

The Legitimacy and Accountability of the ECB at the Age of Twenty

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I. Introduction

This edited volume on the European Central Bank (ECB) comes at an opportune time, not only and perhaps not even primarily because the ECB recently celebrated its 20th birthday –an age which, compared to some other central banks, still puts it in the category of ‘early childhood’–, but because of the greater scrutiny under which this European Union (EU) institution has found itself since the beginning of the European sovereign debt crisis and as a consequence of its new role in banking supervision. The proliferation of the ECB’s tasks has raised questions concerning the economic and legal feasibility of the current framework. It has also flared up concerns regarding the democratic legitimacy of its actions. Accordingly, and in keeping with the general theme of this edited volume, this chapter analyses the ECB’s accountability and transparency framework and related practice over its more than twenty years of existence. In doing so, it combines a chronological with a contextual analysis of the relevant legal and institutional arrangements, from which conclusions can be drawn with regard to the nature and extent of the ECB’s democratic legitimacy.¹ We will draw on the concepts of input, throughput, and output legitimacy where appropriate.² Moreover, the principal-agent model is used as a basic reference point in considering the past and present arrangements at the ECB.³

With regard to the rationale for democratic accountability, it suffices to observe that, in the case of independent central banks, an agency situated outside the *trias politica* is exercising public power (the conduct of monetary policy) on behalf of the executive. As such, the rationale for the accountability of the ECB is not different from other cases of delegation of executive tasks to agencies that operate at arm’s length from the Union institutions. What distinguishes the ECB and other independent central banks

¹ The ECB’s independence and the judicial review of its actions are discussed in chapter 2 by Vestert Borger, chapter 6 by Jonathan Bauerschmidt, chapter 10 by Alexander Thiele, chapter 12 by Takis Tridimas, and chapter 16 by Marijn van der Sluis, in this volume.

² On these concepts, see Vivien Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and “Throughput”’ (2013) 61 *Political Studies* 2, 4 ff, with further references (hereafter Schmidt, ‘Democracy and Legitimacy in the European Union Revisited’). See also Vivien Schmidt and Matthew Wood, ‘Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance’ (2019) 97 *Public Administration* 727.

³ See, eg, Robert Elgie, ‘The Politics of the European Central Bank: Principal-Agent Theory and the Democratic Deficit’ (2002) 9 *JEPP* 186, with further references.

for that matter from many other examples of delegation is the degree of legal insulation from the political institutions and the magnitude of the socio-economic consequences that the exercise of monetary policy can entail. What is more, due to its supranational nature, the ECB is situated at a greater distance from democratically legitimized institutions than is often the case in the national context, while at the same time also not benefitting from the same level of trust and support that has historically grown in the case of many major central banks. Following Gailmard's approach to public accountability as 'a function of the capabilities of principals to judge the performance of their agents',⁴ this calls for governance structures that ensure that the central bank in charge of monetary policy is democratically accountable to its principal for the exercise of this power, thereby ensuring its continuous democratic legitimation.⁵ This then has to translate into concrete legal and practical arrangements, which would ensure not only that the agent is required to explain its conduct and to provide relevant information to enable the principal to make an informed judgment, but also that the principal is provided with instruments allowing it to intervene where it is concluded that the agent is not discharging its tasks as was agreed upon initially. This approach to the function and main characteristics of accountability paints a symbiotic relationship between accountability and transparency, in which the latter arguably constitutes a prerequisite, a *conditio sine qua non*, for purposeful accountability arrangements.⁶ At the same time, it is acknowledged that the importance of observing transparency arrangements is not limited to the principal-agent relationship between a central bank and the executive, as public access to information can also enhance accountability to other stakeholders, such as the civil society or financial markets. Moreover, in the case of the supranational ECB, democratic legitimacy may emanate through supranational and national (constitutional) channels.

This contribution examines the ECB's legal and institutional framework informing its degree of democratic legitimacy at the time of its inception, a framework that—as will become clear in the course of this contribution—in many regards continues to form the backbone of the ECB's existence today. Particular attention is paid to the way in which the accountability arrangements in the Treaties were advanced in practice in the initial years of the ECB's operation, thereby highlighting their dynamic character. Thereafter, the contribution turns to the evolution of the ECB's tasks over the course of the last twenty years, which has resulted in changes to the demands for arrangements securing its democratic legitimacy. The main question is whether the accountability arrangements laid down in primary and secondary Union law match these

⁴ Sean Gailmard, 'Accountability and Principal-Agent Theory' in Mark Bovens, Robert E Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) 91.

⁵ Tonny Lybek, 'Central Bank Autonomy, Accountability, and Governance: Conceptual Framework' in International Monetary Fund, 'Current Developments in Monetary and Financial Law' (vol 4, 6 November 2008) 147; Fabian Amtenbrink, 'The Three Pillars of Central Bank Governance: Towards a Model Central Bank Law or a Code of Good Governance?' in International Monetary Fund, 'Current Developments in Monetary and Financial Law' (vol 4, 6 November 2008) 103–04.

⁶ Fabian Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Hart Publishing 1999) 339 ff (hereafter Amtenbrink, *The Democratic Accountability of Central Banks*); Peter Dyrberg, 'Accountability and Legitimacy: What is the Contribution of Transparency?' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) 83.

developments. The chapter identifies the (remaining) gaps across its main fields of activity (monetary policy, financial assistance programmes, and banking supervision), also in light of the ECB's role during the COVID-19 pandemic. It concludes by looking ahead, namely by asking whether the forthcoming push towards the 'greening' of monetary policy could enhance the ECB's legitimacy and what it would demand of its accountability framework.

The main argument in this contribution is that the accountability framework applicable to the ECB has not evolved sufficiently to match its expanded powers, thereby rendering this EU institution vulnerable to accusations regarding the degree of democratic legitimacy of its action. Whether these shortcomings can (still) be considered 'childhood diseases' of the ECB is questionable. A strategic reorientation of the ECB, thereby using monetary policy to help address broader societal challenges, such as climate change, may increase its output legitimacy. However, it should not be considered a substitute for robust accountability arrangements.

II. The ECB's Inception

Unlike various major central banks that have developed more or less organically over many decades or even centuries, such as the Sveriges Riksbank (1668),⁷ the Bank of England (1694), or the Banque de France (1800), or could at least build on a tradition of central banking, such as the post-war Deutsche Bundesbank (1957), the ECB is a rather new institution. It is situated at the centre of the European System of Central Banks (ESCB) and the Eurosystem. Established on 1 July 1998, its creation marked in many regards a milestone in the unprecedented project of supranational economic, legal, and—albeit to a lesser extent—political integration that has led to the pooling of competences for monetary policy and the replacing of the national currencies of the Member States participating in the single currency area. It is the latter that necessitated the establishment of a transnational monetary policy authority.

Created from scratch by the drafters of the Treaty on European Union⁸ against the backdrop of the rather broad sketch provided by the Delors Report,⁹ the creation of the ECB was, as has been observed by Scheller, 'the embodiment of modern central banking'.¹⁰ This is first and foremost so because, at the time of drafting the basic legal framework of the ECB, its key institutional characteristics reflected the emerging new consensus that monetary policy should be conducted at a safe distance from elected

⁷ Originally founded under the name Riksbens Ständers Bank.

⁸ Namely through the introduction of Arts 3a, 4a, the provisions of Title VI on economic and monetary policy into the Treaty establishing the European Community [1992] OJ C224/1 (hereafter EC Treaty), as well as the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, annexed to the EC Treaty. Currently Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank [2016] OJ C202/230 (hereafter ESCB and ECB Statute).

⁹ Committee for the Study of Economic and Monetary Union, 'Report on the Economic and Monetary Union in the European Communities' (17 April 1989) <https://ec.europa.eu/economy_finance/publications/pages/publication6161_en.pdf> accessed 17 March 2021 (hereafter Delors Report).

¹⁰ Hanspeter Scheller, *The European Central Bank: History, Role and Functions* (European Central Bank 2004) 12.

officials and that the best direct contribution that monetary policy could make to the economic development of a country was to combat inflation.¹¹

The discussion on the requisite institutional characteristics of a central bank to ensure the effectiveness of its policies very much focused on its relationship with the political institutions, notably the negative impact that the mingling of (democratically elected) politicians, who are more often than not driven by competing interests, can have on monetary policy outcomes. Having regard to the so-called inflationary biases, which are linked to the political business cycle, and the time-inconsistency problem associated with the conduct of monetary policy,¹² a strong case emerged for the delegation of monetary policy to an independent and conservative central bank(er).¹³ A conservative central bank(er) 'is more inflation averse than the social planner',¹⁴ or—put differently—is someone who still sets policy in a discretionary fashion but is more concerned with reducing inflation than is the rest of society.¹⁵ Theoretical and empirical evidence emerged, supporting the view that the delegation of monetary policy onto an independent central bank was positively correlated to economic performance and in particular inflation.¹⁶ The vesting of a single, overriding objective has also been considered to strengthen the independent position of a central bank 'against the unavoidable political pressure to pursue short run expansionary policies, particularly in times of economic distress'.¹⁷

The basic characteristics of the legal framework of the ECB thus were in line with what may be described as a shift in dogma away from monetary policy authorities being considered 'departments of ministries of finance ... expected, by law, custom, or both, to utilize their policy instruments to achieve a myriad of objectives like high levels of growth and employment, provision of funds to government for the financing of public expenditures, and to address balance of payments problems',¹⁸ and were linked to a global trend towards central bank independence and price stability as the main or primary objective of monetary policy. In fact, at least in the case of one EU Member State, Germany, the presence of these two basic characteristics was even

¹¹ See, eg, Mario Bleijer, 'Central Banks and Price Stability: Is a Single Objective Enough?' (1998) 1 *Journal of Applied Economics* 105, 105–06; José de Gregorio, 'Price and Financial Stability in Modern Central Banking' (2012) 13 *Economía* 1, 2.

¹² For more details, see Jakob de Haan and Sylvester Eijffinger, 'The Politics of Central Bank Independence' (2016) CentER Discussion Paper No 2016-047 <https://pure.uvt.nl/ws/portalfiles/portal/13825254/2016_047.pdf> accessed 17 March 2021, with further references to the relevant literature.

¹³ Robert Barro and David Gordon, 'Rules, Discretion and Reputation in a Model of Monetary Policy' (1983) 12 *Journal of Monetary Economics* 101; Kenneth Rogoff, 'The Optimal Degree of Commitment to an Intermediate Target' (1985) 100 *Quarterly Journal of Economics* 1169.

¹⁴ Peter Tillmann, 'The Conservative Central Banker Revisited: Too Conservative Is More Costly Than Too Liberal' (2008) 24 *European Journal of Political Economy* 737, 737.

¹⁵ Christopher Waller, 'The Choice of a Conservative Central Banker in a Multisector Economy' (1992) 82 *American Economic Review* 1006, 1006.

¹⁶ For an overview of the relevant literature, see Alex Cukierman, 'Central Bank Independence and Monetary Policymaking Institutions—Past, Present and Future' (2008) 24 *European Journal of Political Economy* 722 (hereafter Cukierman, 'Central Bank Independence and Monetary Policymaking Institutions'); Jakob de Haan, Donato Masciandaro, and Marc Quintyn, 'Does Central Bank Independence Still Matter?' (2008) 24 *European Journal of Political Economy* 717, 718 ff.

¹⁷ Alberto Alesina and Vittorio Grilli, 'The European Central Bank: Reshaping Monetary Politics in Europe' (1991) NBER Working Paper No 3860, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=453813> accessed 17 March 2021 (hereafter Alesina and Grilli, 'The European Central Bank').

¹⁸ Cukierman, 'Central Bank Independence and Monetary Policymaking Institutions' (n 16) 722, 726 ff.

made a constitutional requirement for the transfer of responsibilities and powers of the National Central Bank to the supranational monetary policy authority in the run-up to the establishment of the ECB.¹⁹ With Article 107 of the Treaty establishing the European Community (EC Treaty) [Article 130 of the Treaty on the Functioning of the European Union (TFEU)] on the independence of the ECB and Article 105(1) EC Treaty [Article 127(1) TFEU] on the overriding objective of price stability, this global trend in central banking was embedded, quite prominently, in the primary Union law provisions on the ECB.²⁰

The unequivocal wording of Article 130 TFEU and the prioritization of price stability over any other, potentially conflicting economic objectives, differently to what can for example be observed for the US Federal Reserve System,²¹ can also be interpreted as an attempt by the drafters of the Treaty on European Union to send out a clear signal in support of the new currency and the new supranational agency that would be managing it. In contrast to long-standing central bank systems that could rely on their credibility, meaning the 'commitment to follow well-articulated and transparent rules and policy goals' that is built by actual behaviour over time (track record),²² in the case of the ECB this credibility could initially only emanate from its 'state-of-the-art' legal and institutional arrangements,²³ and its institutional similarities with the highly respected Deutsche Bundesbank.²⁴

Cukierman has observed in a 2008 contribution that accountability and transparency are 'two buzz words of modern monetary institutions [that] were hardly heard twenty years ago or earlier.'²⁵ The author's explanation for this is that: 'In the absence of independence accountability was unnecessary and, as political entities, governments and ministries of finance had no incentives to raise questions about their own transparency in the conduct of monetary policy.'²⁶ Yet, in the case of the ECB it cannot be concluded that, when the Treaty on European Union was originally drafted, the mechanisms securing the accountability of the new institution received as much attention

¹⁹ According to the second sentence of Art 88 of the German Basic Law, the ECB has to be independent and committed to the overriding goal of assuring price stability. This sentence was only added in December 1992, namely less than a year before the coming into force of the Treaty on European Union [1992] OJ C191/1 (Maastricht Treaty). See further Matthias Herdegen, 'GG Art. 88' in Roman Herzog and others (eds), *Maunz/Düring, Grundgesetz-Kommentar* (CH Beck 2020).

²⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47; ESCB and ECB Statute (n 8), Arts 7 and 2 respectively. See also Consolidated Version of the Treaty on European Union [2012] OJ C202/1, Art 3(3) (hereafter TEU), which refers to price stability as one of the objectives of the Union.

²¹ See Federal Reserve Act 1913, Art 2A, 12 USC para 225a, as added by the Federal Reserve Reform Act 1977 (91 Stat. 1387) and amended by acts of 27 October 1978 (92 Stat. 1897), 23 August 1988 (102 Stat 1375), and 27 December 2000 (114 Stat 3028), which refers to 'the goals of maximum employment, stable prices, and moderate long-term interest rates'. On this, see further chapter 15 by Christy-Ann Petit, in this volume.

²² Michael Bordo and Pierre Siklos, 'Central Bank Credibility: An Historical and Quantitative Exploration' (2015) NBER Working Paper No w20824 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548344> accessed 17 March 2021.

²³ But note Alesina and Grilli, 'The European Central Bank' (n 17) 14, who have observed that credibility is not reached 'by simply writing general objectives in the Central Bank statutes'.

²⁴ Karl Kaltenthaler, 'The Bundesbank and the Formation of the ECB's Monetary Policy Strategy' (2005) 14 *German Politics* 297.

²⁵ Cukierman, 'Central Bank Independence and Monetary Policymaking Institutions' (n 16) 732.

²⁶ *ibid* 723.

as its insulation from political influence, that is, its independence. In fact, while accountability and transparency issues have gained more prominence on the agenda of policy-makers and central bankers, but also in the academic discourse over the last three decades, there is little evidence to be found in the legal and institutional framework of the ECB that the drafters of the Treaty on European Union paid the same level of attention to this issue.

The Delors Report, which is sometimes referred to as a blueprint for the Economic and Monetary Union (EMU), stated that the institutional framework necessary for the 'management' of EMU 'would have to promote efficient economic management, properly embedded in the democratic process,' whereby this 'would require the creation of a new monetary institution, placed in the constellation of Community institutions.'²⁷ In reality, with the aim of guarding against any suspicions of political proximity to national or European political institutions, the ECB has by and large been placed outside the democratic process. Its legal basis has provided for a degree of legal insulation that even surpassed that of the Deutsche Bundesbank, thereby making the ECB at the time of its establishment one of the most independent central banks in the world.²⁸ However, as regards the ECB's accountability framework, it could hardly be considered 'best practice' when compared to other modern central bank systems already in the mid-1990s.²⁹

These weaknesses of the legal and institutional arrangements in the (original) legal provisions on the ECB (in the Treaties and Statute) have been examined extensively elsewhere.³⁰ They relate, first of all, to the conditions under which accountability can be effectively exercised, namely the absence of a quantified monetary policy objective in the ECB's legal basis, of an obligation to publish minutes of the policy meetings of the ECB's Governing Council, and of clear legal arrangements providing for a meaningful relationship with the European Parliament. Moreover, save for the option of amending primary Union law pursuant to the highly cumbersome procedure laid down in Article 48 TEU, the Treaty provisions on the ECB have not foreseen any concrete instruments that would allow for a consequential intervention of those in charge of holding the ECB to account, such as through performance-based dismissals of central bank officials, an override mechanism allowing for the (temporary) suspension of monetary policy decisions, or control over the ECB's budget.³¹ Overall, this diagnosis of an accountability deficit regarding the ECB posed a challenge for its legitimacy from the outset. For the reasons discussed in the next section, this problem has become more pressing as a result of the evolution of the ECB's role.

While the law in the books thus had relatively little to offer in terms of providing channels for legitimizing the ECB's exercise of public power, beyond the ratification

²⁷ Delors Report (n 9) 21.

²⁸ For a comparative legal analysis of the accountability arrangements at the Bundesbank prior to the establishment of the ECB, see Amtenbrink, *The Democratic Accountability of Central Banks* (n 6) 334 ff.

²⁹ Jakob de Haan, Fabian Amtenbrink, and Sylvester Eijffinger, 'Accountability of Central Banks: Aspects and Quantifications' (1999) 52 BNL Quarterly Review 169.

³⁰ Amtenbrink, *The Democratic Accountability of Central Banks* (n 6).

³¹ *ibid* 359–63; Menelaos Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (OUP 2020) 15–17 (hereafter Markakis, *Accountability in the Economic and Monetary Union*).

of its legal basis by all Member States, the law in action following the ECB's inception has provided for a somewhat more nuanced picture from the start. Two main factors contributed to this: the increased focus on transparency and, more importantly, the way in which the ECB's relationship with the European Parliament has developed.³²

As regards reporting requirements, the Treaty provisions on the ECB refer in rather broad terms to a publicly accessible annual report on the activities of the ESCB, quarterly activity reports, and weekly consolidated financial statements.³³ One important, albeit foreseeable, development was that the ECB started to hold regular press conferences after every meeting of the Governing Council for which monetary policy decisions were scheduled, to explain its decisions. Moreover, the ECB immediately started publishing monthly, rather than the statutorily foreseen quarterly, reports, which until the end of 2014 were known as Monthly Bulletins and are now referred to as Economic Bulletins. These have not only explained the ECB's monetary policy decisions but also included a broader outlook on the economic developments in the euro area, as well as a timeline of the monetary policy decisions.³⁴ In doing so, rather than ensuring the openness of its decision-making processes,³⁵ the ECB has principally focused on the publicity of its decisions, thereby using transparency as a policy tool. Furthermore, early evidence suggests that it could not be concluded from the ECB's pro-active approach to transparency that financial market participants necessarily considered the ECB to be transparent, which may be explained by the quality or scope of information that was provided.³⁶

What is more, similarly to what has been observed for its transparency, and leaving aside Article 130 TFEU for a moment, the provisions on the ECB originally included in the Treaties and those in force today provide little detail on its relationship with the EU political institutions, notably the European Parliament. Pursuant to Article 284(1)–(2) TFEU (ex Article 113(1)–(2) EC Treaty) the President of the Council and a Member of the Commission may participate, without having the right to vote, in meetings of the ECB's Governing Council. Moreover, the President of the Council may submit a motion for deliberation to the Governing Council. On the other hand, the ECB President must be invited to participate in Council meetings when it is discussing matters relating to the objectives and tasks of the ESCB.³⁷ The European Parliament is not mentioned in these provisions. Instead, pursuant to Article 284(3) TFEU (ex Article 113(3) EC Treaty) the ECB President presents the annual report not only to the Council, but also to the European Parliament, which can hold a debate on that basis.

³² See Fabian Amtenbrink, 'On the Legitimacy and Democratic Accountability of the European Central Bank: Legal Arrangements and Practical Experience' in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002).

³³ ESCB and ECB Statute (n 8) Art 15.

³⁴ Introduced in 2015, the monthly Economic Bulletins provide, *inter alia*, an update on economic and monetary developments and include in-depth articles on more specific issues related to the ECB's operation.

³⁵ For a long time, ESCB and ECB Statute (n 8) Art 10.4 has been interpreted so as to basically exclude the disclosure of any details of the meetings of the ECB's Governing Council.

³⁶ Jakob de Haan and Fabian Amtenbrink, 'A Non-Transparent European Central Bank? Who Is to Blame?' (2003) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138224> accessed 17 March 2021.

³⁷ See also ESCB and ECB Statute (n 8) Art 45.2, according to which the President of the Council and a Member of the Commission can participate, without having the right to vote, in meetings of the ECB's General Council.

More importantly, Article 284(3) TFEU states in rather general and noncommittal language that the ECB President and other Executive Board members *may*, at the request of the European Parliament or on their own initiative, be heard by the competent committees of the European Parliament. While this wording can hardly be construed to establish a legal obligation under primary Union law on the ECB to appear before the European Parliament or any of its committees, the European Parliament took at the time of the inception of the ECB a proactive stance in shaping its relationship with the latter, pointing out that ‘... the independence of the future ECB will only meet with public acceptance if the ECB enjoys a high degree of legitimacy; whereas the only way to ensure this is full accountability of the ECB for its actions ...’ and ‘... as the future ESCB and the ECB will conduct a single monetary policy for all the Member States taking part in European monetary union, democratic accountability must similarly be exercised at the European level ... as the only directly elected institution at this level, the European Parliament is a particularly appropriate institution to hold the ECB to account.’³⁸ Correspondingly, the European Parliament called ‘... for the organization of a dialogue between the European Parliament and the future ECB on monetary and economic affairs, the framework for which dialogue should be confirmed through a mutual agreement.’³⁹

With the agreement of the ECB, this has resulted in a practice of quarterly exchanges between the ECB President and also other members of the Executive Board and the Committee on Economic and Monetary Affairs (ECON) of the European Parliament, better known as *monetary dialogue*.⁴⁰ These arrangements certainly constitute a major improvement over what could have been expected on the basis of the relevant legal requirements, and the ECB has been praised for being ‘highly responsive to the ECON.’⁴¹ At the same time, their usefulness as a mechanism to ensure the democratic accountability of the ECB has been questioned, by and large due to the absence of instruments at the disposal of the European Parliament to actually impose any sanctions if it concludes that the ECB is not performing adequately.⁴² This means that the monetary dialogue can be mainly seen as a forum in which the democratically elected representatives of the EU citizens can ask the ECB to explain its strategy and actions and they can express their support or rejection thereof. Moreover, as Collignon has rightly observed, it can be considered as ‘one of the few bridges to link monetary policy with

³⁸ Resolution of the European Parliament on democratic accountability in the third phase of EMU [1998] OJ C138/177, under C and F.5.

³⁹ *ibid* under F.7.

⁴⁰ Nowadays, see Rules of Procedure of the European Parliament (9th parliamentary term—September 2021), Rule 135(3).

⁴¹ Sylvester Eijffinger and Edin Mujagic, ‘An Assessment of the Effectiveness of the Monetary Dialogue on the ECB’s Accountability and Transparency: A Qualitative Approach’ (2004) 39 *Intereconomics* 190. For various reflections on the workings of the monetary dialogue and proposals for improvements, see Gregory Claeys and others, ‘Monetary Dialogue 2009-2014: Looking Backward, Looking Forward’ (2014) Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy PE 518.753 <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/518753/IPOL_IDA\(2014\)518753_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/518753/IPOL_IDA(2014)518753_EN.pdf)> accessed 17 March 2021 (hereafter Claeys and others, ‘Monetary Dialogue 2009-2014’).

⁴² Fabian Amtenbrink and Kees van Duin, ‘The European Central Bank before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue’ (2009) 34 *EL Rev* 561 (hereafter Amtenbrink and van Duin, ‘The European Central Bank before the European Parliament’).

other policy considerations.⁴³ Yet, the monetary dialogue has not only functioned as a tool for MEPs (and the broader public) to gain information on the conduct of monetary policy relevant for the evaluation of the ECB's performance, but also as a communication channel for the ECB itself to explain and defend its monetary policy stance, such as with regard to its reluctance in the past to actively pursue the secondary objective laid down in Article 127(1) TFEU to support the Union's general economic policies with a view to contributing to the achievement of the objectives stated in Article 3(3) TEU. Measuring the effectiveness of the monetary dialogue as an accountability tool is difficult, in particular when considering that, due to the abovementioned lack of effective instruments, the influence of the European Parliament has been informal and through the power of persuasion.⁴⁴ One notable change at the ECB that may be attributed to the relentless insistence on this point by MEPs has been the practice from 2015 onwards of publishing the accounts of the monetary policy meetings of the ECB's Governing Council.⁴⁵ Previously, the ECB had taken the view that the publication of minutes from the meetings of the Governing Council would run contrary to the confidentiality provision of the Statute of the ESCB and ECB, and hamper the internal deliberations between the National Central Bank governors.⁴⁶ As a result, it had categorically ruled out the publication of any details of these meetings. As has been observed elsewhere, while the accounts do not identify proponents and opponents of a specific monetary policy stance or measures, they still provide useful insights into the main considerations that influenced the decision-making process.⁴⁷

III. The Evolution of the ECB's Democratic Legitimacy and Accountability

With the abovementioned approach to accountability and transparency, the position of the ECB in the pursuit of its statutory objectives remained relatively unchallenged during the first ten years of its existence. However, in the last decade the ECB has undergone a major transformation, reigniting and intensifying the debate about the democratic legitimacy of its position and powers in the European legal order. Two major developments have triggered this: the ECB's role as crisis manager, namely during the European sovereign debt crisis, and its new tasks in the European Banking Union. These will be discussed hereafter in turn.

⁴³ Stefan Collignon, 'Central Bank Accountability in Times of Crisis. The Monetary Dialogue: 2009-2014' in Claeys and others, 'Monetary Dialogue 2009-2014' (n 41) 68.

⁴⁴ For a qualitative analysis, see Amtenbrink and van Duin, 'The European Central Bank before the European Parliament' (n 42); Stefan Collignon and Sebastian Diessner, 'The ECB's Monetary Dialogue with the European Parliament: Efficiency and Accountability During the Euro Crisis?' (2016) 54 *JCMS* 1296 (hereafter Collignon and Diessner, 'The ECB's Monetary Dialogue with the European Parliament').

⁴⁵ European Central Bank, 'ECB to Publish Accounts of Monetary Policy Discussions from January' (18 December 2014) <<https://www.ecb.europa.eu/press/pr/date/2014/html/pr141218.en.html>> accessed 17 March 2021.

⁴⁶ See ESCB and ECB Statute (n 8) Art 10.4, according to which the proceedings of the meetings are confidential, but the Governing Council may decide to make the outcome of its deliberations public. See also Fabian Amtenbrink, 'Economic and Monetary Union' in Pieter Jan Kuijper and others (eds), *The Law of the European Union* (5th edn, Kluwer Law International 2018) 939.

⁴⁷ *ibid* 939–40.

A. The ECB's role as crisis manager

Much has been written about the role of the ECB as crisis manager during the sovereign debt crisis that need not be repeated here. The two main areas of contestation were the ECB's approach to monetary policy and its involvement in the financial assistance programmes for euro area Member States.

In the face of tensions in the financial system that negatively impacted the transmission of monetary policy to the real economy, and with the declared aim of ensuring the effectiveness of its monetary policy toolbox and 'the singleness of monetary policy', that is, the effectiveness of its policies in the whole euro area,⁴⁸ the ECB engaged in non-standard or unconventional monetary policy measures. Initially, these included, *inter alia*, the unprecedented lowering of its key interest rates, the widening of the range of eligible collateral, and targeted longer-term refinancing operations.⁴⁹ Yet, the most controversial measures taken by the ECB were the numerous asset purchase programmes, covering both private and public securities, including three covered bond purchase programmes (2009–10, 2011–12, and from 2014 onwards), an asset-backed securities purchase programme (2014–18, and from 2019 onwards), a corporate sector purchase programme (2016–18, and from 2019 onwards), and a public sector purchase programme (2015–18, and from 2019 onwards). Moreover, in August 2012 the ECB's Governing Council announced the use of outright monetary transactions (OMT) on the secondary markets for sovereign bonds.⁵⁰ While this programme was never put into operation, its announcement alone is believed to have produced effects.⁵¹ By February 2021 the ECB's net purchases under its asset purchase programmes had accumulated to €3,086 billion.⁵²

Ever since the first financial assistance programme for Greece was agreed in 2010, the ECB has also been involved in the negotiations for the economic adjustment programmes that have been consistently attached to the financial assistance granted to euro area Member States, including in the context of the temporary European Financial Stabilisation Mechanism (EFSM) and European Financial Stability Facility (EFSF), as well as the permanent European Stability Mechanism (ESM). Through a

⁴⁸ Jörg Bibow, 'The Euro's Savior? Assessing the ECB's Crisis Management Performance and Potential for Crisis Resolution' (2015) IMK Study No 42, 8 <<http://gesd.free.fr/imk4215.pdf>> accessed 17 March 2021 refers to a policy that 'translates into broadly uniform financial conditions across the currency union'.

⁴⁹ For an overview of these early measures, see Philippine Cour-Thimann and Bernhard Winkler, 'The ECB's Non-Standard Monetary Policy Measures: The Role of Institutional Factors and Financial Structure' (2013) ECB Working Paper No 1528 <<https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1528.pdf>> accessed 17 March 2021; Klaus Tuori, 'Monetary Policy (Objectives and Instruments)' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (OUP 2020).

⁵⁰ European Central Bank, 'Technical Features of Outright Monetary Transactions' (6 September 2012) <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 17 March 2021 (hereafter European Central Bank, 'Technical Features of Outright Monetary Transactions').

⁵¹ See Carlo Altavilla, Domenico Giannone, and Michele Lenza, 'The Financial and Macroeconomic Effects of the OMT Announcements' (2014) ECB Working Paper No 1707 <<https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1707.pdf>> accessed 17 March 2021, who observe effects on the bond yields of some euro area Member States.

⁵² See European Central Bank, 'Asset Purchase Programmes' <<https://www.ecb.europa.eu/mopo/implementation/html/index.en.html#abpp>> accessed 15 March 2021.

series of memoranda of understanding (MoUs), Member States receiving financial assistance commit themselves to specific economic (reform) plans, often entailing significant austerity measures.⁵³ These MoUs effectively function as a benchmark for assessing the country's compliance with the economic adjustment programme and for the decision on the pay-out of tranches from the loan.⁵⁴

In the case of the EFSM/EFSF and the ESM, the ECB's involvement has been written into their respective legal instruments. The ESM Treaty, as is currently in force, states that the European Commission in liaison with the ECB is entrusted with assessing the financing needs of the Member State in need of financial assistance; negotiating the general economic policy conditions attached to the ESM financial assistance; and monitoring, in regular intervals, compliance with these conditions.⁵⁵ In fact, the ECB itself has linked its unconventional monetary policy measures to financial assistance programmes, as in certain cases it constitutes an eligibility criterion for the purchasing of marketable debt securities of euro area Member States.⁵⁶

The involvement of the ECB in the management of the European financial and sovereign debt crisis has been met with considerable criticism. The legality of its actions has been questioned, and doubts were raised about the legitimacy of its powers and its involvement in the economic adjustment programmes. With regard to the former, the scope of the monetary policy mandate of the ECB and whether it covers the announced and implemented asset purchase programmes has become the subject of fierce legal debate and eventually of the well-documented legal challenges brought against the OMT and the public sector purchase programme before the German Federal Constitutional Court (*Bundesverfassungsgericht* or BVerfG) and the Court of Justice of the European Union (ECJ).⁵⁷ Interestingly, in its preliminary reference in *Weiss*, the BVerfG flagged the issue of the democratic legitimacy of the ECB's action. It ruled that, 'The independence enjoyed by the ECB and the national central banks in the exercise of the powers conferred to them ... is in conflict with requirements

⁵³ Usually referred to in the past as the Memorandum on Economic and Financial Policies, the Memorandum of Understanding on Specific Economic Policy Conditionality, and the Technical Memorandum of Understanding.

⁵⁴ See further Roderic O'Gorman, 'Adjustment Programmes, the European Central Bank and Conditionality' in Federico Fabbrini and Marco Ventrone (eds), *Research Handbook on EU Economic Law* (Edward Elgar Publishing 2019); Markakis, *Accountability in the Economic and Monetary Union* (n 31) ch 3, esp 85–102.

⁵⁵ Treaty Establishing the European Stability Mechanism [2012] T/ESM 2012-LT, Art 13 (hereafter ESM Treaty).

⁵⁶ See Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9) [2020] OJ L39/12, Arts 3 and 4, as amended. See also European Central Bank, 'Technical Features of Outright Monetary Transactions' (n 50).

⁵⁷ On judicial review of ECB monetary policy measures, see further Stefania Baroncelli, 'Monetary Policy and Judicial Review' in Federico Fabbrini and Marco Ventrone (eds), *Research Handbook on EU Economic Law* (Edward Elgar Publishing 2019); Alicia Hinarejos, 'The Legality of Responses to the Crisis' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (OUP 2020); Markakis, *Accountability in the Economic and Monetary Union* (n 31) ch 8; Annelieke Mooij and Stefania Baroncelli, 'What Kind of Judicial Review for the European Central Bank?' (2020) BRIDGE Network Working Paper No 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745244> accessed 18 March 2021; Nik de Boer and Jens van't Klooster, 'The ECB, the Courts and the Issue of Democratic Legitimacy after *Weiss*' (2020) 57 CMLR 1689. For a discussion of judicial review of monetary policy measures, see also chapter 2 by Vestert Borger, chapter 6 by Jonathan Bauerschmidt, chapter 10 by Alexander Thiele, chapter 12 by Takis Tridimas, and chapter 16 by Marijn van der Sluis, in this volume.

pertaining to the democratic legitimation of political decisions, but that it did not run contrary to democratic principles 'on the grounds that it takes into account the proven and scientifically supported particularity of monetary policy'.⁵⁸ Yet, in the view of the BVerfG, this conclusion 'hinges on the requirement that its mandate be interpreted restrictively,' thereby being limited to its price stability objective.⁵⁹ From the perspective of the BVerfG and its interpretation of German constitutional law, acts by Union institutions that exceed the competences assigned to the EU lack the democratic legitimation that derives from the transfer of sovereign powers by the Member States by means of a democratic process onto the supranational level and that justifies 'the decrease in the level of democratic legitimation of the public authority exercised by the European Union'.⁶⁰ In its decision in *Weiss*, the ECJ does not engage with the question whether, in light of Article 10 TEU on the principle of democracy, the reduced democratic legitimation of public power resulting from assigning monetary policy onto an independent Union institution calls for a narrow definition of the ECB's monetary policy mandate.

This debate on the democratic legitimacy of the powers exercised by the ECB during the crisis and, in the case of the public sector purchase programme, until this very day, has been further fuelled by the controversy on the effectiveness of the unconventional monetary policy measures and, even more so, their unintended economic side effects. These side effects do not only relate to possible constraints for future monetary policy operations and a reduced appetite of Member States for economic reforms and budgetary discipline, but also to the effects of the unconventional measures on the distribution of wealth and income.⁶¹ As has been pointed out elsewhere, it is these (potential) side effects that have put the spotlight on the independence and democratic legitimacy of central banks.⁶² Moreover, this has resulted in demands for the ECB, but also for the ECJ, to take such consequences more explicitly into account in considering the proportionality of monetary policy measures.⁶³

⁵⁸ BVerfG Order of the Second Senate of 18 July 2017 2 BvR 859/15 ECLI:DE:BVerfG:2017:rs20170718.2 bvr085915, para 103 (hereafter BVerfG 18 July 2017 2 BvR 859/15).

⁵⁹ *ibid.*

⁶⁰ BVerfG Judgment of the Second Senate of 5 May 2020 2 BvR 859/15 ECLI:DE:BVerfG:2020:rs:20200505.2bvr085915, paras 143 and 158.

⁶¹ For an overview, see Joscha Beckmann and others, 'The ECB's Asset Purchase Programmes: Effectiveness, Risks, Alternatives' (2020) Directorate General for Internal Policies, Policy Department for Economic, Scientific and Quality of Life Policies PE 652.741, 18 ff <https://www.europarl.europa.eu/cmsdata/211391/2_KIEL%20final.pdf> accessed 17 March 2021; Gregory Claeys and others, 'ECB Quantitative Easing (QE): What Are the Side Effects?' (2015) Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy PE 587.287 <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/587287/IPOL_IDA\(2015\)587287_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/587287/IPOL_IDA(2015)587287_EN.pdf)> accessed 17 March 2021.

⁶² Boris Vujčić, 'The Role of Central Banks and How to Insure Their Independence' (Speech at the Symposium on 'Central Banking in Central and Eastern Europe: Policy Making, Investment and Low Yields', Prague, 10 June 2016) <<https://www.bis.org/review/r1607012b.htm>> accessed 17 March 2021. See also Nicolò Fraccaroli, Alessandro Giovannini, and Jean-François Jamet, 'The Evolution of the ECB's Accountability Practices During the Crisis', ECB Economic Bulletin Issue 5/2018 <https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201805_01.en.html> accessed 17 March 2021, who provide evidence for increased media attention and public awareness (hereafter Fraccaroli, Giovannini, and Jamet, 'The Evolution of the ECB's Accountability Practices During the Crisis').

⁶³ BVerfG 18 July 2017 2 BvR 859/15 (n 58) para 139, referring to the effects of a government bond purchasing programme on, *inter alia*, personal savings, pension and retirement schemes, and real estate prices.

The increased scrutiny of the ECB's role in the negotiation and monitoring of the financial assistance programmes can be explained by the socio-economic impact that the implementation of these programmes has had in the respective countries. It can be observed that the actual decision-making process in the ESM does not grant the ECB a (formal) role in the adoption of sensitive measures.⁶⁴ The recipient Member State itself actively participates in the conclusion of the programme, and the application of what has been agreed is subject to national implementing measures adopted by means of the domestic democratic decision-making process. Yet, next to the European Commission, the ECB has been perceived as the main author (or co-author) of economic policy conditionality, to the point of triggering (unsuccessful) challenges against the ECB before the EU courts for its involvement.⁶⁵ The ECB is perceived, as has been observed elsewhere, 'as entering the arena typically reserved for political decision making; an arena where competing (public) interests are balanced and decisions with direct distributional effects are taken.'⁶⁶

The evolution of the ECB's role, both objectively and certainly in the perception of many observers, begs the question as to what extent the mechanisms ensuring the legitimacy of its monetary policy function have sufficiently evolved in parallel to these developments. First, it can be noted that these developments have formally taken place within the scope of the existing monetary policy mandate of the ECB or resulted from developments outside the direct control of the ECB, such as the establishment of the ESM. This means that the Treaty provisions on the ECB have remained unchanged. A formal recognition of the transformed role of the ECB as monetary policy authority by the masters of the Treaties is thus missing. In the absence of an amendment of the primary Union law provisions on the ECB, the existing accountability mechanisms have remained unchanged, thereby also limiting any possible evolution of the legal framework governing its accountability. In this connection, it should be further noted that the reformed ESM Treaty would clarify the respective roles of the institutions involved in financial assistance programmes, including the ECB for that matter. However, the developments on the accountability front would be minimal.⁶⁷

The most significant development from a legal perspective has been the engagement of national and EU courts with the ECB's role as crisis manager. First and foremost, while this could hardly be questioned before the sovereign debt crisis, it has become clear that the independent ECB is subject to the rule of law and thus to judicial review by the EU courts.⁶⁸ At the same time, the *Gauweiler* and *Weiss* cases have highlighted the complexity involved in the judicial review of monetary policy decisions.

⁶⁴ For the tasks conferred on the ECB in the ESM, see notably ESM Treaty (n 55) Arts 4(4), 13(1), (3) and (7), 14(6) and 18(2).

⁶⁵ Francesco Costamagna, 'The EMU and the European Social Dimension' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (OUP 2020). On the evolving role of the ECB, see also Alexander Thiele, *Das Mandat der EZB und die Krise des Euro* (Mohr Siebeck 2013).

⁶⁶ Fabian Amtenbrink, 'The European Central Bank's Intricate Independence versus Accountability Conundrum in the Post-Crisis Governance Framework' (2019) 26 MJ 165, 178.

⁶⁷ See further Menelaos Markakis, 'The Reform of the European Stability Mechanism: Process, Substance, and the Pandemic' (2020) 47 LIEI 359.

⁶⁸ On the position of the ECB within the Union legal order, see Case C-11/00 *Commission of the European Communities v European Central Bank* [2003] ECLI:EU:C:2003:395.

Following legal challenges to the ECB's unconventional monetary policy measures in the domestic legal order, the ECJ found itself in the rather unique position of having to enforce the primary Union law 'legal fiction' of a clear delineation of monetary policy from economic policy in the face of a different economic reality.⁶⁹ Moreover, it had to legally review the decisions of an independent expert body that were based on complex economic considerations. The ECJ's approach in *Gauweiler* and *Weiss* may be summarized as the exercise of judicial restraint rather than activism. This is the case for the ECJ's approach to determining the monetary policy character of an ECB measure, as this is 'principally' determined with reference to the objectives of that measure, which the author of the measure itself determines. This is also the case for the ECJ's approach to proportionality review, which essentially amounts to 'an arbitrariness test, which only reviews whether the ECB ... has not exceeded the outer limits of its discretion',⁷⁰ and hence which does not entail a detailed balancing act of the potentially conflicting objectives, interests, and effects that a concrete monetary policy measure may entail. The ECJ's approach to judicial review has been met with considerable resistance by the German Federal Constitutional Court, which effectively considers full judicial review as an instrument of checks and balances for the independent ECB and accuses the ECJ of falling short of fulfilling this function adequately. Yet, judicial review cannot function as a replacement or sufficiently compensate for instruments of democratic accountability. As has been observed elsewhere:

If judges act as counterbalances to expert bodies, they effectively substitute their judgment for that of experts. Or, to put it more bluntly, one non-majoritarian body (a court) replaces the decision by another non-majoritarian body (a central bank). The issue of the fragile democratic legitimation of decisions with potentially far reaching implications is hardly solved by such a switching of actors.⁷¹

Beyond judicial review, it has been observed that the monetary dialogue between the ECB and the European Parliament has evolved during the crisis, as 'the ECB and the European Parliament have increased the frequency of their interactions, innovated on format and increased the focus of exchanges in response to the demand for greater scrutiny of the ECB's actions'.⁷² Yet, the conclusion that 'this has resulted in an enhanced use by the European Parliament of the accountability instruments at its disposal'⁷³ is based on a narrow conception of accountability, according to which the agent has to explain and justify its action but is not subject to any concrete instruments by means of which the principal can assign consequences to its assessment of the agent's performance. Put somewhat more bluntly, neither the directly

⁶⁹ Fabian Amtenbrink and René Repasi, 'The German Federal Constitutional Court's Decision in *Weiss*: A Contextual Analysis' (2020) 45 EL Rev 757, 759 ff.

⁷⁰ *ibid* 775.

⁷¹ *ibid* 776.

⁷² Fraccaroli, Giovannini, and Jamet, 'The Evolution of the ECB's Accountability Practices During the Crisis' (n 62), s 5 (Conclusions); Collignon and Diessner, 'The ECB's Monetary Dialogue with the European Parliament' (n 44).

⁷³ Fraccaroli, Giovannini, and Jamet, 'The Evolution of the ECB's Accountability Practices During the Crisis' (n 62), s 5 (Conclusions).

democratically legitimized European Parliament nor the indirectly democratically legitimized Council of the EU have any effective instruments at their disposal to convince the ECB to make different policy choices, thereby signalling their preferences for fewer (or differently weighted) economic side effects. At first sight, such a possibility could be considered undesirable from the standpoint of safeguarding the ECB's independence. Yet, this comes at the expense of the democratic legitimacy (namely in the shape of throughput legitimacy) of the ECB, which in turn results in open (political) challenges of its independent position.

Finally, while an argument can certainly be made that in its role in managing the crisis the ECB has served the general or public interest, it cannot be readily concluded that the ECB's legitimacy in this regard derives from its policies. Indeed, as has been observed: 'Output legitimacy requires policies to work effectively while resonating with citizens' values, and identity.'⁷⁴ The scepticism with which the ECB's crisis management has been met by the citizens in different countries and for different reasons suggests that the latter is anything but certain.

B. The ECB's role in the European Banking Union

In formal legal terms, the most important evolution of the ECB's accountability framework can be attributed to the development of the European Banking Union.⁷⁵ With the establishment of the Single Supervisory Mechanism (SSM)⁷⁶ and the Single Resolution Mechanism (SRM),⁷⁷ specific accountability arrangements were set out in secondary Union law for the scrutiny of the tasks that the ECB carries out in the Banking Union. These arrangements reflect not only an updated thinking among the EU institutions on the importance of explicitly providing for accountability mechanisms in the applicable legal framework, but perhaps also the difference in the role played by the ECB as a bank supervisor in comparison to monetary policy.⁷⁸

The SSM Regulation, which was adopted on the basis of Article 127(6) TFEU, has conferred specific supervisory tasks on the ECB.⁷⁹ The SSM comprises the ECB and the national competent authorities, and the ECB is responsible for its effective and consistent functioning.⁸⁰ The ECB directly supervises 111 'significant' banks or cross-border groups that are established in Member States participating in the Banking

⁷⁴ Schmidt, 'Democracy and Legitimacy in the European Union Revisited' (n 2) 7.

⁷⁵ See chapter 7 by Kern Alexander, in this volume.

⁷⁶ Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (hereafter SSM Regulation).

⁷⁷ Regulation (EU) 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L225/1.

⁷⁸ In this connection, Paul Tucker argues that the central banks' 'newly fortified powers to oversee and set the terms of trade for banking and other parts of finance unambiguously make them part of the "regulatory state"': Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2018) 8.

⁷⁹ SSM Regulation (n 76) Art 1.

⁸⁰ *ibid* Art 6(1). See chapter 8 by Federico Della Negra and Gianni Lo Schiavo, in this volume.

Union.⁸¹ The ECB's supervisory function is organizationally separate from its monetary policy function.⁸² Its supervisory tasks are carried out by the Supervisory Board, which is an internal body of the ECB.⁸³ Nevertheless, the ECB's Governing Council formally remains the main decision-making body in the SSM, as required by EU primary law.⁸⁴ More specifically, the Supervisory Board approves draft supervisory decisions, which shall be deemed to be adopted unless the Governing Council objects to them.⁸⁵

The framework for the accountability of the ECB in the SSM is partly dependent on existing arrangements and partly dependent on new provisions, following the inclusion of specific rules in the SSM Regulation, notably in Articles 20–21.⁸⁶ The relevant provisions of the SSM Regulation are complemented by the Interinstitutional Agreement (IIA) between the European Parliament and the ECB;⁸⁷ and the Memorandum of Understanding (MoU) between the Council of the EU and the ECB.⁸⁸ Overall, it can be observed that this accountability framework is more elaborate than the one for its monetary policy function.

Article 20(1) SSM Regulation provides that the ECB shall be accountable to the European Parliament and to the Council of the EU for the implementation of this Regulation and thus for ensuring that the SSM's aims are achieved. Article 1 SSM Regulation sets out the objectives pursued by the SSM. It has been observed that, in contrast to the ECB's monetary policy objectives, the SSM Regulation 'includes multiple, vague objectives, without establishing a clear hierarchal order between them.'⁸⁹ To the extent that 'the safety and soundness of credit institutions' and 'the stability of the financial system within the Union and each Member State' may be qualified as the core objectives to be pursued by the ECB in the SSM, it has been argued that 'they hardly amount to a quantifiable yardstick based on which the performance of the ECB can be objectively evaluated.'⁹⁰ What is more, it might be difficult to monitor whether these objectives are achieved in practice, as a clear benchmark is absent.⁹¹ In its 2016

⁸¹ European Central Bank, 'List of Supervised Banks' (1 April 2022) <<https://www.bankingsupervision.europa.eu/banking/list/html/index.en.html>> accessed 24 May 2022.

⁸² SSM Regulation (n 76) Art 25.

⁸³ *ibid* Art 26(1).

⁸⁴ See Arts 129(1) and 282(2) TFEU; ESCB and ECB Statute (n 8) Art 12.

⁸⁵ SSM Regulation (n 76) Art 26(8).

⁸⁶ See generally, Fabian Amtenbrink, 'Art. 20 SSMR Accountability and Reporting' and 'Art. 21 SSMR National Parliaments' in Jens-Hinrich Binder, Christos V. Gortsos, Klaus Lackhoff, and Christoph Ohler (eds), *Brussels Commentary. European Banking Union* (Beck, Hart, Nomos 2022).

⁸⁷ 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) [2013] OJ L320/1 (hereafter IIA between the European Parliament and the ECB).

⁸⁸ 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) [2013] <https://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf> accessed 9 February 2021 (hereafter MoU between the Council and the ECB).

⁸⁹ Fabian Amtenbrink and Menelaos Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism' (2019) 44 *EL Rev* 3, 11–12 (hereafter Amtenbrink and Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area?').

⁹⁰ *ibid* 11. On the ECB and financial stability, see chapter 5 by Agnieszka Smoleńska and Thomas Beukers, in this volume.

⁹¹ *ibid* 12. See also the analysis by Phedon Nicolaides, 'Accountability of the ECB's Supervisory Activities (SSM): Evolving and Responsive' (2019) 26 *MJ* 136.

report on the SSM, the European Court of Auditors notes that ‘the ECB has not yet developed a formal performance framework for the SSM.’⁹² The SSM Supervisory Dashboard Pilot, which allows the ECB to track and assess the most important aspects of its supervisory activities and to monitor the effectiveness with which supervisory priorities are translated into practice, is only available to the Supervisory Board and to senior management.⁹³ Accordingly, Transparency International EU recommended that the ECB create a public version of this tool, which would allow the public to assess whether the ECB is achieving its objectives.⁹⁴

The SSM Regulation, read together with the IIA between the European Parliament and the ECB and the MoU with the Council, introduces a relatively detailed framework on the provision of information to and institutional contacts with the EU institutions. The ECB must submit a report on the execution of its tasks to the European Parliament, the Council, the Commission, and the Eurogroup.⁹⁵ Yet, instead of the ECB President, it is the Chair of the Supervisory Board, who is not a member of the Governing Council (that is, the formal decision-making body in the SSM), that presents that report in public to the European Parliament, and to the Eurogroup in the presence of representatives from participating Member States whose currency is not the euro⁹⁶—a structure which has been described in the literature as ‘the Eurogroup+’.⁹⁷ The IIA sets out in detail the contents of this report and requires that it be made available to the European Parliament in advance of the hearing.⁹⁸

The Chair of the Supervisory Board may, at the request of the Eurogroup, be heard on the execution of the ECB’s supervisory tasks.⁹⁹ The information exchanged during such hearings and exchanges of views shall be confidential.¹⁰⁰ Furthermore, at the request of the European Parliament, the Chair of the Supervisory Board must participate in a hearing on the execution of the ECB’s supervisory tasks by the competent committee of the European Parliament (namely, the ECON Committee).¹⁰¹ The ECB shall reply orally or in writing to questions put to it by the European Parliament or the Eurogroup.¹⁰² Upon request, the Chair of the Supervisory Board shall hold confidential oral discussions behind closed doors with the Chair and Vice-Chairs of Parliament’s competent committee concerning its supervisory tasks when such

⁹² European Court of Auditors, ‘Single Supervisory Mechanism—Good Start but Further Improvements Needed’ (2016) Special Report No 29/2016, 46 <https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf> accessed 17 March 2021.

⁹³ *ibid.*

⁹⁴ Benjamin Braun, ‘Two Sides of the Same Coin? Independence and Accountability of the European Central Bank’ (Transparency International EU, 2017) 7, 48 <https://transparency.eu/wp-content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf> accessed 9 February 2021.

⁹⁵ SSM Regulation (n 76) Art 20(2).

⁹⁶ *ibid* Art 20(3).

⁹⁷ Jean-Victor Louis, ‘Democracy and the European Central Bank. Some Comments on Independence and Accountability’ in Gregorio Garzón Clariana (ed), *Democracy in the New Economic Governance of the European Union* (Marcial Pons 2015) 142–43.

⁹⁸ IIA between the European Parliament and the ECB (n 87) s I.1.

⁹⁹ SSM Regulation (n 76) Art 20(4).

¹⁰⁰ MoU between the Council and the ECB (n 88) s I.2.(3).

¹⁰¹ SSM Regulation (n 76) Art 20(5). See further the IIA between the European Parliament and the ECB (n 87) s I.2.

¹⁰² SSM Regulation (n 76) Art 20(6). See further the IIA between the European Parliament and the ECB (n 87) s I.3.

discussions are required for the exercise of Parliament's powers under the TFEU.¹⁰³ The hearings, exchanges of views, and confidential meetings with the European Parliament and the 'Eurogroup+' shall cover all aspects of the activity and functioning of the SSM.¹⁰⁴ No minutes or any other recording of the confidential meetings shall be taken.¹⁰⁵ Furthermore, the ECB shall cooperate sincerely with any investigations by the European Parliament, subject to the TFEU.¹⁰⁶ The IIA complements the SSM Regulation by granting additional information and consultation rights to the European Parliament concerning the records of the proceedings of the Supervisory Board, the principles and kinds of indicators or information used in developing acts and policy recommendations, informal exchanges of views on draft acts, and so on.¹⁰⁷

A first assessment of the banking supervision dialogue between the European Parliament and the ECB has indicated that 'overall the MEPs raise informed questions that show an understanding of the relevant issues'.¹⁰⁸ At the same time, the queries are not necessarily geared towards evaluating the performance of the ECB as a banking supervisor, as it has been further observed that 'the MEPs do not (explicitly) ask questions on the achievement of the SSM's objectives, but rather focus on the overall performance of the banking sector or the financial health of individual banks'.¹⁰⁹ Moreover, it should be noted that in the past MEPs asked plenty of questions that concerned issues that clearly fall outside the remit of the SSM, questions that touch upon cross-cutting issues that do not exclusively fall within the remit of one institution, agency, or body (eg concerning both the SSM and the SRM), or questions that concern the exercise of the duties of authorities located at different levels of this system of governance (eg the Supervisory Board and the national competent authorities).¹¹⁰ This can be partly explained by the complex division of tasks between and across the EU and national authorities acting in this area. Yet, as has been noted elsewhere, the appropriate forum for discussing such cross-cutting issues is unclear.¹¹¹

Interestingly, in comparison to the monetary policy function of the ECB, somewhat more potent accountability instruments seem to be available to its principals to hold the ECB to account for the execution of its SSM-related tasks. This conclusion can first and foremost be drawn with reference to the nature of the enabling statute of the SSM, which constitutes secondary Union law and thus does not require a Treaty

¹⁰³ SSM Regulation (n 76) Art 20(8).

¹⁰⁴ IIA between the European Parliament and the ECB (n 87) s I.2; MoU between the Council and the ECB (n 88) s I.2.(4).

¹⁰⁵ IIA between the European Parliament and the ECB (n 87) s I.2.

¹⁰⁶ SSM Regulation (n 76) Art 20(9). See further the IIA between the European Parliament and the ECB (n 87) s III.

¹⁰⁷ See further Markakis, *Accountability in the Economic and Monetary Union* (n 31) 158.

¹⁰⁸ Amtenbrink and Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area?' (n 88) 20. On these interactions, see also the study by Adina Maricut-Akbik, 'Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament' (2020) 58 *JCMS* 1199.

¹⁰⁹ Amtenbrink and Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area?' (n 88) 21.

¹¹⁰ *ibid* 18–19.

¹¹¹ *ibid* 19, where it is also argued that 'interparliamentary committee meetings taking place at the EP ... may provide a forum for discussion of such cross-cutting issues'.

revision in order to be amended.¹¹² If the Council is displeased with the functioning of the SSM or the role of the ECB therein, it may amend, replace, or even repeal the SSM Regulation, pursuant to Article 127(6) TFEU, acting by means of Regulations in accordance with a special legislative procedure and after consulting the European Parliament and the ECB. It may use this power to impose additional obligations on the ECB and/or to amend the accountability framework applicable to its activities in the SSM. Yet, the Member States must be unanimous in the Council, including the Member States which are not (yet) participating in the Banking Union for that matter. Moreover, by providing the European Parliament merely with the right to be consulted in the legislative procedure, Article 127(6) TFEU is a relic from the dark ages of European parliamentarianism, when the consultation procedure was the main *modus operandi* in supranational law-making.¹¹³ It has been observed elsewhere that it is possible, in the absence of opposition by national parliaments, for the European Council to decide to switch to an ordinary legislative procedure, an option that should be seriously considered.¹¹⁴

The role of the European Parliament in the appointment and dismissal of the Chair and Vice-Chair of the Supervisory Board is considerably greater than its role in the appointment of the members of the ECB's Executive Board. The European Parliament's approval is required prior to the appointment of the Chair and the Vice-Chair of the Supervisory Board by the Council by means of an implementing decision.¹¹⁵ The IIA between the European Parliament and the ECB lays down in detail the procedure to be followed for their appointment.¹¹⁶ By contrast, the European Parliament is merely consulted on the appointment of the ECB Executive Board members. These are appointed by the European Council, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the ECB.¹¹⁷

The European Parliament's approval is further required for the removal of the Chair and Vice-Chair of the Supervisory Board from office.¹¹⁸ If the Chair of the Supervisory Board no longer fulfils the conditions required for the performance of her/his duties or has been guilty of serious misconduct, the Council may, following a proposal by the ECB, which has been approved by the European Parliament, adopt an implementing decision to remove her/him from office.¹¹⁹ The same procedure is followed to remove the Vice-Chair from office (who is chosen from among the Executive Board members), following her/his compulsory retirement as a member of the Executive Board.¹²⁰ The involvement of the European Parliament in the procedure for removing the Chair or Vice-Chair of the Supervisory Board from office is important from an

¹¹² This is of course with the exception of those provisions from the ECSB and ECB Statute which can be amended without a Treaty revision.

¹¹³ Amtenbrink and Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area?' (n 88) 22. On the development of the legislative role of the European Parliament, see Fabian Amtenbrink and Hans Vedder, *European Union Law: A Textbook* (Eleven Publishing 2021) 590 ff.

¹¹⁴ Markakis, *Accountability in the Economic and Monetary Union* (n 31) 327.

¹¹⁵ SSM Regulation (n 76) Art 26(3).

¹¹⁶ IIA between the European Parliament and the ECB (n 87) s II.

¹¹⁷ Art 283(2) second subpara TFEU.

¹¹⁸ SSM Regulation (n 76) Art 26(4).

¹¹⁹ *ibid* first subpara.

¹²⁰ *ibid* second subpara.

accountability standpoint. The fact that the dismissal procedure relies on a proposal from the ECB does not devalue it as an accountability mechanism. In this context, it is crucial that the European Parliament or the Council may inform the ECB that it considers the conditions for the removal of the Chair or Vice-Chair from office to be fulfilled, to which the ECB shall respond in writing.¹²¹ By comparison, if a member of the Executive Board no longer fulfils the conditions required for the performance of her/his duties or if s/he has been guilty of serious misconduct, the Court of Justice may, on application by the Governing Council or the Executive Board, compulsorily retire her/him.¹²² It should be stressed that the procedure followed for the appointment or removal from office of the Executive Board members is also important for the governance of the SSM, as they are also members of the Governing Council,¹²³ which formally adopts (or objects to) the draft decisions prepared by the Supervisory Board.¹²⁴ This performe limits the extent to which the European Parliament and Council could influence the composition of the SSM's decision-making bodies.¹²⁵ In this connection, the European Parliament has asked that its role in the appointment of the Executive Board members be enhanced, by requiring that it consents to the recommendations of the Council.¹²⁶

A further novelty in the SSM Regulation is that Article 21 lays down a framework for scrutiny by national parliaments. Their involvement is justified on grounds of the potential impact that supervisory measures may have on public finances, credit institutions, their customers and employees, and the markets in the participating Member States.¹²⁷ More specifically, it is provided that the ECB is obliged to simultaneously forward its annual report directly to the national parliaments of the participating Member States. These may address to the ECB their reasoned observations on that report.¹²⁸ They may further submit observations or questions to the ECB in respect of its tasks under the SSM Regulation.¹²⁹ Moreover, they may invite the Chair or a member of the Supervisory Board to participate in an exchange of views in relation to the supervision of credit institutions in that Member State together with a representative of the national competent authority.¹³⁰ It is rightly observed that there is no

¹²¹ *ibid* third subpara; IIA between the European Parliament and the ECB (n 87) s II; MoU between the Council and the ECB (n 88) s II.(6).

¹²² ECSB and ECB Statute (n 8) Art 11.4.

¹²³ Art 283(1) TFEU.

¹²⁴ SSM Regulation (n 76) Art 26(8).

¹²⁵ Markakis, *Accountability in the Economic and Monetary Union* (n 31) 166–67.

¹²⁶ Committee on Constitutional Affairs, 'Report on Constitutional Problems of a Multitier Governance in the European Union' (2012/2078(INI)), 15 November 2013, para 75 <https://www.europarl.europa.eu/doceo/document/A-7-2013-0372_EN.html> accessed 10 February 2021.

¹²⁷ SSM Regulation (n 76) preamble recital 56.

¹²⁸ *ibid* Art 21(1).

¹²⁹ *ibid* Art 21(2).

¹³⁰ *ibid* Art 21(3). See Diane Fromage and Renato Ibrido, 'Accountability and Democratic Oversight in the European Banking Union' in Gianni Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) 81, who note that: 'More transparency and publicity on this dialogue between national parliaments and the ECB would in any case be desirable as they are, at present, barely mentioned in the annual reports.' The most recent annual reports underscore this observation: European Central Bank, 'ECB Annual Report on Supervisory Activities 2019' (19 March 2020) <<https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2019~4851adc406.en.html>>

legal framework for scrutiny by national parliaments in the area of monetary policy.¹³¹ In fact, as the EU has the exclusive competence for monetary policy for euro area countries, the directly democratically legitimized European Parliament should be the prime forum for the scrutiny of the ECB's monetary policy. Nevertheless, in practice, the ECB President has visited from time to time a number of national parliaments in order to explain the ECB's monetary policy.¹³² Until now, these practical arrangements are not formalized in the Treaties and certainly do not pose an obligation for the ECB.

C. The ECB and the COVID-19 pandemic

Next to the European financial and sovereign debt crisis and the emergence of two main pillars of the Banking Union, the ECB has most recently also played an important role in addressing the economic consequences of the COVID-19 pandemic.¹³³ The ECB has mainly acted in its capacity as monetary policy authority, whilst in the field of banking supervision it has used the flexibility that is provided within the existing rules.¹³⁴ The ECB's role as crisis manager was broadened, thereby putting additional strain on the already precarious accountability and transparency framework. In fact, the latter has remained (by and large) unaltered.

In response to the COVID-19 crisis, the ECB has scaled up its use of unconventional monetary policy instruments, by expanding existing asset purchase programmes or adopting new ones. It has further used other monetary policy tools, such as conducting additional longer-term refinancing operations (LTROs) and applying more favourable terms to targeted longer-term refinancing operations (TLTROs).¹³⁵

accessed 13 February 2021; European Central Bank, 'ECB Annual Report on Supervisory Activities 2020' (23 March 2021) <<https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2020~1a59f5757c.en.html>> accessed 24 May 2022; European Central Bank, 'ECB Annual Report on Supervisory Activities 2021' (31 March 2022) <<https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2021~52a7d32451.en.html>> accessed 24 May 2022.

¹³¹ Deirdre Curtin, 'Democratic Accountability of EU Executive Power: A Reform Agenda for Parliaments' in Federico Fabbrini, Ernst Hirsch Ballin, and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) 185. See also Diane Fromage, 'Guaranteeing the ECB's Democratic Accountability in the Post-Banking Union Era: An Ever More Difficult Task?' (2019) 26 MJ 48, 50, 61, who argues that national parliaments should have a role in the field of monetary policy, too, in light of the consequences of the ECB's actions for financial stability in the Member States, in order to increase its democratic legitimacy.

¹³² See further Davor Jančić, 'Accountability of the European Central Bank in a Deepening Economic and Monetary Union' in Davor Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (OUP 2017) 150–54; Tobias Tesche, 'Instrumentalizing EMU's Democratic Deficit: The ECB's Unconventional Accountability Measures During the Eurozone Crisis' (2018) 41 Journal of European Integration 447, 454–58.

¹³³ See generally Paul Dermine and Menelaos Markakis, 'EU Economic Governance and the COVID-19 Crisis: Between Path-Dependency and Paradigmatic Shift' (2020) 6 International Journal of Public Law and Policy 326 (hereafter Dermine and Markakis, 'EU Economic Governance and the COVID-19 Crisis').

¹³⁴ It should be noted that there have further been targeted changes to the prudential regulatory framework. See Regulation (EU) 2020/873 of the European Parliament and of the Council of 24 June 2020 amending Regulations (EU) No 575/2013 and (EU) 2019/876 as regards certain adjustments in response to the COVID-19 pandemic [2020] OJ L204/4.

¹³⁵ European Central Bank, 'Monetary Policy Decisions' (12 March 2020) <<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp200312~8d3aec3ff2.en.html>> accessed 17 June 2020.

More specifically, the ECB has expanded its asset purchases, ensuring a strong contribution from the private sector purchase programmes, by adding a temporary envelope of additional net asset purchases of €120 billion, in order to create favourable financing conditions for the real economy.¹³⁶ The ECB also announced a new temporary asset purchase programme of private and public sector securities to counter the serious risks to the monetary policy transmission mechanism and the outlook for the euro area.¹³⁷ The Pandemic Emergency Purchase Programme (PEPP) had an initial overall envelope of €750 billion.¹³⁸ Purchases would be conducted until the end of 2020 and would include all the asset categories eligible under the existing Asset Purchase Programme (APP). The PEPP differs from the APP in various important respects.¹³⁹ Moreover, purchases under the PEPP are envisaged to be conducted in a flexible manner.¹⁴⁰ The ECB has already increased the envelope for the PEPP twice, first to a total of €1.35 trillion¹⁴¹ and thereafter to €1.85 trillion.¹⁴² It has also extended the horizon for net purchases to end of March 2022. Moreover, the maturing principal payments from securities purchased under the PEPP will be reinvested until at least the end of 2024 and, in any case, the future roll-off of the PEPP portfolio will be managed to avoid interference with the appropriate monetary policy stance.

The ECB further adopted a package of temporary collateral easing measures to facilitate the availability of eligible collateral for Eurosystem counterparties to participate in liquidity providing operations.¹⁴³ The package is complementary to other ECB measures such as LTROs and the PEPP. They collectively support the provision of bank lending especially by easing the conditions at which credit claims are accepted as collateral. Furthermore, the ECB announced additional LTROs, called pandemic emergency longer-term refinancing operations (PELTROs).¹⁴⁴ These operations are

¹³⁶ *ibid.*

¹³⁷ European Central Bank, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (18 March 2020) <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> accessed 17 June 2020 (hereafter European Central Bank, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)').

¹³⁸ See further chapter 3 by Klaus Tuori, in this volume.

¹³⁹ See extensively Dermine and Markakis, 'EU Economic Governance and the COVID-19 Crisis' (n 133) 328–29.

¹⁴⁰ European Central Bank, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 137). See further Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) [2020] OJ L91/1.

¹⁴¹ European Central Bank, 'Monetary Policy Decisions' (4 June 2020) <<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp200604~a307d3429c.en.html>> accessed 8 January 2021.

¹⁴² European Central Bank, 'Monetary Policy Decisions' (10 December 2020) <<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp201210~8c2778b843.en.html>> accessed 8 January 2021.

¹⁴³ European Central Bank, 'ECB Announces Package of Temporary Collateral Easing Measures' (7 April 2020) <<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200407~2472a8ccda.en.html>> accessed 8 January 2021. See also chapter 4 by Jens van 't Klooster, in this volume. The ECB has decided to gradually phase out this package of pandemic collateral easing measures: European Central Bank, 'ECB Announces Timeline to Gradually Phase Out Temporary Pandemic Collateral Easing Measures' (24 March 2022) <<https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220324~8b7f2ff5ea.en.html>> accessed 24 May 2022.

¹⁴⁴ European Central Bank, 'ECB Announces New Pandemic Emergency Longer-Term Refinancing Operations' (30 April 2020) <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200430_1~477f400e39.en.html> accessed 8 January 2021.

aimed at supporting liquidity conditions in the euro area financial system and contribute to preserving the smooth functioning of money markets by providing an effective liquidity backstop.¹⁴⁵

What follows from this summary of the main monetary policy measures aimed at dealing with the economic externalities of the pandemic is that, similarly to what has been observed for the European financial and sovereign debt crisis, the ECB again takes on a very active role in crisis management. However, the accountability framework applicable to its monetary policy activities has remained the same, as it is by-and-large hardwired into the EU Treaties. Some recent small improvements can be noted on the transparency front, albeit these are not necessarily linked to the pandemic. The ECB has published its key findings from the ECB Listens Portal, which was launched as part of the framework for its strategy review, encouraging the general public to express their views on a range of issues.¹⁴⁶ It has further announced that it will begin publishing aggregate results of the Survey of Monetary Analysts, which collects information on market participants' expectations about the future evolution of key monetary policy parameters, financial market variables, and the economy.¹⁴⁷ These are by no means cosmetic changes, but it is argued here that they do not (yet) match the very important powers of the ECB, as these were outlined above.

IV. The ECB's Accountability at Twenty and Beyond

What becomes clear from the reflections in this contribution is that the legal and institutional framework of the ECB has evolved considerably. This is not so much the result of amendments to the relevant Treaty provisions. The legal framework of the ECB is, due to its quasi-constitutional embedding, relatively static in nature. Instead, this evolution is owed to the need to respond to the evolving economic landscape. It is largely the result of the ECB's own understanding of its role and duties, notably during the European financial and sovereign debt crisis, as well as of its new tasks in the SSM.

This contribution argues that the legal and practical arrangements securing the democratic accountability of the ECB have been only partially adjusted to this new reality. The most notable changes concern the accountability and transparency arrangements for the supervisory tasks of the ECB in the SSM. Regarding its monetary policy function, the ECB finds itself, as a consequence of its role as crisis manager, in a rather precarious position when it comes to the public acceptance of its independent position in the Union legal order. It is further exposed to criticism regarding the democratic legitimacy of the powers it exercises. Indeed, considering the significant (re) distributive consequences of its actions, the existing legal and practical arrangements

¹⁴⁵ *ibid.* See also European Central Bank, 'ECB Extends Pandemic Emergency Longer-Term Refinancing Operations' (10 December 2020) <<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr201210~8acfa5026f.en.html>> accessed 24 May 2022.

¹⁴⁶ European Central Bank, 'Key Findings' <<https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview002.en.html>> accessed 16 February 2021.

¹⁴⁷ European Central Bank, 'ECB to Publish Results of the Survey of Monetary Analysts' (8 February 2021) <<https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210208~076431b103.en.html>> accessed 16 February 2021.

pertaining to its monetary policy tasks offer little in terms of throughput legitimacy deriving from the accountability and transparency arrangements in its governance structures. At the same time, the (input) legitimacy that the ECB derives from its legal basis cannot cover the continued exercise of (an increased amount of) public power by this Union institution.

Venues thus need to be explored to strengthen all three dimensions of the legitimacy of the ECB, namely input, throughput, and output legitimacy. To be sure, increasing the democratic legitimacy of the ECB whilst not exposing monetary policy to undesirable political influence calls for a careful balancing exercise. Yet, this does not necessarily have to amount to a zero-sum game, as measures strengthening the democratic accountability of a central bank can under certain conditions also reinforce its independence. This is notably the case for any arrangements aimed at strengthening input legitimacy, that is 'the participatory quality of the process leading to laws and rules as ensured by the "majoritarian" institutions of electoral representation.'¹⁴⁸ Leaving aside the valid questions pertaining to the democratic quality of the Union's political institutions, an option that could be explored, in our opinion, is to give the directly or indirectly democratically legitimized Union political institutions a greater involvement in the determination of the monetary policy objectives of the ECB and in particular, albeit not limited to, the quantification of its primary objective, that is, price stability. This idea takes its inspiration from what can be observed for several central banking systems around the world, which provide for the participation of the government in the establishment of the (inflation-)targeting framework of the central bank either on a legal or on a voluntary basis.¹⁴⁹ One such well-known example is the Reserve Bank of New Zealand Act 1989, which effectively requires the New Zealand Minister of Finance and the Governor of the Reserve Bank of New Zealand to agree on monetary policy targets, setting out 'the operational objectives for carrying out the function of formulating monetary policy' and thus quantifying the Bank's statutory policy objective to achieve and maintain price stability over the medium term and to support maximum sustainable employment.¹⁵⁰ Another example is the Bank of Canada, whose framework features since the early 1990s a so-called inflation-control target that is jointly agreed between the Canadian government and the Bank of Canada for a five-year period.¹⁵¹

It is readily admitted that applying such an approach to the supranational ECB would be anything but straightforward given the current ECB legal framework provided by primary Union law, the asymmetric integration of monetary and fiscal policy

¹⁴⁸ Schmidt, 'Democracy and Legitimacy in the European Union Revisited' (n 2) 4, with reference to a definition provided by Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).

¹⁴⁹ See Amber Wadsworth, 'An International Comparison of Inflation-Targeting Frameworks' (2017) 80(8) Reserve Bank of New Zealand Bulletin 3 ff.

¹⁵⁰ Reserve Bank of New Zealand Act 1989, part 1, s 1A and part 2 s 8. See nowadays Reserve Bank of New Zealand (Replacement of Remit for Monetary Policy Committee) Order 2021 (2021/29). For details on the Remit and its predecessor, the Policy Targets Agreement, see Reserve Bank of New Zealand, 'Monetary Policy Framework' <<https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/monetary-policy-framework>> accessed 17 March 2021.

¹⁵¹ See Bank of Canada, 'Joint Statement of the Government of Canada and the Bank of Canada on the Renewal of the Inflation-Control Target' (24 October 2016) <<https://www.bankofcanada.ca/2016/10/renewal-of-the-inflation-control-target-2016/>> accessed 17 March 2021.

in EMU, as well as the obvious absence of the European equivalent to a Minister of Finance representing the European executive government and an exclusive or at least shared competence for economic policy at the supranational level. In the light of the latter observation, it can be argued that such an agreement should be concluded between the European Parliament, the Council (in the composition of the governments of the euro area Member States), and the Governing Council of the ECB.¹⁵² The involvement of the European Parliament is justified given its prominent role in the current accountability arrangements (namely the monetary dialogue) and the direct democratic legitimation it enjoys as a Union institution. The involvement of the Council would contribute to the democratic legitimation of the ECB, while at the same time also committing national governments to the monetary policy objective of the ECB, thereby recognizing that price developments and inflation are not only in the hands of the central banks.¹⁵³

It is further readily admitted that the introduction of a formal framework into the primary Union law provisions on the ECB laying down a legal obligation to establish such an agreement could lead to substantial difficulties in practice. While the simplified Treaty revision procedure pursuant to Article 48(6) TEU could be utilized, the necessary amendments would still require unanimity in the European Council and the approval by all Member States in accordance with their constitutional requirements.¹⁵⁴ Whether the introduction of such a framework on a voluntary basis by means of an Interinstitutional Agreement between the European Parliament, the Council, and the ECB provides a viable alternative route depends on whether such an agreement would effectively be considered to compromise Article 127(2) TFEU, according to which one of the basic tasks to be carried out by the ESCB is to define and implement the monetary policy of the Union, and, moreover, Article 130 TFEU which prohibits the ECB from seeking or taking instructions from Union institutions when exercising the powers and carrying out the tasks and duties conferred upon it by the Treaties and the Statute.¹⁵⁵

To be sure, it is not suggested that such an agreement would also cover details on when or how the ECB utilizes the monetary policy instruments at its disposal, *inter alia*, through open market and credit operations, such as in the context of an asset

¹⁵² See already Amtenbrink, *The Democratic Accountability of Central Banks* (n 6) 365, where it is argued that the Council should be in the lead. Yet, given the central role that the European Parliament has acquired in the accountability of the ECB over the years, it should be included in this process on an equal footing.

¹⁵³ For an interesting proposal regarding the secondary objectives of the ECB, see most recently Stanislas Jourdan, 'The ECB Needs Political Guidance on Secondary Objectives' (*Positive Money Europe*, 26 April 2021) <<https://www.positivemoney.eu/2021/04/ecb-guidance-secondary-objectives/>> accessed 15 May 2021.

¹⁵⁴ This proposal is predicated on the assumption that such an amendment would only concern provisions in part 3 TFEU (n 20) relating to the internal policies and action of the Union, and that it would not increase the competences conferred on the Union in the Treaties.

¹⁵⁵ Article 295 TFEU, which allows for the conclusion of legally binding interinstitutional agreements between the European Parliament, the Council, and the Commission, could not be relied upon as a legal basis for such an agreement, as this provision does not refer to the ECB. On the legal status of interinstitutional agreements that do not have an explicit legal basis in primary Union law, see generally Jörg Monar, 'Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht' (1994) 31 CMLR 693. See also Deirdre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (OUP 2009) 233.

purchase programme. Put differently, the existence of such an agreement would not have increased the legitimacy of the ECB's unconventional monetary policy measures. More is thus needed to enhance the throughput legitimacy of the ECB, since, beyond the realm of expressing its disapproval (eg through a resolution on the ECB's annual report), the European Parliament is currently lacking any instruments to hold the ECB to account for its action. This could include, as argued above, an enhanced role for the European Parliament in the appointment of Executive Board members pursuant to Article 283(2) TFEU. Furthermore, in the field of the Banking Union, it could entail, as was explained above, a greater role for the European Parliament in adopting or amending legislation on the basis of Article 127(6) TFEU, by switching from a special to an ordinary legislative procedure.

Finally, while certainly not constituting a substitute for adequate input and throughput legitimacy, the ECB's output could also contribute to its legitimacy, and some would argue that this is already currently the case. In fact, in the eyes of some groups of citizens the significant role that the ECB has played as a crisis manager in the past decade, as well as in the ongoing COVID-19 pandemic, has produced positive results in terms of the stability of the euro area as a whole and of its Member States, justifying the ECB's policy stance. Yet, the very measures that have warranted these results and in particular the unconventional monetary policy of the ECB but also its involvement in the negotiation and monitoring of painful austerity measures in certain Member States,¹⁵⁶ have alienated other groups of citizens that consider the ECB's interventions as lying beyond its policy mandate and perhaps illegitimate. As such, it can be noted that output legitimacy certainly lies in the eye of the beholder.¹⁵⁷

For the future, one venue to increase the output legitimacy of the ECB in the eyes of the citizens in a less abstract and more tangible way could be to put more emphasis on the role that the ECB can play in tackling major societal challenges, such as by contributing to environmental and social sustainability. With regard to the former, it has been argued that, in light of both its primary and secondary objectives, the ECB is under a legal obligation to partake in the fight against climate change, and that Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the ECB's actions.¹⁵⁸ Various ways in which the ECB can contribute to the fight against climate change have been highlighted.¹⁵⁹ It was

¹⁵⁶ See also chapter 9 by Florin Coman-Kund, in this volume.

¹⁵⁷ This is something that has, more generally, already been observed by Carol Harlow, 'The Limping Legitimacy of EU Lawmaking: A Barrier to Integration' (2016) 1 *European Papers* 29, 54.

¹⁵⁸ Frank Elderson, 'Greening Monetary Policy' (*The ECB Blog*, 13 February 2021) <<https://www.ecb.europa.eu/press/blog/date/2021/html/ecb.blog210213~7e26af8606.en.html>> accessed 6 March 2021. On Art 11 TFEU, see also Javier Solana, 'The Power of the Eurosystem to Promote Environmental Protection' (2019) 30 *EBLR* 547.

¹⁵⁹ See, eg, Dirk Schoenmaker, 'Greening Monetary Policy' (2019) Bruegel Working Paper Issue No 2 <<https://www.bruegel.org/wp-content/uploads/2019/02/Greening-monetary-policy.pdf>> accessed 6 March 2021; Christine Lagarde, 'Climate Change and Central Banking' (Speech at the ILF conference on Green Banking and Green Central Banking, Frankfurt am Main, 25 January 2021) <<https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210125~f87e826ca5.en.html>> accessed 19 March 2021; Nathan de Arriba-Sellier, 'Turning Gold into Green: Green Finance in the Mandate of European Financial Supervision' (2021) 58 *CMLR* 1097.

thus no coincidence that both the 2020 ESCB Legal Conference¹⁶⁰ and the 2021 ECB Strategy Review Legal Roundtable¹⁶¹ (which was part of its monetary policy strategy review) focused on the ECB's mandate and climate change, and it did not come as a surprise that when the ECB in early 2021 finally announced its new monetary policy strategy it included a 'Detailed roadmap of climate change-related actions'.¹⁶² Whilst not denying the fact that the ECB could (and indeed *should*) make an indispensable contribution to tackling climate change, this could not compensate for existing shortcomings of the accountability framework observed throughout this contribution. In fact, it would broaden the areas of activities for which the accountability and transparency of the ECB must be ensured.

¹⁶⁰ See Iñigo Arruga Oleaga, 'Introduction to the Panel on the EU Taxonomy and Action Plan on Sustainable Finance: What Uses for the ESCB?' in European Central Bank, 'ESCB Legal Conference 2020' (2021) (hereafter European Central Bank, 'ESCB Legal Conference 2020'); Willem Bovenschen and René Lieshout, 'EU Taxonomy, Action Plan & Supervisory Developments on Sustainable Finance: What Uses May These Have for the E(S)CB?' in European Central Bank, 'ESCB Legal Conference 2020' (n 160); György Várhelyi, 'EU Taxonomy and the Monetary Policy Prism' in European Central Bank, 'ESCB Legal Conference 2020' (n 160).

¹⁶¹ Held on 23 February 2021.

¹⁶² See European Central Bank, 'ECB's Governing Council Approves its New Monetary Policy Strategy' (8 June 2021) <<https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210708~dc78cc4b0d.en.html>> accessed 28 July 2021; European Central Bank, 'ECB Presents Action Plan to Include Climate Change Considerations in Its Monetary Policy Strategy' (8 June 2021) <https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210708_1~f104919225.en.html> accessed 28 July 2021.