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The European Central Bank: Issues of Constitutional Law

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Słowa kluczowe: euro, bank, niezależność, technokracja, demokracja, odpowiedzialność, parlament, demokratyczna kontrola, legitymacji

Summary

The paper stresses the need to reform the European Central Bank with the aim to strengthen the democratic legitimation of this institution within the particular EU governance system. Indeed, the study argues for more accountability of the ECB before the citizens without giving up independence. The analysis (also conducted from a comparative-law point of view) shows that the objective can be assured fostering a stronger involvement of the Parliament firstly in the procedure for the appointment of the Members of the ECB's Executive Committee, within a wider reform of the whole EU institutional setup and of the Eurozone's organization in particular.

Streszczenie

Europejski Bank Centralny: Zagadnienia prawa konstytucyjnego

W artykule podkreśla się potrzebę zreformowania Europejskiego Banku Centralnego w celu wzmocnienia jego demokratycznej legitymizacji w ramach konkretnego systemu zarządzania UE. Badania dowodzą, że EBC powinien wykazać się większą odpowie-

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działnością przed obywatelami, nie rezygnując przy tym z niezależności. Analiza (również prowadzona z punktu prawnoporównawczego widzenia) pokazuje, że cel ten można osiągnąć przez większe zaangażowanie Parlamentu przede wszystkim w procedurę mianowania członków Komitetu Wykonawczego EBC – w ramach szerszej reformy całego układu instytucjonalnego UE, a organizacji strefy euro w szczególności.

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I.

The organization and functioning of that “union in the union”, as the EMU is described within the European Union at large², state today several issues to Constitutional law scholars. The main one is the existence itself of the Euro, i.e. the peculiar creation of a currency without a State³; or rather without “sovereign” (considering sovereignty as a fundamental feature of the State), despite the fact that the monetary policy is one of the essential features of sovereignty itself⁴.

Actually, it would first be necessary wonder about the meaning itself of sovereignty in the context of the European integration process⁵, which strongly contributed to separate that concept from the exclusive state reference. For the purposes of this paper, it is however sufficient to remind that when it became necessary to implement acts of substantial sovereignty in order to cope with the financial crisis in Europe, they were not implemented by the States, unable to take the necessary measures to face the sovereign debts⁶. Indeed,

² Art. 3.4 TEU.

³ Never happened before, as argued by T. Padoa Schioppa, *Presentation*, IX, [In:] C. Zilioli, M. Selmayr, *La Banca centrale europea*, Milan 2007.

⁴ See, *ex multis*, A. Predieri, *Non di solo euro. Appunti sul trasferimento di poteri al Sistema europeo delle banche centrali e alla Banca centrale europea*, “Il diritto dell’Unione Europea” 1998, n. 1, p. 8.

⁵ See A. Ruggeri, *Costituzione, sovranità, diritti fondamentali, in cammino dallo Stato all’Unione europea e ritorno, ovrerosia circolazione dei modelli costituzionali e adattamento dei relativi schemi teorici*, “federalismi.it” 2016, No. 11.

⁶ Wider on the topic, G. Pitruzzella, *Chi governa la finanza pubblica in Europa?*, “Quad. cost.” 2012, No. 1, p. 15.

the countries which adopted the single currency, even if they formally retain functions of economic governance, are no longer able to act – so to say – “unconditionally”. In fact they are now limited both by the “Maastricht parameters” and by the limits later imposed by the so-called “*a latere* Treaties”⁷, including the requirement to keep the budget balanced.

Rather, the only effective measures, in terms of more or less direct effects on national economic policies, have been the ones adopted by the European Central Bank⁸. As well known, it decisively intervened to face the crisis with manoeuvres⁹, apparently derived only by the aim to preserve price stability¹⁰, in conformity with its binding mandate¹¹, but practically “unconditional”, meaning substantially sovereign¹², as lastly shown by the implementation of the so-called “*Quantitative easing*”, consisting of measures with neither un-extendable deadline, nor, in practice, fixed quantitative limits¹³, so that for these peculiarities they are to be considered “unbounded”.

Such initiatives were largely anticipated in Mario Draghi’s famous speech at the *Global Investment Conference* of London, in 2012, when the President of the ECB declared that, even within the limits of the received mandate,

⁷ Referring to the Agreements called Euro-plus, Six-Pack, Two-Pack, ESM, and, above all, TSCG, ties on and functioning of them, see called ady policy see after the Maastricht Treaty better known as *Fiscal Compact*, see, *ex multis*, P. Bilancia, *La nuova governance dell’Eurozona e i “riflessi” sugli ordinamenti nazionali*, “federalismi.it” 2012, No. 23, p. 2; F. Donati, *Crisi dell’euro, governance economica e democrazia dell’Unione europea*, “Il diritto dell’Unione europea” 2013, No. 2, p. 337; e E.C. Raffiotta, *Il governo multilivello dell’economia*, Bologna 2013, p. 58.

⁸ See, among others, A. Quadri Curzio, *The Greek crisis and the European crisis. How to face them*, “Ec. Pol.” 2010, No. 1, p. 3; and M. Fortis, *A different tale on Eurozone Debts*, “Ec. Pol.” 2012, n. 2, p. 161.

⁹ As the *Ltro* (“*Long term refinancing operation*”), the OMT (“*Outright Monetary Transactions*”) program, and the famous *QE* (“*Quantitative Easing*”). On the economic effects of these means, see U. Triulzi, *Le politiche economiche dell’Unione europea*, Milan 2016, p. 318, 333.

¹⁰ Considered the EMU’s “*Grundnorm*” by M. Herdegen, *Price stability and Budgetary Restraints in the Economic and Monetary Union: the Law as Guardian of Economic Wisdom*, “CLM Review” 1998, No. 9, p. 21.

¹¹ See art. 127 TFEU and art. 2 ECB’s Statute.

¹² See G. Magri, “*Vietato dalle leggi*” o “*imposto dal pericolo*”? *Le OMT, la normatività della democrazia e la direttività del mercato*, [In:] *Nuove strategie per lo sviluppo democratico e l’integrazione politica in Europa*, ed. A. Ciancio, Rome 2014, p. 569.

¹³ For the technical details, see U. Triulzi, *La Banca Centrale Europea motore dell’integrazione politica*, “federalismi.it” 2015, No. 3, p. 2.

the Central Bank considered itself “*ready to do whatever it takes to preserve the euro*”, showing already the intention to act, if exceptional circumstances would require, beyond the limits of Union law, even if never overtly without them. As it is known, the ECJ finally confirmed the substantial legitimacy of the “unconventional” measures of monetary policy adopted by the Central Bank, with a decision¹⁴ following the preliminary ruling ex art. 267 TEU proposed by the German Constitutional Court which had doubted the compatibility of the OMT Program with the Treaties’ law, as potentially *ultra vires*¹⁵.

Beyond the mentioned judicial history, we can outline the issue, which is more interesting for our purpose. Indeed, even not arriving to the conclusion that the true “sovereign” of the euro-zone is the Central Bank itself (“Sovereign is who decides on the state of exception”¹⁶) it is however manifest as in cases of financial crisis the ECB has adopted a leadership position in managing the crisis¹⁷, implementing a sort of “substitution” function¹⁸, which shows a clear political vocation¹⁹.

II.

Here a very interesting issue from a constitutional point of view because within a system that defines itself a representative democracy²⁰ and which includes among its fundamental values democracy and the rule of law²¹, there is an institution, which implements acts of substantial direction without the traditional boundaries of democratic legitimization. Indeed the ECB is notoriously a technical body absolutely independent (perhaps the most independent

¹⁴ CGE, Dec. of 16 Jun 2015 (C-62/14).

¹⁵ BVerfG, 2 BvR 2728/13 of 14 Jan 2014.

¹⁶ C. Schmitt, *Teologia politica*, [In:] *Le categorie del “politico”. Saggi di teoria politica*, eds. G. Miglio, P. Schiera, Bologna 1972, p. 33.

¹⁷ In this way U. Triulzi, *La Banca Centrale Europea*, op.cit., p. 6.

¹⁸ A. Giovannelli, *Vincoli europei e decisione di bilancio*, “Quad. cost.” 2013, No. 4, p. 935.

¹⁹ See E.C. Raffiotta, *La banca centrale europea tra regole tecniche e vocazione politica. Verso una tecnocrazia europea?*, [In:] *Nuove strategie*, op.cit., p. 617.

²⁰ Art. 10.1 TEU.

²¹ Art. 2 TEU.

among the central banks²²), even though there exist no real core of European economic governance from which to depend, because, at least formally, economic policies have been retained by the Member States.

However, it is clear that the mentioned condition of independence of the Central Bank cannot be put in discussion given the fiduciary nature of the single currency, which does not peg its value to any real datum (for instance, a State's gold reserves), but rather to markets' trust, that is all the more given, as price stability is ensured, avoiding recourse to inflationary manoeuvres²³. This led to entrust European monetary policy to a banking institution, whose nature is rigorously technical, constituted as a body unaffiliated to and impartial from the needs of the single States, which could occasionally be interested in devaluation processes to re-launch their economies²⁴, so to make it absolutely "unaffected" to the political interferences of the different (and changeable) national Governments and related electoral contingencies.

With reference to the European Central Bank, therefore we are once again presented with the dichotomy, not new in the public-law studies, between political legitimization and so to say, technical legitimization, sometimes resolved in terms of the model of Hamiltonian pluralistic democracy. According to this theory, the rules established by the democratically-elected lawmaker can be delegated for their implementation also to politically-unaccountable bodies, provided that they guarantee transparency and are subject to full and effective jurisdictional control²⁵. Indeed, a punctual jurisdictional verification of compliance with the institutional purposes would be sufficient to include within the democratic process functions of substantial political direction exercised by bodies independent from the Governments and as such lacking political

²² See C. Zilioli, M. Selmayr, *The European Central Bank: an Independent Specialized Organization of Community Law*, "Common Market Law Review" 2000, No. 37, p. 591, that consider the ECB an "Independent Specialized Organization of Community Law" and also a further, new Community, different from the three original Communities and legally equal to them.

²³ See T. Padoa Schioppa, *Il governo dell'economia*, Bologna 1997, p. 81. On the connection between independence of Central Banks and price stability, see M.J.M. Neumann, *Central bank independence as a prerequisite of price stability*, "European Economics Review" 1991, No. I, p. 79.

²⁴ See A. Predieri, *Non di solo euro*, op.cit., p. 9.

²⁵ In this direction G. Amato, *Intervento*, [In:] *Le autorità indipendenti nei sistemi istituzionali ed economici* ed. A. Predieri, Firenze 1997, p. 309.

legitimization. In these cases the lack of political control would be compensated by effective jurisdictional control²⁶.

Indeed, it would be a legitimization mechanism based on the centrality of the role of the judge which can, perhaps, be considered apt to guarantee a balance among the essential features (democracy, law and authority) of a system of democratic organization and distribution of public power expressed in the State²⁷, but which could also prove insufficient with respect to the EU and its governance, which for many aspects reveals the long-lasting lamentable feature of “a-political” characterization from a euro-unitary point of view, which still today represents an obstacle on the path to integration.

Actually, it is known how the mistrust grown in the last years towards the “technocracy” which leads Europe currently represents one of the major factors nurturing the widespread euro-scepticism, which recently manifested itself, among others, in occasion of the last elections for the EU Parliament and that is more and more affirming itself within the single state systems, with the rise of extremist political parties, both conservative and nationalistic, and leftist, as new movements of populist inspiration. All these political forces share the aversion towards the integration process and exploit the widespread popular malaise towards the decisions adopted in the traditionally European intergovernmental and/or technocratic venues.

To regain electors’ trust in the European political project it does not seem sufficient, therefore, the legitimization obtained by the judiciary guarantee of compliance with the purposes established by the superior norms of the system, which are to be considered the Treaties’ provisions, which fix price stability as the almost-exclusively canon of reference of the activity of the Central Bank. Neither appears sufficient the fact that the nomination of the Executive Committee of the ECB and, firstly, of its President are entrusted to the representatives of the Governments²⁸, who sit in the Councils (both European one for the appointment and the one of the EU for the recommendation), who in order to be Governments of the Union’s Member States, are all dem-

²⁶ D. Siclari, *Costituzione e autorità di vigilanza bancaria*, Padova 2007, p. 493.

²⁷ See S. Cassese, *La fabbrica dello Stato, ovvero i limiti della democrazia*, “Quad. cost.” 2004, p. 252.

²⁸ Art. 283 TFEU.

ocratically legitimized²⁹, even if in different forms because of different government systems.

Rather, in the prospect of intensifying the political integration, it is necessary to intervene on the European political legitimization by strengthening it³⁰, whereas for other aspects, the substantially (inter)governmental character of the current system to nominate the executive Committee would even lead to a weakening of the total degree of independence of the ECB, which then through an appropriate revision of the mechanism of election of its heads, could even amplify in the framework of a wider restructuring of the whole institutional architecture of the EU and of the Eurozone in particular³¹.

III.

From this point of view it is necessary to assess the possibility to introduce new channels of democratic legitimization of the ECB, preserving, at the same time, its independence through a reform which, in the context of further political integration among the countries taking part (at least) of the Eurozone, might re-collocate also the ECB within the more traditional tracks of democratic control.

As already argued³², the doubts re-call a similar issue, faced (also) in the Italian system with the introduction of the so-called “Independent Administrative Authorities”, invested of the task to regulate so-called “sensitive” administrative sectors, where one could strongly perceive the contraposition between public and private powers, strong organized interests and weak fragmented ones, which require a balanced equilibrium between potentially opposed values³³. This was implemented by entrusting important fields of economic-social

²⁹ Art. 10.2, II para. TEU.

³⁰ In the same sense F. Donati, *Trattato di Lisbona e democrazia nell'UE*, [In:] *Nuove strategie*, op.cit., p. 290.

³¹ See A. Ciancio, *Quali prospettive per l'integrazione politica in Europa dopo le elezioni?*, “federalismi.it” 2014, No. 11.

³² See A. Ciancio, *Inodi della governance europea: euro, politica fiscale, bilancio unico dell'Unione. Per una nuova legittimazione democratica della BCE*, “federalismi.it” 2015, No. 16, p. 11.

³³ See, among others, at least, C. Franchini, *Le autorità amministrative indipendenti*, “Riv. Trim. Dir. Pubbl.” 1988, p. 549; A. Massera, “Autonomia” e “indipendenza” nell'amministrati-

activity to so-called “Guarantor” Authorities. They were established to ensure a high degree of independence from the political, economic and bureaucratic powers in order to shield their actions from external influences, coming from centres of both public power and private interest’ groups. For this purpose they are called to inspire their activities according to criteria different from the ones inspiring political-party actions, which are the basis of the administrative apparatus most directly dependent from the Government, making reference for the regulation of the respective fields of action, to the criterion of the objective valuation of interests and needs existing in the sectors themselves to strike a fair balance in the light of rigorous criteria of impartiality, removing the actual interventions from the unidirectional reading by the Government bodies.

Here the problem of their regulation, which faces the challenge of reconciling the high degree of technicality of these bodies and related competencies, to which it is connected the recalled need of independence from political power, with the establishment of, even indirect, forms of democratic legitimation, which serve to mitigate positions of substantial unaccountability before the electoral body.

The result in the Italian system was obtained with the intervention by the Parliament, not only through parliamentary auditions and periodic updates before the Parliament itself (actually contemplated also with respect to the ECB before the EP³⁴), but also including the involvement, even if in ever changing forms, of the political-legislative body in the nomination of the heads of these Authorities³⁵. Conversely, looking at the European framework, the Parliament is still today involved only in “consultation” in occasion of the appointment of the members of the Executive Committee of the Central Bank³⁶.

Along the lines of the Guarantor-authority model, therefore, and in the prospect of a stronger political integration in the context of a EU, it would be necessary to redefine the whole institutional framework of the Union, fur-

one dello Stato, [In:] *Scritti in onore di M.S. Giannini*, Milan 1988, p. 453; N. Longobardi, *Le amministrazioni indipendenti*, [In:] *Scritti per M. Nigro*, Milan 1991, p. 175; M. Manetti, *Poteri neutrali e Costituzione*, Milan 1994; F. Merusi, M. Passaro, *Le autorità indipendenti*, Bologna 2003; M. Manetti, *Le autorità indipendenti*, Rome–Bari 2007.

³⁴ Art. 284 TFEU.

³⁵ Wider on this topic, A. Ciancio, *Riforma elettorale e ruolo garantistico del Presidente di Assemblea parlamentare: un modello in crisi?*, “Dir. Soc.” 1996, No. 3, p. 414.

³⁶ Art. 283 TFEU.

ther underlining the role of the Parliament³⁷, with a more direct and intense intervention of the representative body also in the nomination of the members of the Executive Committee of the Central Bank. In truth, the desired (re)structuring in a federal sense (at least) of the Eurozone³⁸, with the objective to implement a common budget, create a sole treasurer and establish an autonomous capacity of fiscal action, requires first of all to redefine its whole organizational setup, with a more balanced system of checks and balances among the different institutions³⁹. In particular, it would be necessary to strengthen the Parliament's role in the appointment of the heads of the ECB, following the path for other purposes inaugurated with the implementation of the single supervision mechanism⁴⁰ and which with respect to the nomination of the members of the Executive Committee finds some anticipations in the internal regulation of the EP. Art. 122 of the parliamentary Regulation, indeed, seems to provide a "strong" reading of the "consultation" provided for by the Treaty, because, beyond the audition of the candidate to the Presidency (and of other members) of the Executive Committee before the relative parliamentary commission, introduces a recommendation of the latter to the Parliament in relation to the approval or rejection of the proposal by the Council. In the second case, it would follow the invitation to the Council to modify the nomination, with a procedure, therefore, which seems to attract to the politically-representative body co-decisional, rather than merely consultative, functions, on the verge of the legislative *iter* now become ordinary procedure, but which contrary to this one, still does not find regulation in primary European law. Notwithstanding a change of the nomination system of the members of the Executive Committee similar to the one hereby argued for was expressed also in the so-called "Frankfurt Protocol", stated by the former euro-deputy Andrew Duff with the purpose to elaborate a project of organic reform of the institutional setup of the Eurozone, to be added

³⁷ Recently on the issue A. Ciancio, *Democrazia e sovranazionalità: ripensare il Parlamento europeo*, "Riv. AIC" 2016, No. 3.

³⁸ See A. Ciancio, *Con lo sguardo oltre Lisbona verso gli Stati Uniti d'Europa*, [In:] *Le elezioni del Parlamento europeo del 2014*, ed. B. Caravita, Naples 2015, p. 79.

³⁹ As previously argued in A. Ciancio, *How we might recover from the economic and social crisis through European integration deepening*, "Przegląd Prawa Konstytucyjnego" 2014, No. 3, p. 161.

⁴⁰ See A. Pisaneschi, *Banca centrale europea, vigilanza bancaria e sovranità degli Stati*, "federalismi.it." 2014, No. 17, p. 9.

as an attachment to the Lisbon agreement, so to implement the appropriate finalization of the EMU without modifying the Lisbon Treaty. The project, which still has not been approved in the competent institutional venues of the Union, among its dispositions contains the proposal, similar to the one hereby proposed for, to associate the Parliament to the Council in the nomination of the heads of the ECB, even if on recommendation by the Commission (art. 4). The main effect also in this case would be to alleviate the substantial unaccountability of the European Central Bank before the electoral body by intensifying its relation with the Parliament, preserving at the same time its necessary technical competences.

IV.

It is possible to prevent the objection that a parliamentary nomination of the members of the ECB could undermine its independence, already considering the fact that the latter, more than to the appointment mechanisms, seems entrusted to other guarantees, all already present in the current regulation of this institution.

Among them it is to be recalled firstly the very technical competence of the Executive Committee's members and their related incompatibilities, as well as the features of the mandate. Above all it worth to underline the fixed length of eight years, which by itself removes the position from the so called "political cycle" of the EP, even more considering its no-renewability, a feature which shows the effort to exclude any possibility to "contract" or "exchange" the confirmation of the mandate at the Frankfurt Eurotower with the protection of economic interests (solely) of some countries.

Besides we should consider the peculiar internal organization of the EP which would seem to exclude that these nominations indulge the (economic) interests of one country or the other or their respective Governments. Indeed the Parliament is the only EU Institution articulated not with respect to the nationalities of the members but in groups formed primarily on the base of political affiliation⁴¹. Rather, the political vocation of the groups within

⁴¹ A. Ciancio, *I gruppi parlamentari. Studio intorno a una manifestazione del pluralismo politico*, Milan 2008, p. 70.

the European parliament⁴², combined with the other requirement of “transnationality”, also necessary for this institution, would favour a choice functional to more-shared strategies, transversally to the interests of the single States and at most compliant with the more general objectives of economic growth at the European and (only consequently) national level, taking from this point of view the meaning of a politically unifying investiture beyond States oppositions.

The conclusion, moreover, would be more compelling if it were confirmed the provision of qualified majorities for the nomination of the government bodies of the ECB⁴³, together with the number of six members of the Executive Committee, which makes the Central Bank an institution non-representative of all Member States which adopted the single currency.

Actually – as shown by the already-mentioned experience of the Independent Authorities, even more so if considered from comparative law point of view – the independence appears to be entrusted only minimally to the procedure to select the members of the guarantor bodies⁴⁴. Rather it is greatly maintained by the technical rules that ensure the impartial exercise of their functions, provided it is ensured by other means the compliance of such designations to effective criteria of competence and professionalism⁴⁵.

⁴² S. Baroncelli, *I gruppi parlamentari nell'esperienza del Parlamento europeo*, [In:] *Rappresentanza politica, gruppi parlamentari, partiti: il contesto europeo*, ed. S. Merlini, Turin 2001, p. 11; and A. Ciancio, *Partiti politici e gruppi parlamentari nell'ordinamento europeo* “Pol. Dir.” 2007, p. 159.

⁴³ Art. 283.2 TFUE.

⁴⁴ In the U.S.A., for instance, the development of the phenomenon of *Independent Regulatory Commissions*. P. Tesaurò, *Le “Independent Regulatory Commissions”. Organi di controllo dei pubblici servizi negli Stati Uniti*, Naples 1966, established to protect relevant public interests, removing them from any kind of pressure by public or private forces, has not prevented to entrust their appointment to the President, even if with the screen of the Senate, exercised either in the form of “*advice*”, or “*consent*”. However, the de-politicization of such form of check on public interest services is accomplished through a series of rules, usually contained in the establishing laws of the different *Commissions*, aimed at preventing the President from interfering in their activities after the nomination.

⁴⁵ In this direction goes also the French system of *Autorités Administratives Indépendantes*, born at the end of WWII, on the example of the North-American precedent, which by the variety of *Autorités’* nomination mechanisms conceived (e.g., nomination with ministerial decree or by the Council of Ministers; nominations by the heads of the Higher Courts) sug-

With specific reference to the central banking institutions, a confirmation can be found in the organization of the *Deutsche Bundesbank*, which famously offered the model for the ECB itself⁴⁶. Indeed the German Federal Bank is characterized by the presence of a single administrative body, made up – beside the President and the Vice President – by six members, appointed by the President of the Republic among people with particular professional competence, four of which are selected by the *Bundesrat*, even though in agreement with the Federal Government, which is exclusively entrusted the choice of the other members⁴⁷. Notwithstanding the identification, as the holder of the nomination power, of the Chamber representative of *Länder*, rather than the *Bundestag*, because of to the federal structure of that system in connection to the regional articulation of the German banking system⁴⁸, what is more interesting for this paper is to underline how the inclusion of the Federal Bank in the representative-democratic circuit don't threat the absolute political neutrality of the *Deutsche Bank*⁴⁹. Conversely, after the entry into the SEBC it is

gests lawmakers' almost-total indifference for the chosen nomination mechanism, provided the existence of strict guarantees of protection of independence of such bodies, under the profile of possible nominees, strict incompatibility systems, guarantees of un-transferability and immunity, contained in the establishing laws. See, among others, P. Sabourin, *Les autorités administratives indépendantes*, "L'Actualité juridique. Droit Administratif" 1983, No. 5, p. 275; F. Gazier, Y. Cannac, *Etude sur les autorités administratives indépendantes*, "Etudes et documents Cons. D'Etat" 1983–1984, No. 35, p. 13; J. Chevallier, *Réflexions sur l'institutions des autorités administratives indépendantes*, "La semaine juridiques" 1986, No. 30–32, p. 35; C.A. Colliard, G. Timsit, *Les autorités administratives indépendantes*, Paris 1988.

⁴⁶ See, *ex multis*, A. Giovannini, *Central Banking in a Monetary Union: Reflections on the Proposed Statute of the European Central Bank*, "Occasional Paper" ed. CEPR, 1992, n. 9, p. 10; A. Predieri, *Euro, poliarchie democratiche e mercati monetari*, Turin 1998, p. 283; J.V. Louis, *Le système européen de banques centrales: les rapports entre banques centrales nationales et banque centrale européenne*, [In:] *Mélanges offerts à P. Van Ommeslaghe*, Bruxelles 2000, p. 778; C. Hadjiemmanuil, *Democracy, supranationality and central bank independence*, [In:] *Central bank independence*, Dordrecht 2001, p. 153.

⁴⁷ On the German Central Bank's organization, before and after the entry into the ESCB, see E. Apel, *Central Banking Systems Compared. The ECB, the pre-euro Bundesbank and the Federal Reserve System*, London–New York 2003, p. 15.

⁴⁸ See R. Bifulco, *Bundesbank e Banche centrali dei Länder come modello del Sistema europeo delle Banche centrali*, [In:] *Europa e Banche centrali*, ed. O. Roselli, Naples 2004, p. 75.

⁴⁹ Considered "a fourth branch of government", by E. Kennedy, *The Bundesbank. Germany's Central Bank in the International Monetary System*, London 1991, p. 3. Indeed, D. Marsch, *The*

stronger, because of the further guarantees of impartiality imposed at the European level by both the Treaties and the ECB's Statute as requirements for being part of the European system of Central Banks⁵⁰.

It equally does not seem contestable the independence of the Bank of Italy⁵¹ (sometimes considered in the Italian system the epitome of Independent Authorities⁵²) with respect to the political direction of majority on the issue of (residual) competences of credit control and banking supervision, notwithstanding the ever-lasting strong involvement of the Government in the election of its Governor and, after the chance put forward by law n. 262 of 2005 (art. 19), even on the duration of its mandate, now limited to six years, renewable only once and revocable, even if only for the reasons (and with guarantees of jurisdictional protection) established by the ESCB Statute. Actually, the independence of the institution lays principally in other guarantees, among which the technical-professional competence of the members of the Directorate, today even committed to comply with the Ethical Code adopted in 2006 that integrates the conduct rules already contained in the Statute of the Bank, establishing the behaviours to adopt in relation to conflict of interests, privacy, external appointments, acceptance of gifts or other goods, in

Bundesbank: the bank that rules Europe, London 1992, p. 57, remember that already in 1956 Konrad Adenauer lamented that “The central bank is totally sovereign in its relationship with the government; it is accountable only towards itself”. On the other hand, S. Ortino, *Banca d'Italia e costituzione*, Pisa 1979, p. 9, emphasises how, during the debate leading to the approval, in 1957, of the law on the *Bundesbank*, it was proposed to vest in it, alternatively, either the title of constitutional body or of fourth power.

⁵⁰ C. Zilioli, M. Selmayr, *La Banca centrale europea*, op.cit., p. 75, R. Sturm, *How independent is the Bundesbank?*, “German politics” 1995, o. 4, p. 37, according to which the path of gradual transition towards the common currency coincided with the moment of lowest independence of the German Bank, based on the (merely factual) consideration that it had not originally been consulted about the choice of taking part in the monetary union, but was only later included in the relative decision-making process.

⁵¹ F. Zatti, *Il ruolo della Banca d'Italia tra Sebc, Bce ed istituzioni politiche nazionali*, in *Europa e Banche centrali*, op.cit., p. 200. *Contra*, S. Ortino, *Banche centrali tra indipendenza ed autonomia*, [In:] *Banca impresa società*, 1986, pp. 356–357. See also T. Padoa Schioppa, *The Euro and its Central Bank*, Cambridge 2004, p. 32, who argues that the Bank of Italy has become independent after the signature of the Maastricht Treaty.

⁵² V. Mezzacapo, *L'indipendenza della Banca d'Italia*, [In:] *Mercati e amministrazioni indipendenti*, eds. F. Bassi, F. Merusi, Milan 1993, p. 31.

the respect of the fundamental values of the institution, which are independence and impartiality, together with loyalty and discretion.

The example confirms the secondary importance of the nomination mechanisms of some institutions with respect to the main objective of maintaining the conditions of neutrality for the exercise of their functions, avoiding coercions *ex parte* political, where the “personal”, so to say, guarantees of independence of the ECB, due to the mentioned features of the (non-revocable) mandate of its administrators, are complementary to the other provisions of autonomy, such as the ones already established by the applicable Statute of the Central Bank, both under the financial profile⁵³ and the functional one, related to the possibility to reach its monetary-policy objective in complete autonomy⁵⁴.

For what concerns the so-called institutional autonomy, it likewise seems very high, considering the juridical personality attributed to the ECB⁵⁵, different from the one of the Union’s, as well as the fact that it is neither subject to instructions, nor to annulment of its acts by other bodies, in particular political ones. Different it has to be considered the jurisdictional control exercisable only by the Court of Justice on the regulations that the Central Bank might adopt, as expression of the wide, also normative autonomy recognized for the accomplish of the ESCB’s tasks⁵⁶. These regulations – in compliance with the characteristics of the corresponding normative acts of the Union⁵⁷ – have general character and are directly applicable within the Member States (of the eurozone), but, because of the mentioned independence of the ECB, are adopted by excluding any form of intervention in the formation *iter*, as well as of control, by political bodies, in particular the Parliament. Therefore, it is entrusted to the judicial control⁵⁸ the guarantee of the (only) legitimacy of such normative acts⁵⁹, relative to the ordinary competences of monetary policy.

⁵³ Artt. 28 ss. ECB’s Statute.

⁵⁴ For the various features of the ECB’s independence, see S. Baroncelli, *La banca centrale europea: profili giuridici e istituzionali. Un confronto con il modello americano della Federal Reserve*, Firenze 2000, p. 209.

⁵⁵ Art. 282 n. 3 TFEU and art. 9 St. ECB.

⁵⁶ Art. 132 TFEU.

⁵⁷ Art. 288 TFEU.

⁵⁸ Art. 263 TFEU.

⁵⁹ Art. 35 ECB’s Statute.

On the other hand, to the proposal to modify in the sense hereby indicates the nomination system of the heads of the European bank, it does not seem insurmountably opposable either the consideration that a parliamentary designation of the ECB's Executive Committee Members, mitigating the "institutional" independence, would present an incurable contrast with the principle of absolute autonomy established by the Statute of the ESCB.

An indirect proof is provided by the Swedish Central Bank, even if Sweden – as derogatory Member State – does not yet participate in the monetary union. Indeed, the amendments of the Constitution and of the statutory law relative to the *Sveriges Riksbank*, for what concerns the compliance with the parameter of legal convergence in view of the adoption of the single currency⁶⁰, have not substantially altered the relationships between this Bank and the National Parliament, which features a manifest dependence of the former by the latter⁶¹, in conformity with the characteristics of that system, characterized by a strong "centrality" of the Parliament⁶². In particular, we hereby take into consideration the selection procedure of the members of the Directive Council, whose nomination continues to be entrusted to the parliamentary election even after the constitutional reform⁶³. Indeed, in the different Reports on legal convergence published by the ECB⁶⁴, this fact has not been considered incompatible with the requisites of independence imposed on National Central Banks as conditions for the entry into the ESCB, contrary to other competences attributed to the *Riksdag* towards the *Riksbank* and among them, primarily, the parliamentary control on the operations of earnings distribution, considered contrasting with the principle of financial autonomy⁶⁵.

⁶⁰ On the topic E. Paparella, *Unione monetaria europea e indipendenza delle Banche centrali. Il caso della Sveriges Riksbank*, [In:] *Europa e Banche centrali*, op.cit., p. 150.

⁶¹ "The Riksbank is the central bank of the Realm and an authority under the Riksdag", Art. 9.12.1 Swedish Constitution (*Regeringsformen*).

⁶² D. Arter, *The Swedish Riksdag: The Case of a Strong Policy-Influencing Assembly*, [In:] *Parliaments in Western Europe*, ed. P. Norton, London-Portland 1990, p. 120.

⁶³ "The Riksbank shall have a Governing Council comprising eleven members, who shall be elected by the Riksdag", as laid down by Art. 9.12.2 Swedish Constitution, reformed on this point in 1998. Before, not very dissimilarly, it established that: "The Bank of Sweden is administrated by eight Trustees. Seven of the Trustees are elected by the Riksdag".

⁶⁴ Look at the website www.ecb.europa.eu.

⁶⁵ E. Paparella, op.cit., p. 160.

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The question of the extension of parliamentary intervention in relation to the Central Banks remands to another, not secondary, profile of the issue concerning the democratic legitimization of the ECB.

Indeed, the current forms of interaction between the Central Bank and the other European Institutions, even if sometimes accomplish, in a purely factual view, important occasions of evaluation and exhortation of the actions of the ECB, do not appear able to substitute the weakness of democratic control on the activity of the Central Bank, because of the delicate equilibrium reached at the normative level among the bans imposed to guarantee the independence and the permissible inter-institutional relationships⁶⁶. Indeed, the right of the Council's President and Commission's members to participate, with no voting rights, to the meetings of the ECB's Directive Council, as well as the possibility by the same President of the Council to submit a motion to the deliberation of the same Directive Council; the invitation directed to the President of the Central Bank to participate to the meetings of the Council "when the latter discusses issues related to the ESCB's objectives and tasks"; the obligation by the Bank to refer every year to the European Parliament, the Council of ministers, the Commission and the European Council about its own activity; and even the auditions of the ECB's President and other members of the Executive Committee in the relative parliamentary commissions⁶⁷ do not determine the rise of an authentic accountability of the Central Bank towards the mentioned bodies and, therefore, as anticipated, do not constitute mechanism for sufficient democratic control upon its activity⁶⁸, ensuring at most its transparency⁶⁹, which however is a different principle which must be kept separate from the, just mentioned, one of accountability⁷⁰.

And however, one cannot but perceive that the ECB's independence, in the above-mentioned different nuances, could not certainly put the Europe-

⁶⁶ T. Padoa-Schioppa, *The Euro*, op.cit., p. 32.

⁶⁷ Art. 284 TFEU.

⁶⁸ A also argued by U. Triulzi, *Le politiche economiche*, op.cit., p. 325.

⁶⁹ See C. Zilioli, *Art. 284*, [In:] *Commentario breve ai Trattati dell'Unione Europea*, eds. F. Pocar, M.C. Baruffi, Padova 2014, p. 1391; and before A. Malatesta, *Art. 105-124*, [In:] *Commentario breve ai Trattati della Comunità e dell'Unione Europea*, ed. F. Pocar, Padova 2001, p. 528.

⁷⁰ T. Padoa Schioppa, *The Euro*, op.cit., p. 32.

an Bank without the legal order, and that even its whole explication requires fixing judicial rules allowing the Central Bank to pursue with full discretion, but also efficiently, the objectives entrusted to it. In particular, the legal definition of price stability as (primary) reference criterion for the action of the ECB⁷¹ ought to allow it to operate autonomously in the accomplishment of its objective, shielded from any external pressure, giving though at the same time the judicial basis for an inter-institutional dialogue that could reconcile the already mentioned independence with other forms of accountability of the Bank in the case it does not reach the objectives established by the norms⁷².

According to this view, one could even introduce some types of inspective control by the Parliament on the ECB, similarly in any case to what specialized scholarship had suggested also in the case of the Bank of Italy⁷³, even if one can doubt that the Parliament possesses the technical competences necessary to adequately carry on the inspections in the sectors of competence of the Bank⁷⁴. Anyway, providing for (an extension of) parliamentary control on the activities of the European Central Bank⁷⁵, would establish some forms of accountability⁷⁶ of the Bank towards the immediately representative body and, by so doing, put in place even virtuous control processes of the public opinion on the whole activities of the Institution⁷⁷.

Indeed, in the context of a system which proclaims itself of representative democracy⁷⁸ a central issue is the citizens' possibility to know and inspect

⁷¹ Art. 282.2 TFEU.

⁷² See again T. Padoa Schioppa, *The Euro*, op.cit., p. 33. Similarly also S. Baroncelli, *La Banca centrale europea*, op.cit., p. 249.

⁷³ In the same direction, already, F. Capriglione, *Intervento pubblico e ordinamento del credito*, Milan 1978, p. 161.

⁷⁴ See S. Ortino, *Banca d'Italia*, op.cit., p. 411.

⁷⁵ Already present in embryonic form in the Regulation of the banking single supervisory mechanism, see A. Pisaneschi, *Banca centrale europea*, op.cit., p. 7; and S. Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, Turin 2013, p. 229. But, on the different meaning expressed by the ECB's independence in the field comparing with the other one of the monetary policy, see C. Zilioli, *Art. 284*, op.cit., p. 1393.

⁷⁶ On the various forms of accountability to which are subject sovranational technical institutions, see G. Cerrina Feroni, *Organismi sovranazionali e legittimazione democratica. Spunti per una riflessione*, "federalismi.it" 2016, No. 20, p. 7.

⁷⁷ See T. Padoa Schioppa, *The Euro*, op.cit., p. 33.

⁷⁸ Art. 10.1 TEU.

through the Parliament every step leading to the formation of the will of the decision-making bodies and activate in this way the diffused accountability before the electoral body.

Therefore, one could admit the possibility that the Parliament exercises a sort of “institutional attraction” also on the bodies that one wants to maintain independent, through the inspective activity⁷⁹, to be exercised even through the establishment of dedicated, even temporary, Commissions, in this very case for the control on monetary policy⁸⁰.

The idea to initiate true parliamentary investigations on the activity of the Central Bank and on its compliance with the objectives established by the norms cannot be rejected *a priori* for fear that through the usual instruments of inspective control, Parliament’s political considerations could overlap to the “technical” ones of the body under verification, as could be concluded by those who cannot escape the impression of an absolute incompatibility between independence and political control⁸¹. This conclusion not seems inescapable by solely considering the peculiar regulation of the European Parliament investigations. Indeed, on the one hand the purpose of the investigatory activity is only to allow the Parliament to supervise the correct application of Union law in case of infringements or bad management of the very same. On the other hand, it reaches its conclusions through, at the most, the proposal to adopt a recommendation⁸², which, belonging to the area of “soft law”, allows the receiving body wide margin of evaluation relative to the *an* and the *quomodo* of the implementation of the indications it contains. In this way, the control so exercised on the Central Bank could recall this body to a more effective action or even a more rigorous compliance with its institutional objectives, without substantially undermining its decision-making autonomy, complementing, at the same time, with the ban imposed on it to receive instructions not only by national Governments, but also by the other Union Institutions⁸³. Therefore the parliamentary control on the activities of the Bank

⁷⁹ See D. SICLARI, *op.cit.*, p. 323.

⁸⁰ Similarly, relating to the Bank of Italy, already A. Predieri, *Sistema bancario e istituzioni: un nuovo compito per il Parlamento?*, “Città e regioni” 1976, No. 12, p. 10.

⁸¹ In this way C. Zilioli, M. Selmayr, *La Banca centrale europea*, *op.cit.*, p. 100.

⁸² Art. 198.10, III alinea Reg. PE.

⁸³ Art. 7 ECB’s Statute.

for alleged deviations from its institutional objectives and/or for lack of accomplishments of the same – which, it is worth mentioning, are implemented with technical tools, producing though effects of very high political significance – would complement the judicial control entrusted to the Court of Justice on the recurrence of the (limited) causes for removal of the Members of the Executive Committee, exercisable for lack of the conditions required for the performance of their duties and for serious misconduct⁸⁴.

Wholly considered, therefore, the suggestion to relax the fundamental unaccountability of the European Central Bank before the electoral body by intensifying its relationship with the Parliament, at the very least “parliamentarizing” the nomination of the Members of the ECB’s Executive Committee, would lead to conciliate the “natural” technical connotation of the ECB with a more comprehensive application of democratic principles. And indeed, the proposal so forth presented could even favour the solution to what currently seems a huge paradox, from a political point of view, of the European integration process: i.e. the presence in the EU institutional setup of a body, characterized by a very high independence primarily for effect of the position assumed at the time of its establishment by Germany⁸⁵, which nowadays shows to consider the very independence of the ECB one of the main obstacles to consent to those further cessations of sovereignty necessary for the completion of the EMU and its transformation into a genuinely political Union.

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⁸⁴ Art. 11.4 St. ECB.

⁸⁵ See E. Apel, *Central Banking Systems Compared*, op.cit., p. 190. Conversely, T. Padoa Schioppa, *L’Europa verso l’unione monetaria. Dallo Sme al Trattato di Maastricht*, Bologna, 1992, *passim*, argues that it would be incorrect to consider all the ESCB the result only of German pressures.

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