

## The Emperor's New Clothes: The ECB and the New Institutional Concept

By Timo Tohidipur\*

*"If your Imperial Majesty will be graciously pleased to take off your clothes, we will fit on the new suit, in front of the looking glass."\*\**

### A. Introduction

Taking a look at the ECB of today means, to a certain extent, rethinking the emperor's idea. The European Central Bank is independent and seems almost untouchable in its field of responsibility. Its self-image is stamped by its special status outside the institutional structure of the European Union. However, the indefeasibility and with it the self-conception of the ECB was finally questioned by the European Court of Justice. The Treaty establishing a Constitution for Europe designs a new institutional setting and possibly constitutes a new understanding. The question is to what extent does this new institutional setting redefine the special status of the ESCB and the ECB, and how does it affect questions of democratic accountability and legitimacy.

### B. Institutional Standing *de lege lata*

#### I. Monetary Union and its Institutional Framework

##### 1. Aspects of the System

While the original idea of a monetary union goes back to 1969,<sup>1</sup> the revival of the monetary union project in the second half of the 1980s finally resulted in the establishment of the European Monetary Union as laid down in the Maastricht

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\*\* HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (1837).

<sup>1</sup> See MICHEL CLAPIÉ, INSTITUTIONS EUROPÉENNES 239 (2003); ANTHONY ARNULL ET.AL., EUROPEAN UNION LAW 522 (4th ed., 2000).

Treaty in 1991. On 1 January 1999, eleven European countries transferred their monetary sovereignty to the ECB, and since then the ECB has conducted the single monetary policy for the so-called "euro area."<sup>2</sup> Yet still, economic policy remains within national competence. The European Monetary Union itself is strongly connected to the idea of a single market in the European Union. Such a single market possibly requires a monetary union, and surely both require firm institutional foundations.<sup>3</sup> The institutional framework for the European Monetary Union is the European System of Central Banks (ESCB), as mentioned in Art. 8 and 107 EC. The ESCB is made up of the national central banks of the participating member states with the ECB itself at the center. The federal conception of the ESCB is obvious, constructed with the old German federal bank system as a role model,<sup>4</sup> but with a more decentralized approach.<sup>5</sup> The conceptual approach of the contracting parties - the member states of the euro area - was the creation of a composite institution with the ESCB as responsible actor of the monetary policy.<sup>6</sup> The execution and operation of monetary policy is broadly decentralized within the ESCB while the formulation of monetary policy is in fact centralized within the ECB.<sup>7</sup> This fact corresponds with Art. I-30(2) CT, whereby the ESCB "shall be governed" by the decision-making bodies of the ECB. Pursuant Art. 12(1) of the ECB-Statute the ECB shall have recourse to the national central banks to conduct operations, which form part of the duties of the NCBs such as open market operations or the production of EURO banknotes and coins. Meanwhile, the ESCB is the institutional framework, only the ECB (and the NCBs certainly) has its own

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<sup>2</sup> The EURO is not the common currency of the European Union but the mutual currency of the (now 12) member states that have joined the euro area, see Hugo J. Hahn & Ulrich Häde, *Die Zentralbank vor Gericht*, 165 ZEITSCHRIFT FÜR DAS GESAMT HANDELS- UND WIRTSCHAFTSRECHT 30, 32 (2001); EUROPEAN CENTRAL BANK (ED.), THE MONETARY POLICY OF THE ECB 9 (2004), <http://www.ecb.int/pub/pdf/other/monetarypolicy2004en.pdf>

<sup>3</sup> TOMMASO PADOA-SCHIOPPA, THE ROAD TO MONETARY UNION IN EUROPE 2 (2d ed., 2000).

<sup>4</sup> See PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 695 (3<sup>rd</sup> edition, 2003); Paul Magonette, *Towards "Accountable Independence?" Parliamentary Control of the European Central Bank and the Rise of a New Democratic Model*, 4 EUROPEAN LAW JOURNAL 326, 328 (2000).

<sup>5</sup> Christian Seiler, *Das Europäische System der Zentralbanken (ESZB) als Verantwortungsverbund: Systemgebundene Aufgabenerfüllung durch eigenständige Kompetenzträger*, 1 EUROPARECHT 52, 54 (2004).

<sup>6</sup> HANSPETER K. SCHELLER, THE EUROPEAN CENTRAL BANK - HISTORY, ROLE AND FUNCTIONS 42 (2004); Christian Seiler, *Das Europäische System der Zentralbanken (ESZB) als Verantwortungsverbund: Systemgebundene Aufgabenerfüllung durch eigenständige Kompetenzträger*, 1 EUROPARECHT 52 (2004); Martin Seidel, *Im Kompetenzkonflikt: Europäisches System der Zentralbanken (ESZB) versus EZB*, 18 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 552 (2000).

<sup>7</sup> Jean-Victor Louis, *The Economic and Monetary Union: Law and Institutions*, 41 COMMON MKT. L. REV. 575, 589 (2004); DIETRICH RÜMKER, AUSWIRKUNGEN DES EURO AUF DEN EUROPÄISCHEN FINANZMARKT: WÄHRUNGSPOLITISCHE UND RECHTLICHE ASPEKTE 5 (1999); ARNULL ET. AL., *supra* note 1, at 534.

legal personality, Art. 107(2) EC. Therefore, the components of the ESCB are the legal persons and the real actors of the EURO-System.<sup>8</sup>

## 2. *The Core of the System*

While the ESCB sets the institutional framework, the ECB is undoubtedly the core of the institutional system.<sup>9</sup> The ECB is an independent supranational “organization” with extensive powers and at first sight not embedded within a larger network of governing institutions.

In its Convergence Report of March 1998, the European Monetary Institute (EMI), the predecessor of the ECB, had further specified the concept of independence in the Treaty: “financial, personal and institutional independence” must be guaranteed.<sup>10</sup> The most notable feature of the institutional structure of the ECB is that its statute makes the ECB one of the most politically independent central banks in the world by granting full constitutional independence.<sup>11</sup> According to Art. 108 EC the ECB cannot “...seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body.”

The ECB has an Executive Board, composed of a President, a Vice-President, and four other members, who are experts in monetary and banking matters, together with a Governing Council, which consists of the Executive Board and the Governors of the national central banks of the euro area.

The institutional independence is reinforced by the guarantees of an entirely independent budget and personal independence of members of the Executive Board and of the Governing Council. However, the president of the ECB is appointed by the Heads of State and Government, thus every member state sends one delegate to the Governing Council – so the nomination exercise may be criticized as too close to the practice of International organizations.<sup>12</sup> But apart from that selective nomination, the Member States have no direct access to monetary policy of the ECB.

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<sup>8</sup> SCHELLER, *supra* note 6, at 41.

<sup>9</sup> Louis, *supra* note 7, at 41.

<sup>10</sup> *EMI Convergence Report required by Article 109j of the Treaty establishing the European Community*, 291-295 (1998); *see also* CHARLOTTE GAITANIDES, *DAS RECHT DER EUROPÄISCHEN ZENTRALBANK* 41 (2005).

<sup>11</sup> Kathleen McNamara, *Managing the EURO: The European Central Bank*, in *THE INSTITUTIONS OF THE EUROPEAN UNION*, 164, 173 (John Peterson & Michael Shackleton eds., 2002); OTMAR ISSING, *THE ECB AND THE EURO: THE FIRST FIVE YEARS* 58 (2004).

<sup>12</sup> JÜRGEN HARTMANN, *DAS POLITISCHE SYSTEM DER EUROPÄISCHEN UNION* 38 (2001).

The modification of the ECB's statute would require an amendment to the EC-Treaty, which can only occur with the unanimous agreement of all Member States and ratification by all national parliaments.<sup>13</sup>

Nevertheless the separation of the ECB from the political process of the European Union is not complete, for the ECB is partially linked to political bodies of the EU. According to Art. 113 EC, the President of the Council and a member of the Commission may participate in the deliberations of the Governing Council of the ECB and may submit motions for considerations, but are unable to vote.

In return, "the President of the ECB shall be invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB."<sup>14</sup> The ECB also has a right to be consulted by other legislative authorities, both at the community and the national level, on any draft measure in its field of competence,<sup>15</sup> which has been frequently practiced.

Furthermore, the ECB has to fulfill its obligations regarding the principle of transparency by issuing retrospective annual reports on its activities. The ECB president is obliged to give quarterly reports to the European Parliament, but the Parliament is not authorized to give instructions to the ECB. Moreover the President of the ECB or any member of the Executive Board may be heard by the relevant committee of the European Parliament if requested by the European Parliament or the ECB itself.

Given the absence of effective monitoring, one has to trust that the ECB will pursue policies in accordance with its mandate and that the outcome will benefit the European Union as a whole. While the ECB sets monetary policy for the entire euro area, there is no equivalent economic institution that may balance the policies pursued by the ECB. Budgetary and fiscal policies remain to be pursued by the governments of the Member States.

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<sup>13</sup> PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW*, 695 (3<sup>d</sup> ed., 2003); Amy Verdun, *Economic and Monetary Union*, in *EUROPEAN UNION POLITICS* 320, 326 (Michelle Cini ed., 2003)

<sup>14</sup> Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C340) 113(2) [hereinafter EC Treaty].

<sup>15</sup> EC Treaty art. 105(4).

## II. Self-conception of the ECB – the Emperor’s Story

Regarding its self-conception, the ECB could be seen as an organization *sui generis* – an “independent specialized organization of Community law,”<sup>16</sup> a kind of “new Community.” It has its own legal personality, broad independence from any other institution of the EU (even the EU itself), and sole responsibility of the EURO, including law-making responsibilities.

### 1. Formal Criteria

The *sui generis* idea has its basis in the specific status of the ECB in the Founding Treaties. The ECB is not listed in Art. 7 EC, the general provision regarding Community institutions, but has its own Art. 8 EC, which established the ESCB and the ECB. Furthermore, the ECB is again not listed in part five of the TEC which is entitled “Institutions of the Community.” The ECB is therefore omitted from the typical institutional structure of the European Community. The ECB is also not included in the so-called “single institutional framework” established through Art. 3 EU.<sup>17</sup>

Bearing in mind this special status, the ECB aims to position itself next to the European Community and not as a part of it. The separate legal personality of the ECB is a key difference between this institution and other entities, which are able to represent the European Union only by acting on the Union’s behalf and in its name. The ECB is thus in a position, *inter alia*, to conclude agreements under public international law and to participate in the work of international organizations such as the International Monetary Fund, the Organization for Economic Cooperation and Development (OECD), and the Bank for International Settlements. Furthermore, the ECB must be treated as a legal person in each Member State of the European Union and may acquire or dispose of movable and immovable property, as well as be party to any legal proceedings.

The ECB’s resources are provided exclusively by shareholder contributions from the national central banks and from income generated by the performance of the ECB’s and the national central banks’ business and allocated in accordance with Articles 32 and 33 of the Statute. The ECB receives no funds from the Community budget, meaning that its operating budget does not form part of the general budget

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<sup>16</sup> Chiara Zilioli & Martin Selmayr, *The European Central Bank: An independent specialized organization of Community law*, 37 COMMON MKT. L. REV. 591-644 (2000).

<sup>17</sup> Deirdre Curtin, *The constitutional structure of the European Union: a Europe of bits and pieces*, 30 COMMON MKT. L. REV. 17, 28 (1993); Emile Noël, *A new Institutional Balance?*, in EUROPE AFTER MAASTRICHT 16, 23 (Dehousse ed., 1994).

of the Community. The fact that the ECB is financially independent is also borne out by the fact that adoption of its budget and its annual accounts are exclusively a matter for its managing bodies.<sup>18</sup> No other boundaries of binding political expectations and responsibilities exist.

## 2. *Substantial Criteria*

The primary objective of the ESCB is price stability according to Art. 105(1) EC. According to Art. 4 EC, this mandate is a fundamental activity of particular importance. While the ESCB is also required to support the general economic policies of the Community, this must be achieved without prejudice to the overriding price stability objective. However, the Founding Treaties did not indicate the interpretation of the term “price stability” and therefore the ECB was required to define the term, thereby specifying its own mandate against the resistance of many economists.<sup>19</sup>

Another indicator of its special status is that the endowment of the ECB with extensive law making powers under Art. 110 EC, enables the ECB to formulate regulation as well as decisions, recommendations, and opinions.<sup>20</sup> This provision echoes Art. 249 EC, which defines the law-making power of the EC.<sup>21</sup> In addition the ECB may issue guidelines and instructions, which are binding acts internal to the ESCB.<sup>22</sup>

With this comprehensive power, the ECB is the invulnerable institution of the EURO-Zone, therefore a constitutive component of the economic constitution of the EU.<sup>23</sup>

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<sup>18</sup> See Article 26.2 of the ESCB Statute and Articles 15 and 16.4 of the Rules of Procedure of the ECB.

<sup>19</sup> Fabian Amtenbrink & Jakob De Haan, *The European Central Bank: An independent specialized organization of Community Law – A Comment*, 39 COMMON MKT. L. REV. 65, 67 (2002); Matthias Herdegen, *Price stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 9 (1998); ISSING, *supra* note 11, at 43.

<sup>20</sup> CHARLOTTE GAITANIDES, *DAS RECHT DER EUROPÄISCHEN ZENTRALBANK* 174 (2005).

<sup>21</sup> PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 690 (3d ed., 2003).

<sup>22</sup> ARNULL ET AL., *supra* note 1, at 533.

<sup>23</sup> For an in-depth look at the complex organization of the ECB, DAVID HOWARTH & PETER LOEDEL, *THE EUROPEAN CENTRAL BANK – THE NEW EUROPEAN LEVIATHAN ?* (2005).

*III. Bringing the Emperor "back home"*

The first and most important breach in the idea of indefeasibility of the ECB constitutes the OLAF-decision of the ECJ<sup>24</sup>, which brought the ECB back into the EU's system of institutional balance and constitutional accountabilities.

The European Anti-Fraud Office (OLAF) was established by the Commission in 1999 through regulation 1073/1999<sup>25</sup> with concretion in Decision 1999/352 and "shall exercise the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions." (Art. 2 of Decision 1999/352).<sup>26</sup>

OLAF should be responsible for institutions, bodies, offices and agencies established by, or on the basis of, the treaties. On the foundation of its self-image the ECB regards itself as excluded from the scope of directive 1073/1999 because it is not part of the institutional system of the European Union and has resources distinct from the Community budget. The ECB sought to create its own anti-fraud committee through decision No. 1999/726/EG - which was adopted by the Governing Council of the ECB on the basis of Article 12.3 of the ESCB Statute. However, the Commission argued that the European Court of Justice should annul the contested decision and succeeded. The ECJ accentuates that the ECB is a creation of the TEC, apparent in Art. 8 EC.<sup>27</sup> Furthermore the ECJ deconstructs the idea that the ECB is the only independent institution of the European Union by pointing out that Community institutions such as the European Parliament, the Commission, or the ECJ itself enjoy independence and guarantees comparable in a number of respects to those afforded to the ECB.<sup>28</sup> But coevally the ECJ approves the specific task of the ECB and accentuated that Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks. After paying tribute to the special task of the ECB, the ECJ brings the ECB "back home" by concluding that, "By contrast, as the Commission and the interveners have rightly pointed out, recognition that the ECB has such independence does not have the consequence of separating it entirely

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<sup>24</sup> Case C-11/00, *Commission v. ECB*, 2003 ECR I-7147.

<sup>25</sup> Commission Regulation 1073/99, 1999, O.J. (*L 136*)1.

<sup>26</sup> Commission Regulation 1073/99, 1999, O.J. (*L 136*) 20.

<sup>27</sup> Case C-11/00, *Commission v. ECB*, 2003 ECR I- 7147, para. 64.

<sup>28</sup> *Id.* at para. 133.

from the European Community and exempting it from every rule of Community law.”<sup>29</sup>

Following the findings of the Court the ECB acts within the scope of the Founding Treaties, has to contribute to the achievement of the objectives of the European Community (Art. 105(1) EC), and has to act within the limits of the powers conferred upon it by the EC Treaty and the ESCB Statute (Art. 8 EC). Moreover, the ECB is subject to various kinds of Community controls, notably review by the Court of Justice and control by the Court of Auditors and it could not have been the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature, as has become apparent in Article 105(6) EC, Article 107(5) and (6) EC and Article 110(1), first indent, and 3 EC.<sup>30</sup>

### C. Institutional standing *de lege ferenda*

#### 1. *The ECB and the New Institutional Framework of the Constitutional Treaty*

##### 1. *The Convention Debate*

The Convention on the Treaty establishing a Constitution for Europe has raised “economic governance” as a subject to be discussed in a working group. The mandate should comprise monetary policy, economic policy and institutional issues. The ECB also monitored the debate closely and intervened in many ways.<sup>31</sup> The Working Group VI on “Economic Governance” recommended that the current structure of the Economic and Monetary Union be maintained,<sup>32</sup> which means that monetary policy has to remain an exclusive Community competence, exercised by the ECB, whereas the economic policies remain within national competence. The majority of members of the group considered that tasks, mandates, and statutes of the ECB should remain unchanged and would not be affected by any new treaty provision – although some members thought about widening the mandate of the ECB to include the objectives of growth and employment.<sup>33</sup> Besides questions of

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<sup>29</sup> *Id.* at para 135.

<sup>30</sup> *Id.* at para 135.

<sup>31</sup> For an overview of the ECB’s participation in the debate see *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 58.

<sup>32</sup> *Final Report of Working Group VI on Economic Governance*, CONV 357/02, 1, 2 (Oct. 21, 2002).

<sup>33</sup> *Final Report of Working Group VI on Economic Governance*, CONV 357/02, 1, 3 (Oct. 21, 2002).



informal consultation and cooperation amongst finance ministers,<sup>34</sup> institutional issues were not discussed extensively - with the exception of the potential improvement of accountability of the ECB through enhancing the ECB's reporting to the European Parliament, giving the European Parliament a greater role in the designation of ECB Board members, and providing for the obligatory publication of ECB minutes.<sup>35</sup> Fundamental changes in the institutional structure regarding the ECB itself were not discussed.

## 2. *The Outcome of the Constitutional Treaty*

The Treaty establishing a Constitution for Europe was agreed upon by the Heads of State or Government of the European Union during their meeting on 17-18 June 2004 in Brussels and signed on 29 October 2004.<sup>36</sup> The ECB saw no need to adjust the monetary constitution.<sup>37</sup>

The term "Eurosystème" gets introduced by Art. I-30 CT following a suggestion of the ECB, which has been using the term for several years to indicate the ESCB as the ECB and the national central banks of the euro area.<sup>38</sup>

The Constitutional Treaty broadly maintains the balance between the institutions and leaves the current Treaty provisions governing the economic policy framework of the EMU fundamentally unchanged. Relating to the ECB, the new institutional structure set by the EU-Constitution is characterized by the "institutional framework" as defined in Art. I-19 CT and the specific provisions of Art. I-30 and III-188 CT. These provisions and the "Protocol on the Statute of the European System of Central Banks and of the European Central Bank" form the new statutory framework of the ECB.

Art. I-30(3) CT finally defines the ECB as a Union institution and incorporates the ECB unambiguously in the constitutional texture and its responsibilities although Art. I-19 CT leaves the ECB out of the so-called "institutional framework" of coherence, which comprises the European Parliament, the European Council, the

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<sup>34</sup> Now formally recognised by primary law in a brief protocol annexed to the European Constitution, Protocol No. 12 on the EURO-Group specifies that the finance ministers of the Member States whose currency is the EURO meet to discuss questions of shared responsibilities with regard to the single currency.

<sup>35</sup> *Final Report of Working Group VI on Economic Governance*, CONV 357/02, 1, 3 (Oct. 21, 2002).

<sup>36</sup> Treaty Establishing a Constitution for Europe, Dec. 16 2004, 2004 O.J. (C310) 1.

<sup>37</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 57.

<sup>38</sup> Tommaso Padoa-Schioppa, *Central Banks and Financial Stability: Exploring a Land in Between*, in *THE TRANSFORMATION OF THE EUROPEAN FINANCIAL SYSTEM* 269, 271 (Vitor Gaspar et al. eds., 2003).

Council of Ministers, the European Commission and the Court of Justice. But the definition as a Union institution does not alter the self-image of the ECB as an institution with a *sui generis* status although the ECB recognizes that there exists some kind of “broad principle” to bring the ECB more into line with certain aspects of other EU institutions.<sup>39</sup> Moreover the ECB seems to see its specific status underlined by the classification of the ECB as one of the “other Institutions and bodies of the EU” in Part I Chapter II of the Constitutional Treaty and the separation from the Union institutions listed in Art. I-19 CT.<sup>40</sup> The independence of the ECB was never in question<sup>41</sup> and is now guaranteed in Art. I-30(3) CT: “It [the ECB] shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.”

The procedure for the appointment of members of the Executive Board will be changed when the Constitutional Treaty comes into effect. From then on, the Executive Board members will be appointed by a qualified majority vote in the European Council and no longer by “common accord” of the national governments. This procedure is equivalent to the appointment procedure of the President of the Commission, the Union Minister of Foreign Affairs and the President of the European Council – which are all prominent political positions. The impact of that new procedure is uncertain and ambiguous. On the one hand, this procedural adjustment is consequent on the ECJ-ruling and the normative inclusion of the ECB in the institutional structure of the European Union. On the other hand, there is no apparent improvement regarding questions of democratic legitimacy, because the decision-makers remain the same.

Economic policy remains in the hands of the Member States. According to Art. III-177 CT the adoption of an economic policy is only based on the close coordination of Member States' economic policies and not an integral competence of the Union itself. And Art. III-178/179 CT confirms this concept of consultation and cooperation.

The ESCB remains the integral (institutional) concept of the EMU and has the primary objective of maintenance of price stability, Art. I-30(2) and Art. III-185(1) CT. The ESCB as a generic term for the collectivity of ECB and the national central banks shall conduct the monetary policy of the European Union, however, the ESCB is governed by the decision-making bodies of the ECB. Thus, the ECB

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<sup>39</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 62.

<sup>40</sup> *See The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 61.

<sup>41</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 61.

Council and the ECB Board as the two decision-making bodies of the Eurosystem remain unaffected.<sup>42</sup> The law-making competences are equally unaffected in Art. III-190 CT.

While the status of the ECB and its independence are fully anchored in the Constitutional Treaty, the ESCB - or better the national central banks - are facing a substantial change to their current status. The independence of the national central banks is only guaranteed in Art. III-188 CT. This Part III of the Constitutional Treaty could be revised in a simplified procedure as laid down in Art. IV-444 CT and is insofar open to simplified access to politics. The ECB sees the independence of the national central banks still "fully anchored" in the Constitutional Treaty<sup>43</sup> but the national banks like the German Federal Bank (Bundesbank) see their independence in danger.<sup>44</sup>

The relevance of this formulated danger of the National central banks can not simply be ignored especially if one looks at the Stability and Growth Pact and the political implications of its erosion.

## *II. Stability and Growth Pact and Political Decision-making*

In the mid-1990s, the idea of specified convergence criteria resulted in the formulation of rules which later took the form of the Stability and Growth Pact.<sup>45</sup> The Stability and Growth Pact aims to ensure that the member states continue their budgetary discipline efforts after the introduction of the euro.<sup>46</sup> The rules laid down in Article 104 EC are defined more precisely and strengthened by the Stability and Growth Pact, constituted, in particular, by the Resolution of the European Council of 17 June 1997 and Regulation No 1467/97. Economists and former members of the Executive Board of the ECB emphasized the importance of the clarity of the convergence criteria as laid down in the Stability and Growth Pact.<sup>47</sup> However, many have argued that the criteria are artificial and will be impossible to

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<sup>42</sup> TOMMASO PADOA-SCHIOPPA, *THE EURO AND ITS CENTRAL BANK* 27 (2004).

<sup>43</sup> *The European Constitution and the ECB*, ECB Monthly Bulletin, August 2004, at 61-63.

<sup>44</sup> Axel A. Weber, *Stabilität bewahren*, FRANKFURTER ALLGEMEINE ZEITUNG, June 16 2004, at 2.

<sup>45</sup> Verdun, *supra* note 13, at 320.

<sup>46</sup> See EC Treaty art. 104; See also Commission Regulation 1466-1467/97 O.J. (L209).

<sup>47</sup> ISSING, *supra* note 11, at 31; Bob Hancké et al., *Flexibilisierung des Stabilitätspaktes, Pro und Contra*, 1 ZEITSCHRIFT FÜR RECHTSPOLITIK 28 (2003); Otmar Issing, *Der Stabilitäts- und Wachstumspakt – unentbehrliches Korrelat zur einheitlichen Geldpolitik*, 1 KREDITWESEN 15-18 (2003).

implement.<sup>48</sup> The legal status of the Stability and Growth Pact was not definitely clarified at that time.<sup>49</sup>

If a participating Member State fails to act in compliance with the provisions of the Pact the Council may impose sanctions, Art. 104(7-11) EC. An excessive deficit procedure was initiated in relation to the Federal Republic of Germany in November 2002 and in relation to the French Republic in April 2003. In the subsequent legal dispute thereafter the ECJ stressed the binding character of the procedure laid down in Art. 104 EC and the provisions of the Stability and Growth Pact. The Court ruled that "In this context, marked by the importance that the framers of the Treaty attach to observance of budgetary discipline and by the aim of the rules laid down for applying budgetary discipline, those rules are to be given an interpretation which ensures that they are fully effective."<sup>50</sup> Thus the Stability and Growth Pact became "hard-law" in 2004.

But only some months later during the meeting of the European Council in Brussels in March 2005, the Heads of State or Government endorsed a report entitled "Improving the implementation of the Stability and Growth Pact" which should "update" and "complement" the Pact.<sup>51</sup> In the end, the provisions regarding budgetary discipline were softened and deprived of their inflexibility. The downfall of the Stability and Growth Pact gave an idea of how fast politically driven decisions regarding short-term economic implications can overcome any hard law.

### *III. Institutional Independence, Democratic Accountability and Transparency*

#### *1. Structural Requirements*

All institutions operate in a specific environment. The environment of the Treaties and the Constitutional Treaty contain certain principles constituting a number of requirements. In this respect Art. 6(1) EU states that the "Union is founded on the principles of ... democracy ... and the rule of law..." Following that clear statement, Art. I-2 CT declares democracy and the rule of law as Union values: "The Union is founded on the values of ... democracy ... [and]... the rule of law ...". And Art. I-46(1) CT amends "the functioning of the Union shall be founded on

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<sup>48</sup> Verdun, *supra* note 13, at 320.

<sup>49</sup> See HUGO J. HAHN, DER STABILITÄTSPAKT FÜR DIE EUROPÄISCHE WÄHRUNGSGEMEINSCHAFT – DAS EINHALTEN DER DEFIZITBEREICHUNGSGRENZE ALS STETIGE RECHTSPFLICHT (1997).

<sup>50</sup> Case C-27/04, *Commission v. Council*, 2004 E.C.R.I-4829.

<sup>51</sup> Presidency Conclusions, Brussels European Council, (March 22-23, 2005).

representative democracy.” Thus democracy remains a central demand in the text of the European Constitution. But the principle of democracy contains not only the idea of the people as sovereign (in other words popular government and the idea that parliament should always hold the ultimate responsibility for any principal decision including monetary policy)<sup>52</sup> but also the idea of transparency as a mode of constituting democratic accountability (see Art. I-50 CT).<sup>53</sup> Accountability as a basic precondition for democratic legitimacy in general, means that institutions with the power to affect the lives of the people should be subject to the scrutiny of the elected representatives of the people.<sup>54</sup>

## 2. The Democratic Issue

The degree of independence of the ECB has raised many important issues about the desirability and functionality of the institutional structure. Independence and (democratic) accountability form a critical pair.<sup>55</sup> The much-debated status of the ECB is criticized as a contradiction to the common understanding of democracy. Independence does not imply the total absence of democratic control but the need for unambiguous definition of the limits and the way in which democratic control is exercised. The main political question confronting the ECB is how this institution can maintain independence and profit from the benefits of political autonomy and at the same time be viewed as legitimate and accountable to the European public.<sup>56</sup> The compatibility of efficiency and democracy, or in other words accountability and independence, is the lynchpin here.<sup>57</sup> To what extent should the ECB be under parliamentary control? The importance of unquestioned independence of the ECB to fulfill its tasks without political intervention is not simply acknowledged, especially in scholarly literature,<sup>58</sup> even if the importance of independent central

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<sup>52</sup> HANSPETER K. SCHELLER, *THE EUROPEAN CENTRAL BANK* 125 (2004).

<sup>53</sup> Armin von Bogdandy, *Europäische Prinzipienlehre*, in *EUROPÄISCHES VERFASSUNGSRECHT* 178 (Armin von Bogdandy ed., 2003).

<sup>54</sup> SCHIOPPA, *supra* note 42, at 32.

<sup>55</sup> *Id.*; SCHELLER, *supra* note 52; LAURENCE W. GORMLEY, *EUROPEAN MONETARY UNION AND THE DEMOCRATIC PRINCIPLE* (1997).

<sup>56</sup> Legitimacy claims are an inherent element of democratic rule, Christian Joerges, *Constitutionalism and Transnational Governance*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 339, 373 (Christian Joerges et al. eds., 2005).

<sup>57</sup> To follow the debate *see* Magnette, *supra* note 4; CHARLOTTE GAITANIDES, *DAS RECHT DER EUROPÄISCHEN ZENTRALBANK* 199 (2005).

<sup>58</sup> Verdun, *supra* note 13, at 326; Laurence Gormley & Jakob de Haan, *The Democratic Deficit of the European Central Bank*, 21 *EUR. L. REP.* 95 (1996).

banks has been stated as early as the 1920s.<sup>59</sup> The formulation and management of monetary policy in the euro area has been taken out of the hands of politicians as entrusted to the technocrats of the ECB and the national central banks.<sup>60</sup> This technocratic approach is criticized for neglecting the question of democratic legitimacy<sup>61</sup> and may intensify the democratic deficit in the European Union.

Alternatively, it could be seen as a sensible and unavoidable strategy to shield monetary policy against short-term moods of national politics.<sup>62</sup> The “downfall” of the Stability and Growth Pact could have a deterrent effect in this respect. Furthermore the ESCB is regarded as a rule-based system that was conceived as depoliticized. The ECB is not a main political actor, more an economic agency with an admittedly strong influence on political issues. On the one side, the ECB is left out of the political decision-making process. On the other side the ECB should be implemented in the institutional structure of the EU. The integration of the ECB in the institutional structure of the European Union does not necessarily implement an intensified democratic accountability. The ECB is constructed as an institution, which is based on the idea of technocratic decision-making, comparable to the early High Authority of the European Coal and Steel Community back in 1952. But to draw a distinction on what is political or technical (and/or purely economic) seems to be impossible. Moreover, one has to deal with the rise of new forms of political participation focusing on the practice of (governing) power and the effects of intensified public debate – keeping in mind that legitimacy may be evoked not only through elections but through a broad public discussion about transparent decisions.<sup>63</sup> So the independence of the ECB and the need for transparency and accountability goes hand in hand.<sup>64</sup> Accountability is therefore essentially linked to transparency.

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<sup>59</sup> R. Ceasar, *Central banks and governments: issues, traditions, lessons*, 2 FINANCIAL HISTORY REVIEW 124 (1995). And regarding the historical role of central banks in general: Tommaso Padoa-Schioppa, *Central Banks and Financial Stability: Exploring a Land in Between*, in THE TRANSFORMATION OF THE EUROPEAN FINANCIAL SYSTEM, 269, 275 (Vitor Gaspar et al. eds., 2003).

<sup>60</sup> ARNULL ET AL., *supra* note 1, at 535.

<sup>61</sup> INES DERNEDDE, AUTONOMIE DER EUROPÄISCHEN ZENTRALBANK 197 (2002).

<sup>62</sup> Mathias Herdegen, *Price stability and budgetary restraints in the Economic and Monetary Union: The law as guardian of economic wisdom*, 35 COMMON MKT. L. REV. 9 (1998).

<sup>63</sup> See Magnette, *supra* note 4, at 328.

<sup>64</sup> ISSING, *supra* note 11, at 58.

### 3. *Independence and Transparency*

The ECB and the National Currency banks exercise a public function.<sup>65</sup> The credibility of the ECB ultimately depends on its ability to make decisions that achieve the assigned objective of price stability. Furthermore the ECB has the interest to ensure that its decisions are properly explained, justified, and transparent. The ECB is accountable to the European public and its elected representatives in the European Parliament, which lead to the requirement of transparency in all areas relevant to the fulfillment of its mandate and the underlying decision-making process.

The Annual Accounts of the ECB and all the national central banks belonging to the Eurosystem are examined by independent external auditors. In addition the financial management is scrutinized by the European Court of Auditors and there are reporting commitments according to Art. 15 ESCB-Statute. Furthermore the Monthly Bulletin informs all actors about “research & occasional papers” and “publications by activity”, all of which are available online. But taking the principle of transparency seriously, the decisions of the ECB must be open to public discussion which reminds of the idea of deliberative democracy and the transnational concept of deliberative supranationalism.

### IV. *Bridging the Gap – Democracy, Legitimacy and Deliberative Supranationalism*

The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from collective decisions of the members of a society who are governed by that power. Collective decision-making requires free public reasoning among equals.<sup>66</sup> The idea of deliberative democracy which had its “(re)birth” in the 80s as an American debate<sup>67</sup> and was intensively discussed during the last 20 years,<sup>68</sup> tries to construe a theoretical foundation for collective decision-

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<sup>65</sup> SCHELLER, *supra* note 6.

<sup>66</sup> Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE* 95, 99 (Seyla Benhabib ed., 1996).

<sup>67</sup> J. M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* (Robert Goldwin & William Shamba eds., 1980).

<sup>68</sup> *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* (Seyla Benhabib ed., 1996); *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman & William Rehg eds., 1997); *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998); *DELIBERATIVE POLITICS, ESSAYS ON DEMOCRACY AND DISAGREEMENT* (Stephen Macedo ed., 1999); *DEBATING DELIBERATIVE DEMOCRACY* (James S. Fishkin & Peter Laslett eds., 2003); JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* (1992).



making in a democracy using a procedural model of discursive decision-making.<sup>69</sup> Democracy, in the deliberative view, should be a framework of social and institutional conditions that facilitates free discussion for participation and evokes ideals of rational legislation, participatory politics, and civic self-governance.<sup>70</sup>

Christian Joerges and Jürgen Neyer transferred an abstract model of deliberative democracy to the supranational level by developing the principle of “deliberative supranationalism” based on an in-depth analysis of the comitology system of the Commission.<sup>71</sup> In search for normative justifications of supranationalism, this idea of deliberative supranationalism is intended to construe a new legitimate basis – following the assumption that the emergent legal structures on the level of the European Union do not fit any of the institutionalized national or supranational models.<sup>72</sup> European Law is supposed to have emancipated itself from its intergovernmental origins and set itself up as an autonomous system. Nevertheless the Member States still do play a central role in parts of the decision-making process at the European level.<sup>73</sup> Thus deliberative Supranationalism conceptualizes this European Law as a species of conflict of laws and as a part of a non-hierarchical legal structure, where actors of the European and the national level are included in the decision-making process.

The comitology is linked to the bureaucracies as well as to the policies of the Member States and has a complex internal structure in which government representatives, representatives of social interests, and parts of “the economy” interact.<sup>74</sup> It requires intensive exchange between national and European civil

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<sup>69</sup> For an in-depth view see Timo Tohidipur, *Deliberative Rechtstheorie*, in NEUE THEORIEN DES RECHTS (Ralph Christensen et al.eds., 2006).

<sup>70</sup> This idea was heavily criticized, see Michael Walzer, *Deliberation...and what else?*, in DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 58-69 (Stephen Macedo ed., 1999); Frank I. Michelmann, *How can the People ever make the laws? A critique of deliberative democracy*, in DELIBERATIVE DEMOCRACY 145-171 (James Bohman & William Rehg eds., 1997).

<sup>71</sup> EU COMMITTEES: THE EVOLUTION OF UNFORESEEN INSTITUTIONAL ACTORS IN EUROPEAN PRODUCT REGULATION (Christian Joerges & Ellen Vos eds., 1999); DAS AUSCHÜßWESEN DER EUROPÄISCHEN UNION: PRAXIS DER RISIKOREGULIERUNG IM BINNENMARKT UND IHRE RECHTLICHE VERFASSUNG (Christian Joerges & Josef Falke eds., 2000); GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET (Christian Joerges ed., 2002).

<sup>72</sup> The critique of this model of deliberative supranationalism is verbalized by Rainer Schmalz-Bruns *Deliberativer Supranationalismus*, 6 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN 185-242 (1999); *On the political theory of the Euro-polity*, in MAKING THE EUROPEAN POLITY 59-83 (Erik Oddvar Erikson ed., 2005) and to follow the ongoing debate Christian Joerges, *Deliberative Supranationalism – Two Defences*, 8 EUROPEAN L. J. 133-151 (2002).

<sup>73</sup> Oliver Gerstenberg, *Law's Polyarchy: A Comment on Cohen and Sabel*, in PRIVATE GOVERNANCE, DEMOCRATIC CONSTITUTIONALISM AND SUPRANATIONALISM, 31 (Christian Joerges and Oliver Gerstenberg eds., 1998).

<sup>74</sup> Joerges, *supra* note 72, at 142.



servants, therefore cooperation between different levels of government and bureaucratic actors.<sup>75</sup> If rational argumentation and collective decision-making are required to create a specific (and sufficient?) form of legitimacy in the decision-making process of the ESCB then this model of deliberative supranationalism could be adopted here. The complete ESCB is based on networking and not on the exercise of unilateral authority. This is obviously visible in the composition of the Governing Council, where there are more NCB Governors than Executive Board members and in the important role of the ESCB-Committees within the decision-making process of the ECB, composed of officials of the NCBs.<sup>76</sup> The Eurogroup meetings as well as the Economic and Financial Committee could be the “germ cell” of a horizontal and vertical dialogue. Such a regular dialogue provides an opportunity to explain the course of the monetary policy.<sup>77</sup> One possible remedy to the isolation of the monetary authority from political authorities is then based on an institutionalized but informal dialogue,<sup>78</sup> a kind of “monetary dialogue”.

The deliberative and argumentative processing of efficiency may be helpful to create a revised legitimacy scheme for a “new” political structure.<sup>79</sup> Thus, the deliberative supranationalism demands a certain degree of autonomy regarding the decision-making bodies – in some respects similar to the regulatory model.<sup>80</sup> This may be regarded as incompatible to the basic idea of the parliamentary model which regards parliamentary control over the administration as essential.<sup>81</sup> One could conclude that the relationship between legislature and the executive remains problematic even in the deliberative model. The deliberative model reformulates legitimacy but at the same time loses its connection to the idea of participation (of the citizens or political communities as addressees) as a dominant part of the democratic principle. While the European Union could then be well described as a

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<sup>75</sup> Christian Joerges & Jürgen Neyer, *From intergovernmental bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, 3 EUROPEAN L. J. 273-291 (1997).

<sup>76</sup> Louis, *supra* note 7, at 41.

<sup>77</sup> HANSPETER K. SCHELLER, THE EUROPEAN CENTRAL BANK – HISTORY, ROLE AND FUNCTIONS 130 (2004).

<sup>78</sup> Louis, *supra* note 7, at 41.

<sup>79</sup> Massimo La Torre, *Legitimacy for a Supranational European Political Order – Derivative, Regulatory or Deliberative?* 15 RATIO JURIS 63, 82 (2002).

<sup>80</sup> *Id.* at 64 who defines the deliberative idea as a reshaped regulatory model. See also: Christoph Knill & Andrea Lenschow, *Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation*, 7 EUROPEAN INTEGRATION ONLINE PAPERS 1 (2003).

<sup>81</sup> Renaud Dehousse, *European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?*, 35 COMMON MKT. L. REV. 595, 626 (1998); INES DERNEDDE, AUTONOMIE DER EUROPÄISCHEN ZENTRALBANK 313 (2002).

system of executive federalism, the inherent tension precludes the description of the European Union as a parliamentary democracy.<sup>82</sup>

### C. Concluding Remarks: Do the New Clothes Fit Well?

One could conclude that the Constitutional Treaty will not lead to substantial changes to the current monetary constitution. The ECB will be included in the institutional structure of the Union after the ratification of the Constitutional Treaty without corrupting the general mandate. The primary position of price stability in the mandate of the ECB and the ESCB is therefore preserved. But the gap between the self-conception of the ECB and the institutional surrounding has been heightened by the normative inclusion of the ECB in the institutional structure of the European Union through the Constitutional Treaty, which may signify the explicit end of the self-conception as an "independent specialized organization of Community Law." Although the ECB is no political institution in its origin its decisions have an undeniable political impact.

Accountability remains limited by the incompleteness of political union in the European Union. To fulfill the expectations of democratic accountability it is not necessary to nominate members of the ECB by election. Improving accountability may rest on improving communication and transparency.<sup>83</sup> The EC Treaty divides the policy responsibilities but at the same time it promotes dialogue, cooperation, and rational argumentation between and within the different policy-makers advancing the implementation of the deliberative model (deliberative supranationalism). Nevertheless the quest for legitimacy goes on.

The ECB does not stand naked in front of its upcoming challenges, but the principle of democracy as a value of the EU may stand naked before the ECB.

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<sup>82</sup> Philipp Dann, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, 9 EUR. L. J. 551 (2003) (using the term "semi-parliamentary" democracy in this context).

<sup>83</sup> Kathleen McNamara, *Managing the EURO: The European Central Bank*, in THE INSTITUTIONS OF THE EUROPEAN UNION 164, 181 (John Peterson & Michael Shackleton ed., 2002).