The Evolution of the European Central Bank

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INTRODUCTION

The European Central Bank ("ECB") is a central bank whose array of functions and jurisdictional domain are determined by a treaty instrument, the Maastricht Treaty. Following the adoption of the Treaty of Lisbon, the Treaty on the Functioning of the European Union ("TFEU") governs the ECB. This distinctive feature makes the ECB a unique institution amongst central banks.

3. Consolidated Version of the Treaty on the Functioning of the European Union art. 127, 2010 O.J. C 83/47, at 102-03 [hereinafter TFEU]. The complex and intricate structure of the European Union sometimes makes it difficult for legislators and commentators to make the correct distinctions. The Treaty of Lisbon was signed on December 13, 2007. It came into force on December 1, 2009, with some provisions taking effect at a later date. It amends, but does not replace, both the Treaty on European Union (formerly known as the Maastricht Treaty) and the Treaty Establishing the European Community (formerly known as the EC Treaty or Treaty of
The ECB is the monetary authority in those Member States of the European Union that have adopted the euro as their single currency. The euro area or Eurozone comprises the EU Member States whose currency is the euro and in which a single monetary policy is conducted by the ECB. The current members are: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain.

The ECB is the centerpiece of the European System of Central Banks ("ESCB"). The ESCB has a dual structure, with the ECB at the center, headquartered in Frankfurt, Germany, and the National Central Banks ("NCBs") at the periphery. Since not all Member States have adopted the euro as their single currency, a distinction is made between the "ins" and the "outs" (the Member States that have adopted the euro are the "ins," and the Member States with a derogation, according to Article 139 of the TFEU are the "outs").

According to Article 3(4) of the Treaty on European Union ("TEU"), "[t]he Union shall establish an economic and monetary union whose currency is the euro." The European Union’s monetary policy is the monetary policy of the Member States whose currency is the euro. Article 282(1) of the TFEU is clear in this regard: "The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union."

While the ECB website defines the ESCB as "the central banking system of the European Union," the Eurosystem is defined as "the central banking system of the euro area." This differential jurisdictional domain is the source of tensions and

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4. Id. arts. 136–38, at 106–07.
6. See id.
7. See id.
10. All Glossary Entries: E, supra note 5.
11. Id.
conflicts that this Essay explores. Only the ECB and the NCBs have legal personality; that is, the power to sue and be sued.

This Essay first surveys the functions and objectives of the ECB and pays special attention to the increasing emphasis given to the goal of financial stability, a goal that was somewhat neglected when the ECB was created. The Essay also considers the complex structure of the ESCB, the status of independence and accountability, and the challenges the institution currently faces in the light of the sovereign debt problems in Greece and other Eurozone Member States. Like all EU institutions, the ECB has evolved since its inception and continues to evolve.

I. OBJECTIVES AND FUNCTIONS OF THE ECB

In order to understand the functions and objectives of the ECB, which are enshrined in Article 127 of the TFEU, it is useful to review the evolving nature of central banking generally. Central banking has evolved throughout its relatively short history, from the time in which the Swedish Riksbank (the first central bank in the world, created in 1668) and the Bank of England (established in 1694) started operations, to central banks in contemporary times, with the Federal Reserve System (“Fed”) established in 1913 and the ECB in 1999. While the original raison d’être for the establishment of the first central banks was note issue and government finance, this rationale has changed over time. Following the banking crisis of 1907, the Fed was founded, inter alia, “[t]o provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States.” The main rationale for the creation of the Bundesbank in 1957, a

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country that had suffered from hyperinflation during the interwar period, was price stability; this rationale was “inherited” by the ESCB.\textsuperscript{16}

Vera Smith (a student of Friedrich August Hayek) explained in her excellent 1936 book \textit{The Rationale of Central Banking} that the twin mandate of central banks was stable money and sound banking.\textsuperscript{17} The emphasis on stable money as the primary objective of monetary policy in the late 1980s and in the 1990s often accompanied a move away from the supervisory tasks that are integral instruments to achieve sound banking and finance. A crucial aspect of current reform proposals in response to the 2007–2009 financial crisis has been the closer involvement of monetary authorities in financial supervision and a return to the financial stability mandate. The twin mandate of central banking to which Vera Smith referred is, in modern terminology, monetary stability and financial stability.

The list of central bank functions is open-ended and dynamic, including, inter alia, note issue, government finance, monetary policy, banking supervision and regulation, banker’s bank and lender of last resort, smooth operations of the payment systems, management of gold and foreign reserves, conduct of foreign exchange operations, debt management, exchange controls, and development and promotional tasks. The scope of powers and the relative importance of the functions of central banks have changed over time and across countries. Indeed, the ECB’s key function is monetary policy, although it has other functions as further discussed below.

One notable feature in central banking history is that there has always been a strong connection between the central bank and the government. They have built a special relationship: the central bank has been consciously awarded privileges by the government, and in exchange it has been expected to provide certain services and functions for the government.\textsuperscript{18} However, this special relationship has not always been easy; indeed, at times it has been rather confrontational. The nickname given to

\begin{footnotes}
\footnotetext{17. Vera C. Smith, \textit{The Rationale of Central Banking and the Free Banking Alternative} (Liberty Press, photo. reprint 1990) (1936).}
\footnotetext{18. Lastra, \textit{Central Banking}, supra note 12, at 272.}
\end{footnotes}
the Bank of England, the Old Lady of Threadneedle Street, is a reminder of this special relationship.\(^{19}\) It is this strong relationship that today colors the debate about the role of the ECB during the financial and sovereign debt crisis and the instruments it has established to combat both crises.

A. ECB Objectives and Their Evolution

The objectives of the ESCB are spelled out in Article 127(1) of the TFEU. The primary objective of the ECB is price stability, i.e., the control of inflation.\(^{20}\) The ECB is heir to the stability culture of the Bundesbank and a creature of its time: economic theory and evidence supported the case for a price-stability-oriented, independent central bank since 1989, when the Reserve Bank of New Zealand Act was introduced.\(^{21}\) This historical rationale—instututions of creatures of their time—is important to understand the limits of what the ECB can do in response to the crisis. If the Maastricht Treaty had been signed in 2010, the enumeration and prioritization of objectives would have been different. But treaties are difficult to amend, and an expanded European Union has made treaty reform ever more difficult (not to mention the opening of Pandora’s Box that the negotiation of certain provisions would entail). Treaties enumerate the obligations of the Member States. In this respect, it is worth pointing out that a degree of flexibility is embedded in the relevant treaty provision through the ensuing language: the primary objective—the pursuit of the internal aspect of monetary stability—is to be pursued without prejudice to the secondary objective—the support of general EU economic policies with a view to contributing to the achievement of the

19. The nickname comes from a Thomas Gillray cartoon published in May 1797, following a speech that a Member of Parliament, Richard Brinsley, had made in the House of Commons alluding to the Bank as an “elderly lady in the City of great credit and long standing, who had unfortunately, fallen into bad company.” See, e.g., BANK OF ENGLAND, http://www.bankofengland.co.uk (follow “Education” hyperlink; then follow “Museum” hyperlink; then follow “Walk Through Time” hyperlink; then follow “Did You Know?” hyperlink). This “bad company” was that of Prime Minister Pitt, who had required the Bank to make large loans to the government to finance a war against France.  
20. TFEU, supra note 3, art. 127(1), 2010 O.J. C 83, at 102-03. 
21. LASTRA, CENTRAL BANKING, supra note 12, at 65-68.
EU objectives as laid down in Article 3 of the TEU. The wording of this provision is heavily influenced by Article 12 of the 1957 Bundesbank Law.

In addition to price stability and support of the general economic policies of the European Union, financial stability (mentioned in Article 127(5) of the TFEU) must be added to the enumeration of objectives. Financial stability has become an overriding policy objective in the aftermath of the financial crisis. The other condition mentioned in Article 127(1) of the TFEU is to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

B. ECB Functions and Their Evolution

The functions of the ESCB are divided into “basic tasks” (defined in Article 127(2) of the TFEU and reproduced in Article 3(1) of the ESCB Statute) and other functions “nonbasic tasks” that are scattered throughout other provisions. Although this distinction is not always clear (e.g., why is the issue of banknotes not included in the enumeration of basic tasks?), it is enshrined in the TFEU.

While the language applicable in Article 127(2) refers to the “basic tasks to be carried out through the ESCB” (the ESCB being construed as the compound of its constituent parts, i.e.,

23. TFEU, supra note 3, art. 127(5), 2010 O.J. C 83, at 103 (“The European System of Central Banks (“ESCB”) shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.”); Gesetz über die Deutsche Bundesbank [BBankG] [Bundesbank Act], July 26, 1957, BUNDESGEZETZBLATT I [BGBl I] at 1782, last amended by Gesetz [G], Dec. 22, 2011, BGBl. I at 2959, art. 9 (Ger.).
24. TFEU, supra note 9, art. 127(1), 2010 O.J. C 83, at 102; see id. art. 119, at 96-97 (requiring Member States to adopt, “[f]or the purposes set out in Article 3 of the Treaty on European Union... an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition”).
25. Id. art. 127(2), at 102; TFEU Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank art. 3.1, 2010 O.J. C 83/230, at 231 [hereinafter ESCB Statute].
both the ECB and the NCBs), the language applicable to nonbasic tasks typically mentions the ECB and the NCBs separately (with the one significant exception of Article 127(5) of the TFEU, which refers to the ESCB).

The ESCB’s four basic tasks are: “[(1)] to define and implement the monetary policy of the Union, [(2)] to conduct foreign-exchange operation consistent with the provisions of Article 219, [(3)] to hold and manage the official foreign reserves of the Member States, [and (4)] to promote the smooth operation of payment systems.” There are four other “nonbasic” tasks (i.e., not included under the umbrella of “basic tasks”): (1) issue of banknotes, (2) contribution to financial stability, (3) advisory functions and collection of statistical information, and (4) international cooperation and “external operations.”

The key function of the ECB is monetary policy. The formulation and implementation of monetary policy is the first and most important basic function to be “carried out through” the ESCB. Responsibility for monetary policy has been clearly transferred from the national arena to the supranational arena. In this sense, it is both accurate and entirely appropriate to talk about a “single monetary policy” for the Member States whose currency is the euro.

Article 14.3 of the ESCB Statute states that “[t]he NCBs are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB.” Accordingly, in implementing ESCB tasks, i.e., monetary policy and other responsibilities resulting from the TFEU and the ESCB Statute, the NCBs act in their capacity as constituent parts of the ESCB, and not as national agencies.

Monetary policy is a public function. A central bank conducts monetary-policy operations and other central banking

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27. Id.; ESCB Statute, supra note 25, art. 3.1, 2010 O.J. C 83, at 231.
28. See LASTRA, supra note 16.
functions in the pursuit of the public interest. The transfer of monetary policy powers from the national to the supranational arena signifies the surrender of one of the classic attributes of sovereignty of the nation-state. The Greek debt crisis has magnified the inconsistency between a centralized monetary policy and a decentralized fiscal policy, which characterizes the Economic and Monetary Union ("EMU") project.

Monetary policy also is a key attribute of monetary sovereignty. The adoption of a single currency—the euro—and the creation of the ESCB signify the voluntary surrender of monetary sovereignty by those Member States that have agreed to transfer sovereign rights to the European Union. This is a

32. Central banks act in a dual capacity: on the one hand they can perform central banking functions (\textit{acta jure imperii}), and on the other they can perform corporate functions (\textit{acta jure gestionis}). \textit{Acta jure imperii} are activities of a governmental or public nature carried out by a foreign state or one of its subdivisions, which qualify for state immunity under the modern doctrine of restrictive foreign sovereign immunity. When they perform central banking functions, central banks enjoy sovereign immunity. \textit{Acta jure gestionis} are activities of a commercial nature carried out by a foreign state or one of its subdivisions or agencies. These acts are not immune from the jurisdiction and process of local courts under the modern doctrine of restrictive foreign sovereign immunity. The United States Court of Appeals for the Second Circuit recently provided a ringing endorsement of central bank immunity. See \textit{NML Capital Ltd. v. Banco Cent. de la República Argentina}, 652 F.3d 172, 188 (2d Cir. 2011) (treating central banks as more than "generic 'agencies and instrumentalities'" by entitling them to "'special protections' belitit the particular sovereign interest[s]" at stake (quoting \textit{EM Ltd. v. Republic of Argentina}, 473 F.3d 463, 485 (2d Cir. 2007))). According to the Second Circuit, the central bank enjoys sovereign immunity when it exercises central banking functions. \textit{See id.} at 190, 194. The United States as amicus curiae offered its understanding of central bank functions as follows:

\begin{quote}
Central banking activities include, among other things, issuance of a country’s currency; holding of the country’s currency reserves or precious metal reserves; maintenance of domestic reserves of depository institutions; regulation of depository institutions; engaging in open market operations; setting monetary policy; settlement of clearing balances in the payments system; administration of credit controls; serving as a banker’s bank to private sector banks and as lender of last resort; and providing general banking services to the parent government.
\end{quote}

Brief for the United States of America as Amicus Curiae in Support of Reversal at 11–12, NML Capital, 652 F.3d 172 (No. 10-1487). The court had invited the United States to address two questions: “(1) whether the Banco Central de la República Argentina (BCRA) [was] the ‘alter ego’ of the Republic of Argentina...and (2) if so, whether the BCRA’s assets at the Federal Reserve Bank of New York (FRBNY) [were] immune from post-judgment attachment.” \textit{Id.} at 1–2.


34. \textit{See} \textit{Costa v. Ente Nazionale per l’Energia Eletttrica (ENEL), Case 6/64, [1964] E.C.R. 585}, at 593 (“By creating a Community of unlimited duration,
limited surrender, a nonexclusive transfer of sovereign powers. The members of the Eurozone retain their national sovereignty in those domains where no other consensual limitation has been agreed upon. The holder of monetary sovereignty for those Member States whose currency is the euro is not the ECB but the European Union, in the composition of the seventeen member states that have pooled monetary sovereignty and formed the Eurosystem. The ESCB and ECB exercise the Union’s “exclusive competence” in monetary policy, and since only the ECB has legal personality (the ESCB and the Eurosystem do not), the ECB holds the rights and obligations.

The ECB has used standard and nonstandard measures of monetary policy in response to the crisis to ensure the proper working of monetary transmission and the provision of liquidity to the euro area banking system. Standard measures include open market and credit operations (Article 18 of the ECSB Statute) and minimum reserves (Article 19 of the ECSB Statute). Following standard measures, the ECB lowered interest rates by twenty-five basis points in November 2011 and by another twenty-five basis points in December 2011. Since then, the rate on the main refinancing operations has been at the historically low one percent. Article 20 of the ECSB Statute allows for other instruments of monetary control.

An example of nonstandard measures—aimed at preserving the proper transmission of monetary policy—is the Securities

having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights . . . and have thus created a body of law which binds their nationals and themselves.”).  
35. TEU post-Lisbon, supra note 8, art. 5(2), 2010 O.J. C. 85, at 18 (“Competences not conferred upon the Union in the Treaties remain with the Member States.”); see Costa, [1964] E.C.R. 585, at 593 (describing the “transfer of powers” as occurring “within limited fields”).  
36. See LASTRA, supra note 16, at 28. “This is in line with the established doctrine of monetary sovereignty, where the state, as representative of the will of the people, is the holder of such sovereignty, even if the exercise of some of its prerogatives—such as the monopoly of note issue—is the responsibility of the central bank.” Id. at 28 n.87.  
37. See ESCB Statute, supra note 25, arts. 18–19, 2010 O.J. C 83, at 238.  
Markets Programme, which was established in May 2010 as an instrument of monetary policy in response to the emerging debt crisis in the Eurozone. According to the preamble of the Decision of the European Central Bank of May 14, 2010, establishing a Securities Markets Programme:

(1) Pursuant to Article 18.1 of the Statute of the ESCB, national central banks of Member States whose currency is the euro (hereinafter the “euro area NCBs”) and the European Central Bank (ECB) (hereinafter collectively referred to as the “Eurosystem central banks”) may operate in the financial markets by, among other things, buying and selling outright marketable instruments.

(2) On 9 May 2010 the Governing Council decided and publicly announced that, in view of the current exceptional circumstances in financial markets, characterised by severe tensions in certain market segments which are hampering the monetary policy transmission mechanism and thereby the effective conduct of monetary policy oriented towards price stability in the medium term, a temporary securities markets programme (hereinafter the “programme”) should be initiated. Under the programme, the euro area NCBs, according to their percentage shares in the key for subscription of the ECB’s capital, and the ECB, in direct contact with counterparties, may conduct outright interventions in the euro area public and private debt securities markets.

(3) The programme forms part of the Eurosystem’s single monetary policy and will apply temporarily. The programme’s objective is to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism.

(4) The Governing Council will decide on the scope of the interventions. The Governing Council has taken note of the statement of the euro area Member State governments that they “will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures” and the precise additional commitments taken by some euro area Member State governments to

accelerate fiscal consolidation and ensure the sustainability of their public finances.

(5) As part of the Eurosystem’s single monetary policy, the outright purchase of eligible marketable debt instruments by Eurosystem central banks under the programme should be implemented in accordance with the terms of this Decision.\(^4\)

Another nonstandard measure is that which gives Eurosystem counterparties (European banks) US dollars that the ECB has obtained via the dollar swap lines offered to it by the Federal Reserve Bank of New York.\(^4\)

Article 127(2) of the TFEU and Article 18 of the ESCB Statute grants the ECB with competence to provide market liquidity.\(^4\) The ECB has indeed provided hugely expanded liquidity operations during the twin crises (financial and sovereign debt crises) and has made ample use of the considerable set of operational tools at its disposal to handle a liquidity crisis. However, what constitutes “ordinary” liquidity assistance as opposed to “emergency”/lender of last resort (“LOLR”) liquidity assistance blurs during a crisis, since the drying of the interbank market gives the central bank a primary role in the provision of liquidity.\(^4\) Although the ECB is

\(^{41}\) Id. at 8.


\(^{43}\) TFEU, supra note 3, art. 127(2), 2010 O.J. C 83, at 102; ESCB Statute, supra note 25, art. 18, 2010 O.J. C 83, at 238.

\(^{44}\) See Lastra, Central Banking, supra note 12, at 262–68; see also Rosa Lastra & Andrew Campbell, Revisiting the Lender of Last Resort, 24 BANKING & FIN. L. REV. 453 (2009); Rosa Maria Lastra, Lender of Last Resort: An International Perspective, 48 INT’L & COMP. L.Q. 340 (1999).
competent to provide liquidity assistance to “financially sound” banks, the classic LOLR assistance (collateralized loans to troubled illiquid but solvent banks) remains a national competence unless the problems originate in the payment system. In 2000, the ESCB adopted a restrictive reading of the ECB competences, concluding that the provision of LOLR assistance to specific illiquid individual institutions was a national task of the NCBs in line with Article 14.4 of the ESCB Statute, a provision that allows NCBs to perform non-ESCB tasks on their own responsibility and liability.

In December 2011, the Governing Council of the ECB announced additional enhanced credit support measures to

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46. See TFEU, supra note 3, art. 127(2), 2010 O.J. C 83, at 102.
47. ECB, ANNUAL REPORT 1999, at 98 (2000); see ESCB Statute, supra note 25, art. 14.4, 2010 O.J. C 83, at 237 (“National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.”). The ECB can assess whether a given lender of last resort operation by a National Central Bank (“NCB”) interferes with monetary policy and, if so, either prohibit it or subject it to certain conditions. To this effect, the ECB has some internal rules requiring ex ante notification to the Governing Council of such lender of last resort operations. ESCB Statute, supra note 25, art. 14.4, 2010 O.J. C 83, at 237. The ECB described this system in its 1999 Annual Report:

The institutional framework for financial stability in the EU and in the euro area is based on national competence and international cooperation. Coordination mechanisms are primarily called for within the Eurosystem. This is the case for emergency liquidity assistance (ELA), which embraces the support given by central banks in exceptional circumstances and on a case-by-case basis to temporarily illiquid institutions and markets. If and when appropriate, the necessary mechanisms to tackle a financial crisis are in place. The main guiding principle is that the competent NCB takes the decision concerning the provision of ELA to an institution operating in its jurisdiction. This would take place under the responsibility and at the cost of the NCB in question. The agreement on ELA is internal to the Eurosystem and therefore does not affect the existing arrangements between central banks and supervisors at the national level or bilateral and multilateral co-operation among supervisors and between the latter and the Eurosystem.

ECB, supra, at 98.
support bank lending and liquidity in the euro area money market. In particular, the Governing Council decided:

To conduct two longer-term refinancing operations (LTROs) with a maturity of [thirty-six] months and the option of early repayment after one year. To increase collateral availability by (i) reducing the rating threshold for certain asset-backed securities (ABS) and (ii) allowing NCBs, as a temporary solution, to accept as collateral additional performing credit claims (i.e. bank loans) that satisfy specific eligibility criteria.

Long-term refinancing operations ("LTRO") are nonstandard measures designed to alleviate severe credit conditions among the countries of the Eurozone. Two LTRO tranches have been announced so far, one that took place in December 2011, and a second to occur in February 2012.

The EMU rests upon a relatively strong "M" and a weak "E." The weak economic pillar of EMU provides the background to understanding the December 2011 adoption of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("Fiscal Compact") by the Heads of State or Government of Member States in the Eurozone. This is intended to move the Eurozone towards a


49. Id. "After one year counterparties will have the option to repay any part of the amounts they are allotted in the operations, on any day that coincides with the settlement day of a main refinancing operation. Counterparties must inform their respective NCB, giving one week's notice, of the amount they wish to repay." Id.

50. Id.


52. See Mark Milner, Europe's Financial Architect, GUARDIAN (U.K.), Aug. 15, 2003, http://www.guardian.co.uk/business/2003/aug/16/3. According to Alexandre Lamfalussy, "The greatest weakness in... [economic and monetary union] is the E. The M Part is institutionally well organised. We have a solid... framework. We don't have that for economic policy." Id.

53. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union art. III(1)(e), Mar. 2, 2012 (not yet ratified). The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also known as the Fiscal Compact, is an intergovernmental agreement, which is separate from an EU-wide treaty that must be ratified by twenty-seven member states. Instead, this agreement
stronger economic union, including a new fiscal compact and strengthened economic policy coordination to be implemented through an international agreement.54

The architecture to deal with sovereign debt crises in the Eurozone will become more permanent once the seventeen Eurozone Member States ratify the Treaty Establishing the European Stability Mechanism (“ESM”),55 signed on February 2, 2012 and expected to become operational in July 2012.56 The ESM will be an international financial institution based in Luxembourg and designed to provide financial assistance to Eurozone Member States who are experiencing or being threatened by severe financing problems, when ESM action is indispensable for safeguarding financial stability in the Eurozone area as a whole.57 As a permanent mechanism, the ESM will take over the tasks currently fulfilled by the European Financial Stability Facility and the European Financial Stabilisation Mechanism.58


54. See Ireland Votes in Favour of EU Fiscal Pact, supra note 53.


57. Id. “The original version of the treaty was signed on 11 July 2011, but it has been modified to incorporate decisions taken by the heads of state and government of the euro area on 21 July and 9 December 2011, aimed at improving the effectiveness of the mechanism.” Id. Once ratified by the seventeen Eurozone Member States, the treaty “will enter into force and the [European Stability Mechanism will] become operational as soon as possible: the target date is July 2012, a year earlier than originally planned.” Id.

58. Id. “With the accelerated entry into force, the [European Stability Mechanism] will now operate alongside the [European Financial Stability Facility] for [twelve] months. Their joint lending capacity is currently set at €500 billion, subject to reassessment in March 2012. With the subscribed capital of €700 billion (€30 billion as paid in capital, the rest as callable), the initial maximum lending capacity of the [European Stability Mechanism] is set at €500 billion.” Id.
These measures notwithstanding, the Eurozone still falls short of a fiscal union with a centralized system of fiscal transfers. That will in principle require a treaty revision. The tension inherent in the differences in jurisdictional domain was further evidenced by the UK veto of the ESM in December 2011. 59

II. A NOTE ON SUPERVISION AND FINANCIAL STABILITY

The consistency between one instrument (monetary policy) and one goal (price stability) that is present in the pursuit of monetary stability contrasts with the multiplicity of instruments and goals that exist with regard to the pursuit of financial stability. This makes the pursuit of financial stability a difficult endeavor, and this difficulty is further compounded by the problems of jurisdictional domain, since financial stability is a goal that transcends national boundaries. Like a tsunami that does not respect national boundaries, episodes of financial instability have a transnational dimension, thus requiring a transnational solution. Financial stability also is a goal that transcends institutional mandates.

The Draft Statute of the ESCB—released by the Committee of Governors of the European Community ("EC") Central Banks in November 1990—included prudential supervision amongst the basic tasks of the ESCB. 60 However, the opposition of some countries (notably Germany) to such an inclusion means that the final version of the ESCB Statute and of the EC Treaty (as revised by the Maastricht Treaty) only referred to supervision in a limited way, as a nonbasic task. 61

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61. TFEU, supra note 3, art. 127(4)–(6), 2010 O.J. C 83, at 102–03; ESCB Statute, supra note 25, art. 25, 2010 O.J. C 83, at 240. However, Article 127(6) of the TFEU left the door open for a possible expansion of supervisory responsibilities following a simplified procedure (simplified in the sense that it does not require the formal amendment of the TFEU, but not likely to be exercised lightly due to the requirement of unanimity in the Council plus the assent by the European Parliament). Although the TFEU refers to to “prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings,” it is an anachronism to do so. TFEU, supra note 3, art. 127(6), 2010 O.J. C 83, at 103. Financial developments in
It is now widely accepted that the neglect of financial stability prior to the crisis was an important contributing factor. Financial stability should be the ultimate goal of supervision, regulation, and crisis management. It is a national, European, and international goal, but a commonly accepted definition is still lacking, complicating its pursuit.

A distinction is now made between macro-prudential supervision and micro-prudential supervision. According to the House of Lords Report on the Future of EU Supervision and Regulation:

Macro-prudential supervision is the analysis of trends and imbalances in the financial system and the detection of systemic risks that these trends may pose to financial institutions and the economy. The focus of macro-prudential supervision is the safety of the financial and economic system as a whole, the prevention of systemic risk. Micro-prudential supervision is the day-to-day supervision of individual financial institutions. The focus of micro-prudential supervision is the safety and soundness of individual institutions as well as consumer protection. The same or a separate supervisor can carry out these two functions. If different supervisors carry out these functions they must work together to provide mechanisms to counteract macro-prudential risks at a micro-prudential level.

While micro-prudential supervision remains a national competence, it is subject to increasing centralization since the establishment of the European Supervisory Authorities—the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority. Macro-prudential supervision, on the other hand, is a task entrusted to the European Systemic Risk

the last decades have rendered this exception meaningless, since nowadays financial conglomerates encompass banking, securities, and insurance undertakings.


although the ECB and NCBs also are competent to contribute to prudential supervision and issues of financial stability. This can pose problems or tensions, particularly with regard to non-Eurozone NCBs.

A common trend in response to the crisis is to give the central bank responsibility for macro-prudential supervision.⁶⁵ The reinforcement of the role of the central bank now coexists with greater political interference and reduced independence for central banks and supervisory agencies because of the fiscal costs of the bailout or rescue packages. This latter trend is in stark contrast with the movement towards independence that characterized the framework of central banks prior to the crisis. Of course, the ECB is better shielded from political pressure than other central banks with jurisdictional domain in the national arena. But it is not exempt from such pressure.


III. ORGANIZATIONAL COMPLEXITY

As I have discussed in earlier writings, the European System of Central Banks is a complex central banking system. This complexity is multi-layered. While the structural complexity—ECB and NCBs—is a permanent feature of the system, the other layers of complexity can have a dynamic or transitory nature (the division between “ins” and “outs” and the dual nature of NCBs as operational arms of the ESCB and as national agencies).

In terms of the ECB’s internal organizational structure, the Eurosystem is governed by the Governing Council and the Executive Board, the two main decisionmaking bodies of the ECB. The NCBs of the countries that do not participate in the EMU (“Member States with a derogation”), either because they have opted out ([Denmark and the United Kingdom]), rejected membership through a referendum (Sweden), or have not qualified yet still participate in the third governing body of the ESCB, the General Council. The tasks of the General Council can be classified into coordinating functions (between the monetary policies of the “outs” and that of the Eurozone) and preparatory functions (helping the “outs” prepare for eventual Eurozone membership).

IV. STATUS, INDEPENDENCE, AND ACCOUNTABILITY

The structural and functional duality of the ESCB, its organizational complexity, and the novelty of a truly “independent institution” within the Community’s institutional structure triggered a heated legal debate with regard to the constitutional position of the ECB.

The ECJ clarified the legal position of the ECB in saying that “the ECB, pursuant to the EC Treaty, falls squarely within the Community framework.” The Treaty of Lisbon confirmed

66. This Section draws on Rosa Maria Lastra, The Division of Responsibilities Between the European Central Bank and the National Central Banks Within the European System of Central Banks, 6 COLUM. J. EUR. L., 167, 167-80 (2000), and on LAstra, supra note 16, at 210–14.
67. Id. arts. 44–46, at 248–49.
68. See generally LAstra, supra note 16.
the position of the ECB as a core institution of the European Union. The Court of Justice for the European Union ("Court") has clarified the extent of the independence of the ECB in the European Anti-Fraud Office (OLA-F) case. The Court held that the ECB "should be in a position to carry out independently the tasks conferred upon it by the Treaty." The Court further stated 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, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB statute.

The Court is clearly in favor of a limited notion of independence, confined by the functions, tasks, and powers specifically conferred upon the ECB. The Court upheld a concept of “independence within the Community structure” (not independence from the Community) that is reminiscent of the notion of “independence within government.” The “recognition that the ECB has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law.”

The ECB is independent “organically,” “functionally,” and “financially.” The “organic independence” is evidenced by a number of safeguards or guarantees such as the appointment and removal procedures of the members of its governing bodies (e.g., Articles 11(2) and 11(4) of the ESCB Statute with regard to the Executive Board and Article 10 of the ESCB Statute with regard to the Governing Council). The “functional” independence is enshrined in EC Treaty Article 108 (as recognized by the ECJ in the OLAF case) and also is safeguarded by other provisions, such as those dealing with the prohibition to finance public sector deficits via central bank

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70. TEU post-Lisbon, supra note 8, art. 18, 2010 O.J. C 83, at 22.
72. Id. ¶ 130.
73. Id. ¶ 134.
credit (e.g., Article 21(1) of the ESCB Statute) or those dealing with the regulatory powers of the ECB. The ECB is independent within the limits of the powers expressly conferred upon it by the Treaty and the ESCB Statute. The “controls” to which the ECB is subject constitute another limit. The European Court of Justice in OLAF specifically mentioned the review by the Court of Justice and the control by the Court of Auditors. These are, in fact, important mechanisms of accountability.

Since 1992, I have advocated the need for “accountable independence.” This notion of independence is the one that Geoffrey Miller and I have developed. An independent central bank is “a particular kind of institution that is independent in some respects, but highly constrained in others,” constrained by the goal, by the statutory objective, and by the demands of democratic legitimacy and accountability.

Although a consensus has been reached on the definition and adequate quantum of independence, a debate is still going on regarding the definition and the adequate quantum of accountability. The ECB has often been criticized for its alleged lack of accountability and transparency. But what do we mean by accountability and transparency? There are several paradigms and forms of accountability. Depending on which paradigm one judges the institution (the ECB), one reaches different results. Fabian Amtenbrink argued that the existing democratic deficit of the European Central Bank is an expression of the democratic deficit of the European Community at large, rather than a “particular deficiency” of the institution. Chiara Zilioli argued that the ECB is accountable if we use a new “economic

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79. Id. at 481–82.
81. Id. at 32.
notion of accountability” rather than the traditional “formalistic” notion of accountability based on the theory of the division of powers and the existing system of checks and balances. The economic notion of accountability (i.e., performance accountability) “is based on the assessment of the results achieved” in relation to the specified statutory objective, namely price stability. In my opinion, the new paradigm also is based on participation (i.e., consultation) and transparency (i.e., disclosure).

Accountability can only be judged through the life of the institution. Accountability cannot be guaranteed by the fact that at the initial stage of its creation, it is legitimate democratically. It is in its continuing operations and policies that the institution must be subject to appropriate mechanisms of accountability. And if the ECB gives proper account, explains and justifies the actions or decisions taken (or omitted) in the exercise of its responsibilities, is subject to judicial review and audit control, and responds to Parliament through reports and testimonies, it can be judged to be sufficiently accountable.

CONCLUSION

The ECB has played a key role during the twin financial and sovereign debt crises in Europe. It has been an institution that has proved to be adept at evolving, stretching the mandate granted to it by the TFEU to the limits of the law while remaining within the law’s bounds. Ordinary times are not the same as extraordinary times. The success of institutions is to tread carefully on what is extraordinary and try to channel the instruments at their disposal towards a return to ordinary times. Central banks often act as a last resort: purchasers of last resort, lenders of last resort, liquidity of last resort, and investors of last resort. These last resort considerations are suited for extraordinary times. It is the immediacy of the availability of central bank liquidity that makes such liquidity essential when other sources either dry out or become prohibitively expensive.

84. See Chiara Zilioli, Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy?: The Specific Case of the European Central Bank, in II MÉLANGES EN HOMMAGE À JEAN-VICTOR LOUIS 395, 402–05 (Georges Vandersanden et al. eds., 2003).
85. Id. at 402–04.
Financial stability is a goal that transcends institutional mandates and geographic boundaries. The relative simplicity of one goal (price stability)—one instrument (monetary policy) that characterizes the monetary responsibilities of central banks contrasts with the multiplicity of instruments (supervision, regulation, crisis management, LOLR, and others) that characterize the pursuit of financial stability. Since supervision and regulation also are aimed at other goals (e.g., consumer protection), the mandate of central banks in the pursuit of financial stability and the design of central bank independence in such pursuit are more complex than the mandate of monetary stability and the design of monetary independence.

In the light of the Eurozone crisis, the time is ripe to give the ECB an adequate mandate in the pursuit of financial stability and to entrust it with appropriate supervisory responsibilities, activating the enabling clause, i.e., Article 127(6) of the TFEU.\footnote{See supra note 61} If the ECB is going to continue to provide assistance “in a rainy day” it needs to know what is going on “in a sunny day.” Financial supervision in the single market can be organized according to the Champions League model, with some institutions competing in the European context and others only in the national arena. The former could be supervised by the ECB.