art. 129(4) TFEU and Art. 31 ESCB Statute, which provide for mere consultation of the EU parliament (R. Smits, *The European Central Bank – Institutional Aspects* (diss. Amsterdam UvA), The Hague: Kluwer Law International 1997, p. 177).

23 Art. 132(1) and (2) TFEU; Art. 34.1 and 34.2 ESCB Statute.

24 Art. 132 (3) TFEU; Art. 34.3 ESCB Statute. See Regulation (EU) 2532/98, as amended by Regulation (EU) 2015/159 of the Council of 27 January 2015 (*OJ* 2015, L 27/1).

25 Thus possibly countering what is commonly referred to as 'regulatory capture', a tendency by the supervisor to adopt the attitude and thinking of the supervised and to promote the interest of the industry rather than the public interest in the service of which they are mandated to operate.

26 Art. 4(1)(1) Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (*OJ* 2013, L 321/6) (CRR).

ational efficiency',<sup>20</sup> thus staying aloof from ECB policy decisions. *Functional independence* concerns the freedom of the ECB to act without resort to the political authorities: the ECB conducts policy without instructions or directions for individual measures. Only in respect of the imposition of minimum reserves, the collection of statistics and the sanctioning of infringement of the ECB norms,<sup>21</sup> is it for the political authorities to provide the framework for the ECB's functioning;<sup>22</sup> within this structure, the ECB takes autonomous decisions in these fields.

Note that the ECB has its own regulatory power in its fields of competence<sup>23</sup> and may impose fines and periodic penalty payments.<sup>24</sup> Such legal acts are subject to judicial and, in the field of prudential supervision, to administrative review.

*Autonomy of supervisory authorities*  
Before outlining the accountability mechanisms that counterbalance this deep independence, it is useful to

introduce the independence of supervisory authorities, which is adjacent to but not similar to a central bank's independence. Supervisory authorities, over any business activity, are usually granted a measure of autonomy from the political authorities, for several reasons: their specific expertise and the need to ensure supervision unfettered by other considerations than those resulting from the objective of oversight<sup>25</sup> plead for a status apart from the main government departments. Such independence is also prescribed for competent authorities designated to supervise credit institutions (EU parlance for 'banks'<sup>26</sup>): they need to 'have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to prudential supervision, investigations and penalties set out in [Capital Requirements Directive IV (CRD IV) and Capital Requirements Regulation (CRR)]'.<sup>27</sup> This independence is somewhat different from the



autonomous position of central banks: the substantive norms and the instruments to be pursued in the interest of the safety and soundness of the banks and the financial system at large are adopted by the legislators, usually following global standards setting whereas, in monetary policy, only the ultimate objective of price stability is set at the political level<sup>28</sup> and the conduct of the policies conducive to that goal are for the central bank to devise and enact. Competent authorities apply the prudential norms set by the global standard setters<sup>29</sup> and (national and/or EU) legislators, making use of the instruments given in their statutory mandates. While this resembles the independence of a monetary authority,<sup>30</sup> it is not altogether similar to central bank independence.

### 3 An accountability report by the ECB is published! What does this author do now?

In the month during which this contribution was to be written, the ECB published its latest *Economic Bulletin* containing an extensive explanation of the accountability practices as they developed during the financial and sovereign debt crisis.<sup>31</sup> Over 25 pages, the authors give detailed information about accountability, accompanied by graphs, tables, boxes and charts, in vivid colours. What does one do when confronted with such an appealing source? This author chose to continue writing this contribution while inviting you, the reader, to also acquaint yourself with the highly readable article, while always acknowledging that it is an ECB publication.<sup>32</sup> Other, more critical publications on the accountability of the ECB should be mentioned as well.<sup>33</sup>

### 4 Political accountability

#### *Concept of accountability*

Extensive literature exists on what accountability means in relation to central banks.<sup>34</sup> This is not the place to go into this debate. Some consider 'true' accountability as providing for an override mechanism which allows the

principal (the legislator, the executive) to override the agent (the independent monetary authority) and to instruct it to act otherwise. In my view, democracy can be likened to an 'ART',<sup>35</sup> involving accountability, representation and transparency. Applied to the central bank, its Accountability consists in an *ex post* giving reasons requirement, with *ex ante* Transparency of the procedures and mechanisms the central bank should follow in its operations, and with a true dialogue with the people's Representatives, the executive and stakeholders. This accountability provides what is dubbed 'output legitimacy', i.e. that the effectiveness of policies to serve the people justify the actions undertaken, which contrasts with 'input legitimacy', where prior democratic choices legitimise a chosen path. As a third form of accountability, 'throughput legitimacy' looks at what happens between these two. In the case of the ECB, the democratic legitimacy of the independent central bank is sometimes considered to begin with the process of its creation (through the adoption of the Treaty provisions which have been adopted democratically).<sup>36</sup> However, I consider that the political processes in place for the appointment of its governors and their interaction with politicians as well as the accountability mechanisms for the ECB provide continued legitimacy throughout its life.

### In my view, democracy can be likened to an 'ART', involving accountability, representation and transparency

#### *General*

There are a number of political accountability mechanisms in place, vis-à-vis the other institutions.<sup>37</sup> Below, these mechanisms are grouped under several headings in accordance with the kind of accountability instrument,<sup>38</sup> while the framework of accountability for banking supervision is separately discussed. Sections 5 and 6 below discuss further methods of giving account by the ECB.

- 27 Art. 4(4) Directive (EU) 2013/36 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, (*OJ* 2013, L 176/338) (CRD IV).
- 28 In the European Union, by Art. 127(1) TFEU and Art. 2.1 ESCB Statute: 'The primary objective of the ESCB shall be to maintain price stability'. The provisions add: 'Without prejudice to the objective of price stability, it shall support the general economic policies in the Union with a view to contributing to the achievements of the objectives of the Union as laid down in Article 3 [TEU]'.
- 29 Notably, the Basel Committee on Banking Supervision, the Financial Stability Board and, in the area of combatting money laundering and terrorist financing, the Financial Action Task Force.
- 30 Note that the independence given to the ECB and the NCBs by the Treaty extends to all their 'tasks and duties' which, beyond monetary policy, include the conduct of foreign-exchange operations, the management of foreign reserves, the promotion of the payment systems, the issuance of bank notes, the control of the issue of coins and statistical functions: Art. 127(2) and (5), 128 and 219(1) and (2) TFEU; Art. 3.1, 4, 5 and 16 ESCB Statute.
- 31 N. Fraccaroli, A. Giovannini & J. Jamet, 'The evolution of the ECB's accountability practices during the crisis', *Economic Bulletin* 2018, Issue 5, at: [www.ecb.europa.eu/pub/pdf/ebu/eb201805.en.pdf](http://www.ecb.europa.eu/pub/pdf/ebu/eb201805.en.pdf).
- 32 With which I may differ at some points, specified in this contribution.
- 33 D. Curtin, "Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency', *European Law Journal* (23) 2017, Issue 1-2, p. 28-44; F. Coman-Kund, A. Karatzia & F. Amtenbrink, 'The Transparency of the European Central Bank in the Single Supervisory Mechanism', *Credit and Capital Markets* (51) 2018, Issue 1, p. 55-72.
- 34 Summarised in T. Teschle, 'Instrumentalising EMU's democratic deficit: the ECB's unconventional accountability measures during the eurozone crisis', *Journal of European Integration*, published online 29 August 2018; <https://doi.org/10.1080/07036337.2018.1513498>.
- 35 R. Smits, 'From subordinated to prominent: the role of the European Commission in EMU – Reflections on Euro Area democracy', in: L. Daniele, P. Simone & R. Cisotta (eds.), *Democracy in the EMU in the Aftermath of the Crisis*, Cham: Springer/Giappichelli 2017, p. 51-71.
- 36 C. Zilioli, Antrittsrede, Institute for Law and Finance, Goethe Universität, Frankfurt am Main, 5 July 2016. For a recent exchange of views on the ECB's accountability and transparency, see the contributions by various speakers and panellists at the ECB Legal Conference 2017 *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4-5 September 2017, at: [www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf](http://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf).
- 37 NCBs also report on ESCB policies and activities to the political bodies in their own jurisdictions and their actions and omissions are subject to judicial review: elements of accountability of the ESCB as a whole.
- 38 See, more extensively, R. Smits, 'Central Bank Independence and Accountability in the light of EMU', in M. Giovanoli (ed.) *International*

*Monetary Law, Issues for the New Millennium*, New York: Oxford University Press 2000, p. 245-266.

- 39 This is the Council (of Ministers) of the European Union in the composition of the Ministers of Economic and Financial Affairs.
- 40 And in the meetings of another, temporary ECB decision-making body, the General Council (Art. 44-47 ESCB Statute).
- 41 Art. 284(1) TFEU.
- 42 See Smits 2017, notably at p. 66-67.
- 43 Foreseen in Art. 284(2) TFEU.
- 44 Art. 1 of Protocol No. 14 on the Euro Group (OJ 2008, C 115/01).
- 45 Art. 6(2) Treaty establishing the European Stability Mechanism (OJ 2011, L 339/1) (ESM Treaty).
- 46 The ESM may 'mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members [i.e., EU States that use the euro, RS] which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States': Art. 3 ESM Treaty.
- 47 Art. 284(3) TFEU.
- 48 Introductory statement to the press conference (with Q&A), Mario Draghi, President of the ECB, Frankfurt am Main, 6 November 2014, at: [www.ecb.europa.eu/press/pressconf/2014/html/is1411106.en.html](http://www.ecb.europa.eu/press/pressconf/2014/html/is1411106.en.html).
- 49 Art. 284(3) TFEU; Art. 15.3 ESCB Statute.
- 50 Information on euro foreign exchange reference rates prevailing in the markets are given by the ECB at its website and, oddly enough, then reported on a daily basis in the Official Journal by the Commission: an indication of the relevance of the political authority in the realm of exchange rates or a remnant of the past when the Commission published ECU exchange rates (the ECU was the basket currency preceding the euro)? See Information and Notices, Euro exchange rates (OJ 2018, C 299/1) at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2018:299:TOC>.
- 51 Art. 15.1 and 15.2 ESCB Statute.
- 52 Art. 15.4 ESCB Statute.
- 53 See: European Parliament, [www.europarl.europa.eu/committees/en/econ/questions-ecb.html](http://www.europarl.europa.eu/committees/en/econ/questions-ecb.html).
- 54 See: ECB, [www.ecb.europa.eu/pub/pub/intco/html/index.en.html?skey=letter](http://www.ecb.europa.eu/pub/pub/intco/html/index.en.html?skey=letter).
- 55 Live-streamed and available as webcasts afterwards, see: ECB, [www.ecb.europa.eu/press/tvservices/webcast/html/index.en.html](http://www.ecb.europa.eu/press/tvservices/webcast/html/index.en.html).
- 56 Art. 10.4 ESCB Statute.
- 57 President Mario Draghi of the ECB used the conference celebrating the 200th anniversary of the Dutch central bank to announce this initiative: M. Draghi, 'Monetary policy communication in turbulent times', speech at the Conference *De Nederlandsche Bank 200 years: Central banking in the next two decades*, Amsterdam, 24 April 2014, at: [www.ecb.europa.eu/press/key/date/2014/html/sp140424.en.html](http://www.ecb.europa.eu/press/key/date/2014/html/sp140424.en.html).
- 58 These accounts are available a month later in English and can be accessed at the ECB's website under 'Monetary policy accounts'; see: ECB, [www.ecb.europa.eu/press/accounts/2018/html/index.en.html](http://www.ecb.europa.eu/press/accounts/2018/html/index.en.html).

### *Mutual representation in decision making bodies*

The President of the Ecofin Council<sup>39</sup> and a member of the Commission may participate in Governing Council meetings,<sup>40</sup> without the right to vote, and the Ecofin Council President may submit a motion for deliberation to the Governing Council.<sup>41</sup> Elsewhere, I have deplored the absence of a more prominent role for the Commission, as the EU executive.<sup>42</sup>

A mirroring arrangement is the participation of the ECB President in Ecofin Council meetings.<sup>43</sup> Pursuant to the rules governing the Euro Group, the ever more important 'informal' meeting of the ministers of economic and financial affairs of the Euro Area without its own decision-making competences, the ECB 'shall be invited to take part in' its meetings.<sup>44</sup> One should also note that the ECB President may appoint an observer in the Board of Directors of the European Stability Mechanism (ESM),<sup>45</sup> the arrangement for financial support of individual Euro Area Member States when urgently needed.<sup>46</sup>

This mutual representation by politicians at the central bank's highest decision-making body and vice-versa, enables coordination and mutual information, whilst allowing for immediate accountability vis-à-vis the political representatives.

### *Appearance before the European Parliament*

The ECB President and other members of its Executive Board may be heard by the competent committees of the European Parliament, at the request of the European Parliament or on their own initiative.<sup>47</sup> The ECB President is to present the annual report to the European Parliament (as well as to the Ecofin Council), with Parliament holding 'a general debate on that basis'. It is this relationship with the direct representatives of the people of Europe that has been expanded into the central accountability mechanism, also in the eyes of the ECB itself. In the words of ECB President Mario Draghi: 'Never forget that the ECB is accountable to the European Parliament, not necessarily to the national parliaments. We

have accepted invitations that national parliaments have kindly extended to us, but the normal counterparty is the European Parliament.'<sup>48</sup>

## The ECB has expanded its reporting on its own initiative. A tradition of answering questions by individual MEPs has blossomed

### *Required reporting requirements and own initiatives on reporting; answering MEP questions*

Before elaborating on the interaction with the European Parliament, the accountability through reporting should be mentioned. The ECB is to report regularly, through periodic publications. Annually, a report is to be submitted to the European Parliament, the Council, the Commission and the European Council.<sup>49</sup> Quarterly and weekly reports<sup>50</sup> are mandated by the Statute,<sup>51</sup> free of charge.<sup>52</sup> Beyond what is mandated, the ECB has expanded its reporting on its own initiative: since it was founded, in 1998, it has been reporting on a monthly basis through the *Monthly Bulletin*; since 2015 replaced by the *Economic Bulletin* that is published eight times a year. A tradition of answering questions by individual Members of the European Parliament (MEPs) has blossomed, with the ECB answering questions and the dialogue published on the websites of the European Parliament<sup>53</sup> and the ECB.<sup>54</sup> Also, the ECB organises a press conference immediately after each Governing Council meeting.<sup>55</sup> While the European System of Central Banks (ESCB) Statute prescribes confidentiality of the proceedings of the meetings of the Governing Council,<sup>56</sup> the option given in that same article to 'decide to make the outcome of its deliberations public' has allowed the Governing Council<sup>57</sup> to begin publishing accounts of its monetary policy meetings in 2015.<sup>58</sup> An explanation is in order here: the confidentiality of the *minutes* of the meetings of the Governing Council was introduced at a time of much lesser transparency (early 1990s) and with

the justified purpose of shielding NCB Governors from criticism from their 'own' Member State if their individual position was made public. Governors of the NCBs, which 'are an integral part of the ESCB',<sup>59</sup> are bound to work in the European interest only and are not their Member States' representatives, like ministers of Finance in the Ecofin Council. Publishing *accounts* of the monetary policy part of the meeting of the Governing Council, practised since 2015, permits transparency without flouting the protection against undue exposure of national NCB Governors in the execution of their European mandate.

In an effort to reach out to national constituencies, aware that the live-streaming of the monetary dialogue and the press conferences are unlikely to reach most Europeans, the ECB President has paid visits to national parliaments

#### *Appearances before national parliaments*

As briefly intimated, outside the relations with the European Parliament which are based on the Treaty on the Functioning of the European Union, during the crisis, the ECB has also connected with national parliaments. In an effort to reach out to national constituencies, aware that the live-streaming of the monetary dialogue and the press conferences are unlikely to reach most Europeans, the ECB President has paid visits to national parliaments. His opening speeches in Berlin (2012 and 2016), Madrid and Paris (2013), Helsinki (2014), Rome (2015) and The Hague (2017) are available at the ECB website.<sup>60</sup> Contrary to the views apparently prevalent at the ECB,<sup>61</sup> I consider these appearances more than a public relations exercise and part of the inclusion of national parliaments in the political accountability of the ECB. This *monetary dialogue* with national

lawmakers formed part of an array of what Teschle calls *unconventional* and *ad hoc* accountability measures.<sup>62</sup> It is in line with the increased role of national parliaments in the *economic dialogue*.<sup>63</sup> The role of national parliaments is also more pronounced in the newly assumed ECB task of banking supervision.

#### *Banking supervision*

The introduction, in 2014, of the Single Supervisory Mechanism (SSM), the term for the joint supervision by the ECB and National Competent Authorities (NCAs) of the Euro Area Member States of the banks operating in the Euro Area, has led to new mechanisms of accountability. Notably, when accounting for its supervisory tasks, the ECB is to answer questions from the Euro Group, beyond questions from MEPs, has to specifically report on ten elements of supervision in its annual report, and must have confidential oral discussions with representatives of the European Parliament in specific cases. This broader accountability reflects the different approach to independence for prudential tasks compared to the independence for monetary policy-related tasks, discussed before. At the same time, the provisions on independence in the SSM Regulation are largely identical to the Treaty texts.<sup>64</sup> They add that the Supervisory Board, the newly introduced organ to prepare Governing Council decisions in the area of prudential supervision, is to 'act independently and objectively in the interest of the Union as a whole',<sup>65</sup> beyond avoidance of instructions from any side.<sup>66</sup> The instances from which instructions may be neither sought nor taken are instructed to respect the independence of the ECB and the NCAs.<sup>67</sup>

Again, the accountability mechanisms begin with *mutual participation in meetings*: here, the role of the Commission as the initiator of EU legislation in the Single Rulebook, the body of prudential supervisory standards adopted for the banking industry EU-wide,<sup>68</sup> is recognised in that its representative, rather than a representative of the Council,<sup>69</sup> may attend the Supervisory Board as an observer.<sup>70</sup> The Chair of the Supervisory Board

59 Art. 14.3 ESCB Statute.

60 See, also, Table 1 in Teschle 2018.

61 'While the ECB's interaction with national parliaments is not part of its accountability activities' is the intro of the footnote on these appearances in the ECB *Economic Bulletin* 2018, Issue 5, p. 59.

62 Teschle 2018, p. 2. He considers that 'the ECB co-opts national parliaments to penetrate the national public sphere, thereby causing a virtuous cycle of revived support for central bank independence and increasing output legitimacy', see Teschle 2018, p.12.

63 In new economic governance legislation adopted during the crisis (the so-called 'six-pack' of 2011 and the 'two-pack' of 2013), an economic dialogue was introduced between the Council and the Euro Group with the European Parliament, a dialogue that may include discussions with national parliaments. See Articles 3 and 8 Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, *OJ L 140/1*, 27.5.2013.

64 Compare Art. 19 SSM Regulation with Art. 130 TFEU and Art. 7 ESCB Statute.

65 In view of the separation between the EU (28 members) and the Euro Area (19 members), the instruction to serve the interest of the Union as a whole is remarkable. Since the sovereign debt crisis, there has been a tendency towards more separate Euro Area responsibilities, even if informally, e.g. the Euro Area Summit.

66 Art. 19(1) SSM Regulation mentions: 'the institutions or bodies of the Union, from any government of a Member State or from any other public or private body'.

67 Art. 19(2) SSM Regulation.

68 See the interactive Single Rulebook at the website of the European Banking Authority (EBA), at: EBA, [www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook](http://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook).

69 A member of the Council, the EU institution representing the governments of the Member States, and a member of the Commission, the EU executive, may participate in meetings of the Governing Council (Art. 284 TFEU). This right to attend (without voting rights) has been granted in the Maastricht Treaty in view of the ECB's monetary policy task. These representatives may attend the Governing Council, which is the ECB's ultimate decision-maker, also in the area of prudential supervision: draft supervisory decisions are prepared by the Supervisory Board and are considered adopted unless the Governing Council objects within two weeks (Art. 26(8) SSM Regulation).

70 Art. 26(11) SSM Regulation, which adds that observers may not access confidential information relating to individual institutions.



attends regular hearings at the European Parliament and exchanges views with the competent committee of the European Parliament,<sup>71</sup> and with the Euro Group.<sup>72</sup>

*Answering questions* from the politicians is another venue of accountability, as is regular *reporting*. Not only questions from MEPs,<sup>73</sup> but also from the Euro Group are to be answered.<sup>74</sup> The *annual report* on supervisory tasks to the European Parliament, the Ecofin Council, the Euro Group, the European Commission and the national parliaments of participating Member States initiates this dialogue.<sup>75</sup>

Special arrangements have been agreed to respect the confidentiality of supervisory work. ‘Confidential oral discussions behind closed doors’ are foreseen between the Chair of the Supervisory Board and the Chair and Vice-Chairs of the European Parliament’s competent committee.<sup>76</sup> These arrangements have been elaborated in a Memorandum of Understanding with the Council<sup>77</sup> and an Inter-Institutional Agreement with the European Parliament.<sup>78</sup>

## Central banks are not used to being held accountable before the courts, at least not in the core activity of monetary policy

### 5 Administrative and judicial review

Special mention should go to the administrative and judicial review of acts of the ECB, which is an aspect of accountability, not towards the political authorities (parliament, executive) but vis-à-vis the judiciary or, in the case of administrative review, an independent review board. The acts or omissions of the ECB are subject to judicial control by the European Courts.<sup>79</sup> The European Courts apply a deferential standard of review to the legal acts adopted by the EU’s other institutions, allowing them discretion to decide complex cases in which their expertise is not ‘second-guessed’ by the judiciary. This standard applies to economic policy-related

issues, including the enforcement of competition law. The Courts will establish whether a contested decision is impaired by a manifest error, whether there has been a misuse of powers, and whether the limits of the institution’s competences have been upheld, while also checking whether the relevant procedural rules, in particular on due process, have been complied with, whether the statement of reasons is sufficient and whether the facts on which a contested decision was based were accurately set out. Thus, they guard that such discretionary measures are lawful, consistent and proportionate.

Central banks are not used to being held accountable before the courts, at least not in the core activity of monetary policy. Objections to interest rate decisions and other monetary policy measures do not lend themselves easily to adjudication before the courts, as most acts are of a general nature and standing for affected parties is lacking.<sup>80</sup> Moreover, monetary policy differences are best debated in the public domain rather than litigated on against a monetary authority with top expertise and deep pockets. Yet, the unconventional monetary policy measures have found their way into the court room, with proceedings starting in Germany against such measures ending up before the European Court of Justice: non-standard interventions by the ECB have been challenged in German court, with references made to the Luxembourg judges.

The main argument by the plaintiffs in these German constitutional cases is the lack of competence for the ECB to engage in such ‘non-standard measures’. The ECB’s announcement of a programme of Outright Monetary Transactions (OMT),<sup>81</sup> planned but never implemented, became an issue before the German Constitutional Court, which referred questions on the interpretation of the ECB’s powers to the Court of Justice of the European Union (CJEU). These OMT were meant to restore the transmission channels of monetary policy, which had become unhinged because of extreme interest rate differentials between Member States: ECB interest rate decisions no longer translated into interest rates prevailing in ‘the real economy’ across

71 Art. 20(3), (5) and (8) SSM Regulation.

72 Art. 20(3) and (4) SSM Regulation.

73 Chart A on p. 57 in the ECB *Economic Bulletin* 2018, Issue 5 specifies the increasing number of questions on supervisory matters posed by MEPs.

74 Art. 20(6) SSM Regulation.

75 ECB, *ECB Annual Report on supervisory activities 2017*, at: [www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2017.en.html](http://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2017.en.html).

76 Art. 20(8) SSM Regulation.

77 Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), at: [www.ecb.europa.eu/ecb/legal/pdf/mou\\_between\\_eucouncil\\_ecb.pdf](http://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf).

78 Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU) (OJ 2013, L 320/1), at: [www.ecb.europa.eu/ecb/legal/pdf/celex\\_32013q113001\\_en\\_txt.pdf](http://www.ecb.europa.eu/ecb/legal/pdf/celex_32013q113001_en_txt.pdf).

79 Art. 35 ESCB Statute and relevant provisions of the TFEU: Art. 263 (legality review), 265 (failure to act), 267 (preliminary rulings on the interpretation and validity of acts), 268 (actions for damages) and 270 (staff disputes). A special provision is Art. 35.6 ESCB Statute and Art. 271(d) TFEU: the ECB may bring an NCB before the Court in case of alleged non-fulfilment of its Treaty and Statute obligations.

80 Discussed in R. Smits, ‘Competences and alignment in an emerging future – After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop’, *ADEMU Working Paper Series* 2017, 77, at: <http://ademu-project.eu/wp-content/uploads/2017/12/0077-Competences-and-alignment-in-an-emerging-future.pdf>.

81 ECB Press Release ‘Technical features of Outright Monetary Transactions’, 6 September 2012, at: [www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html).

82 Which, legally, is irreversible: the adoption of the euro and the replacement of the former national currency (‘legacy currency’) is irrevocable: Art. 119 and 140(3) TFEU, and the Protocol on the transition to the third stage of economic and monetary union, attached to the Maastricht Treaty (repealed by the Lisbon Treaty in the unjustified belief that the irreversibility of the single currency had been firmly established).

83 M. Draghi, speech at the Global Investment Conference, London, 26 July 2012, at: [www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html](http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html).

84 Art. 5(1) and (2) TEU.

85 CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Gauweiler and Others vs. Deutscher Bundestag*).

the currency union. Beyond the wish to re-establish the unity of monetary policy across the Euro Area, the ECB wanted to restore confidence in the irreversibility of the single currency.<sup>82</sup> In 2012, speculation on the demise of the euro was rife and preparations for a return to legacy currencies were on-going in legal and finance circles. To rebut this trend, President Mario Draghi announced in London in July 2012 that 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.'<sup>83</sup> Lawyers note the first three words in this statement; the ECB is subject to the principle of conferral, or specific attribution of powers,<sup>84</sup> another guarantee against unfettered exercise of its powers by the central bank.

### The ECB's reasoning that, for its single monetary policy to work, it may have to ensure that interest rate conditions in the 19 Member States do not diverge too much, was accepted

In its *Gauweiler* judgment,<sup>85</sup> the European Court found that the ECB acted within its mandate when announcing the OMT.<sup>86</sup> The ECB's reasoning that, for its single monetary policy to work, it may have to ensure that interest rate conditions in the 19 Member States do not diverge too much, was accepted. Also, linking any purchases of government bonds under the OMT to a programme of economic adjustment policies agreed by the government with the EU was considered an acceptable condition to apply by the ECB: it did not overstep its competences (which are for *monetary* policy, not *economic* policy) but executed its mandate, which includes the injunction to support the general economic policies in the Union.<sup>87</sup>

A similar case was decided by the European Court after this manuscript was finished. It concerns the central bank's 'Quantitative Easing':<sup>88</sup> a programme of purchases of bonds with the intention to drive down the returns on

these securities (interest rates relate inversely with bond prices) and thus to nudge financial market parties towards lending to the real economy. These large-scale transactions include purchases of government bonds under the so-called public sector purchase programme (PSPP). In answer to the referring German Constitutional Court, the ECJ found in the *Weiss* case<sup>89</sup> that the PSPP is within the ECB's mandate, concerns monetary policy rather than economic policy (which is largely reserved to the Member States and not a competence of the ECB<sup>90</sup>) and does not conflict with the prohibition of 'monetary financing' of Article 123 TFEU (central banks are forbidden to grant credit to public authorities).

Overstepping the boundaries of its mandate, foraying into economic policy setting, is also an objection raised against the ECB's participation in the 'troika', the three creditor agencies involved in financing of Member States whose governments could no longer finance themselves on the capital markets during the crisis. Other Member States collectively, acting through facilities with a AAA rating specially set up to this effect,<sup>91</sup> borrow on the international capital markets and on-lend the proceeds to governments that are unable to borrow themselves. Such lending is conducted on strict conditionality, drawn up by the European Commission, the International Monetary Fund (IMF) and the ECB. Affected parties (people who were hurt by economic policy 'conditionality' which had reduced their income, or investors who had been exposed to a reduction in the value of their Greek bond holdings or Cypriot Bank exposures) have sought relief against such measures before the courts. While they were considered not to have standing<sup>92</sup> or the measures were not held to be taken by the agents against which the plaintiffs acted,<sup>93</sup> the European Court held that the Commission and the ECB are bound to ensure that measures adopted in the context of the ESM conform with human rights as laid down in the EU Charter of Fundamental Rights.<sup>94</sup>

In the specific area of prudential supervision of banks, legal acts may be challenged before the Court or, alterna-

86 See V. Borger, 'Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*', *CMLR* (53) 2016, Issue 1, p. 139-196.

87 See Art. 127(1) TFEU and Art. 2 ESCB Statute, cited in footnote 28 above.

88 QE has also been employed by the American and UK central banks to push their economies out of the crisis.

89 CJEU 11 December 2018, C-493/17, ECLI:EU:C:2008:264 (*Weiss and Others*).

90 See the *Pringle* case: CJEU 27 November 2012, C-370/12, ECLI:EU:C:2012:756.

91 The temporary European Financial Stability Facility (EFSF) and the permanent European Stability Mechanism (ESM). Abstraction is made from bilateral lending to Greece and from the temporary EU fund, the European Financial Stability Mechanism (EFSM). For explainers on the lending to Greece, Ireland, Portugal, Spain and Cyprus, see: ESM, *www.esm.europa.eu/explainers* and EU explainer, <http://eexplainer.nl/?p=337>.

92 E.g., Order of 27 November 2012 in Case T-541/10, ECLI:EU:T:2012:626 (*Anotati Diokisi Enoseon Dimosion Ypallilon (ADEDY) and Others vs. Council*).

93 CJEU 13 July 2018, T-680/13, ECLI:EU:T:2018:486 (*Chrysostomides vs. Council, Commission, ECB, Eurogroup, EU*).

94 CJEU 20 September 2016, Joined Cases C-8-10/15 P, ECLI:EU:C:2016:701 (*Ledra Advertising*). See, R. Repasi, 'Judicial protection against austerity measures in the euro area: *Ledra and Mallis*', *CMLR* (54) 2017, Issue 4, p. 1123-1156.

95 Repeated disclosure: this author is an Alternate Member of ABoR.

96 The requirements laid down in Art. 263 TFEU and elaborated in the *Plaumann* judgment, CJEU 15 July 1963, C-25/62, ECLI:EU:C:1963:17 (*Plaumann*).

97 See: C. Brescia Morra, R. Smits & A. Magliari, 'De Administrative Board of Review van de Europese Centrale Bank: de eerste ervaringen', *Tijdschrift voor Financieel Recht* 2018, Issue 4.

98 See also the section on the ABoR in ECB, *ECB Annual Report on supervisory activities 2017*, at: [www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf](http://www.bankingsupervision.europa.eu/press/publications/annual-report/pdf/ssm.ar2017.en.pdf).

99 CJEU 16 May 2017, T-122/15, ECLI:EU:T:2017:337 (*Landeskreditbank Baden-Württemberg – Förderbank vs. ECB*). The Advocate General's Opinion in the appeal case (C-450/17 P), delivered on 5 December, rejects the arguments against the General Court's findings on the exclusive ECB competences in the field of prudential supervision within the SSM; ECLI:EU:C:2018:982.

100 Interested readers are referred to a list of case law, based on public sources, that I organise, together with Federico Della Negra, at the website of the European Banking Institute: *The Banking Union and Union Courts: overview of cases*, at: European Banking Institute (EBI), <https://ebi.europa.eu/publications/eu-cases-or-jurisprudence/>.

101 The same approach as is followed in competition law cases. See CJEU 15 February 2005, C-12/03 P, ECLI:EU:C:2005:87 (*Commission vs. Tetra Laval*), par. 39 and CJEU 10 July 2014, C-295/12 P, ECLI:EU:C:2014:2062 (*Telefónica and Telefónica de España vs. Commission*), par. 54. See, in respect of judicial review of monetary policy deci-



- sions, CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Gauweiler and Others vs. Deutscher Bundestag*), par. 68, 69 and 75.
- 102 CJEU 26 April 2018, T-251/15, ECLI:EU:T:2018:234 (*Espirito Santo Financial (Portugal), SGPS, SA vs. ECB*).
- 103 CJEU 13 September 2018, C-358/16, ECLI:EU:C:2018:715 (*UBS Europe SE and Alain Hondequin et consorts vs. DV and Others*) and CJEU 13 September 2018, C-594/16, ECLI:EU:C:2018:717 (*Enzo Buccioli vs. Banca d'Italia*).
- 104 SRB Appeal Panel 19 June 2018, Joined Cases 44/2017 and 7/2018, at: [https://srb.europa.eu/sites/srbsite/files/case\\_44\\_17\\_7\\_18\\_project\\_decision\\_20180618\\_anonymised.pdf](https://srb.europa.eu/sites/srbsite/files/case_44_17_7_18_project_decision_20180618_anonymised.pdf).
- 105 See: ECB, [www.ecb.europa.eu/press/key/date/2018/html/index.en.html](http://www.ecb.europa.eu/press/key/date/2018/html/index.en.html). There is also a *Weekly schedule of public speaking engagements and other activities*, at: ECB, [www.ecb.europa.eu/press/weekly/html/index.en.html](http://www.ecb.europa.eu/press/weekly/html/index.en.html).
- 106 Fraccaroli, Giovannini and Jamet mention the 'two dimensions of transparency' and note that 'transparency is considered as a tool aimed at enhancing the effectiveness of the ECB's policy', see Fraccaroli, Giovannini & Jamet 2018.
- 107 Although the cooperation with other supervisory authorities based on Memoranda of Understanding (MoUs) is not yet in the public domain. See: R. Smits, 'Reflections on euro area banking supervision: context, transparency and culture from an institutional law perspective', in: G. Lo Schiavo (ed.), *The European Banking Union and the Role of Law* (forthcoming), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3092657](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3092657).
- 108 ECB, *SSM Supervisory Manual – European banking supervision: functioning of the SSM and supervisory approach*, March 2018, at: [www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf](http://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf).
- 109 See: ECB Banking Supervision, [www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html](http://www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html).
- 110 Art. 68 CRD IV. See, also, Art. 132 Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17).
- 111 Art. 27.1 ESCB Statute.
- 112 For the external accountant of the Dutch central bank, see Council Decision of 28 May 2009 amending Decision 1999/70/EC concerning the external auditors of the national central banks, as regards the external auditor of De Nederlandsche Bank (2009/448/EC) (OJ 2009, L 149/64).
- 113 Art. 27.2 ESCB Statute.
- 114 ECA, *Special report no 02/2018: The operational efficiency of the ECB's crisis management for banks*, at: [www.eca.europa.eu/Lists/ECADocuments/SR18\\_02/SR\\_SSM2\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR18_02/SR_SSM2_EN.pdf).
- 115 In the accompanying press release of 16 January 2018, the ECA writes: '[...] despite some positive cooperation, the ECB nonetheless

tively, before the Administrative Board of Review (ABoR)<sup>95</sup> by persons to whom such act is of 'direct and individual concern'.<sup>96</sup> These routes are not exclusive: after administrative review, the path to judicial review is open, while a plaintiff may also avoid the ABoR and directly go to Luxembourg. This contribution is not the place to go deeper into administrative review.<sup>97</sup> Suffice it to say the ABoR has given some 25 opinions<sup>98</sup> to the Supervisory Board on whether to maintain, vary or repeal a supervisory decision under review, and that the General Court has referred to these opinions in several follow-up cases, arguing that the ABoR's opinion may be taken on board to assess whether the ECB's decision following administrative review is sufficiently motivated.<sup>99</sup>

The ECB's new supervisory role leads to much wider reliance on the courts by affected parties than is the case in respect of other ECB functions: decisions have been brought before the General Court, and appeals lodged against the latter's judgment, in some 30 cases concerning its SSM activities. This number does not include the cases against the ECB (and the Single Resolution Board (SRB)) in the matter of the resolution of a Spanish bank in 2017.<sup>100</sup>

It is too early to derive a general theme from the case law except for two threads. First, the Court continues its deference to decision-making in complex economic matters. As explained above, the Court's review is then limited to establishing whether the contested decision was impaired by a manifest error or misuse of powers and whether it clearly exceeded the bounds of the ECB's discretion, while also verifying whether the relevant procedural rules, in particular on due process, were complied with, whether the statement of reasons is sufficient and whether the facts on which a contested decision was based have been accurately set out.<sup>101</sup> Second, the courts seem to require more transparency and a greater measure of access to files. This is clear in a monetary-policy related case on Emergency Liquidity Assistance (ELA)<sup>102</sup> and in recent decisions on access to supervisory files of NCAs which, it is submitted, would also apply to the ECB's SSM

files.<sup>103</sup> A similar trend towards more openness, always balanced with the need to uphold professional secrecy, can be seen in recent decisions of the SRB Appeals Panel.<sup>104</sup>

## Beyond the political dialogue there seems to be an intense dialogue with academia and with stakeholders

### 6 Other accountability mechanisms

#### *Interaction with academia, stakeholders*

Beyond the political dialogue on the basis of mutual attendance meetings, reporting and explaining these reports, regular dialogue with parliamentarians, including answering their questions, there seems to be an intense dialogue with academia and with stakeholders. Invitations of outsiders to conferences and seminars contribute to this dialogue. Members of the ECB Governing Council, the Executive Board and the Supervisory Board take part in this interchange of ideas through a succession of speeches,<sup>105</sup> which also serve to disseminate the views of the central bank and to anchor inflation expectations.<sup>106</sup>

#### *Website communication and further transparency*

The ECB website is a rich source of information and explanation: in the form of short videos, extensive Q&As and links to documents, the visitor is treated with extensive accounts of what the central bank does, and why. There has been a tendency towards more openness.<sup>107</sup> The publication of the *SSM Supervisory Manual* in March 2018 is a case in point.<sup>108</sup> Some of this openness is prescribed by law: fines imposed by the ECB, or by NCAs in proceedings opened at the ECB's request, are published<sup>109</sup> in accordance with the requirements of the CRD IV.<sup>110</sup>

Without seeking completeness in the complex web of accountability for the central bank in its diverse functions,

there are at least three elements that cannot go unmentioned here. They concern the auditing of the central bank, the Union's fight against financial fraud and the ECB's troika role (its part in the oversight of economic policies during and after the financial crisis), leading to a national parliamentary inquiry, and the role of the European Ombudsman.

### External auditors

Accountability beyond political answerability and judicial or administrative review is also derived through outside expert examination of accounts (revenue and expenditure). Auditing of the ECB and NCBs is prescribed.<sup>111</sup> The ECB Governing Council recommends external auditors and the Ecofin Council approves them.<sup>112</sup> The role of the European Court of Auditors (ECA) in respect of the ECB is limited to 'the operational efficiency of the management of the ECB'.<sup>113</sup> This restriction seeks to protect the independence of the ECB. A somewhat precarious relationship between the central bank and the ECA is clear from a special report on crisis management;<sup>114</sup> the ECA complained about the ECB's refusal to provide 'important evidence'.<sup>115</sup> Likewise, when auditing the Commission's role in the Greek financial support programme,<sup>116</sup> the ECA found it had been unable to assess the ECB's role due to lack of evidence.<sup>117</sup> The ECB insisted in its replies to the ECA's complaints that it had extensively cooperated and challenged the ECA's finding that it could not draw conclusions on the operational efficiency of the central bank.<sup>118</sup>

### Fraud prevention

A reluctance to permit entry into offices and files was evident at the outset when the ECB was unwilling to have an arm of the Commission, the European Anti-Fraud Office (OLAF),<sup>119</sup> enter its offices in the search for any potential irregularities in the ECB's finances. As the ESCB resources do not form part of the EU's budget, there were understandable reasons to stay clear from investigations by the executive's office for keeping the EU's budget free from fraud and corruption and to establish a separate anti-fraud com-

mittee for the central bank itself. However, as the Treaty provision<sup>120</sup> speaks of 'the financial interests of the Union', the Court found against the ECB<sup>121</sup> in proceedings which the Commission had instituted against the relevant ECB's legal act.<sup>122</sup> The Court found that 'the ECB, pursuant to the EC Treaty, falls squarely within the Community framework'.<sup>123</sup>

## A reluctance to permit entry into offices and files was evident at the outset when the ECB was unwilling to have the European Anti-Fraud Office enter its offices in the search for any potential irregularities in the ECB's finances

### Troika role: national parliamentary inquiry

Increased scrutiny of the ECB, such as by Transparency International,<sup>124</sup> can be attributed to its non-standard monetary policy measures, the extension of its mandate into banking supervision and the role played in the economic adjustment programmes for Greece, Ireland, Portugal, Spain and Cyprus. Its troika role in the 'bail-outs'<sup>125</sup> called for scrutiny, also by national parliamentary inquiries. When the Irish parliament (*Oireachtas*) undertook an encompassing inquiry,<sup>126</sup> the ECB did not submit to the *Oireachtas*'s invitation to engage, which the Irish Parliament strongly deplored<sup>127</sup> as, in the words of the parliamentary committee: 'it should have been possible, with a cooperative mind-set, to reach agreement on appropriate modalities for engagement which would have met the needs of the Inquiry while respecting the mandate of the ECB'.<sup>128</sup>

### Ombudsman

This already too lengthy contribution cannot properly take on board other mechanisms of accountability, such as the influence of the European Ombudsman,<sup>129</sup> or of the European

refused to provide important evidence which the ECA had requested. This had a negative impact on the audit work to the extent that the ECA was able to draw overall conclusions about the design of the ECB's processes, but was unable to confirm the operational efficiency, in practice, of its crisis management'.

116 ECA, *Special report No 17/2017: The Commission's intervention in the Greek financial crisis*, at: [www.eca.europa.eu/en/Pages/DocItem.aspx?did=43184](http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=43184).

117 In the accompanying press release of 16 November 2017, the ECA writes: 'As part of this audit, the auditors attempted to assess the role of the European Central Bank (ECB) in the Programmes, in line with their mandate to audit the ECB's operational efficiency. However, the ECB questioned the auditors' mandate and failed to provide sufficient evidence. The auditors were therefore unable to report on the ECB's role.' See: [www.eca.europa.eu/Lists/ECADocuments/INSR17\\_17/INSR\\_GREECE\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/INSR17_17/INSR_GREECE_EN.pdf).

118 See the 11-pages of ECB replies at the end of the ECA's Report.

119 Office de Lutte Anti-Fraude (OLAF), see: [https://ec.europa.eu/anti-fraud/home\\_en](https://ec.europa.eu/anti-fraud/home_en).

120 Currently, Art. 325 TEU.

121 CJEU 10 July 2003, C-11/00, ECLI:EU:C:2003:395 (*Commission vs. ECB re OLAF*), par. 95: 'the expression "financial interests of the Community" in Art. 280 EC is not restricted exclusively to the budget of the European Community in the strict sense but also covers the resources and expenditure of the ECB'.

122 Decision 1999/726/EC of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5), *OJ* 1999 L 291/36, 13.11.1999.

123 CJEU 10 July 2003, C-11/00, ECLI:EU:C:2003:395 (*Commission vs. ECB re OLAF*), par. 95.

124 Transparency International, *Two sides of the same coin? Independence and accountability of the European Central Bank*, 28 March 2017, at: [http://transparency.eu/wp-content/uploads/2017/03/TI-EU\\_ECB\\_Report\\_DIGITAL.pdf](http://transparency.eu/wp-content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf).

125 For Spain, financial assistance only concerned the recapitalisation of its banking sector.

126 See: Joint Committee of Inquiry into the Banking Crisis, <https://inquiries.oireachtas.ie/banking/>.

127 '[T]he Joint Committee is critical of the failure of the ECB in particular to co-operate with the Inquiry, while acknowledging that there was no legal obligation on it to do so', see: Joint Committee of Inquiry into the Banking Crisis, *Report of the Joint Committee of Inquiry into the Banking Crisis*, Vol. 1, p. 4 at: <https://inquiries.oireachtas.ie/banking/>.

128 Joint Committee of Inquiry into the Banking Crisis, *Report of the Joint Committee of Inquiry into the Banking Crisis*, Vol. 2, par. 7.43-7.46, at: <https://inquiries.oireachtas.ie/banking/wp-content/uploads/2016/01/02106-IBC-Report-Volume-2.pdf>.

129 See C. Duran, 'Soft-law mechanisms, hard institutional impacts: how the European Ombudsman is enhancing the European Central Bank's transparency framework', *International Journal of Open Governments* (3) 2016, at: <http://ojs.imodev.org/index.php/RIGO/article/view/63/157>.

- 130 Press release 22/2014 ‘Ombudsman welcomes ECB decision to release “Irish ECB letter”’, 6 November 2014, at: [www.ombudsman.europa.eu/en/press-release/en/58279](http://www.ombudsman.europa.eu/en/press-release/en/58279).
- 131 A consultative group including commercial bankers; see: [www.group30.org](http://www.group30.org).
- 132 See: [www.ombudsman.europa.eu/en/correspondence/en/81040](http://www.ombudsman.europa.eu/en/correspondence/en/81040).
- 133 ECB, [www.ecb.europa.eu/home/html/index.en.html](http://www.ecb.europa.eu/home/html/index.en.html).
- 134 ECB Banking Supervision, [www.banking-supervision.europa.eu/home/html/index.en.html](http://www.banking-supervision.europa.eu/home/html/index.en.html).
- 135 The Economic and Monetary Affairs Committee, [www.europarl.europa.eu/committees/en/econ/home.html](http://www.europarl.europa.eu/committees/en/econ/home.html).
- 136 Among them, I mention: Claire Jones, Frankfurt Bureau Chief of the *Financial Times (FT)*, [www.ft.com/claire-jones](http://www.ft.com/claire-jones); Francesco Canepa, ECB correspondent of Reuters, [www.reuters.com/journalists/francesco-canepa](http://www.reuters.com/journalists/francesco-canepa); Martin Sandbu, Economics Commentator of the *FT*, [www.ft.com/martin-sandbu](http://www.ft.com/martin-sandbu), and Matthijs Bouman, economic commentator at *Het Financieele Dagblad*; see: <http://mathijsbouman.nl/>.
- 137 Notably, Nicolas Véron of Bruegel and the Peterson Institute; see: <http://bruegel.org/author/nicolas-veron/>.
- 138 C. Jeffery, ‘Three tricks to remove a troublesome Eurosystem governor (Eurozone authorities have learnt how to circumvent central bank independence – emboldened by feeble action by the European Commission)’, 8 November 2018, at: [www.centralbanking.com/author/christopher-jeffery](http://www.centralbanking.com/author/christopher-jeffery).

Data Protection Supervisor. Just mentioning the intervention of Emily O’Reilly on the publication by the ECB of a letter sent by then-President Jean-Claude Trichet to the Irish government in 2010,<sup>130</sup> or on the membership of the G30<sup>131</sup> of the ECB President,<sup>132</sup> does not do justice to the issues discussed between these authorities and the ECB or to the follow-up given to them by the ECB. The interested reader is invited to check for her- or himself.

### I find the ECB to be generally responsive to the people it serves: the citizens of Europe

#### 7 Outlook

What can an interested reader do to follow the ECB and check its actions? In other words: how does accountability towards an EU citizen work? My advice would be to closely follow the ECB<sup>133</sup> and Banking Supervision

websites,<sup>134</sup> that of the EP committee<sup>135</sup> and to follow a number of specialised journalists.<sup>136</sup> Also, writing to one’s MEP may assist the latter in asking an incisive question to the ECB. Finally, there are academics and think-tanks who critically follow the ECB.<sup>137</sup>

The independence of the ECB, set in stone in the Treaty and the ESCB Statute, will continue to be challenged in times of calls for increased transparency, also in view of its wide mandate. Personally, I consider that both sides of the coin are shining brightly: the independence of the ECB is well-established, even though not unchallenged,<sup>138</sup> and increased transparency and accountability make the other side ever more visible. Therefore, my own perspective on Europe’s central bank can be summed up as follows: although the balance between the limitations imposed by its mandate and the call for transparency may be difficult to find, at times, and may be shifting, I find the ECB to be generally responsive to the people it serves: the citizens of Europe.