The European Central Bank and Legitimacy
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1. The Sovereign of Monetary Policy

The creation of a single market and the continuing concentration and integration at the European level have created phenomena that can neither be governed by nationally based policies nor left to the working of unregulated markets. According to the European Court of Justice, one of the cardinal aims of the Treaty is to create a single economic region, free from internal restrictions, in which an economic and customs union may be progressively achieved. This requires, among other things, that the parities between the currencies of the various Member States remain fixed until all national currencies in the Economic and Monetary Union (the EMU), have been replaced by the single currency, the Euro. The European Central Bank, acts as the sovereign within the sphere of Community monetary policy.

The cornerstone of the Bank’s meaningful position is its exclusive right to issue money and responsibility over its value. The primary objective of the ECB is to maintain price stability in the Euro area. Not disregarding this objective it shall

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3 As stated by the ECJ, as soon as this requirement ceases to be met the process of integration envisaged by the Treaty will be retarded or prejudiced. Case Schluter v. Hauptzollamt Lorrach, p. 1661.

4 Or the abbreviation ESCB used for the European System of Central Banks as no distinction is here made between these two. Therefore the terms “the ECB or “the Bank” are used to cover both.

5 Art. 106 EC: ‘The ECB shall have the exclusive right to authorise the issue of banknotes within the Community.’

6 EC Treaty includes no definition of “price stability” which gives the Bank relatively free hands to both define and implement the objective. According to Gros and Thygesen “if the ESCB had indeed repeated the listing of objectives set for the Community in general, regular political reassessments of the relative weight of the different objectives would have become legitimate. Such reassessments are essentially political decisions, which could not be delegated to an institution outside the centre of the policy-making process. A simple and single-valued objective is therefore
also support the general economic policies and objectives of the Community as laid down in Article 2 EC. This provision establishes a clear hierarchy of objectives.\textsuperscript{7} The ECB is bound by the same principles as the other EU organs\textsuperscript{8}, i.e. the principles of legitimacy\textsuperscript{9} and proportionality.\textsuperscript{10} Placing all central rules regulating the ECB in the Treaty and Statute which constitute primary law with direct effect on and within Member States gives the System a strong law-based status and strengthens its independence even further. Since the Treaty can only be changed if all Member States agree on and ratify amendments, the Statute has a very high legal, de facto constitutional status.\textsuperscript{11}

According to Gros, the organisational structure and mode of operation of the Bank, however important these dimensions are, cannot solely determine its future performance. More essential is the general mandate for monetary policy the ECB pursues and its relationship to political authorities, summarised under the headings of independence and accountability.\textsuperscript{12} The Union is, in accordance with Art. 6(2) TEU and well-established case law of the ECJ, bound to respect fundamental rights. Still, an independent central bank running an autonomous monetary policy questions the foundations of legitimacy and accountability, the
general basis of democratic decision-making being the participation of those affected.

The system of monetary decision-making has deliberately been distanced from the conventional politically organised and democratically legitimated system of decision-making in order to make it immune to political pressure. By leaving the concept of price stability undefined, some flexibility has been achieved. At the same time, however, it has become difficult to control the accountability of the ECB and secure that it functions in a legitimate manner. Therefore the most central question becomes whether it is possible to function in an independent and legitimate manner at the same time, fulfilling both the substantive and procedural requirements for legitimacy. Is the ECB too independent? Democracy based on representation assumes a symmetrical relationship between power and accountability – when public power is implemented someone must be able to be held accountable for it. Public power is used within the EU and by ECB without, if nothing else, the traditional forms of political accountability which otherwise should follow automatically.

According to doctrine, an autonomous central bank is seen as a prerequisite for price stability, the general opinion appearing to be that monetary sovereignty cannot be divided. Thus, are there different categories of decision-making so that undemocratic decision-making by a central bank can be regarded as more legitimate than if it took place in the auspices of another organ? It has also been suggested that undemocratic decision-making could, nevertheless, be justified through profitable results. The objective of this paper is to consider the implementation of ECB’s law-making powers and its effects in light of the principle of democracy and the requirements of legitimate decision-making. In this paper, democracy is seen as the most central way to create legitimacy, even if other measures are introduced as well.

15 E.g. Louis, Jean-Victor et al (1995), p. 62; According to Smits it is believed that only with such autonomous institutions can the strict monetary policy necessary to ensure price stability to be properly implemented. Smits, René (1996), p. 327.
17 It is possible to question the varying degree of autonomy usually given to central banks. Still, it is extremely rarely challenged that a central bank fulfils its obligations best when independent.
2. Legislative Powers of the ECB

2.1. Independent and Accountable – Independent or Accountable?

ECB has the power to make regulations, take decisions, make recommendations and deliver opinions to the extent necessary to implement its tasks and carry out its responsibilities within its area of competence, monetary policy. The ECB is also entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations stemming from its regulations and decisions. The regulations and decisions enacted by the ECB enjoy the status of Community law and may be invoked by interested parties in national courts assuming that the conditions for direct effect are met.

Article 34.1 of the Statute has been formulated in the same manner as Article 249 EC establishing the legislative powers of the Council the difference being that Article 34.1 does not mention directives. Unlike Article 249, Article 43.1 also defines the field in which regulatory power can be implemented. The list of different types of norms the ECB can adopt demonstrates political will to restrict its regulatory power, on the one hand, and the rather large extent of its competence, on the other, considering that the Bank is able to adopt directly applicable legal acts. In most cases, however, the ECB is only able to implement its powers in individual cases within the limits set by the EC Treaty and further defined by the Council. The Bank can decide to publish its decisions, recommendations and opinions, which should be encouraged in order to increase

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18 Art. 110 EC and Art. 34 of the Statute. The legal acts given by the ECB have the same status as the norms adopted by the other EC organs.
19 Art. 110.3 EC.
20 The ECB can even undertake actions in the private law field, such as enter agreements, e.g. acquire or dispose of movable and immovable property and be a party to legal proceedings (Art. 9.1 of the Statute). These acts, despite of being of a legal nature, are not covered by Article 34 which only establishes the regulatory powers of the Bank.
22 E.g. in the case of statistics, minimum reserve requirements, prudential control and sanctions in which the Council shall, in accordance with Article 42 of the Statute, define in detail the competence of the Bank. These Council regulations were adopted in November 1998. Geographically the Bank has general law-making powers as it can adopt legal acts that have direct effect in the whole of the Euro area. Regarding the substance the Bank has not, however, any general law-making power as its competence is limited to a specific area, the monetary policy. Subsequently, the ECB can adopt binding acts only in relation to individuals coming within its area of competence.
23 The ECB is even required 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 stable prices, sound public finances and monetary conditions, and a sustainable balance of payments. Article 105(1) EC. See also Snyder, Francis (1994), p. 80.
transparency. The ECJ has declared on several occasions that Article 249 is not exhaustive and established that EC organs can adopt additional acts to those mentioned therein. The Court is likely to implement Article 34 in a similar manner.

The difference between the legislative competence of the ECB and that otherwise implemented within the Community is that the Bank uses its powers independently from the other EC organs and national parliaments. The basis for the inter-institutional relations of the Bank is Article 108 EC which establishes that neither the ESCB, the ECB, or a national central bank nor any member of their decision-making bodies, shall seek or take instructions from Community institutions, governments or any other bodies. Thus, the Bank has a wide margin of appreciation when it comes to judging between different monetary policy measure alternatives. This is motivated by the need to make monetary policy decisions in the interests of the whole of the Monetary Union. The ECJ has, nevertheless, jurisdiction to review the legality of the acts of the ECB on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or misuse of powers.

Article 113 EC places the leadership of the Bank under some obligations to report to the other EC organs. Thus, according to Snyder, the accountability of the ECB stems less from the (limited) extent to which it is directly answerable to the Community's political institutions or national governments than from the fact that the Bank is locked into a relatively complex institutional structure and set of inter-

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24 E.g. 90 and 91/63 Dairy Products.
25 The future will show whether Article 34 can even be seen to cover directives.
26 Louis, Jean-Victor et al. (1995), p. 74. The law-making process within the Council includes indirect democratic control through national parliaments. This is not the case with the ECB.
27 According to Smits this does not exclude informal contacts between individual members of the Governing Council and other EC organs or representatives for the Member States. Smits, René (1997), p. 172. Similar contacts can exist between a national central bank and the government of that Member State as the idea has not been to isolate the Central Bank but to give it the opportunity to make decisions independently. See even Martenczuk, Bernd (1998), p. 174.
29 According to Article 230 EC the legality of all measures adopted by the ECB can be reviewed by the EC.
30 The same article also gives the Presidents of the Council and the Commission the right to participate in the Governing Council meetings. See also Art. 15 of the Statute.
institutional relations. Goodhart states, however, that the reports of the ECB are only examples of ex-post justification and without a clear Treaty-based definition of price stability it is hard to hold the ECB accountable for its actions. Subsequently, it is almost impossible for outsiders to demonstrate that the ESBC is mistaken in its judgements, reflecting that the System is carefully protected against any criticism by its independence.

In the last instance National Parliaments are responsible for the provisions in the Treaty regulating the competence of the Bank. In other words, the ‘rules of the game’ are decided upon according to traditional democratic procedures at the national level, but the ‘game’ is delegated to the Central Bank, and since national parliaments are in a position to alter the legislation, the ECB remains under their ultimate control. Article 108 EC establishes that the ECB shall not seek or take instructions from any government of a Member State. This means that the ECB is independent in relation to political decision-making both at the European and at national levels. Subsequently, the fundamental problem with the Bank’s political independence is the discrepancy between those defending its independent status and those demanding greater legitimacy and stricter arrangements to guarantee the Bank’s accountability. In many observers’ opinion there is a fundamental trade-off between central bank independence and accountability, in that pure

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32 Goodhart, Charles (1993), p. 237. According to von Hagen disciplinary measures and pressure on the ECB would require joined efforts by the Commission and the Council which means that the possibilities to control the ECB are a lot more restricted than those existing with respect to national central banks. Therefore the only way for a Member State to truly make ECB accountable for its actions would be threatening to leave the Monetary Union. Von Hagen, Jürgen (1997), p. 18-19. The EC Treaty does not have specific regulations concerning such a situation. In practice this would take place through an amendment of the EC Accession documents of the Member State in question. This has happened once, in 1985 when Greenland left the Community. The Greenland Treaty has been published in OJ L 29, 1.2.1985.

33 Gormley, Laurence and de Haan, Jakob (1996), p. 112. According to Gormley and de Haan the European Parliament should logically be responsible for the legislative framework of the ECB, at least by way of co-decision. Idem. This would also shorten the distance between the citizens and the Bank.

34 Arndt has used the concepts autonomy and independence meaning “nicht-weisungsgebunden”, not bound by instructions. Arndt, Hubertus (1996), p. 212. Arndt underlines that even if the Bank shall not take instructions this does not mean that it could operate independent of law. Idem., p. 215. Another aspect of independence is the need to convince the financial markets of the fact that neither the ECB nor any EC organ implicitly guarantees the obligations of Member States. Padoa-Schioppa, Tommaso (1994), p. 183.

One should, however, keep in mind that there is no agreed basis for measuring the extent to which central banks are independent from government control. In general a central bank is considered independent if it is free from government intervention, has the full range of monetary instruments at its disposal and is able to use them without government restriction. Elgie, Robert (1998), p. 54-56.
independence rules out accountability and substantial accountability rules out independence.35

Monetary policy in the traditional, national sense includes balancing the parliament and the government on the one hand and the central bank on the other.36 In the Union the Central Bank has no equivalent counterpart. The independence of the ECB is further strengthened by the fact that it does not interact with just one but several national governments which also means that political pressure remains weaker than in a national environment.37 It is practical for the members of the Executive Board that both the objective and accountability of the ESCB have been left blurred and fuzzy as the solution leaves a wide margin of appreciation. But for the rest Goodhart suggests that part of the Treaty and the Protocol is deficient. 38

Even if the ECB’s policies based on price stability proved profitable for all members of the society this would not frustrate the need to consider the relationship between the implementation of the Bank’s powers and democracy39 as a way to create greater legitimacy. The same question applies to the effect of the Bank’s law-making powers in relation to the rights of individuals. The need is further strengthened by the fact that the ECB has in some cases, when allowed to choose its own strategy, sacrificed some accountability in exchange for other

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35 E.g. Brentford, Philip (1998), p. 108. To enable the ECB to perform successful monetary policy two conditions are necessary: the ECB should be as autonomous as possible and there should be precommitments of the ECB policy, which enable the private economic agents to build up rational expectations. Kirchgässner, Gebhard (1994), p. 329.

36 After Maastricht Treaty monetary policy is highly centralised but other policies decentralised, thereby disclosing a lack of counterpart relations. Hoffmeyer, Erik (1992), p. 39. Apparently it seems to have been easier for national decision-makers to delegate competence within areas in which they have not previously had some than to delegate powers they are in the habit of implementing themselves.

37 Von Hagen, Jürgen (1997), p. 17. According to von Hagen the situation with only one government or national parliament could mobilise greater political pressure. Instead ECB has as partners the European Parliament and the Ecofin Council which both represent national interests, and the European Commission, which represents a vaguely defined Community interest. Other governments insisting on greater monetary discipline balance attempts to pressure from one national government. Idem.

38 Goodhart, Charles (1993), p. 238. According to Goodhart under the Treaty some flexibility is achieved by being careful to fudge the question of how exactly price stability shall be measured, but that same fudge blurs the accountability of the ESCB.

39 Scheinin, Martin (1997a), p. 3. According to Scheinin, the independence of the Central Bank is seen as means to create economic flourishing. Democracy, again, is an axiomatic value, which does not need to be motivated through its results. Therefore the economic benefits do not remove the need to evaluate the actions of an autonomous central bank also from the democratic point of view. Even if monetary policy based on price stability would benefit all members of the society and would in this sense be politically neutral, the ESCB means still implementing power. All use of powers must be considered from the democratic point of view. Idem.
gains. Focusing on democracy and accountability as a matter of principle means that the true impact of the ECB’s acts is of minor importance. Thus, assuming that legitimacy can be established only through profitable results requires less from the other categories of legitimacy, namely procedural and substantive.

2.2. Price Stability versus Fundamental Rights

The ECB is, in the same manner as the other EC organs, bound to respect the rights of individuals in its actions. Nevertheless, even if the ECB has the competence to adopt directly applicable legal acts those acts have only a very limited direct effect on individuals. When considering their indirect effect, however, the influence of the Bank is far more significant. The role of the ECB is also greater in respect for undertakings, which can become addressees for its legal acts.

Regulations adopted by the Bank can set statistical requirements and requirements regarding minimum reserves on undertakings, credit institutions and other relevant instances. The ECB is also entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its

41 E.g. a government that works in a fully illegitimate manner from the democratic point of view but still guarantees the citizens a high living standard is probably not questioned by them. Obradovic names as one of the problems when solving the Union’s legitimacy problem the concept of “utilitarian support”. The main point of this thesis is that the Union gains its legitimacy through the appeal to the economic welfare it may provide. However, an emphasis on the material rewards of Union co-operation is insufficient to guarantee sustained legitimacy. Obradovic, Daniela (1996), p. 198-199. According to Brentford, effectiveness may justify the creation of the Bank on the output side of democracy. Still, the deficiencies on the input side and the absence of a subjective constitution should not be overlooked. Brentford, Philip (1998), p. 110.
42 A wide interpretation of the most central Human Rights conventions, especially the European, considering it to be the most relevant in this context, can contribute to the discussion on the ECB and fundamental rights. According to the ECHR Art. 13 “everyone whose rights and freedoms are set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that he violation has been committed by persons acting in an official capacity”. According to Art. 8(1) everyone has “the right to respect for his private and family life, his home and his correspondence” and according to Art. 6 is also “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.
43 Concerning macroeconomic statistics is it reasonable to assume that ECB will mainly make use of the statistical information the national central banks collect. According to Art. 285 (2) EC the production of Community statistics shall not entail excessive burdens on economic operators. It is, however, the ECB who decides what makes an excessive burden.
regulations and decisions. The right to review the acts of the Bank held by the ECJ has so far not been actualised. The Court has, however, previously stated that the rights of individuals within the monetary policy are extremely limited in relation to the State. Consequently, it is not surprising that in general, attempts to deduce enforceable rights from the Text of the Treaty in the field of capital have failed. Furthermore, it is difficult to imagine circumstances in which an individual interest would proportionally outweigh a Community measure claimed to infringe on fundamental rights.

According to the Treaty, the ECB has an objective that has to be given absolute priority. This means that in case of confrontations between price stability on the one hand and fundamental rights and the principle of democracy on the other, the latter take second place, even if the Union in other fields highlights the importance of the full implementation of human rights. According to the liberal theory as explained by Arndt, price stability can be regarded as a value that stands above democracy. Thus, central bank independence creates means to protect the fundamental right of citizens to price stability. Inflation means a weakening of this right and an infringement on citizens’ financial position, which the state is under an obligation to protect. Placing the “right to price stability” among other

44 Art. 110 EC and Art. 35 of the Statute.

45 Schütter v. Hauptzollamt Lörrach, p. 1161. According to the Court it is the duty of the Community and of Member States to co-operate in and to ensure the creation and maintenance of conditions for a single economic market. According to the Court the obligations for Member States listed in Article 5 EC (now Article 10 EC) and in Article 107 EC (now Art. 108 EC) cannot create legal consequences of which parties might avail themselves in court. Idem. As the Community now has exclusive competence within the field of monetary policy, one can assume that the Community now has replaced the State.

46 Mann, F.A. (1992), p. 502. The question whether ECB is bound by Art. 2 EC establishing the objectives of the Community has also been discussed. According to Zilioli and Selmayr, for example, the ECB is not one of the Community organs but a separate and autonomous entity which, though linked to the Community by its task to define the monetary policy of the Community and a number of co operating procedures, rather constitutes a “Community of its own” or a “Community within the Community”. Zilioli, C and Selmayr, M (1999), p. 285. This view has been motivated e.g. by the fact that third countries recognise the ECB’s legal personality, which in international law is the constitutive element of international legal personality. Idem. In this case Art. 2 would not directly bind the ECB but only by the specific Articles regulating the EMU which would widen the scope of its activities significantly. Torrent, Ramon (1999), p. 1230 (footnote).


48 Koskenniemi points out that a political culture that officially insists that rights are foundational, inalienable or basic but in practice finds that they are not becomes a culture of bad faith. Accordingly, the rights-rhetoric is not as powerful as it claims to be. Koskenniemi, Martti (1999) pp. 99-100.

49 Arndt, Hubertus (1996), p. 217. This view corresponds to the traditional German view. The requirement of price stability existed in German law already before it was introduced to the EC Treaty. The requirement was widened at Germany’s request to cover the whole of the Union by giving the ECB the main objective of maintaining price stability. Smits, René (1994), p. 123.
fundamental rights sounds, however, slightly exaggerated even if the objective has a connection with the realisation of a number of rights, mainly social.

The ECB has powers that do not automatically belong to the area of competence of every central bank. Thus, these powers should be motivated especially carefully. These include the Bank’s law-making competence and the competence to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions\(^{50}\) the legality of which has not received much attention. ECB decisions may also require an undertaking to submit to an infringement procedure.\(^{51}\) In this case the Council of the ECB underlines the need for an effective conduct of a thorough investigation of any alleged infringement, while at the same time providing for a high level of protection for the rights of defence of the undertaking concerned and the confidentiality of the infringement procedure.\(^{52}\) The ECB regulation also establishes a simplified procedure for minor infringements.\(^{53}\)

Within the infringement procedure it is possible to draw parallels to powers of the Commission to impose sanctions under regulation 17/62 in the field of EC Competition law.\(^{54}\) In determining the sanction the ECB shall be guided by the

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\(^{50}\) Council Regulation (EC) No 2532/98 concerning the powers of the ECB to impose sanctions; ECB Regulation (EC) No 2157/1999 on the powers of the ECB to impose sanctions (ECB/1999/4). ECB’s powers also include e.g. supervision of credit institutes, payment systems and minimum reserves.

\(^{51}\) According to art. 3(2) of the Council Regulation (see footnote 49), in carrying out the procedure the ECB or the national central bank shall have the right to require the submission of documents, examine the books and records of the undertaking, take copies or extracts from such books and records and obtain written or oral explanations. In case an undertaking obstructs the conduct of the procedure the participating Member State shall afford the necessary assistance including ensuring access to the premises of the undertaking.

\(^{52}\) According to Smits, irrespective of the findings on this point, the safeguards deriving from the pan-European law on human rights should be upheld and these procedures should only be implemented within the limits set out by Art. 6 of the ECHR according to which “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. These judicial safeguards remain also in relation to an undertaking and when determining what reporting requirements can be placed on it. Smits, René (1997), p. 220.

\(^{53}\) Art. 10. According to the Article, in the event of a minor infringement, the Executive Board of the ECB may decide to apply a simplified infringement procedure. The sanction to be imposed under this procedure shall not exceed EUR 25000.

\(^{54}\) Council Regulation 17/62 implementing Articles 85 and 86 EC, (1962) OJ Special edition No 204/62 p. 87 as amended. The possibility is mentioned in the ingress of the ECB Regulation of the right of the ECB to impose sanctions and in Brentford, Philip (1998), p. 97.
principle of proportionality and the nulla poene sine lege rule so that all its powers are set down by law. These factors may allow the Bank to make careful assessments in imposing sanctions, or, alternatively, allow it to adopt a heavy-handed approach intent on reinforcing its credibility. The powers of the Commission with respect to undertakings in the field of competition law have been criticised by saying that they set aside the doctrine of separation of powers and in practice allow the Commission to act as law-maker, supervisor and judge. The same worrying quality can now be re-found with respect to the ECB as its competence indicates great unity of powers. Furthermore, the possibilities of the undertakings to defend themselves against such a sovereign power within the monetary policy are very limited.

The investigatory and pecuniary powers of the Bank are a part of an overall trend towards a Community system based on sanctions, which may be classified an instrument of droit repressif. Sanctions are seen as a way to ensure uniformity and effectiveness. Still, the competence of the ECB within the area gives reason to be worried for at least two reasons. Firstly, its competence is extensive and can endanger individual undertakings' status. Secondly, it is possible to note small but observable differences between the case law of the European Court on Human Rights and the ECJ concerning the rights of undertakings when determining whether a breach has occurred. This can also be seen as a sign of the ECJ not showing as much respect for the rights of undertakings so far.

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55 Council Regulation of the powers of the ECB to impose sanctions, article 2(2).
56 The limits and conditions are set down by the Council under the procedure laid down in article 42 of the Statute. See also Article 34.3 of the Statute. The upper limit for the fines imposed by the ECB shall be EUR 500 000 and for periodic penalty payments EUR 10 000 per day of infringement. This means that the sums imposed by the ECB are considerably smaller than those imposed by the Commission within Competition law. Within Competition Policy was the highest fine imposed on an undertaking (Tetra Pak) until 1998 75 million ECU. In January 1998 a fine of 102 million was, however, imposed on Volkswagen. In a cartel case Combureau was imposed a fine of 248 million ECU in 1994. The sums within the Competition policy are therefore much higher. It is worth noting, however, that both the Court of First Instance and the ECJ can review the decisions of the Commission.
57 It is arguable, however, whether such credibility would be achieved. Brentford, Philip (1998), p. 98.
58 Idem., p. 97.
59 This is the case e.g. concerning the interpretation of Article 8(1) in the European Convention on Human Rights establishing the right to private and family life. According to the ECJ the Article establishing cannot be seen to cover business premises, see Cases 46/ 87 and 227/ 88 Hoehst AG v. Commission, para 18. According to the Human Rights Court, the Article covers some business premises and e.g. in case Niemiez v. Germany the Court established that the article covers a lawyer’s office. See also cases Funke, Crémieux and Mialhe v. France. Furthermore, it is unclear whether the ECJ would see ECB’s fines or other pecuniary measures as amounting to a “criminal charge” within the meaning of Article 6. Smits, René (1997), p. 220.
2.3. Restrictive Exceptions to the General Principle of Transparency?

Geoffrey Edwards argues that the European people need to have more than a minimal knowledge of the European institutions, procedures, norms and values in order to accept them. Thus, openness and transparency are an integral factor in the process of legitimisation and the EU must be seen as more efficient, democratic and effective, both in terms of policy-making and policy implementation.\(^{60}\) The same applies even for the legitimisation process of the ECB. According to the European Ombudsman, public access to documents should be the core rule and all exceptions implemented restrictively.\(^ {61}\) Still, given while the EMI was active, the recommendations of the Ombudsman only concerned the administrative documents of the ECB predecessor. All documents connected with monetary policy could remain confidential unless the Council decided otherwise.\(^ {62}\) The ECB has confirmed that the same limitation is applicable to its archives.\(^ {63}\) For the time being even all voting records and motivations remain confidential.\(^ {64}\)

Restrictions on transparency contradict the idea of democracy by hindering the right of the people to have access to governmental acts and their entitlement to use

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The European Court on Human Rights has, however, discussed the concept “criminal charge” in several cases and established that disciplinary measures fall outside of the Article. See e.g. Danelius, Hans (1998), p. 136-138 and case Engel v. The Netherlands where the Court stated that relevant considerations when determining whether a measure falls under the concept criminal charge include the nature of the offence charged, the sanction imposed and the group to whom the offence applied. In the case Weber v. Switzerland where Weber had been fined 300 Swiss francs for breach of confidentiality of Court proceedings the Court affirmed the criteria set in Engel and concluded the fine fell under Art. 6. Case Demicoli v. Malta concerned a fine given for breach of privilege under ordinances governing procedure in Parliament. The fine was seen to fall under Article 6. Case Öztürk v. Germany involved an offence, which was not qualified under German law as criminal but as “regulatory” offence (Ordnungswidrigkeit). The Court established that it still was an offence including the possibility to impose a sanction, which confers a criminal character on the proceedings, and therefore it was covered by Art. 6.


\(^{63}\) ECB’s decision concerning public access to documentation and the archives of the ECB, preface (OJ L 110, 28.4.1999). The public has access to documentation and the archives of the ECB of the ECB only with regard to administrative documents. Furthermore, according to Article 4 of the Decision, access to an administrative document shall not be granted where its disclosure could undermine the protection of the public interest, of the individual and of privacy, the protection of copyright and of commercial, banking and industrial secrecy, the protection of the ECB’s financial interests or the protection of confidentiality. With the protection of the public interest is meant in particular public security, international relations, monetary and exchange rate stability, court proceedings, inspections and investigations. Therefore the scope of exceptions is rather wide and is also determined on the first hand by the ECB itself.

\(^{64}\) According to Article 23 of the Rules of Procedure of the ECB (OJ L 125, 19.5.1999), all proceedings of the decision-making bodies, committees or working groups and all documents drawn up by the ECB shall be confidential unless the Governing Council decides otherwise.
such information to expose possible incidents of public misconduct or maladministration. The independent status of a central bank is usually motivated by the need to lead the market in an unprecedented way. Thus, the democratic legitimacy of the monetary policy within the EMU framework cannot be realised on the basis of traditional, democratic methods but through a combination of different supervisory and accountability arrangements, which contribute to creating legitimacy. Transparency plays a central role in these arrangements.

The ECB has chosen to arrange press conferences, release a series of publications, publish results of its research and update a web site of its own. Bringing in the defence side, according to the President of the ECB, Dr Willem Duisemberg, the EC Treaty contains various provisions to ensure the democratic accountability of the ECB. One of these cornerstones is the presentation of the Annual Report to the European Parliament and the Council, others include a number of other reports and its information policy, an area where even the internet is being actively used. In addition, the Bank has strengthened its relationship with the European Parliament which, according to the EC Treaty, can hold general debates on the basis of the ECB reports. In practice the President has regularly attended hearings organised by the Committee on Economic and Monetary Affairs and answered questions asked by the Parliamentarians, welcoming their delegations to its premises in Frankfurt. According to Duisenberg, these practices secure the Bank’s ability to stand in comparison with other Central Banks in the field of transparency. This is undoubtedly true. The question is, however, whether the

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65 Chryssochoou, Dimitris N. (1998), p. 69. According to Chryssochoou, "closed government" also deprives citizens of the possibility to acknowledge on grounds on which those in power decide issues of public interest. Thirdly, it questions the foundations of popular legitimacy, in that citizens cannot exhibit their confidence in the procedures that bring about binding decisions if these procedures remain hidden from public scrutiny. Fourth, it also challenges the idea of constructive public dialogue since the demos is no longer in a position to follow the debate on secretly produced legislation. Finally, it discredits the common defining property of all democratic political systems, namely that he demos is empowered to participate as fully as possible in the actual process of government. Idem.


67 According to the Annual Report 1998 of the ECB, the aims of the ECB’s external communication policy are to foster the transparency and clarity of its policy objectives, to inform the public about its tasks and actions, thereby enhancing its effectiveness, credibility and efficiency, and to contribute to the accountability of the Eurosystem without disregarding the statutory provision relating to the confidentiality of the proceedings of the Governing Council (p. 101).


71 Idem. According to another Executive Board Member, Professor Otmar Issing, the set of information that leads to monetary policy decisions cannot simply be summarised in a few numbers or charts. Whatever the score currently attributed to the ECB in terms of transparency, it would not be significantly modified by the publication of an internal forecast. Professor Issing
Bank can stand in comparison with other organs with a law-making competence? The answer to this question must be negative.

2.4. The ECJ – Lack of Expertise Results in Nominal Revisory Power

The freedom of action of each and every Community institution is restricted. The question of where lines are drawn has in later years grown in significance as the institutions today have varying jobs, both executive and law making. The same applies even for the ECB. According to Article 8 EC the ECB shall act within the limits of the powers conferred upon it by the Treaty. The ECJ shall review the legality of its acts and also establish failure to act. The Court also has unlimited jurisdiction over the review of final decisions of the ECB whereby a sanction is imposed and competence to give preliminary rulings concerning the acts of the Bank. All decisions adopted by the ECB take direct effect in all Member States and therefore it is possible for undertakings and private individuals who consider themselves to have suffered from a measure infringing on their rights as established by an ECB act to claim damages before a domestic court.

In practice, however, the picture is not as pretty as it seems. In Dunnett’s words, the “scope for challenge to an act of the ECB is as slight as the discretion accorded to that body is wide” and “as long as the ECB interprets the concept of price stability reasonably, it will be difficult to allege that the ECB has wrongly defined its objectives and is misusing its powers”. According to Dunnett, it will be even harder to assert that the means adopted by the ECB are disproportionate to the

regards the practice with President Duisenberg summarising and explaining the decisions of the Governing Council and being available for extensive questioning as highly transparent. According to him the lack of publication of individual voting records does not undermine the accountability of the ECB as accountability according to Issing only refers to the need to justify and accept responsibility for decisions taken. Speech at the Royal Institute of International Affairs. For these two, see internet material.

73 The ECB has the powers to supervise the NCBs and can, if needed raise proceedings against them. Art. 14.3 of the Statute.
74 Art. 230 EC.
75 Art. 232 EC.
76 Art. 5 of the Council Regulation on the powers of the ECB to impose sanctions. The unlimited jurisdiction brings also about the possibility of observing all relevant circumstances for the case, not only the four grounds for invalidity established in Art. 230 EC, namely lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, or misuse of powers.
77 Art. 234 EC.
78 The ECB and ECJ can only impose sanctions the proceeds from which shall belong to the ECB, Art. 3(9) of the Council regulation on the powers of the ECB to impose sanction. They cannot grant damages.
objective. Thus, it is doubtful whether a Member State or an individual, even one especially affected by any particular ECB measure, would receive an effective judicial remedy. Furthermore, there is no provision that would permit states or individuals to claim that they have been affected in a discriminatory manner by an act of general application.

In addition, the ECJ has established that the Community cannot be liable for damage suffered by individuals as a consequence of a Community measure unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred. The applicants also need to demonstrate a comparably significant economic interest in the outcome of the complaint procedure. In general, judicial review in relation to a central bank is very unusual. Louis argues, nonetheless, that in one way the existence of the possibility to judicial review reflects the will of the authors of the Treaty to insert the ECB fully in the EC legal order. Therefore, it is an important form of accountability, which in some way complements the political dialogue with the European Parliament and compensates for the technocratic features of the Bank.

Despite the Treaty based power of the ECJ to review the acts taken by the central bank, the competence might be difficult to exercise, given the inherent complexities of monetary policy, despite the fact that price stability in itself is a sufficiently simple aim. Thus, the ECJ can be expected to make a relatively moderate review of the acts of the Bank, in the same way as it has been careful to state that the other organs have acted beyond their competence. This is partly due to the Bank’s large margin of discretion in the field of monetary policy, partly to the fact that the Judges do not have the expertise within monetary policy that would be needed in order to be able to establish that the Bank is guilty of a failure to act or has taken the wrong decision. Therefore, the lack of expertise in the monetary field leads in one way to only nominal right to review. Claims of invalidity based on

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80 Idem.
81 Idem., p. 145.
82 Case CNTA 74/74, p. 546, point 16.
83 This has been stated by Crombeen within the area of competition law. Within that field, examples of such interests might include the potential for loss or injury as a direct consequence of the alleged infringement. Crombeen, Iris L.P. (1998), p. 160.
84 Judicial review in relation to other organs is more general, according to Art. 220 EC the ECJ shall ensure that in the interpretation and application of the Treaty the law is observed.
87 Nergelius, Joakim (1998), p. 147-148. With respect to the ECB it will be, at least in the beginning, more a question of a very marginal review. Idem.
infringement of a procedural requirement or serious misconduct of a Member of the Governing Council might be the only clear-cut cases where the Court would have the competence to act.

Furthermore, the requirement of a serious damage results in the extreme difficulty of proving that the act of an organ, especially that of a central bank, caused damage of that description. Even if the failure of the Bank to meet its main objective, price stability, would result in the weakening of the possibilities of an individual to enjoy many fundamental rights, it is extremely unlikely that anyone could ever get the Bank to accept the responsibility for that. When seen as a matter of principle, the question is even more fundamental as it is difficult to understand why such new instances that do not function on the basis of the principles of accountability and responsibility for one's results are created. On the other hand, considering the results of this non-democratic government the problem is smaller as the status of the individual remains almost untouched if only its direct effect is considered.

The role of the ECB in relation to undertakings is more comprehensive than in relation to private individuals as they are touched by the powers of the ECB in a more direct way. This can also be seen as a rule of law question as the norms adopted by the Bank are not necessarily public and knowable to all. Furthermore, whether laws are binding on everyone including the state (or the EU) and its officials is in the case of the ECB not sufficiently effectively controlled. The right to judicial review by the ECJ can be seen as some kind of a guarantee of the rule of law as it means that the Bank does not enjoy absolute legal independence. Still, even the acts of the ECJ have been criticised and fundamental rights within EC law must be seen as an underdeveloped area. The priority of economic efficiency might also indicate that other rights of the individual in relation to EU organs are not as effectively protected. The same applies to the relationship between the ECB and an individual. Therefore it is of utmost importance to consider the relationship of the Central Bank to democracy and its possibilities to function in a legitimate manner.

3. Aspects of Legitimacy and Democracy

3.1. Principle of Reversibility as a Justification

As described by Edwards, the formal entry into force of the Treaty of Maastricht in November 1993 was surrounded by a certain air of uncertainty along with one of
relief.\textsuperscript{88} The discussion preceding this milestone indicated that a number of different elements that had seemed important in the past in legitimating the integration process now seemed deficient and inadequate.\textsuperscript{89} Thus, the consequent moves to establish a Political Union in Europe resulted not simply in the problems related to ratifying the Treaty but also in a more general scepticism towards the single currency which would symbolise the Union.\textsuperscript{90} Among the consequences were the results of the French and Danish referendums. In Germany the discussion was dominated by a number of cases where the legitimacy of the Treaty, especially that of the EMU and ECB, was questioned.\textsuperscript{91}

After considering the cases the German Constitutional Court established that even if monetary policy in the EMU becomes isolated from parliamentary, democratic legitimacy, the German Constitution provides expressly that the functions and powers of the Bundesbank can be transferred to the ECB.\textsuperscript{92} Subsequent important alterations to the integration programme would, however, not be covered by the existing Act of Accession and would therefore not be legally binding within the sphere of German sovereignty.\textsuperscript{93} Placing most of the management of monetary policy on an autonomous basis in the hands of an independent central bank restricts democratic legitimacy, stemming from the voters in the Member States, and therefore affects the principle of democracy. This modification of the democratic principle was, however, according to the Constitutional Court, acceptable as it took account of the particular mention that an independent central bank is a better guarantee of the value of currency.\textsuperscript{94} Consequently, the placing of monetary policy

\textsuperscript{88} Edwards, Geoffrey (1998), p. 121. \\
\textsuperscript{89} Idem., p. 125. \\
\textsuperscript{90} Idem., p. 131. \\
\textsuperscript{91} The best-known case is \textit{Manfred Brunner and Others v. the European Union Treaty}, Bundesverfassungsgericht (2. Senat) 12.10.1993, Cases 2 BvR 2134/92 and 2159/92. The case has also been published in (1994) 1 CML Reports 57, Vol 69(2), pp. 57-108. \\
\textsuperscript{92} According to the Court, this provision also means that the implementation of the power is not in itself contrary to basic rights. Protection of fundamental rights is result of a “relationship of cooperation” between the ECJ and the Constitutional Court. \textit{Brunner and Others v. the European Union Treaty}, pp. 78-79. According to the Court, it is part of the unassailable content of the democratic principle that the carrying-out of state functions and the exercise of state powers is derived from the people of the state and the persons exercising them are fundamentally answerable to the people. Still, the necessary relationship of responsibility can be established in various ways. What according to the Court is decisive is that a sufficiently effective content of democratic legitimacy, that is, a specific level of legitimacy is achieved. Idem., pp. 84-85. \\
\textsuperscript{93} \textit{Brunner and Others v. the European Union Treaty}, p. 89. According to the Court, Germany’s membership in the Union and the rights and duties that follow therefrom have been defined in the Treaty so as to be predictable for the legislature and are enacted in the Act of Accession with sufficient certainty. Idem. The Court underlined that the interpretation of the Treaty might not have effects that are equivalent to an extension of the Treaty and that such an interpretation of enabling rules would not produce any binding effects for Germany. Idem., p. 105. \\
\textsuperscript{94} \textit{Brunner and Others v the European Union Treaty}, p. 104. Emphasis added.
within the independent jurisdiction of the ECB in accordance with the strict criteria of the Treaty and the Statute satisfied the requirements of the German constitution under which a modification could be made to the principle of democracy.95

The decision of the German Constitutional Court is often referred to in connection with the attempts to restore the democratic deficit. According to Gustavsson, the Court argued for a constitutional Status Quo, namely indicating that the principle should even in the future be provisional suprastatism and overstatism without democracy.96 Even today, many responsible politicians would argue in this way if placed against the wall.97 What makes the theory somewhat unreliable is, however, that according to the Treaty one of the constitutional principles applicable to the Bank is irreversibility in the form of irrevocable fixing of convergence rates98 and the fixing of the calendar for transition to Stage 3 of the EMU99 which provide the context for a fully operational ECB.100 Against this background the Constitutional Court's theory of the provisional nature of the transfer of powers is imperfect. Furthermore, the provisional character of suprastatism has never been demonstrated in practice.101 Also Article 312 EC states that the Treaty is concluded for an unlimited period, which gives the impression of the arrangement being rather permanent than temporary. The democratic deficit is defended by the Court in terms of marginality, predictability and revocability, which according to Gustafsson leads “one to expect that the Court would be disinclined to view the EMU as democratically acceptable”.102 Still, the converse actually obtains. Thus, “in adducing the position of the constitutionally independent and guarded Bundesbank, the Court makes a European virtue out of a German exception from the general rule of popular sovereignty and democratic accountability.”103

Following the Court’s reasoning, price stability becomes a value of greater significance than democracy and its prioritisation takes place at the expense of other rights of the individual. Whether the EMU arrangements can be considered a modification of the principle of democracy is in the author’s view debatable, as is the extent to which the ECB can be regarded as democratic at all. One aspect of the

95 Idem, p. 104. According to the Constitutional Court the fact that an independent central bank is a better guarantee of price stability has been tested and proven in the German system.
97 Idem., p. 215.
98 Now Art. 123(4) EC.
99 Now Art. 121(4) EC.
103 Idem.
theory, forgotten by many, is the fact that the independence of the central bank is only one necessary condition for price stability\textsuperscript{104} and that stability cannot be achieved solely by monetary policy. Thus sacrificing a number of political rights does not in itself guarantee the fulfilment of other fundamental rights contributed to by price stability.

3.2. Through Democracy towards Greater Legitimacy

The debate about democracy within the EU is part of a wider discussion on the status of human rights and fundamental freedoms in the Union. In the recent years, the democratic deficit of the Community governance has received great attention, partly due to the paradox of the principle of democracy otherwise being considered more or less a fundamental European value. Usually, and especially on ceremonial occasions, it is claimed that democracy legitimates itself.\textsuperscript{105} Even if public international law does not recognise the principle of democracy as such, the major international treaties do spell out the essential features of democracy, understood as the right of all citizens to participate in the political life of their societies.\textsuperscript{106} Recently some scholars have argued that democracy, or more specifically the right to vote in free and fair elections, has achieved universal recognition as an international legal right.\textsuperscript{107}

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\textsuperscript{104} Gros, Daniel (1998), p. 353. According to Gros other important factors that assure price stability in the long run are the aversion to inflation felt by the public and, more particularly, the behaviour of the representatives of employees and employers reflecting such an attitude.\textsuperscript{Idem}.

\textsuperscript{105} Hermansson, Jörgen (1996), p. 37.

\textsuperscript{106} Curtin, D.M. (1997), p. 34. See e.g. art. 25 of the International Convention on Civil and Political Rights, referred to also in footnote 41. Rosas underlines that the article explicitly accepts both the direct and indirect forms of democracy. Rosas, Allan (1999), p. 438. Even if there exists no “right to democracy” can democracy be seen as a combination of some political rights such as the right to political participation and the right to vote. From these follows even the right to hold the decision-makers accountable through a possibility of not renewing a mandate in the next elections and this way require changes in the policy through periodic elections. According to Chryssochoou, a responsible government not only has to give an account of itself to its citizens, but also needs to be prepared to listen to, and answer questions in, the legislature about its actions and inactions. Chryssochoou, Dimitris N. (1998) p. 51. This requirement is partly fulfilled by the ECB.

\textsuperscript{107} This has been stated by Curtin, D.M. (1997), p. 33. Even according to Rosas it is clear that the international community has increasingly rallied around a basic requirement of democracy and political rights. Rosas, Allan (1999), p. 447. This is according to Rosas visible e.g. in the results of the World Conference on Human Rights in Vienna 1993 and the work of the OECD Human Dimension. Rosas also mentions the resolutions of the UN Security Council such as the resolutions on South Africa, Cambodia, Haiti and Burundi. Idem. pp. 446-447. Rosas makes also reference to the human rights clauses in all trade and co-operation agreements the Union has entered with third countries, which include an express right to suspend the operation of the agreement if the other party violates “democratic principles”. Idem. p. 447.
\end{flushright}
According to Scott, whilst it is the application of law that maintains the existence of a state, it is the democratic arrangements that legitimise the rule of law. A large portion of laws are accepted because they are fashioned by the democratic process and can be changed through the exercise of democracy. In a democracy the executive carries out the business of government whereas the constitutional role of the parliament is to scrutinise, to call to account and to make a global judgement of confidence in the executive government. Democracy is a way to create greater legitimacy. At one level, legitimacy is about the justification, and the acceptance, of authority and of the exercising of power. Thus, democratic legitimacy is a feature of collective decisions that accord with certain secondary rules. According to Nida-Rümelin, the decisions made using democratic procedures depend on the presupposition of being at least fundamentally capable of achieving common consensual agreement, whereas more comprehensive legislative projects are universally justified with normative arguments like the common interest, political justice and economic efficiency.

An ideal form of government from a democratic point of view is a structure that guarantees justice and equal rights for all citizens who wish to participate in the decision-making. Decisions affecting the lives of individuals must be subject to public accountability. In brief, the civic virtue of contemporary government relies on the premise that the representatives of the demos decide policies for the interests of the demos and under the control of demos. The conception of democracy as an institutional arrangement has as its ultimate task to successfully channel and reflect the wishes of the majority in both the policy-formation and policy-execution stages. Still, it has been argued that political independence and democratic accountability do not need to be mutually exclusive, as there exist other forms of democracy apart from that based on the role of the parliament. Therefore,

110 De Búrca, Gráinne (1996), p. 349. According to De Búrca, since the Member States lose much of the power, which is transferred to the European Union, their internal, constitutional structures can, at best, constitute only an indirect source of legitimacy of Community power. Idem., p. 352. According to De Búrca it is argued that given that the Union is not a state, it does not require the same mode of democratic legitimation, which we expect of the state, but can be legitimated in other ways. Idem., p. 353.
111 Nida-Rümelin, Julian (1997), p. 43. According to Nida-Rümelin, it is, nevertheless, difficult to say in abstract terms which secondary rules are constitutive for a democratic system. Idem.
112 Idem.
114 Idem., p. 56.
115 Idem., p. 48.
one way to create legitimacy is to limit and control the delegated powers e.g. through judicial review and predetermined goals.\textsuperscript{116} Harden argues that even within the framework of a State, the complexity of the tasks of modern government is such that not all public power can be exercised directly by elected politicians.\textsuperscript{117} Every political system also includes a number of institutions that cannot claim to function in a democratic manner, such as the court system, but which are still a central part of a democracy. Still, at the same time as the citizens’ possibilities to affect decision-making decrease their interest of the process also potentially disappears. Democracy in the European Union is certainly desirable and maybe possible, but only if new ways to design the institutional mechanisms for holding executive power accountable to Europe’s voters are discovered.\textsuperscript{118} Therefore, even measures other than those usually suggested, increasing the powers of the European Parliament and of the ECJ, are needed. In any case, large-scale democratic deficiencies should not be seen as the price citizens must pay for their governments’ European centred activities.\textsuperscript{119} Democracy and legitimacy are not co-terminus.\textsuperscript{120}

3.3. Supervisory Mechanisms and Legitimacy

Credibility, legitimacy and accountability are central concepts that should be distinguished among when discussing the ECB.\textsuperscript{121} Credibility is based on the expectation that an institution can fulfil the functions it has been delegated and will properly carry out the functions it is entrusted with.\textsuperscript{122} In the case of the ECB it is crucial for the success of the Bank (and the EMU) that it can establish sufficient credibility and it is, in fact, questionable whether this has been achieved. Legitimacy, on the other hand, refers to the belief that a specific institution is widely recognised or at least accepted as being the appropriate institution to

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\item \textsuperscript{116} Majone, Giandomenico (1996), p. 13-14.
\item \textsuperscript{117} Harden, Ian (1994), p. 624.
\item \textsuperscript{118} Hix, Simon (1998), p. 47. According to Hix, for at least the foreseeable future, the EU is an ‘upside-down political system’: the institutions at the national level exercise greater executive authority in most areas of public policy than the European institutions, and the media and the general public are primarily concerned with who controls these national offices. Idem. p. 44.
\item \textsuperscript{119} Chryssochou, Dimitris N. (1998), p. 63.
\item \textsuperscript{120} Weiler et al (1995), p. 6. One knows from the past of polities with arguably democratic structure and process, which enjoyed shaky political legitimacy and were replaced, democratically, with dictatorships. One knows from the past and present of polities with an egregiously undemocratic governmental structure and process which, nonetheless, enjoyed or enjoy high levels of legitimacy. Idem. p. 6.
\item \textsuperscript{121} The following distinction is introduced by Snyder in Snyder, Francis (1999), p. 463.
\item \textsuperscript{122} Snyder, Francis (1999), p. 463.
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exercise specific powers. Accountability refers to the fact that the institution is more or less responsive, directly or indirectly, to the people who are affected by its decisions. Therefore, accountability and legitimacy are closely connected. On second thought, credibility has a connection with that form of legitimacy that is created through beneficial results. As stated by Cooper, the ultimate basis for a democratic government is “accountability to the public by all officials who make policy decisions affecting public welfare”. Thus, according to Cooper, the ECB fails to satisfy this principle when it frames and executes one of the most important aspects of policy in modern economies, affecting hundreds of millions of people without being accountable to anyone. This also entails lacking legitimacy.

Both at the national and EU level recent years have shown a tendency towards autonomous organs, specialised agencies that have independent regulatory powers within a specific area. As a result of the transfer of certain powers to a new organ some of the legitimacy is lost – power can be delegated within the limits established by law but legitimacy does not automatically follow. Therefore the new institution must be able to create and establish its own legitimacy. This might in some cases prove a difficult task as these agencies are in most cases run by experts nominated by politicians and they implement extensive but by democratic methods marginally controllable power. Many of the problems in this context can be recognised even in relation to the ECB. Even though the legislative powers of the ESCB are subject to judicial review by the ECJ, which often is not the case with these agencies, the powers of the Bank represent quite a far-fetched model of indirect participation, even when assessed within the already problematic constitutional structure of the EU. The Bank is not the most suitable vehicle for increasing the accountability and overall constitutional value of the Community institutional matrix and even inside the EU its lack of accountability is highlighted.

123 Idem. According to Snyder, the legitimacy of the whole of the EMU is closely bound up with the nature and function of its institutions, the ECB and the ESCB.
124 Idem.
125 Cooper, Richard (1994), p. 70. Cooper underlines that whereas democracies differ greatly in their detailed institutional arrangements, the fundamental principle is the same.
126 Idem.
127 Such agencies include for example the European Environmental Agency, the Agency for the Evaluation of Medicinal Projects, the Agency for Safety and Health at Work and the Monitoring Centre for Control of Drugs and Drug Addition. Power can be delegated to these administrative organs e.g. in order to create greater efficiency or increase expertise.
128 Scheinin, Martin (1998), p. 23. It has even been stated that the ECB represents a great deal of the EU’s democratic deficit.
According to Scheinin, in the case of the ECB, the EC Treaty includes no appropriate legislative structure guaranteeing that the enactment of legal rules at the decisive stage of the process would be in the hands of a representative legislative body elected for that purpose.\textsuperscript{130} This means that the fundamental constitutional principle of the participation of those who are affected is compromised\textsuperscript{131} and indicates a lack of procedural legitimacy. At the same time this is a prevalent solution when central banking is considered – there exists hardly any central bank whose legal acts would be directly controlled by such an organ. On the other hand, the ECB has more comprehensive powers than most of the other central banks and \textit{de facto} can adopt acts affecting the legal status of an individual. This makes one question the democratic accountability and therefore also the legitimacy of the ECB – the weakness in the possibilities to call for democratic control and accountability and the Bank’s isolation from political influences contribute to an increased democratic deficit in the EU.\textsuperscript{132} The independence of the ECB can, however, also be seen, in accordance with the theory of the German Constitutional Court, as a modification of the principle of democracy that has been specifically created to implement monetary policy.\textsuperscript{133}

The fact that the term of office of the members of the Executive Board is eight years and is non-renewable\textsuperscript{134} weakens the democratic accountability of the ECB even further in the sense that the public cannot show its dissatisfaction with the leadership by not renewing their mandates. During those eight years, a member of the board can be forced to retire by the Court of Justice only if he no longer fulfils the conditions set for the quality of his work or if he has been guilty of serious misconduct.\textsuperscript{135} Firstly, this entails that the appointments undoubtedly become political even if the mandate cannot be renewed. Secondly, however, this is not necessary a bad thing against the background of political legitimacy. As suggested


\textsuperscript{131} Idem. According to Scheinin, the situation of the ECB is corollary of the more general constitutional problem or defect in the constitutional structure of the EU. Hence, law making in the EU is not based on direct or first-degree-indirect participation of the people. Idem.


\textsuperscript{134} Art. 112(2)b and Art. 11(2) of the Statute. The members shall be appointed from among persons of recognised standing and professional experience in monetary or banking matters by common accord of the governments of the Member States on a recommendation from the Council, after it has consulted the European Parliament, and the Governing Council of the ECB. The Statute includes specific provisions for the initial appointment of the Executive Board, namely that the President is appointed for 8 years, the Vice-President for 4 years and the other members for terms of office of between 5 and 8 years. None of these are renewable (Art. 50).

\textsuperscript{135} Art. 11.4 of the Statute. This is initiated by an application by the Governing Council or the Executive Board.

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by Gros, it is debatable whether or not the requirement strengthens independence: on the one hand it implies that governments cannot reward ‘soft’ policy by a second turn. On the other hand it means that in practice the cohesion of the Board might be diminished and all Board members might be even more dependent on political good-will to find suitable jobs after their term has expired. Consequently, not only is the ECB shielded from politicians, the statutes also place it beyond the reach of democratic rules that sanction bad behaviour. Furthermore, changes in the functions and goals of the ECB require the revision of the Treaty. This takes not only time but also the agreement of all Member States, which in practice makes it almost impossible.

It is clear that there exists no idealistic nation state where all principles of democratic accountability could be made a reality also within monetary policy. Central banks have traditionally enjoyed varying levels of independence. There are, however, considerable differences between the ECB and national central banks, partly in their relation to parliamentary control. According to constitutionalism an independent central bank is a threat to democracy only if it is developed to have a management that works in parallel with the political government but under no requirement to function in an accountable manner. Some observers are of the opinion that accountability requires explanation and justification, but not necessarily control by elected politicians. According to the result-dominated theory, a loss of democracy in this sense can be accepted if

138 The requirement of all Member States acceptance, being primary law, makes the ECB immune to the incidence of political changes. Hahn, Hugo J. (1991), p. 814. In some Member States this would require constitutional amendments. At the same time it is, according to Herdegen, difficult to visualise higher restraints on democratic principles or a stronger entrenchment against majority rule between nations. Herdegen, Matthias J. (1998), p. 21. This view can also be criticised – unfortunately it is difficult to believe that the ECB in practice would be the most extreme example of an infringement of the implementation of the principle of democracy.
139 Hoffmeyer sees the accountability problem in relation to the question of ultimate political control and considers the central banks functioning in national systems having at least two formal strings to the political system. Firstly, their rules have been stipulated and can be revoked by parliaments. Secondly, central bank leadership is nominated politically and in almost all cases for a limited period. In addition monetary policy decisions are subject to public opinion in the sense that they must be understood and in the long run accepted by the public. Hoffmeyer, Erik (1992), p. 37. According to Elgie, compared to other central banks, the institutional architecture of the ECB is a departure from the norms of political accountability and there therefore is a distinct “democratic deficit” which needs to be addressed. Elgie, Robert (1998), p. 53. Central Banks in the Euro area do, however, suffer from similar problems than the ECB and as their status was strengthened through the convergence criteria.
141 E.g. According to Harden, in a democracy there is no reason for all public power to be concentrated in the hands of an executive government. Harden, Ian (1990), p. 414.
economic efficiency is rated higher than democracy in the economic and political situation at hand.\textsuperscript{142} According to this theory it becomes crucial for the legitimacy of the EMU that the arrangement has demonstrable positive results.\textsuperscript{143} Furthermore, it is difficult to decide whether increased democracy would eventually produce more preferable economic effects.\textsuperscript{144}

In democracies, all power is delegated power,\textsuperscript{145} and the parliament is free to make any decisions it wishes. Why therefore would it be wrong to give a central bank an independent status?\textsuperscript{146} After all, the possibility to delegate decision-making power is a necessary and widely accepted part of representative democracy.\textsuperscript{147} The independence of a central bank can never be absolute. Still, an organ of the state needs to implement its powers in a legitimate manner. Therefore, in a democratic state the independence of the central bank needs to be “accountable independence”.\textsuperscript{148} Still, it should not be forgotten that the EC (EU) is not a democracy, at least not in the traditional sense.

It is often concluded that the deficit of democracy and legitimacy can be avoided by establishing other sources of accountability by way of combining different supervisory mechanisms all the time maintaining the important independence of the Bank.\textsuperscript{149} One possibility is public discussion and the principle of

\textsuperscript{142} But this only assuming that the decision is unanimous and that the economic efficiency actually increases as a result of the politically independent monetary policy. This is one way of handling the problem of the democratic deficit. \textit{Agné, Hans} (1998), p. 28. At this point it is possible to see some connection with the infranational (or the neo-corporatist) model of government of J.H.H. Weiler as the implementation of law is rather justified by results than process. See e.g. \textit{Weiler} et al (1995). See also and the problem of “utilitarian support” in \textit{Obradovic} (1996) mentioned in footnote 40.

\textsuperscript{143} \textit{Hermansson, Jörgen} (1996), p. 38. The same applies to the whole of the EU.

\textsuperscript{144} Idem., p. 37.

\textsuperscript{145} \textit{De Grauwe, Paul} (1998), p. 2. According to \textit{De Grauwe}, people delegate powers to politicians and politicians delegate it to specialised institutions. In order for the pyramid to work well, at each stage there must be a strong mechanism, which ensures that those who receive power remain accountable.

\textsuperscript{146} \textit{Arndt, Hubertus} (1998), p. 221.

\textsuperscript{147} Idem., p. 222. See also \textit{Jyränki, Antero} (1994). According to \textit{Jyränki}, the more democratic a law-making procedure is, the easier the delegation is approved of and the longer the distance to political institutions, the weaker political supervision becomes. \textit{Jyränki, Antero} (1994), pp. 142-143. According to \textit{Jyränki}, the principle of democracy can also be regarded as meaning that the legislative power can only be exercised by a parliament. \textit{Jyränki, Antero} (1994), p. 140.

\textsuperscript{148} \textit{Lastra, Rosa Maria} (1992), p. 482.

\textsuperscript{149} The topic has been discussed by a number of scholars. The nine (most comprehensive) alternatives following in the main text are introduced by \textit{Scheinin} in \textit{Scheinin, Martin} (1998), pp. 28-33. Another theory is introduced by \textit{Majone} according to whom independent organs can be placed under democratic accountability through different control mechanisms. \textit{Majone} names clear objectives and procedural requirements, judicial review to protect the rights of individuals, expertise to guarantee the technical quality of decisions, transparency and the participation of the public to guarantee the organs responsibility in relation to it. \textit{Majone, Giandomenico} (1996), p. 14. For \textit{Padoa-Schioppa}’s theory see footnote 163.
transparency\textsuperscript{150}, which in the case of the ECB is limited. Another factor that could contribute to the democratic legitimacy of the ECB is the adoption of a binding objective through a democratic process. A fixed objective is, nevertheless, legitimate only if there is some kind of control on how the objective is interpreted and if there is a possibility to change the goal through a democratic process.\textsuperscript{151} In the case of the ECB the Bank interprets the goal independently.\textsuperscript{152} Revisory power of the European Parliament to amend the objective of the Bank would create legitimacy but this is not the case with the ECB.\textsuperscript{153} Furthermore, there is the possibility for judicial review of the acts of the ECB, which at least has strong potential in the construction of legitimacy.\textsuperscript{154}

\textsuperscript{150} According to Scheinin, many central banks have improved their capacity to be in regular dialogue with the media. Every statement by a central bank is, however, a message to the market and is intended to influence market operations. Therefore, this communication must be seen as instrumental and not discursive. Scheinin, Martin (1998), p. 29. According to Ungerer, however, the central banks in Germany, Switzerland, the US and the Netherlands are not independent in that sense that they would be outside democratic control and the formulation of public opinion. Ungerer, Horst (1993), p. 18.

The ECB has often been discussed in relation to the central bank of New Zealand. According to Mayes it is, however, impossible for the ECB to reach a population more than 100 times that of New Zealand, a fact that in practise sets the banks in very different positions. The problem with respect to the ECB becomes more serious in connection with the whole of the EU's democratic deficit. This makes the ECB rather to follow the rules it has been placed under than to see its competence in the future restricted. Mayes, David G. (1998), p. 24.

\textsuperscript{151} According to Arndt the possibility to change the judicial status and objectives of the central bank functions as an alarm system. The law the regulating the status of the central bank must be based on the will of the citizens. Therefore it should not be possible for a central bank to function in the long run without the acceptance of the citizens. Arndt, Hubertus (1998), p. 223. Also Cooper suggests that the European Parliament should be given the power to amend the Statute, by analogy with independent national central banks (perhaps by special majority), without the much more arduous (and unanimous) process required to change the whole of the Treaty. Cooper, Richard (1994), p. 71.

\textsuperscript{152} Scheinin suggests that greater transparency and accountability could be created through a process through which the ECB and the Council together would determine a numeric inflation target for a fixed period of time in order to concretise the primary objective. Scheinin, Martin (1998), p. 30.

According to Gormley and de Haan, the objective of the monetary policy should be decided according to normal democratic procedures, i.e. logically by the European Parliament, but the game should be delegated to the ECB. Against this background, the ECB falls short of democratic accountability. Gormley and de Haan (1998), p. 112. The article is analysed in Francis Snyder (1999), p. 466.

\textsuperscript{153} In the case of the EU, neither the European nor the national parliaments have the power to amend the objective. Scheinin, Martin (1998), p. 32.

Fifthly, the requirement of professional expertise from the Board Members\textsuperscript{155} could create legitimacy by guaranteeing the high quality of decisions. The sixth alternative is the appointment procedure of the Members of the Bank leadership, which in the case of the ECB is not primarily democratic in nature.\textsuperscript{156} The ECB is under some reporting obligations to the other EC organs which, however, without any decision-making powers can only have a limited role in contributing to the Banks’s democratic legitimacy.\textsuperscript{157} The eighth possibility is the European Parliament, the modest role of which in the EU structure is apparent.\textsuperscript{158} Furthermore, one should remain critical of the possibilities of the European Parliament to increase legitimacy and democracy in the EU. According to Edwards, the elections to the EP have witnessed a relatively low and even falling voter turnout and therefore it would seem that the organ has only won limited credibility with the electorate.\textsuperscript{159} Finally, Scheinin mentions the possibility of

\textsuperscript{155} Scheinin, Martin (1998), p. 30. According to Scheinin the idea of transferring the power to make decisions from “politicians” to “experts” is fundamentally undemocratic. Idem. According to De Grauwe, political independence of the ECB has been based on a very primitive theory according to which the ECB consists of wise men, whereas politicians are wicked people eager to undermine the good policies of the central bank. De Grauwe, Paul (1998), p. 1. Also according to Arndt the theory he calls “Verständnis-Argument” including that only experts being capable of making monetary policy decisions sounds somewhat exaggerated. Arndt underlines that the national parliaments take continuously decisions within other very complicated areas and therefore it is not motivated to claim that specifically monetary policy would be an area needing a separate independent government. Arndt, Hubertus (1998), p. 218. See also Scheinin, Martin (1997b), p. 181.

\textsuperscript{156} Scheinin, Martin (1998), p. 30. According to Scheinin the independence of the central bank would undoubtedly be compromised in case the Governor of a NCB could at any time be given a vote of non-confidence.

\textsuperscript{157} Idem., p. 31. Gros points out that the reporting obligation can still be useful for parliamentarians in helping develop understanding of the policies of the central bank. Gros, Daniel (1998), p. 359. Greater powers to the European Parliament with regard to the ECB, through a regular report by the ECB president and a formal veto power over the ECB leaders and this way a transformation in the distribution of power in the EU system of multi-level governance signifies, however, according to Snyder, increased legitimation without increased democratisation. Snyder, Francis (1999), p. 466.

\textsuperscript{158} Scheinin, Martin (1998), p. 31. The seriousness of this defect will according to Scheinin depend on the role of the national Parliaments in relation to NCBs and the operation of national Governments in the Council. According to Dashwood et al, the political accountability of the ECB makes a domain where the European Parliament will have to play a role in a context very different from that prevailing at national level. See Dashwood, Alan et al (1999), p. 519. An important aspect of the future role of the European Parliament is its ability to exert control on the Commission and the new independent agencies, among them the ECB. According to the authors, the Parliament has several times asked for greater powers e.g. in the appointment procedure of the Executive Board members in the same way it participates in the appointment of the Commission. See Dashwood, Alan et al., p. 519. Greater powers to the Parliament in this area would, however, mean taking a new step towards a federal Europe. Cooper, Richard (1994), p. 71.

\textsuperscript{159} Edwards, Geoffrey (1998), p. 129. Still, the European Court for Human Rights established in the case Matthews v. the UK that “the European Parliament represents the principal form of democratic and political accountability in the Union”. “Despite its limits the legitimacy of the organ it “derives its legitimation from the direct elections by universal suffrage” and therefore the organ “must be seen as that part of the Community structure which best reflects concerns to “effective, political democracy” (point 52).
national parliaments participating in the decision-making.\textsuperscript{160} But as decision-making powers are delegated to genuinely independent or supranational bodies, as is the case with the EU, the possibilities of national parliaments are very limited, as decisions are not made by Government representatives but by independent operators, such as the ECB.\textsuperscript{161} These nine alternatives show, according to Scheinin, that there is certain strong potential for combining independence and accountability in the operation of the ECB, but at the same time they show worrying signs of a serious deficit of legitimacy.\textsuperscript{162} Gros, on the other hand, concludes that the claimed conflict between the requirement for a central bank to be independent and the idea that it should also be accountable for its actions to a democratic body can be more apparent than real.\textsuperscript{163}

It has been stated that the ratification of the Treaty and Statute by all Member States, a clear legal basis and organs with (even if only indirectly) elected members guarantee that the independence of the ECB does not result in a complete lack of any democratic control.\textsuperscript{164} Some authors are, however, of the opinion that accountability cannot be guaranteed simply by the fact that the initial stage of the EMU is democratic but that the continuing operations and policies of the Bank should be subject to democratic control.\textsuperscript{165} This entails first and foremost a problem connected with the Treaty-making.

One possibility to increase democracy would be to give the Council the right to override actions of the ECB in some cases, but only after debate in national parliaments.\textsuperscript{166} The competence of the European Parliament could be strengthened so that it at least could initiate an amendment to the Statute even if the change would require the approval of the Council to take legal effect.\textsuperscript{167} Another alternative would be the creation of a specific supervisory Board that would

\textsuperscript{160} Scheinin, Martin (1998), p. 32-33.
\textsuperscript{161} Idem., p. 33.
\textsuperscript{162} Idem.
\textsuperscript{163} Gros, Daniel (1998), p. 359.
\textsuperscript{164} Stredt, Detlef (1993), p. 249. See also Padoa-Schioppa, Tommaso (1994), p. 189 who mentions the ratification of the Treaty by all Member States and the judicial review guaranteeing its implementation by the ECJ; the national appointment procedures of the ECB leadership; the right of the president of the Ecofin Council to attend meetings of the ECB Council and the annual report of the Bank. Consequently, according to Padoa-Schioppa, the Bank clearly fits into the political structure of the Community and interact directly with the other institutions. Thus, its legitimacy is achieved in four ways.
\textsuperscript{165} Lastra, Rosa Maria (1992), p. 499.
\textsuperscript{166} Cooper Richard (1994), p. 71. This idea is based on the model in use in the Netherlands. In practice this might be both complicated and time consuming with reference to the rapid changes in the market.
function independently from both Community and national instances. This institution could oversee the ECB’s work and eventually have the power to veto, delay or at least discuss its decisions. The basic problem of independence and accountability would, however, still remain as it is highly unlikely that this kind of a government would itself be directly accountable, maybe unless the organ would be elected by and accountable to the European Parliament.

Without risking the required independence of the ECB and restricting the competence of the ECJ it would be necessary to guarantee that the political institutions of the EU have adequate possibilities to decide whether the monetary objectives and acts of the Bank correspond with the financial objectives of the Union as well as how the ECB in practice manages to achieve these goals. Those supportive of a strong and independent central bank find that sustainable and successful monetary policy is a prerequisite for legitimacy. Still, clarity and credibility can only be achieved through explicit voluntary precommitments to certain intentions and the possibility for the assessment of performance and results in case the predetermined criteria are not met. Furthermore, as stated by Obradovic, the concept of legitimacy refers not merely to the validation of rules and rule making but also to the acceptance of legal decisions by individual citizens, as a moral obligation to accept them.

The question of the ECB and legitimacy has been answered in two ways. To the first group belong those who think that the existing mechanisms constitute an acceptable and sufficient guarantee of legitimacy. To the other group belong those who find that even if the dispersed and scattered arrangements within the EMU contribute to creating legitimacy, the Bank’s powers give reason to feel uneasy about the legitimacy of the arrangement. Thus, the ECB cannot fulfil the requirements of democratic decision-making. The opinions vary as greatly between those who oppose the democratic deficit and those who speak for new restrictions to the implementation of the principle of democracy in order to create more technocratic ways of governance. To the latter group belong those who are in

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168 Padoa-Schioppa, Tommaso (1994), pp. 171-172 making reference to the Delores report; Antola, Esko (1997), p. 20. This kind of an organ has been successfully in use in some Member States, e.g. in Finland where the Parliamentary Trustees of the Bank of Finland have guaranteed parliamentary supervision at least at some level. A similar organ could supervise the ECB and eventually review or at least discuss decisions taken by the Bank.


favour of a total abandonment of accountability, a position that according to Gustavsson is “needed in order to defend the idea of the European Central Bank being irreversibly beyond any possible influence from electoral change or shifts in public opinion”.\textsuperscript{173}

In the already problematic structure of the Union the criticism against the ECB is highlighted even if an independent central bank is a normal solution in national arenas. It is extremely difficult to solve the problem of independence versus accountability. How to make the ECB more accountable and still keep it independent of political decision-making? As for a vision for the future, as stated by Brentford, “there is no evidence that the trade-off between independence and accountability will necessarily disappear in the long run.”\textsuperscript{174} With reference to the risk of inflation it is possible, however, that the Bank is one of those efficiency-oriented institutions that can only be legitimated through its results.\textsuperscript{175} Still, it is difficult for many to accept a political theory not built upon the principle of representativeness and not open to the possibility of changing policies and office-holders as the result of general elections.\textsuperscript{176} Therefore, there are observers who find that, in line with the German Constitutional Court, provisional suprastatism remains the best available option.\textsuperscript{177} In the author’s view, however, the theory is more fiction than facts and therefore hardly realistic. As stated by Chryssochou, “if the Union is ever to meet even the minimum requirements of a large-scale democratic polity, it needs to adjust its present arrangements to ensure the closeness, representativeness and accountability of the governors to the governed”.\textsuperscript{178} This applies even for the ECB. The Bank is in many ways characterised by a lack of democratic legitimacy. Thus, it is crucial to determine whether other arrangements can contribute to the establishment of sufficient legitimacy, which in the case of the ECB is questionable.

At the same time it is fully possible that the democratic problems of the Union and the Bank have been exaggerated. Even at the national level there are a great number of institutions that lack democratic accountability, such as the central banks in general, but their legitimacy is questioned extremely seldom.\textsuperscript{179} Generally

\begin{thebibliography}{9}
\bibitem{173} Gustafsson, Sverker (1999), p. 19.
\bibitem{174} Brentford, Philip (1998), p. 109. According to Brentford, “it is arguable that a lack of broad public support or the total absence of political involvement in monetary policy would lead to a central bank eventually being overridden.” Idem.
\bibitem{176} Gustavsson, Sverker (1999), p. 18.
\bibitem{177} Gustavsson, Sverker (1999), p. 18.
\bibitem{178} Chryssochou, Dimitris N. (1998), p. 47.
\end{thebibliography}
however, as explained by MacCormick, the deepest enemies of democracy in the contemporary world is the relapse to rule by a virtuous few, whether it be judges of a supreme court, a council of ministers deliberating in private or a bureaucracy of highly trained experts. According to Louis, in a democratic society it should always be the political authority that has the final word, even with regard to a central bank.

The possibility for a real, pluralistic and participatory democracy in the Union exists. It is, however, unclear whether there is political will to improve the situation. The reality might be that the legitimacy and the relevance of the whole of the Union is not sensed by large sections of the public. The same applies to the norms adopted by the ECB and central bank actions in general.

4. Conclusions

In general, EC law is adopted through different procedures where the Council, the European Parliament and the Commission have varying competence and functions. The ECB, however, adopts norms with the same legal status but independently of both the other EC organs and Member States. The fact that the ECB cannot function effectively with more restricted powers has not been questioned. Therefore it becomes necessary to consider the relationship between its independence and accountability. A central bank requires a high level of unpredictability in order to succeed in its objective and therefore it becomes difficult to consult other instances when taking decisions. Against this background the ECB is hardly too independent. So far the Bank has not taken measures that

180 MacCormick, Neil (1994-95), p. 296. According to MacCormick, this can be avoided through control of sovereign government and with full and equal participation of all citizens, or at least those who wish to involve themselves.
181 Louis, Jean-Victor (1990), p. 57. According to Louis, in case of persistent disharmony between the government and the central bank its importance depends greatly on the degree of autonomy granted to the central bank.
182 Gustavsson, Sverker (1996), p. 123. Governments wish to avoid making the Union democratic. For functionalists, the deficit is a central element of the Union, which becomes problematic only in the area of public opinion. Idem, p. 108. Thus, governments do not wish to empower the European organs with the same legitimacy they enjoy. Therefore the democratic deficit turns into a weapon against the powers of the EU in their hands.
could be criticised as unfounded or over-reaching. On the contrary, the ECB has every now and then been described as too careful and moderate in its actions. On second thought, also this can be seen as failure.

Even if the ECB has given the public access to its administrative documents confidentiality surrounds a major part of its working. Still, the Bank is of the opinion that its actions are already now more transparent than required by the Treaty. Still, when compared to legislatures in general, the System is characterised by a lack of transparency and democratic accountability. One should, however, welcome discussion on this topic between the public and the Bank.

Even if monetary policy in a sense seems an abstract area, whether the Bank succeeds or fails in its primary objective, the maintenance of price stability, influences the position of the individual in numerous ways. The realisation of many fundamental rights, such as the right to education, health care and social security, has a strong connection with price stability. Still, the actions of the Bank have only an indirect impact on the individual with the exception of undertakings. The ECB’s great investigatory competence and its power to sanction cause uneasiness in the same manner as the similar competence of the Commission has been criticised within competition law. Even the requirement of a sufficiently serious economic impact brings about problems of evidence – it will not be easy to show that the acts of a Central Bank have caused such an injury on an individual. These sanctions are, however, undoubtedly not going to be used very often. Furthermore, it is hard to imagine a situation where a central bank would deliberately adopt measures that infringe on the rights of individuals. Still, the question is also one of principle. The Bank has the competence to infringe on fundamental rights and therefore effective safeguards should be guaranteed against this. It is questionable whether the protection offered by the ECJ can in this situation be regarded as sufficient. It is also important to consider the acts of the Bank in light of the norms of the Treaty and the Statute to guarantee that the Bank does not widen its competence through its power to adopt norms.

The ECB has several times been accused of using power without the accountability that should automatically follow. It is crucial to guarantee that the ECB functions within a system of democratic political power and not outside of one. In the case of the ECB its objective has only been connected to the inflation concept which makes it difficult to find support for responsibility and, consequently, the Bank hard to supervise. The legitimacy of monetary policy cannot in EMU conditions be realised through traditional democratic mechanisms. Instead, combining different
supervisory arrangements that restrict and control the delegated powers, for example through judicial review and claims for accountability is necessary.

It is clear that the Treaty-makers have been fully aware of the potential lack of legitimacy of the Bank. Its democratic deficit has not been created by accident. It is, however, uncertain what was the reasoning behind the decision to choose this structure as most of the documents preceding the decision remain confidential. One possible explanation could be the need of a central bank to react quickly without parliamentary intervention, a need that in that case would be regarded as justifying the negative effects in the field of democracy. This would entail that undemocratic decision-making of a central bank would be more acceptable than that of another organ. This is also in many ways the only explanation available due to the Bank’s failure to meet both the procedural and substantive requirements for legitimate decision-making. Still, central bank uses great power in a society, which makes it one of the most central organs. The decisions of the ECB affect the lives of hundreds of millions of people. Can it be so that the only thing that matters is efficiency and that the organ only needs to be legitimated through its results? In the author’s view, even if the policies of the ECB proved to be profitable for all, the need to consider the relationship between the use of power on the one hand and democracy and the rights of individuals on the other does not disappear.

In many ways, the ECB makes more of an exception to than a modification of the principle of democracy. In order to function, the ECB claims in one sense lower legitimacy standards than otherwise would be required in relation to other legislative organs. This is motivated e.g. with the need to lead the market. In case the ECB is considered an exception to the principle, it is crucial that its actions can still be regarded as legitimate. Democracy, after all, is only one way to create legitimacy. To summarise, there are several scholars who find that the existing arrangements create sufficient legitimacy for the Central Bank System. But there are also those who think that the existing mechanisms, even if they take steps in the right direction, cannot save the situation. The implementation of the powers of the ECB does not enjoy comprehensive legitimacy.

The problem surrounding the independence of the ECB and the undemocratic character of the EMU has perhaps been overrated. The ECB is not the only undemocratic institution, neither at the European nor at the national level. Furthermore, the case of the ECB is not hopeless and there are possibilities to develop the legitimacy of the ECB further. The possibility of giving the European Parliament the competence to initiate an amendment of the Treaty or the Statute should be at least considered. The creation of a specific supervisory organ to
control the acts of the ECB is one possible solution. It might also be motivated to re-consider the competence of the Bank when first observed how it uses the competence it now has. Still, it is unlikely that the status of the ECB will experience greater changes in the near future. When the competence of the EU is extended to new areas new arrangements are needed and even the Central Bank System must remain flexible in order to enable new Member States’ participation in the EMU at least to some extent.

One of the most central problems with respect to the ECB is the placement of the law regulating the status of the Bank in the Treaty and the Statute, which makes their amendment complicated. It is questionable whether the first active year of the Bank can be considered successful. This can partly be dependent on the fact that its status is not optimal in all aspects. The extensive powers of the Bank would in any case be easier to accept if there was a possibility to amend them in an easier manner. This would even create greater legitimacy.

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