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DEMOCRATIC ACCOUNTABILITY AND PARLIAMENTARY OVERSIGHT OVER THE ECB. THE BANKING UNION EXPERIENCE

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ABSTRACT

In 2013, at the peak of the economic and financial crisis, Regulation (EU) No. 1024/2013 established an integrated and multilevel structure – the Single Supervisory Mechanism (SSM) – transferring the direct supervision competences on the most systemically important banks to the European Central Bank (ECB). One year later, Regulation (EU) No. 806/2014 introduced the second pillar of the European Banking Union – the Single Resolution Mechanism (SRM) – that is, an EU-level system for the rescue of non-viable banking institutions.

At the same time, Regulations (EU) No. 1024/2013 and No. 806/2014 tried to balance this additional transfer of powers to the EU through the strengthening of the transparency and democratic accountability standards within the context of the supervision and resolution policies in the Eurozone. Indeed, the Regulations in question reserved several original oversight powers for the European Parliament and the National Parliaments within the Banking Union governance. Partially reproducing the practice of the Monetary Dialogue (art. 284.3 TFEU), the new democratic oversight mechanisms have contributed to the establishing of a “Banking Dialogue” that includes, among others, hearings, reporting sessions and the transmission of information. However, unlike the Monetary Dialogue, the new Banking Dialogue involves not only the European Parliament, but also the National Parliaments.

Against this background, the paper seeks to first analyse the general legal framework that characterize the Banking Union governance. Secondly, it will analyze the dialogical procedures between the European Parliament – and in particular the Committee on Economic and Monetary Affairs (ECON) – and the ECB in the field of Single Supervisory Mechanism. The third part of the paper focuses on the National Parliament’s participation in the democratic oversight over the EU banking supervisor. The last part of this paper contains concluding remarks look at whether these powers can, as regards the banking policies pursued in the Eurozone, indeed provide an “answer” to the problem of the “informational asymmetry” which has been identified by scholars as one of the main factors at the basis of the “executive dominance issue”.

Keywords: *European Banking Union; democratic accountability; parliamentary oversight; European Central Bank; National Parliaments*

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INTRODUCTION (*)

In 2013, at the peak of the economic and financial crisis, Regulation (EU) No. 1024/2013 (hereinafter: SSM Regulation) established an integrated and multilevel structure – the Single Supervisory Mechanism (SSM) – transferring the direct supervision competences on the most systemically important banks to the European Central Bank (ECB). One year later, Regulation (EU) No. 806/2014 introduced the second pillar of the European Banking Union – the Single Resolution Mechanism (SRM) – that is, an EU-level system for the rescue of non-viable banking institutions.

At the same time, Regulations (EU) No. 1024/2013 and No. 806/2014 tried to balance this additional transfer of powers to the EU through the strengthening of the transparency and democratic accountability standards within the context of the supervision and resolution policies in the Eurozone. Indeed, the Regulations in question reserved several original oversight powers for the European Parliament and the National Parliaments within the Banking Union governance. Partially reproducing the practice of the Monetary Dialogue (art. 284.3 TFEU), the new democratic oversight mechanisms have contributed to the establishing of a “Banking Dialogue” that includes, among others, hearings, reporting sessions and the transmission of information.

However, unlike the Monetary Dialogue, the new Banking Dialogue involves not only the European Parliament, but also the National Parliaments. Several explanations may account for this difference between these dialogues of ‘first’ and ‘second’ generation. The Monetary Dialogue has been in place since 1992 as a part of the monetary policy – upon which the European Union (EU) has exclusive competence (article 3-1 c TFEU) – whereas the Banking Dialogue pertains to a much newer evolution visible in the recent creation of the Banking Union after the financial crisis. It is therefore in an area which had thus far largely remained the responsibility of the Member States alone and this new transfer of powers may account for the need to involve not only the European Parliament but also national parliaments even if, as highlighted below, their status does differ in these accountability procedures. Additionally, and perhaps primarily, the SSM is in itself a mixed mechanism in which national and European institutions are called to intervene and cooperate. In this sense, it has been considered that ‘such direct possibility for national parliaments to call the ECB to account seems appropriate given the mixed administration created.

(*) Although the content of the paper is the result of a joint work, Diane Fromage has written paragraphs 4 and 5 while Renato Ibrido the others. A draft version of this paper was presented in the conference “*The Political Role of the European Central Bank in European Union Governance*”, held on April 5-6, 2017 at Duisburg-Essen University.

It will often be the ECB, rather than the respective NCA [National Competent Authority], which decides on issues that may have a huge impact in the Member States'.¹

The question of the ECB's accountability in general originally arose because of the decision to delegate the management of the monetary policy to an entity independent from political organs: as a compensation of this delegation of powers, the ECB had to be accountable to an elected organ.² This issue remained salient as the ECB received new banking supervision authorities.

Against this backdrop, our paper seeks to first analyse the general legal framework that characterizes the Banking Union governance to set the background necessary to the analysis of the level of accountability within said Union. Secondly, we address the dialogical procedures between the European Parliament – and in particular the Committee on Economic and Monetary Affairs (ECON) – and the ECB in the field of Single Supervisory Mechanism. The third part of the paper focuses on National Parliament's participation in the democratic oversight over the EU banking supervisor. The last part of this paper contains concluding remarks looking at whether these powers can, as regards the banking policies pursued in the Eurozone, indeed provide an “answer” to the problem of the “informational asymmetry” which has been identified by scholars as one of the main factors at the basis of the “executive dominance issue”³.

From a methodological point of view, our paper will endorse a legal perspective, and more precisely a European Constitutional Law focus. Although the issue of the ECB's accountability has been analyzed mainly by political scientists, it identifies one of the core topics of the process of “constitutional integration” in the EU. Especially in the field of the Banking Union, the issue of the parliamentary oversight over the ECB questions the future of democracy in Europe. The ECB's dual role as the EU's Banking supervisor and as the main responsible of its monetary policy also raises further question as to the reconciliation of both roles and potential overlaps.

¹ G. TER KUILE, L. WISSINK, W. BOVENSCHIN, *Tailor-made accountability within the Single Supervisory Mechanism*, CMLR, 2015, 155-190, 171.

² G. CLAEYS, M. HALLBERG, O. TSCHKASSIN, 'European Central Bank accountability: How the monetary dialogue could evolve', *Bruegel policy contribution 2014/04*, 2014, 3. Further on the ECB's independence and the need for accountability mechanisms: C. ZILIOLI, 'The independence of the European Central Bank and its new banking supervisory competences' in D. RITLENG (ed), *Independence and legitimacy in the institutional system of the European Union*, OUP, 2016; F. AMTENBRINK, *On the Legitimacy and Democratic Accountability of the European Central Bank*, in A. ARNULL – D. WINCOTT (eds.), *Accountability and Legitimacy in the European Union: Legal Arrangements and practical experience*, Oxford, OUP, 2002, 147 ff.

³ On this concept, see D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *The Modern Law Review*, 1, 2014, 1 ff. and notably 15.

2. The Banking Union governance: general legal framework

2.1. The Single Supervisory Mechanism and the further pillars of the Banking Union project

The Banking Union architecture is built on three different pillars: the Single Supervisory Mechanism (SSM), the Single Resolution Mechanism (SRM), and the European Deposit Insurance Scheme (EDIS).

The legal basis of the SSM is the art. 127, par. 6 TFUE according to which:

“The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings”

Such a conferral of powers took place with the adoption of Regulation No. 1024/2013 which transferred the direct supervision competences on the most systemically important banks in the Eurozone to the ECB. The National supervisory authorities, instead, continue to carry out the supervision of “less significant banks”, albeit under the ultimate responsibility of the ECB.

With the aim to ensure a separation between supervisory responsibilities and monetary policy, the ECB’s supervisory tasks are carried out by a Supervisory Board (SB). The SB is a new internal body of the ECB which prepares the draft decisions adopted by the ECB Governing Council under a non-objection procedure. Indeed, the Governing Council maintains the power to reject the Supervisory Board’s decisions within a defined period of time. The Supervisory Board is composed of a Chair, a Vice-Chair, four representatives of the ECB and one representative from each national supervisory authority in the participating Member States. The appointment of the Chair, Vice-Chair and four representatives of the ECB is submitted to the EP’s approval, which is held at a public hearing of the candidates proposed by the ECB.

With the introduction of the SSM, the role of the European Banking Authority (EBA) – within the European System of Financial Supervision (ESFS) – is undergoing some important changes. In any case, the EBA – a regulatory agency already established with Regulation No. 1093/2010 – maintains the responsibility for the implementation of the Single Rulebook, promoting the uniformity at the EU level of the secondary regulations in the banking sector.

It is important to emphasize the asymmetry between the EBA and the Banking Union: the EBA competences embrace the whole EU, while the SSM and SRM Regulations find application only in the Eurozone and in those non-Euro countries that opt to join the Banking Union mechanisms.

Secondly, Regulation No. 806/2014 and Directive No. 59/2014 introduced the SRM, that is, an EU level system for the resolving of non-viable financial institutions.

The SRM is based on a distribution of tasks between an atypical European agency – the Single Resolution Board – and the national authorities. The Board is directly responsible for the cross-border cases and for the significant banks, while the national authorities ensure the resolution of the other cases. However, the resolution scheme adopted by the Board enters into force only if, within 24 hours after its adoption by the Board, there are no objections from the Council (acting by simple majority) on a proposal by the Commission⁴.

The non-objection procedure aims to ensure the compliance of the Single Resolution Mechanism with the Meroni doctrine. Indeed, according to the jurisprudence of the European Court of Justice, an EU legislative act cannot delegate discretionary powers to an EU agency lacking a Treaty base. With the aim to bypass the limits of the Meroni doctrine and at the same time to safeguard the compliance with the EU Law, the involvement of the Commission and the Council within the SRM decision making process allows to ascribe a discretionary decision to institutions regulated by the Treaties.

The SRM finds a fundamental component in the Single Resolution Fund (SRF). This common fund, which is financed with the contributions of the same banks of the Banking Union participant

⁴ “Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission.

Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme in the cases not covered in the third subparagraph of this paragraph.

Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council:

(a) to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfill the criterion of public interest referred to in paragraph 1(c);

(b) to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.

The resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board.

The Council or the Commission, as the case may be, shall provide reasons for the exercise of their power of objection.

Where, within 24 hours from the transmission of the resolution scheme by the Board, the Council has approved the proposal of the Commission for modification of the resolution scheme on the ground referred to in point (b) of the third subparagraph or the Commission has objected in accordance with the second subparagraph, the Board shall, within eight hours modify the resolution scheme in accordance with the reasons expressed.

Where the resolution scheme adopted by the Board provides for the exclusion of certain liabilities in the exceptional circumstances referred to in Article 27(5), and where such exclusion requires a contribution by the Fund or an alternative financing source, in order to protect the integrity of the internal market, the Commission may prohibit or require amendments to the proposed exclusion setting out adequate reasons based on an infringement of the requirements laid down in Article 27 and in the delegated act adopted by the Commission on the basis of Article 44(11) of Directive 2014/59/EU” (art. 18, par. 7 Regulation No. 806/2014).

countries, will be used for resolving the failing credit institutions. However, a precondition for accessing the fund is the application of the “bail-in” system. In order to minimize the costs of the resolution of a failing entity borne by the taxpayers, Directive No. 59/2014 introduces specific rules to avoid the application of the “bail-out” model. The “bail-in” principles ensure that shareholders and creditors of the failing entity suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the entity. Only if necessary will it be possible to resort to the Single Resolution Fund.

Finally, the EU institutions are currently working on several proposals designed to protect the depositors in case of insolvency or resolution of a bank. In particular, according to the proposal concerning the European Deposit Insurance Scheme,⁵ the protection of the depositors will be ensured through the collaboration between the national deposit guarantee schemes and a new European deposit insurance fund, managed by the SRB, and financed with the sector bank contributions.

2.2. The parliamentary “counterpart” of the ECB within the Banking Union governance the Single Supervisory Mechanism and the further pillars of the Banking Union project

As stated in the introduction, the conferral to the ECB of direct supervisory competences on the most systemically important banks (and indirect supervisory powers over the less significant credit institutions) implies the need to counterbalance the ECB’s independence with the introduction of appropriate democratic oversight mechanisms over the new European banking supervisor. On the one hand, the chances of a successful Banking Union project largely depend on the capacity of the ECB to endure the political and economic pressure, also from national governments and EU institutions. In this perspective, the legal clause (art. 19 Reg. SSM) that recognizes the independence of the ECB and national authorities within the SSM is structured similarly to the Article 130 TFEU concerning the ECB monetary policy⁶.

On the other hand, the conferral of supervisory tasks draws the ECB into a potential space of politicization. As observed by the economic literature, the level of central bank independence is

⁵ The proposal is under discussion in the European Parliament at the time of writing (March 2017).

⁶ See M. MACCHIA, *The independence status of the Supervisory Board and of the Single Resolution Board: an expansive claim of autonomy?*, in E. BARUCCI – M. MESSORI (eds.), *Towards the European Banking Union. Achievements and Open Problems*, Bagnò a Ripoli, Passigli, 2014, 117 ff.

inversely proportionate to the number of objectives that characterize the central bank's mandate⁷. Moreover, the ECB is already called to maintain the price stability (art. 127(1) TFEU), including through unconventional monetary programmes to purchase Member State bonds on the secondary markets (Court of Justice, C-62/14 – Gauweiler e a.).

Therefore, eight decades after the Carl Schmitt conference in Berlin, the thorny question of the “neutral powers” reemerged. In his speech in front of the *Industrie- und Handelskammer* of Berlin, the German scholar identified the *Reichsbank* of Weimar Republic as the paradigmatic case of *neutrale Grösse*. In other words, a technocratic institution called to make political decisions in place of political bodies but which is destined to be “capture” on the long period by political forces⁸.

However, the political implications of the banking supervision⁹ entail appropriate parliamentary oversight channels and a robust democratic accountability framework regulated also by sources of hard law¹⁰. This is all the more true of banking supervision at supranational level and in the case of the ECB since it is amongst the most independent central banks worldwide.

In this context, Article 21 of the SSM Regulation establishes that “the ECB shall be accountable to the European Parliament and to the Council for the implementation of this Regulation”. Although the SSM Regulation considered the European Parliament and the Council as the two “democratically legitimised institutions representing the citizens of the Union and the Member States” (recital no. 66), this paper cannot consider in detail the role of the Council within the Banking Union governance. It focuses mainly on the interactions between the ECB and the European Parliament.

Arguably, the Council cannot be considered as the second Chamber of EU¹¹. Firstly, unlike the German Bundesrat, the Council also acts as an executive body in the case establish by the Article

⁷ Inter alia, see G. Fodor, *Sull'autonomia della banche centrali*, in L. BOSCO – R. TAMBORINI – F. TARGETTI (eds.), *L'Italia e l'Europa oltre Maastricht* (Supplemento a *Economia e Banca*, 7-8/1994-1995), 207 ff.

⁸ See C. SCHMITT, *Die neutralen Größen im heutigen Verfassungsstaat*, in *Das Problem der innerpolitischen Neutralität des Staates*, now in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954*, Berlin, Duncker & Humblot, 1958, 41 ff.

⁹ About the essential elements of good supervision, see the IMF Staff Position Note May/18/2010 “The Making of Good Supervision: Learning to Say ‘No’”, at <https://www.imf.org/external/pubs/ft/spn/2010/spn1008.pdf>

¹⁰ Among the sources of soft law, see the Principle 2 of the Basel Committee on Banking Supervision – Core Principles for Effective Banking Supervision (<http://www.bis.org/publ/bcbs230.pdf>). In January 2014, the Basel Committee on Banking Supervision (BCBS) set up a Task Force on Impact and Accountability (TFIA) to develop a range-of-practice study on how supervisors around the world define and evaluate the impact of their policies and actions, manage against that impact and then account for this impact to their external stakeholders. Moreover, in July 2015, BCBS published a Report on the impact and accountability of banking supervision (<http://www.bis.org/bcbs/publ/d326.pdf>), which compares the different accountability practices.

¹¹ R. IBRIDO, *L'Unione bancaria europea. Profili costituzionali*, Torino, Giappichelli, 2017, 232 ff.

291(2) TFEU.¹² Secondly, the internal procedures and organization of the Council cannot be compared with the deliberative process of a Parliament. From this point of view, an eminent scholar pointed out that «the Council is still the most secretive legislature west of Beijing»¹³. On the contrary, per the general principles of Parliamentary Law, the publicity identifies an essential feature of the parliamentary institutions, defining the same identity of a Parliament. This notwithstanding, the Council was indeed recognized as one of the two pillars in charge of ensuring democratic legitimacy in the Lisbon Treaty (art. 10 TEU), though its members are to be themselves accountable to national parliaments or directly to the people which makes the accountability mechanisms *vis-à-vis* national parliaments contained in the SSM Regulation particularly worth analyzing.

3. The interactions between the ECB and the European Parliament within the Single Supervisory Mechanism

The European Parliament's oversight powers within the Single Supervisory Mechanism are only partially defined by Regulation (EU) No. 1024/2013. Indeed, Article 20(9) of the SSM Regulation refers to an Interinstitutional Agreement between the European Parliament and the ECB for the concrete definition of the “practical modalities of the exercise of democratic accountability and scrutiny over the exercise of the tasks conferred on the ECB by this Regulation.” The Interinstitutional Agreement between the European Parliament and ECB was published on 30 November 2013 in the Official Journal of the EU.¹⁴

Moreover, in December 2013 the Council of the EU and the European Central bank signed a Memorandum of Understanding on the cooperation related to the Single Supervisory Mechanism.¹⁵ The Memorandum implemented the accountability and reporting obligation of the ECB to the Council and the Euro Group under Regulation (EU) No. 1024/2013.

The Interinstitutional Agreement between the European Parliament and ECB can be divided into four parts.

¹² “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council” (art. 291, par. 2 TFEU).

¹³ S. HIX, *What's Wrong with the Europe Union and How to Fix It*, Cambridge, Polity Press, 2008.

¹⁴ 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).

¹⁵ 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).

Firstly, the Agreement defined some specific oversight procedures: a) the presentation of an Annual Report of the ECB at a public hearing of Parliament that concerns the execution of supervisory tasks within the SSM¹⁶; b) the power of the ECON Committee of the European Parliament to convene the Chair of the Supervisory Board for ordinary hearings, ad hoc exchanges of views and confidential meetings; c) the duty of the ECB to reply in writing to written questions put to it by the European Parliament as promptly as possible, and in any event within five weeks of their transmission to the ECB; and d) the possibility for the European Parliament to access some categories of information in possession of the ECB.

Secondly, in the attempt to strengthen the standard of transparency in the selection process of the Chair and Vice-Chair of the Supervisory Board, the Interinstitutional Agreement of 30 November 2013 submitted their appointment to Parliament's approval, which is held at a public hearing of the candidates proposed by the ECB. If the proposal for the Chair is not approved, the ECB may decide either to draw on the pool of candidates that originally applied for the position or to re-initiate the selection process. From this point of view, these provisions present some analogies with the appointment procedure of the European Banking Authority Chairperson.¹⁷

The European Parliament can use this sort of veto power also in relation to the ECB's proposal to remove the Chair and the Vice-Chair of the Supervisory Board from their office.

Moreover, in the case that the European Parliament sets up a Committee of Inquiry, the ECB, in accordance with EU law, shall assist the Committee of Inquiry in carrying out its tasks in accordance with the principle of sincere cooperation. In exchange for this support, the European Parliament shall respect some confidentiality obligations.

Finally, according to the Interinstitutional Agreement, the ECB shall pre-emptively inform the ECON Committee with regard to the main contents of some categories of acts that the ECB drafts to adopt within the SSM. This obligation is also established with reference to the Code of Conduct referred to in Article 19 of Regulation No. 1024/2013.

In the course of 2015, the Chair of the Supervisory Board spoke before the EP ECON Committee for the presentation of the 2014 ECB Annual Report on supervisory activities. Moreover, he

¹⁶ Article 13n of the ECB Rules of Procedure establishes that the Governing Council – upon a proposal from the Supervisory Board submitted by the Executive Board – adopts the Annual Report. However, the Chair of the Supervisory Board presents the Annual Report approved by the Governing Council to the European Parliament (Article 20 Reg. 1024/2013). According R. D'AMBROSIO (*Il Meccanismo di Vigilanza Unico: profili di indipendenza e di Accountability*, 2016, 89, at <https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2016-0081/QRG-81.pdf>), the Article 13n – in so far as it provides that the Annual Report of the SSM Regulation shall be adopted by the Governing Council – could potentially undermine the principle of independence of SSM as well as the principle of separation between monetary policy and supervision.

¹⁷ Art. 48-2 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

interacted within the EP ECON Committee within two ordinary public hearings, and two ad hoc exchanges of views. Eventually, the ECB published on its website 26 replies to questions from members of the European Parliament on supervisory matters and transmitted all the records of proceedings of its Supervisory Board meetings to the European Parliament. In 2016, the chair of the Supervisory Board also interacted in the occasion of two ordinary meetings with the EP ECON Committee as well as of three ad hoc exchanges of views.¹⁸ She was furthermore involved in the European Parliamentary Week 2016¹⁹ and again presented the Annual report on supervisory activities to the EP ECON Committee, whereas Supervisory board vice-chair Sabine Lautenschläger additionally gave a speech at a parliamentary evening on 13 September 2016. The ECB published 34 replies to questions by MEPs on supervisory matters and again transmitted all the records of proceedings of its Supervisory Board meetings. Much to Parliament's satisfaction, its information was improved this year as a result of the introduction of a new format to improve the records of proceedings.

The European Parliament oversight powers defined by Regulation No. 806/2014 (SRM Regulation) mirror, in great part, the powers established by Regulation No. 1024/2013 and by the Interinstitutional agreement of November 2013. In particular, the Single Resolution Board attends regular hearing and exchanges of view in the European Parliament, which can address written questions and comments to the annual reports²⁰.

To a certain extent, the new powers of the European Parliament within the Banking Union seem to represent the partial reproduction and enhancement of the format already experimented with the Monetary Dialogue. Within this accountability dialogical procedure, the European Parliament oversees the ECB monetary policy through regular hearings and exchanges of views, written questions and the adoption of a recommendation in light of the ECB annual report.²¹

As in the Monetary Dialogue, the new powers of the European Parliament within the Banking Union are rarely configured as definitive and fully binding. Nonetheless, the new ex post parliamentary oversight powers can potentially activate fruitful discourse dynamics with the purpose of making the Banking Union governance more transparent, more open and consequently, more legitimate. This dialogue does not exclude, but on the contrary, implies that the ECB maintains the "last word" with regard to competences that already before their transfer at EU

¹⁸ ECB Annual report on supervisory authorities 2016, 2017, 51.

¹⁹ <https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/index.en.html>

²⁰ *Amplius*, N. LUPO – R. IBRIDO, *Which democratic oversight on the Banking Union? The role of the Euro-national parliamentary system*, in *Law and Economics Yearly Review*, 2, 2015, 289 ff.

²¹ See F. AMTENBRINK – K. VAN DUIN, *The European Central Bank before the European Parliament: theory and practice after 10 years of monetary dialogue*, in *European Law Review*, 2009, 561 ff.

level, were in many Member States taken away from the entitlement of democratically elected bodies²².

Furthermore, it is not possible to underestimate the potential democratic contribution of the new information rights conferred to the European Parliament. Indeed, the empowerment of this category of parliamentary powers could represent a first answer to the problem of the “informational asymmetry” between executive and legislative powers, that is one of the main factors at the bottom of the so called “Executive dominance issue”²³.

At the same time, the Banking Union experience offers a potential solution to enhance the quality of the parliamentary oversight over the ECB and in particular the democratic accountability within the Monetary Dialogue.

Firstly, the involvement of the European Parliament within the appointment procedure of the Supervisory Board Chair could offer a model for a stronger parliamentarization of the Executive Board appointment procedure.

Secondly, the Banking Dialogue could open new scenarios in the perspective of an involvement of the National Parliaments within the Monetary Dialogue. This point is analyzed in the following paragraphs.

4. National parliaments’ relationship with the ECB in the “Banking Dialogues”²⁴

Council Regulation 1024/2013 interestingly also foresees certain accountability mechanisms of the ECB vis-à-vis national parliaments as had been requested by national parliaments themselves.²⁵

The formalization of such type of relationships between both institutions is unique. This is because generally accountability is to be ensured at the same institutional level, i.e. EU institutions are to be accountable to other EU institutions whereas national institutions are in turn accountable

²² See R. IBRIDO, *L’Unione bancaria europea. Profili costituzionali*, Torino, Giappichelli, 2017, 259 ff.

²³ See D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *The Modern Law Review*, 1, 2014, 1 ff. and notably 15.

²⁴ It is interesting to note that although one question on accountability within the SSM had been included in the 2016 FIDE questionnaire on the Banking Union whose rapporteur was Takis Tridimas, only few of the national reports have included an answer to this question. FIDE, *European Banking Union*, Congress proceedings vol. 1, Wolters Kluwer, 2016.

²⁵ For a comparative perspective on the democratic accountability in the field of the banking supervision before the creation of the Banking Union, see R. IBRIDO, *L’Unione bancaria europea. Profili costituzionali*, Torino, Giappichelli, 2017, 262 ff.

to other national institutions.²⁶ Recital 56 to the Regulation justifies this relationship with national parliaments as follows: “This role for national parliaments is appropriate given 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”. One can however wonder if this impact is specific to the supervisory measures adopted in the framework of the SSM or if, on the contrary, the ECB’s actions are likely to produce effects important enough on Member States that they would justify closer relationships between the Central Bank and national parliaments in all its domains of activity.

This assumption is confirmed by the organization of some informal dialogues between ECB and national parliaments which started to take place shortly before the SSM Regulation was adopted,²⁷ despite there not being any formal framework for the relationships between national parliaments and the ECB in its monetary policy.²⁸ The relationships established by the SSM Regulation are therefore to be envisaged within the broader context of tighter relationships between the ECB and national parliaments. In that sense, Mario Draghi appears to have adopted a different approach from the one of his predecessor Jean-Claude Trichet as he is committed to increased transparency.²⁹ For instance, after the ECB had announced its OMT programme in September 2012, he accepted to appear before the German Bundestag. This visit was followed by another one to the Spanish Congress in February 2013 and yet another one to the French National assembly in June 2013. He also paid a visit to the Finnish parliament in November 2014 before he appeared before the Italian Chamber of deputies in March 2015. These meetings were organized in different settings in each of the parliaments: he appeared for instance before the Budget committee, the Finance Committee and the European Affairs Committee jointly in the Italian Chamber whereas in the French Assembly the session was hosted by the European Affairs Committee, the Foreign Affairs Committee and the Finance Committee. Some of them were additionally held behind closed doors whereas others were broadcast and made available online. These practical

²⁶ On this point: : C. ZILIOI, ‘The independence of the European Central Bank and its new banking supervisory competences’ in D. RITLENG (ed), *Independence and legitimacy in the institutional system of the European Union*, OUP, 2016, 176. Arguably, interparliamentary conferences have for instance indeed been said to contribute to holding Commission members to account but only indirectly since their main purpose is the exchange of information and best practices. Only the newly created Joint parliamentary group for the scrutiny of Europol has a clearer accountability function.

²⁷ On this evolution and the visits subsequently mentioned : D. JANCIC, ‘Accountability of the European Central Bank in a deepening economic Monetary Union’ in id. (ed), *National parliaments after the Lisbon Treaty and the Euro crisis. Resilience or Resignation?* OUP, 2017, 151f.

²⁸ M. BOVENS, D. CURTIN, ‘An unholy trinity of EU Presidents?: Political accountability of EU executive powers’ in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES, *The end of the Eurocrats’ dream. Adjusting to European diversity*, CUP, 2016, 2010.

²⁹ FRAMKE A., KUEHNEN E., SUONINEN S., ‘Special report: How Mario Draghi is reshaping Europe’s central bank’, Reuters, 9.1.2013.

arrangements are far from being trivial as the events' publicity and their potential to increase transparency will eventually depend on the chosen set up and as, most importantly, the level of expertise of the MPs debating with ECB representative will inevitably vary depending on which committee hosts the meeting. Of course in this matter regard must be had of the organization pattern in each national parliament since, for example, different rules apply in terms of the membership of their EU Affairs committee so that in some chambers the MPs belonging to that committee will necessarily have to belong to another sectoral committee at the same time whereas this will on the contrary not be allowed in other chambers.³⁰

These general remarks also bear some importance for the relationship to be developed between the ECB and national parliaments of the participating Member States in application of the SSM Regulation. It is first interesting to note before delving into the specific provisions on national parliaments that these are separated from the ones on 'Accountability and reporting' contained in article 20 as previously stated. Even though national parliaments are addressed under the same Chapter IV (Organizational principles), they are the subject of article 21 which is simply titled 'National parliaments' without any further detail which is more in accordance with the principle according to which EU institutions are to be accountable to EU (and not national) institutions. Additionally, national parliaments' involvement may actually endanger the Supervisory Board members' capacity to respect their obligation to act in the interests of the Union as a whole as requested by article 26 of the SSM Regulation.³¹ Indeed, it is likely that the Board members will be called to their parliaments of nationality to avoid linguistic difficulties but it will be 'difficult [...for said Board member] to bear in mind the obligation of the Supervisory Board to take account of the interests of the Union as a whole in its decisions if they clearly conflict with the national interest'.³²

In line with the direct information channel between EU institutions and national parliaments foreseen by article 12 TEU, article 21 establishes the direct transmission of the SSM annual report to national parliaments 'simultaneously' as it is forwarded to the European Parliament. In reaction to it, '[n]ational parliaments may address their reasoned observations to that report'. Additionally, '[n]ational parliaments of the participating Member States, through their own procedures, may request the ECB to reply in writing to any observations or questions submitted by them to the

³⁰ On the composition of the EU Affairs committees see: T. FREIXES et al, *Constitucionalismo multinivel y relaciones entre Parlamentos: Parlamento europeo, Parlamentos nacionales y Parlamentos regionales con competencias legislativa*, CEPC, 2013.

³¹ C. ZILIOLI, 'The independence of the European Central Bank and its new banking supervisory competences' in D. RITLENG (ed), *Independence and legitimacy in the institutional system of the European Union*, OUP, 2016, 176-177.

³² Ibid.

ECB in respect of the tasks of the ECB under this Regulation’ (art. 21-2). A certain unclarity concerning this procedure however exists: whereas article 21-2 unambiguously provides for the possibility that national parliaments request from the ECB that it replies to any observation or question – albeit in writing only –, recital 56 less clearly states that the ECB *may* reply to them, thus implying that such an answer is at the ECB’s discretion. Recitals are not legally binding as they are merely included to shed light on the norm which they precede; hence the ECB is under the obligation to answer to national parliaments’ questions and observations. Yet, this apparent contradiction is somewhat puzzling.

In addition to this written procedure, face-to-face exchanges of view may be organized with the Chair or a member of the Supervisory Board ‘in relation to the supervision of credit institutions in that Member State’ (art. 21-3).

Before proceeding with this analysis, it should be noted that these rights were solely attributed to the national parliaments *of the participating Member States*. While this makes sense in the light of the rationale for the introduction of these prerogatives recalled above, it also formalizes the asymmetry among Member States that exists in this field whereas it confirms the European Parliament in its quality as the legislature for the Union as a whole.³³

These provisions concerning national parliaments – which indeed are much less protective than those concerning the European Parliament – did not fully satisfy them. The French National Assembly underlined for instance that national parliaments’ prerogatives appear to be limited especially if one bears in mind the control powers they had at the time of their introduction over national supervisory authorities and in the light of the consequences surveillance measures can have on public finances and credit institutions among others.³⁴ The rapporteurs in charge of the report on the progress of the Banking Union and the economic integration in the framework of the Economic and monetary Union indicated also that they did not receive any response from the ECB to the queries they had addressed in the framework of their preparation and that they considered necessary for national parliaments to receive the reports of the surveillance board meetings just like the European Parliament does. The UK House of Lords similarly concluded that ‘an effective, calibrated and streamlined mechanism of accountability to national parliaments should be established, in particular in relation to individual supervision decisions that have a significant impact on an individual Member State’s banking sector. It must be for national Parliaments to set

³³ Further on this: R. IBRIDO, N. LUPO, ‘Which democratic oversight on the Banking Union? The role of the euro-national parliamentary system’, *Law and Economics Yearly Review*, 2015, 289-322, 312-313.

³⁴ Assemblée nationale, Rapport d’information n° 1665 déposé par la Commission des Affaires européennes sur les progrès de l’union bancaire et de l’intégration économique au sein de l’Union économique et monétaire (C. CARESCHE, M. HERBILLON, D. QUENTIN), 18.12.2013, 17.

out how any new accountability structures and frameworks should operate in practice'.³⁵ In this context, it is also important to bear in mind that (some) national parliaments have kept some investigative powers over their national competent authorities. This could interfere with the independence of the SSM decision-making process, which in turn would affect the ECB's responsibility in the SSM and its need to be held accountable.

As concerns the practice of these instruments, it should be noted that the information available in the ECB's annual reports as well as on its website are rather scarce. The Annual report for 2016 for instance simply states that 'As part of the reporting requirements under the SSM Regulation, representatives of the ECB involved in banking supervision took part in exchanges of views with national parliaments'; nothing further is stated on these exchanges of views. A similar statement had additionally already been enclosed in the 2015 report. Only in reference to 2014 had the Annual report contained some additional information as it specifically referred to two exchanges with the German Bundestag and the French National Assembly. The news section commonly entails some information on these exchanges of views as they are taking place but this information is not available in any dedicated section. Although the problem highlighted here is more one of transparency than of impediment to access ECB documents, such scarce information could be seen as being somewhat at odds with the content of recitals 69 of the SSM Regulation which states that 'The regulation referred to in Article 15(3) TFEU should determine detailed rules enabling access to documents held by the ECB resulting from the carrying out of supervisory tasks, in accordance with the TFEU', whereby article 15-3 TFEU defines principles of transparency and document access to all EU citizens.

Data obtained from the ECB directly shows that two of such exchanges of views took place every year in 2014, 2015 and 2016 and involved the German Bundestag (Finance Committee), the French National Assembly (European Affairs Committee), the Dutch House of Representatives (Finance Committee), the Italian Senate (twice) (Treasury and Finance Committee) and the Slovenian National Assembly. It is interesting to note that whereas the exchange of views organized by the French Assembly mentioned previously had brought together several committees among which the specialized Finance committee, in this occasion only the members of the European Affairs Committee were involved.³⁶ By contrast, in the German Bundestag, in the Dutch House of representatives, in the Italian Senate the exchanges of views took place before sectoral specialized committees, i.e. the Finance Committee and the Treasury and Finance Committee.

³⁵ House of Lords, European Union Committee, 7th report of session 2012-13, European Banking Union: key issues and challenges, 2012, 46.

³⁶ Assemblée nationale, Commission des Affaires européennes, Compte-rendu n°177 du 16 décembre 2014 <http://www.assemblee-nationale.fr/14/europe/c-rendus/c0177.asp>.

Even if of course some members of the finance committee may be also members of the European Affairs Committee – in France, dual membership is mandatory –, it can be reasonably expected that these members are, in general, less capable of holding the ECB to account for its actions than the members of the other parliaments' sectoral committees were. Hence, it is necessary to monitor the identity of the MPs who are to check on the ECB's actions to establish whether the accountability mechanisms are likely to be efficient or not.

It is regrettable that the information regarding these exchanges of views are not more easily accessible in a common place of the ECB's website (and are not more detailed in the Annual reports) especially seeing as, as illustrated previously, the instruments national parliaments have are already of a soft nature despite the impact of the ECB's decisions on their Member States; it is true though that banking supervision is a particularly delicate matter in which too much publicity may influence the markets and hence have a global impact and that therefore national parliaments' powers could have hardly been stronger. Furthermore, such opacity contrasts with Mario Draghi's original commitment to more transparency. It would however not be difficult for the ECB to simply list the exchanges of views in which it participated in a given year together with any observation or question it received from national parliaments, although national parliaments themselves should arguably take the initiative in this regard. They could, for instance, invite the ECB to reorganize the information and make it more easily accessible by using the possibility offered to them to comment on the Annual reports. A recent example of a difficult relationship between the ECB and the Portuguese parliament actually indicates that the ECB is not fully as open to exchanges with national parliaments as it claims.³⁷ In Spring 2016, the Portuguese parliament invited ECB vice-president Vítor Constâncio to attend the meeting of an enquiry committee on a Portuguese banking institution that went bankrupt in 2015, Banif. The vice-president declined the invitation alleging that the ECB only answers to the European Parliament. Therefore he could not take part in the meeting. Interestingly, a similar argument had already been used by Mario Draghi when he was requested to participate in an enquiry by the Irish parliament after the banking crisis in 2014 and 2015.³⁸ However, whereas the Irish request did not fall under the SSM Regulation, the Portuguese one did, hence the Portuguese parliament should have at least received an answer in writing. The Portuguese parliament was however not fully playing by the book either: it was claiming the existence of an

³⁷ More detailed on this episode: N. COELHO and D. FROMAGE, *The ECB in check: a case from Portugal on the new Single Supervisor Mechanism*, *Blog droit européen*, 9.6.2016 available at: <https://blogdroiteuropeen.com/2016/06/09/the-ecb-in-check-a-case-from-portugal-on-the-new-single-supervisory-mechanism-by-nelson-coelho-et-diane-fromage/> [26.3.2017].

³⁸ D. GRIFFIN, 'Inquiry strongly criticises ECB over refusal to attend hearings', *The Irish Times*, 27.1.2016.

obligation on the ECB to attend the meeting of the enquiry committee whereas no such obligation exists. Besides, its invitation was not addressed to the right person since it chose to invite ECB vice president Vítor Constâncio who ‘randomly’ happened to be a Portuguese national and had already been heard in a parliamentary enquiry as former governor of the Portuguese Central Bank. Instead, it should have invited the Chair of the Supervisory Board Eventually the Portuguese parliament did after all receive said answer but this procedure has proven anything but easy. Bearing this example in mind as well as the ECB’s limited transparency and the few exchanges of views organized so far (six in total), it can be regretted that little efforts are being made to make the most of this innovative and promising additional channel of accountability.

5. Conclusion

As illustrated above, the SSM Regulation has established an innovative and unique framework for the accountability of the ECB in its quality as supervisory authority in the Banking Union. So far, national parliaments had not been included; only the European Parliament had. However, national parliaments and the European Parliament were not placed on an equal footing so that the European Parliament alone, together with the Council, shall ensure accountability whereas national parliaments are to be informed and be able to submit observations and questions as well as organize hearings. After the difficulties faced by the Portuguese parliament in 2016, it will be necessary to observe how these soft prerogatives are unfolded in practice to determine whether they are of any added value to national parliaments or not.

A possibility to enhance the role of national parliaments and the European Parliament together could be for them to enhance their cooperation. In this way, they could exchange useful information and best practices and hence be better able to remedy to the often existing lack of information or informational asymmetry among them with some being better informed than others. Should some national parliaments manage to establish closer relationships to the ECB than others as might be anticipated of the parliaments of the largest Eurozone Member States, enhanced interparliamentary cooperation could help those who are less fortunate in the scrutiny exercise of their own national government. As recalled above, the SSM Regulation indeed clearly established both the European Parliament and the Council and the institutions ensuring the ECB’s accountability so that national parliaments should use this indirect channel too. The next question is of course how such closer interparliamentary cooperation should in practice take place. In the

light of the almost uncontrolled blossoming of initiatives for interparliamentary cooperation,³⁹ it appears rather undesirable to create yet again a new interparliamentary conference. Similarly, the Conference on Stability, Coordination and Governance is probably not the best setting for effective scrutiny mechanisms – even if matters related to the Banking Union were addressed in its framework in the past – since four years after its creation it is doubtful whether it will ever be truly effective. Questions such as the lack of any rule concerning the composition of each national delegation or fluctuating attendance – of officials alone in certain cases – imply that it is deemed to remain solely a forum for the exchange of information and best practices in the near future. For now, one could therefore envisage increased informal interparliamentary cooperation and the use of COSAC as a platform: it could already prove useful for instance for parliaments’ scrutiny for the SSM to be the object of one section of an upcoming COSAC bi-annual report so that parliaments at least know what their counterparts are doing in this domain.

Be this at it may, it remains that it might prove difficult to clearly separate the different functions of the ECB for them to be addressed in the appropriate and specific “dialogical” procedure, especially as the activities it pursues as banking supervisor may have implications for its activities in the monetary field.⁴⁰ This is also particularly important to avoid fragmentation⁴¹ but also to make an optimal use of the available resources. Indeed, the question of fragmentation is a crucial one since it makes external control more difficult. In an already particularly complex and technical policy area as is the oversight over the ECB with its three main components – monetary policy, Banking Union and the European Systemic Risk Board (body chaired by the ECB President⁴²) – it

³⁹ Formal and informal initiatives for interparliamentary cooperation among national and European parliaments are indeed always more numerous and more difficult to follow for citizens which arguably mitigates their potential as factors of ‘democratic boost’ within the EU. See on this phenomenon: D. FROMAGE, *Increasing interparliamentary cooperation: Current trend and challenges*, European Public Law, 2016.

⁴⁰ See on these potential overlaps: G. CLAEYS, M. HALLBERG, O. TSCHEKASSIN, ‘European Central Bank accountability: How the monetary dialogue could evolve’, *Bruegel policy contribution 2014/04*, 2014, 10-11.

⁴¹ See on the issue of fragmentation: R. IBRIDO, *Il controllo democratico della politica monetaria: equilibri costituzionali e integrazione europea dopo le sentenze OMT*, in *Federalismi*, 5, 2017, notably 22.

⁴² According to the art. 19 Reg. 1092/2010 “At least annually and more frequently in the event of widespread financial distress, the Chair of the ESRB shall be invited to an annual hearing in the European Parliament, marking the publication of the ESRB’s annual report to the European Parliament and the Council. That hearing shall be conducted separately from the monetary dialogue between the European Parliament and the President of the ECB.

2. The annual report referred to in paragraph 1 shall contain the information that the General Board decides to make public in accordance with Article 18. The annual report shall be made available to the public.

3. The ESRB shall also examine specific issues at the invitation of the European Parliament, the Council or the Commission.

4. The European Parliament may request the Chair of the ESRB to attend a hearing of the competent Committees of the European Parliament.

5. The Chair of the ESRB shall hold confidential oral discussions at least twice a year and more often if deemed appropriate, behind closed doors with the Chair and Vice-Chairs of the Economic and Monetary Affairs Committee of the European Parliament on the ongoing activity of the ESRB. An agreement shall be concluded between the European Parliament and the ESRB on the detailed modalities of organising those meetings, with a view to ensuring full confidentiality in accordance with Article 8. The ESRB shall provide a copy of that agreement to the Council.”

may prove difficult for MPs and MEPs to always know in which forum and in what way they can address which ECB representative on a specific issue.

Eventually the ECB is in a stronger and better position to use this fragmentation to escape adequate parliamentary accountability since it has the overview and the required specialized knowledge.

Beyond all this, one can wonder whether the new “Banking dialogue” of second generation can perhaps represent a model for the older Monetary dialogue and in particular whether it could be justified to involve national parliaments in the Monetary dialogue too. The same soft powers national parliaments have been given in the Banking dialogue could be attributed to them in the monetary field too, i.e. they could have the possibility to receive the Annual report from the ECB directly, to issue comments or questions and to invite ECB representative for exchanges of views. In this way, the informational asymmetry sometimes observable between parliaments and governments and among parliaments themselves would be avoided and the only obstacle to further parliamentary scrutiny would be parliaments’ own lack of mobilization. At a time when the ECB’s policy in this framework are sometimes doubted which hence gives rise to increased problems of democratic legitimacy, perhaps one way to remedy to these issues would indeed be to systematically involve national parliaments too. As recalled above, some informal initiatives have indeed existed in the past but with the important risk that in the absence of any formal obligation, the ECB remains free to choose which parliaments it decides to visit and which not – just like the European Commission is free in her choice to visit one parliamentary chamber or another in the framework of its informal Political Dialogue with national parliaments. While a certain degree of formalization appears desirable, a new institutional design which would prevent the ECB from having to travel to each and every single parliamentary chamber should nevertheless be elaborated since otherwise the Central Bank would in any case most probably not be able to abound to all requests simply for practical reasons.

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