

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs	
Justice, Freedom and Security	
Gender Equality	
Legal and Parliamentary Affairs	
Petitions	

**Limits and opportunities
for the ECB in the multi-tier
governance**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

Limits and opportunities
for the ECB in the multi-tier governance

NOTE

Abstract

The European Central Bank constitutes together with the national Central Banks the European System of Central Banks: a unique governance system in which the execution of tasks conferred upon the ESCB is divided between the European level (ECB) and the national level (national Central Banks) and which is characterised by the principle of decentralisation. The EU level decides to which extent the national level is competent for the proper execution of Central Bank's tasks whilst the main decision-making body is composed by representatives of the national level. A possible extension of this successful governance to other field of economic governance in the euro zone is to be examined. The particularities of the ESCB (independence guarantee and its function to maintain price stability), however, conflict with an extension of its role. Such an extension would require more democratic accountability and in-depth modifications of the law and the functioning of the ECB.

This document was requested by the European Parliament's Committee on Constitutional Affairs

AUTHOR

René REPASI
Institut für deutsches und europäisches Gesellschafts- und Wirtschaftsrecht
Ruprecht-Karls-Universität Heidelberg
Friedrich-Ebert-Platz 2
D-69117 Heidelberg

RESPONSIBLE ADMINISTRATOR

Petr NOVAK
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: petr.novak@europarl.europa.eu

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

European Parliament, manuscript completed in December 2012.
© European Union, 2012.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS	4
Executive Summary	5
1. State of affairs: The European Central Bank as core institution of the European System of Central Banks	7
1.1. Overview of the legal framework of the European Central Bank	7
1.1.1. Legal particularities of the European Central Bank	7
1.1.2. The interplay of National Central Banks and the European Central Bank within the European System of Central Banks	8
1.1.3. Decision-making within the European Central Bank	10
1.2. Multi-level governance within the ESCB	11
2. Limits for the European Central Bank	12
2.1. Limits for the European Central Bank set by law	12
2.1.1. Tasks conferred upon the ESCB	12
2.1.2. Tasks conferred upon the ECB under Article 127(6) TFEU	12
2.1.3. Subject to other EU institutions and agencies	13
2.1.4. Subject to secondary EU law	13
2.1.5. Integration of non-eurozone Member States	13
2.2. Limits for the European Central Bank set by its function	14
2.2.1. The role of the “Lender of Last Resort”	14
2.2.2. Extension of the role of the ECB to supporting general economic policies	15
2.2.3. Limits to any extension of the role of the ECB: Democratic accountability and independence guarantee	15
2.3. Legal challenges to the ECB governance by the establishment of a Single Supervisory Mechanism	16
2.3.1. The scope of application of the independence guarantee	17
2.3.2. Inclusion of non-eurozone Member States into ECB’s decision-making process	17
3. Opportunities of the ECB in the multi-tier Governance	18
References	20

LIST OF ABBREVIATIONS

- EBA** European Banking Authority
- ECB** European Central Bank
- ESCB** European System of Central Banks
- HICP** Harmonised Index of Consumer Prices
- LTRO** Long Term Refinancing Operations
- NCB** National Central Bank
- OLAF** European Anti-Fraud Office
- OMT** Outright Monetary Transactions
- SMP** Securities Markets Programme
- Statute** Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

The European Central Bank (ECB) constitutes together with national central banks (NCBs) the European System of Central Banks (ESCB). The governance within the ESCB is unique compared to other fields of activity of the European Union. Normally, if a task is conferred on the EU it has thus the competence to carry out this task. If a task is conferred on the ESCB the necessary competences are divided between the ECB with its own legal personality, and the NCBs with their own legal personality according to their respective national laws. However, the supervision of these activities is assigned to the ECB.

The ESCB, therefore, has three layers of governance: A European layer, a national layer and a national layer under ECB supervision. A particularity of the ESCB's governance is that the Governing Council of the ECB has the right to decide on whether a NCB acting as independent national authorities on its responsibility and liability interferes with the objectives and tasks of the ESCB and that, by that, the ESCB is from now on competent for carrying out this task. The relationship between the European layer and the national layer in the ESCB is characterised by the principle of decentralisation according to which the ECB shall have recourse to the NCBs to carry out operations to the extent deemed possible and appropriate. The decision on whether the ECB acts (centralisation) or the NCBs under the ECB's supervision (decentralisation), however, lies with the decision-making bodies of the ECB. At the same time, the core decision-making body of the supervisory Union institution, the Governing Council of the ECB, is controlled by the supervised NCBs. Moreover, NCBs are the shareholders of the ECB.

This unique governance structure is the basis for the efficient execution of tasks conferred upon the ESCB, in particular, of the conduct of the monetary policy of the Union. Therefore, an extension of the ESCB's competences in the economic governance of the eurozone appears to be tempting. The Treaties, however, do not allow any extension of the role of the ESCB and the ECB without a Treaty change with exception of the conferral of specific tasks of banking supervision by means of regulations under Article 127(6) TFEU. The current proposal for such a conferral of tasks already reaches the limits set by EU law.

An extension of the role of the ECB by means of Treaty changes to a real lender of last resort including the right to impose fiscal and structural reforms on Member States or the extension of the primary objectives of the ESCB to economic objectives such as employment would require a higher democratic accountability of the ECB. By such an extension measures taken by the ECB would have political impacts. Such decisions need to be controlled by democratically elected bodies. Such a control, however, conflicts with the independence guaranteed for the ECB. It is therefore submitted in this note that the role of the independent ECB in the multi-tier governance should remain restricted to the conduct of the monetary policy of the Union under the objective of maintaining price stability. Competences needed for a Europeanization of economic and fiscal policies of the Member States should be granted to the political EU institutions such as the European Parliament, the Council and the European Commission. The lack of competences of the political EU institutions should not be compensated by extending the competences of the ESCB or the ECB.

Background and Aims

The purpose of this note is to assess the opportunities and limits for the ECB set by EU law and by its functions as defined by the Treaties. Current activities of the ECB in order to safeguard the stability of the Euro zone (such as the “Outright Monetary Transactions” (OMT)) are to be discussed as well as the current proposal to extend the role of the ECB to specific tasks of banking supervision. Both will clarify the limits and the opportunities of the ECB as part of the ESCB in the multi-tier governance.

For the purposes of this note one has to distinguish between “multi-level governance” and “multi-tier governance”. “Multi-level governance” is here understood as *vertical* policy-making and decision-making structures involving supranational, national, regional and local governments that are enmeshed in territorially overarching policy networks (Marks 1993: 402). “Multi-tier governance” focuses on the supranational level and describes the *horizontal* interplay between different subsets of Member States that establish a task-specific closer cooperation and, in particular, between participating Member States (“Ins”) and non-participating Member States (“Outs”) of such a task-specific closer cooperation.

As a preliminary remark, it should be noted that the ESCB is under the existing Treaties a role model par excellence for multi-tier governance. It includes the Eurosystem, composed by the ECB and the national central banks of the Member States whose currency is the euro, as well as the national central banks of the Member States whose currency is still their national currency. The ECB, however, is an institution for the Eurosystem. Its main decision-making body, the Governing Council, is composed by the Governors of NCBs of Member States whose currency is the euro and of the members of the Executive Board of the ECB who must be nationals of Member States whose currency is the euro. And its main task is the conduct of the monetary policy for the Euro. This particularity already gives a glimpse at the conclusion: Whilst the ESCB is a role model for multi-tier governance, the ECB is an institution for a subset of Member States charged with currency-specific tasks.

1. STATE OF AFFAIRS: THE EUROPEAN CENTRAL BANK AS CORE INSTITUTION OF THE EUROPEAN SYSTEM OF CENTRAL BANKS

1.1. Overview of the legal framework of the European Central Bank

The European Central Bank (hereinafter: ECB) is according to Article 13 TEU a Union institution. It is, however, characterised by some legal particularities unlike other Union institutions (1.1.1). The ECB is part of a special governance network structure called the European System of Central Banks (hereinafter: ESCB) in which the tasks conferred upon the ESCB are shared with National Central Banks (hereinafter: NCB) (1.1.2). The decision-making process within the ECB reflects this special governance structure (1.1.3).

1.1.1. Legal particularities of the European Central Bank

Inspired by the model of the German *Bundesbank*, the ECB enjoys a far-reaching independence from any possible political influence sought by the European Union or by the Member States (1.1.1.1). Furthermore and contrary to the other Union institutions foreseen by Article 13 TEU the ECB has a legal personality (1.1.1.2). Finally, the ECB has a regulatory capacity enabling the elaboration of regulations and making of decisions under Article 132 TFEU (1.1.1.3).

1.1.1.1. The independence of the European Central Bank

The independence is guaranteed under Article 130 TFEU “when exercising the powers and carrying out the tasks and duties conferred by the Treaties and the Statute”. This independence has four dimensions: a financial one (independent resources of the ECB outside of the EU budget), a personal one (term of eight years for members of the Executive Board without being renewable), a functional one (absence of any instructions from the EU or Member States as well as of any prior political approval) and an institutional one (distinct legal personality from the EU). The same applies to NCBs when they carry out ESCB tasks.

The independence has to be seen in correlation with the tasks and duties conferred upon the ESCB and the ECB. Moreover, the independence guarantee is not an end in itself. It is rather a means to achieve a certain objective: The free and uninfluenced conduct of the monetary policy of the Union.

1.1.1.2. The legal personality of the European Central Bank

The ECB has a legal personality (Article 282(3) TFEU). This legal personality is comparable to the one of the European Union according to Article 335 TFEU. Whilst other Union institutions foreseen by Article 13 TEU act as organs of the legal person European Union the ECB has the capacity to act in its own name. It is the subject of rights and obligations itself. This, however, does not mean that the ECB is to be distinguished from the European Union as a “specialised organization of Community law” (Zilioli & Selmayr 2000: 591). The ECB is limited to the powers conferred on it by the Treaties and the Statute (Article 13(2) TEU). It has to contribute to the achievement of the objectives of the Union as laid down in Article 3 TEU (Article 127(1) TFEU). The purpose of the legal personality is to guarantee the institutional independence of the ECB from the EU but not to exclude it from the Union. The

ECB is therefore a body of the European Union entrusted to pursue specific tasks of Union policy within a group of bodies (ECB and NCBs) that constitutes the ESCB (Smits 2003: 23).

1.1.1.3. The regulatory capacity of the European Central Bank

In order to carry out tasks entrusted to the ECB it has a regulatory power comparable to the Council and the European Parliament. It can make regulations and take decisions (Article 132 TFEU). This regulatory power is, however, restricted to the eurozone (cf. Article 139(2)(e) TFEU). In order to carry out its tasks the ECB does not need any executive powers to be conferred upon it by the EU legislator. By consequence, the ECB is not constrained by the “Meroni” case law of the ECJ (ECJ 1958) which only applies to executive powers conferred by Union institutions and not to executive powers conferred by the EU Treaties.

1.1.2. The interplay of National Central Banks and the European Central Bank within the European System of Central Banks

Together with the NCBs the ECB constitutes the European System of Central Banks. The NCBs of all EU Member States are part of the ESCB. In Article 139(2) TFEU, which contains a list of all the provisions that do not apply to Member States outside of eurozone¹, Article 282 TFEU on the ESCB is not mentioned.

The main objective of the ESCB is price stability. A secondary objective is to support the general economic policies of the Union while contributing to the achievement of the objectives of the Union as laid down in Article 3 TEU (Article 127(1), Article 282(2) TFEU).

The main task to be carried out by the ESCB is to define and implement the monetary policy of the Union. Furthermore, the ESCB has to conduct foreign-exchange operations, to hold and manage the official foreign reserves of the Member States and to promote the smooth operation of payment systems (Article 127(2) TFEU). Finally, the ESCB shall contribute to the smooth conduct of policies pursued by the competent national authorities relating to prudential supervision of credit institutions and the stability of the financial system (Article 127(5) TFEU). The Statute of the ESCB and ECB, a protocol to the TFEU being an integral part of primary law (Article 51 TEU), provides further tasks with regard to the collection of statistical information (Article 5.1 of the Statute), international cooperation (Article 6.1 of the Statute) and certain reporting commitments (Article 15 of the Statute).

The ESCB has no legal personality and is not a Union institution. The Treaty assigns tasks and objectives to it. In order to carry out the conferred tasks, however, the ESCB needs its two constituents with a capacity to act: the ECB and the NCBs. The ESCB cannot be distinguished from the European Union. It is a part of the EU and cannot be considered as a “specialised organisation” outside of it.

With regard to the NCBs as constituents of the ESCB the role of NCBs of eurozone Member States, on the one hand, (1.1.2.1) is to be clearly distinguished from the one of NCBs of non-eurozone Member States on the other (1.1.2.2).

¹ The application of Article 139 TFEU to the United Kingdom results from Protocol (No. 15) to the TFEU and to Denmark results from Protocol (No. 16) to the TFEU.

1.1.2.1. The role of NCBs of eurozone Member States

Together with the ECB the NCBs of eurozone Member States constitute the Eurosystem the task of which is to conduct the monetary policy of the Union. The term “Eurosystem” was introduced by the Lisbon Treaty without any further legal meaning. It is only mentioned in Article 282(1) TFEU and Article 1 of the Statute. Therefore, it is only a term distinguishing those members of the ESCB which are part of the Monetary union (so-called “Ins”), including the ECB, when conducting the monetary policy of the Union, from those which are not part of the eurozone (so-called “Outs”).

The NCBs are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council has to ensure compliance with these guidelines and instructions (Article 14.3 of the Statute). In order to ensure compliance the Governing Council can start infringement procedures against NCBs at the European Court of Justice having the same powers as the Commission with regard to Member States under Article 258 TFEU (Article 271(d) TFEU). Article 14.4 of the Statute clarifies that this subordination of NCBs is limited to the objectives and tasks of the ESCB. When performing other functions NCBs are not an integral part of the ESCB and are not bound by guidelines and instructions of the ECB.

Following the rule according to which subordination requires participation in decision-making the Governors of all NCBs of eurozone Member States constitute together with the members of the Executive Board of the ECB the Governing Council (Article 283(1) TFEU). Apart from the Executive Board the Governing Council is one of the two decision-making bodies of the ECB (Article 129(1) TFEU).

1.1.2.2. Role of NCBs of non-eurozone Member States within the ESCB

Non-eurozone Member States are required to ensure that their national legislation including the statutes of their NCBs is in conformity with the Treaties and the Statute.² The NCBs of non-eurozone Member States are, however, not obliged to comply with the guidelines and instructions of the ECB. The application of Article 14.3 of the Statute to these NCBs is explicitly excluded by Article 42.1 of the Statute.

Furthermore, the NCBs of non-eurozone Member States are not bound by the objectives of the ESCB in Article 127(1) TFEU. The tasks mentioned in Article 127(2) and (5) TFEU are not to be carried out by these NCBs. Article 139(2)(c) TFEU excludes their applicability to non-eurozone Member States. The same applies to the task of international cooperation as Article 42.1 of the Statute excludes the application of Article 6 of the Statute to non-eurozone Member States. Therefore NCBs of non-eurozone Member States only contribute to the advisory functions of the ESCB (Article 127(4) TFEU, Articles 4 and 25.1 of the Statute), to the collection of statistical information (Article 5.1 of the Statute) and have to fulfil certain reporting commitments (Article 15 of the Statute).

At the same time the Governors of NCBs of non-eurozone Member States are not members of the Governing Council of the ECB (Article 283(1) TFEU) and nationals of non-eurozone Member States cannot be appointed as members of the Executive Board of the ECB (Article 139(2)(h) TFEU).

² Except for the Bank of England (cf. Point 4 of Protocol (No. 15) to the TFEU).

The Governors of all NCBs are, however, members of the General Council of the ECB (Article 141 TFEU, Article 44 of the Statute). The General Council is called a “decision-making body of the European Central Bank”. Its responsibilities are exhaustively listed in Article 46 of the Statute. It contributes among other things to the above mentioned tasks of the collection of statistical information, advisory functions and reporting activities. The General Council shall be informed by the President of the ECB of decisions of the Governing Council. It has, however, no direct impact on the decision-making process of the Governing Council.

1.1.2.3. The role of the ECB

The ESCB is governed by the decision-making bodies of the ECB (Article 129(1), Article 282(2) TFEU), i.e. the Governing Council and the Executive Board. By governing the ESCB the ECB is bound by the primary objective of the ESCB to maintain price stability. The ECB's role is limited to the tasks conferred on the ESCB. Once a regulation under Article 127(6) TFEU confers specific tasks concerning the prudential supervision of credit institutions and other financial institutions on it, the ECB may also take over other tasks outside of the ESCB. With regard to prudential supervision the ESCB's contribution is limited to the smooth conduct of this supervision (Article 127(5) TFEU). In order to carry out these tasks the ECB can adopt binding regulations and decisions and impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions (Article 132 TFEU). This right is, however, restricted to the Euro area as Article 139(2)(e) TFEU explicitly excludes the application of Article 132 TFEU to non-eurozone Member States.

The ECB retains the ultimate responsibility when carrying out the tasks conferred upon the ESCB. It either implements them in the scope of its own activities or through the NCBs by adopting binding guidelines and decisions.

1.1.3. Decision-making within the European Central Bank

The central decision-making body of the ECB is the Governing Council. It has to adopt the guidelines and take decisions necessary to ensure the performance of the tasks entrusted to the ESCB. It formulates the monetary policy of the Union and establishes the necessary guidelines for their implementation (Article 12.1 of the Statute). In general, decisions are made by a simple majority of its members who have to exercise their votes in person. Votes on decisions concerning financial matters of the ESCB are weighted according to the NCBs' shares in the subscribed capital of the ECB without counting the votes of the Executive Board members. If such a decision requires a qualified majority according to the Statute the votes in favour must represent at least two thirds of the subscribed capital and at least half of the NCBs as shareholders of the subscribed capital.³

The Executive Board comprising the President, the Vice-President and four other members that are appointed by the European Council on a recommendation of the Council and after consultation of the European Parliament and the Governing Council (Article 283(2) TFEU) is responsible for the current business of the ECB. Besides, it has to implement the monetary policy as defined by the Governing Council and in accordance with the Governing Council's guidelines and decisions and give the necessary instructions to NCBs. Furthermore, the

³ From the date on which the number of governors in the Governing Council of the ECB exceeds 18 the Governing Council will decide according to a new voting system (cf. Article 1 of the ECB decision ECB/2008/29 ([2009] OJ L 3/4). On the functioning of the rotation system this note only refers to its detailed description in Article 10.2 of the Statute and Article 3a of the Rules of Procedure of the ECB.

Statute provides a possibility for the Governing Council to delegate certain powers to the Executive Board (Article 12.1(2) of the Statute).

The General Council consists of the Governors of all NCBs and the President and Vice-President of the ECB. As mentioned above the General Council is not included in the decision-making process of the ECB. It only contributes to the performance of ECB tasks and performs the tasks of the former European Monetary Institute (EMI). According to its rules of procedure decisions of the General Council are generally taken by simple majority if a quorum of two thirds of its members or alternates is met.

1.2. Multi-level governance within the ESCB

The governance within the ESCB is unique compared to other fields of activity of the European Union. Normally, if a task is conferred on the EU it has thus the competence to carry out this task. If a task is conferred on the ESCB the necessary competences are divided between the ECB with its own legal personality, and the NCBs with their own legal personality according to their respective national laws. However, the supervision of these activities is assigned to the ECB.

Three layers of governance can be distinguished within the ESCB:

1. European layer: The ECB ensures that the tasks conferred upon the ESCB are carried out either by its own activities or through the NCBs. The ECB then acts as superior and supervisory Union institution by adopting guidelines and decisions which legally bind NCBs and by giving instructions to NCBs.
2. National layer under ECB supervision: NCBs acting as independent national authorities carry out tasks conferred on the ESCB under the supervision of the ECB.
3. National layer under the responsibility and liability of NCBs: NCBs acting as independent national authorities on their responsibility and liability unless the Governing Council finds by majority of two thirds that the NCB's performance interferes with the objectives and tasks of the ESCB (cf. Article 14.4 of the Statute).

The relationship between layer no. 1 and layer no. 2 is characterised by the principle of decentralisation according to which the ECB shall have recourse to the NCBs to carry out operations to the extent deemed possible and appropriate (Article 12.1(3) of the Statute). The decision on whether the ECB acts (centralisation) or the NCBs under the ECB's supervision (decentralisation), however, lies on layer no. 1 with the decision-making bodies of the ECB. At the same time, the core decision-making body of the supervisory Union institution, the Governing Council of the ECB, is controlled by the supervised NCBs. Moreover, NCBs are the shareholders of the ECB.

An example to illustrate this interplay is the issue of euro banknotes and coins (Article 128 TFEU). Euro coins are issued by the Member States upon approval of the volume of the issue by the ECB. With regard to banknotes, the ECB has the exclusive right to authorise the issue of banknotes. In both cases the ECB is responsible for the money supply. The issue of the banknotes as such is according to Article 128(1)(2) TFEU for the ECB and the NCBs together. A strict application of the principle of decentralisation would require that euro banknotes should be issued by the NCBs. According to the ECB decision ECB/2010/29 ([2011] OJ L 35/26), however, NCBs are technically responsible for the issue of banknotes, whilst nevertheless 8 % of the banknotes are considered to be issued by the ECB.

2. LIMITS FOR THE EUROPEAN CENTRAL BANK

2.1. Limits for the European Central Bank set by law

The role of the ECB differs in relation to the respective task conferred upon the ESCB or the ECB itself. The Treaty provides for tasks for the ESCB in Art. 127 TFEU. The Statute repeats Article 127 TFEU in its Article 3 and stipulates further tasks in Articles 5.1, 6.1 and 15. Article 9.2 of the Statute provides for a leading role of the ECB with regard to the tasks conferred upon the ESCB in Article 127 TFEU. The conduct of the monetary policy of the Union and its implementation fall within in the exclusive competence of the ECB according to Article 12.1 of the Statute.

The limits for the ECB arise from the fact that new tasks can only be assigned to it by a Treaty change (2.1.1). The only exception to this is the conferral of specific tasks concerning banking supervision by means of regulations based on Article 127(6) TFEU (2.1.2). Although the ECB is independent from any political influence it is subject to other EU institutions (2.1.3) and EU secondary law (2.1.4). Finally, the ECB was designed as an institution to serve the euro system which means that the integration of non-eurozone Member States within its decision-making bodies is legally difficult (2.1.5).

2.1.1. Tasks conferred upon the ESCB

According to the principle of conferral a Union institution such as the ECB can only act within the limits of the competences conferred upon it by the Member States in the Treaties or the Statute. Therefore, there can only be new tasks for the ESCB or the ECB if the Treaties or the Statute are changed. Since the Statute is a Protocol to the TFEU it can generally only be modified by a Treaty change as well. By way of derogation Article 129 TFEU enumerates all the Articles of the Statute which can be amended by either the ordinary or a special legislative procedure. Article 3 of the Statute on the tasks is, however, not mentioned in Article 129 TFEU. The introduction of new Articles containing new tasks is not covered by Article 129 TFEU as it addresses only amendments.

As a result, the question arises whether the ESCB or the ECB may be entrusted with tasks by secondary law. In general, Union institutions can be entrusted by secondary law. The ESCB and the ECB, however, are protected by the independence clause in Article 130 TFEU from any political influence on their work. Therefore, the EU legislator cannot entrust them with other tasks than those foreseen by the Treaties and the Statute. This is confirmed by Article 127(6) TFEU according to which "specific tasks" with regard to banking supervision can be conferred upon the ECB by means of regulations. This is the only exception where the Treaties explicitly allow a conferral of tasks on the ECB.

2.1.2. Tasks conferred upon the ECB under Article 127(6) TFEU

Under Article 127(6) TFEU "specific tasks [...] concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings" can be conferred upon the ECB. The establishment of a Single Supervisory Mechanism on the basis of Article 127(6) TFEU is currently discussed. As this provision only means the conferral of "specific tasks" it covers neither a conferral of the entire supervision nor of a set of specific tasks, that *de facto* corresponds to an entire supervision. When adopting a regulation under Article 127(6) TFEU all EU Member States have to vote on it as this provision is not mentioned in Article 139 TFEU.

2.1.3. Subject to other EU institutions and agencies

The ECB is subject to other EU institutions even though Article 130 TFEU forbids any influence from other Union institutions. With regard to the European Court of Justice Articles 263, 265 and 267 TFEU as well as Article 35.1 of the Statute clarify that the ECB is subject to judicial control. Article 27.2 of the Statute recognises the Court of Auditor, even though it restricts the audit to an examination of the operational efficiency of the management of the ECB. In more general terms the ECJ decided that “the ECB, pursuant to the EC Treaty, falls squarely within the Community framework” and found that “recognition that the ECB has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law.” The purpose of Article 130 TFEU is not “to shield the ECB from any kind of legislative action taken by the Community legislature” (ECJ 2003: paras 93, 135). In this case, the ECB claimed that it was not subject to the investigative competences of OLAF. The Court, however, rejected this reasoning unless the “measures adopted by the Community legislature [...] is such as to undermine its ability to perform independently the specific tasks conferred on it by the EC Treaty” (para 137). The ECJ considered OLAF not to undermine the ECB’s independence because of its specific task of anti-fraud investigations, its complete independence from the Commission and its strict observance of the rules of EU law.

This leads to the following two conclusions: First, the ECB is, in principle, subject to other EU institutions and agencies. Second, as far as the independence guarantee of the ECB is concerned this submission is restricted to measures that are not capable of undermining the ECB’s independence.

2.1.4. Subject to secondary EU law

The same principles apply to ECB’s submission under secondary EU law: In general, secondary EU law applies to the ECB as the independence guarantee does not “shield the ECB from any kind of legislative action”. However, any legislative measure which is capable of undermining ECB’s independence does not apply to the ECB because it infringes Article 130 TFEU.

2.1.5. Integration of non-eurozone Member States

Non-eurozone Member States participate in the General Council of the ECB. They have no participation rights in the decision-making bodies of the ECB, the Governing Council and the Executive Board. The Governing Council is according to Article 12.1 of the Statute the main decision-making body. Exceptions to this rule have to be stated explicitly. A delegation of powers can generally be decided by the Governing Council. Such a delegation of powers is, however, restricted to the Executive Board (Art. 12.1(2) of the Statute).

Participation of non-eurozone Member States within the ECB but outside of the General Council is only possible as long as they do not take part in the Governing Council or the Executive Board and as long as the final decision-making remains with the Governing Council.

2.2. Limits for the European Central Bank set by its function

The main function of the ECB is the conduct of the monetary policy of the Union. Its primary objective is to maintain price stability. In order to carry out this task properly the ECB is independent and has a regulatory capacity. The ECB has defined price stability as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%. In the pursuit of price stability the ECB aims at maintaining inflation rates below but close to 2% in the medium term. Main monetary policy instruments for reaching the aim of price stability are open market operations, reserve requirements, influencing market interest rates and liquidity in the banking system or foreign exchange interventions.

2.2.1. The role of the “Lender of Last Resort”

During the financial crisis in 2010 a discussion started on whether the ECB should act as a lender of last resort for the sovereigns in the euro area (de Grauwe 2011). Under the actual Treaty, Article 123 TFEU forbids such a role for the ECB. The ECB, however, has been acting as lender of last resort within the limits set by Article 123 TFEU. It used three measures: The Securities Market Programme (SMP) which covers outright purchases of sovereign debt in the secondary market (established in May 2010), the longer-term-refinancing operations (LTRO) of December 2011 and February 2012 in order to support private banks to purchase, both on the primary markets as well as on the secondary markets, government bonds (esp. Spanish and Italian government bonds) and, finally, the Outright Monetary Transactions (OMT) established in September 2012 which replaced the SMP and which covers outright purchases of debts of sovereigns subject to the ESM on the secondary markets.

2.2.1.1. Critique of the measures

The ECB Governing Council considered these measures to be necessary in order to stabilise the government bond market in the euro area. Their effectiveness is, however, questioned. With regard to the SMP it should be considered that a purchase of government bonds on primary markets is more effective than on secondary markets. If the main interest of the intervention is to stabilise the government bond market by lowering interest rates on such bonds purchase activities on the secondary markets are more costly than on primary markets. LTROs are even more costly. The ECB cannot tie the LTROs to liquidity support for Member States. During a banking crisis such measures could therefore end up in supporting insolvent banks without significantly encouraging private banks to purchase government bonds on primary and secondary markets (Buiters & Rahbari 2012). These disadvantages are, however, owed to Article 123 TFEU which forbids the ECB to purchase government bonds on the primary markets. An extension of ECB's activities would require a Treaty change.

Both programmes lack, furthermore, incentives for Member States to continue with fiscal and structural reforms as they do not contain any conditionality. As a consequence, the ECB linked the OMT to the fact that a Member State is subject to the ESM which has the power to impose structural and fiscal reforms (Buiters & Rahbari 2012).

This critique leads to important questions for the role of the ECB in the future economic governance for the euro area:

1. Should the ECB become a real lender of last resort?

2. Should the ECB impose structural and fiscal reforms on Member States which it is supporting?

2.2.1.2. Extension of the role of the ECB to be a lender of last resort

There are good reasons for the extension of the role of the ECB to be a lender of last resort. States that do not have full control over their central banks can get in a situation, as banks, in which a liquidity and maturity mismatch between their assets and liabilities occur. In such a situation a phenomenon similar to a “bank run” can happen to a State. In order to avoid such a situation a State needs a source of unlimited liquidity such as a central bank acting as lender of last resort (Buiter & Rahbari 2012).

Several arguments were put forward against such a role of the ECB: Such a role would, first, lead to inflation. By buying government bonds the ECB increases the money stock which leads into a risk of inflation. If, secondly, a State, in the end, fails to service its debts the ECB will make losses which are to be borne by Member States’ budgets and, by that, by taxpayers. And, thirdly, the role of lender of last resort increases the moral hazard issue according to which such intervention would decrease the interest of States to make the necessary fiscal and structural reforms.

Taking into account the actual design and functioning of the ECB, some of these arguments have to be seen in a different light. The ECB remains bound by the primary objective of maintaining price stability. Even if it would act as a lender of last resort the ECB would take additional measures in order to sterilise the liquidity created through its lender of last resort activities (as it did e.g. as part of the OMT, c.f. point “sterilisation” in the “Technical features of the Outright Monetary Transaction”, ECB press release of 6 September 2012; criticised by de Grauwe 2011: 6 on the same sterilisation measures under the SMP). The moral hazard issue had been addressed by the ECB in the OMT as ECB purchases of government bonds on the secondary market were made subject to the condition that a Member State is submitted to an ESM/EFSF programme. This conditionality was not included in the SMP.

2.2.2. Extension of the role of the ECB to supporting general economic policies

Under the existing Treaties the ECB “shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union” (Article 127(1) TFEU). This support, however, is “without prejudice to the objective of price stability”. This shows, firstly, that the ECB is not only committed to price stability but also to the support of general economic policies. But there is nevertheless a hierarchy with regard to these objectives. Every measure of the ECB must not endanger price stability. Therefore, some argue to put both objectives on the same footing following the example of the US Federal Reserve whose objectives are equally maximum employment, stable prices and moderate long-term interest rates.

2.2.3. Limits to any extension of the role of the ECB: Democratic accountability and independence guarantee

The options to extend the role of the ECB as they were presented above, are, however, limited by the way how the ECB is designed. When exercising its powers and carrying out its tasks and duties the ECB is independent and not accountable to any political institution.

Extending its role from maintaining price stability to more political objectives requires more democratic accountability.

The role as lender of last resort could still be covered by the main objective of maintaining price stability and, by that, by the independence guarantee of the ECB. This is even more convincing as Member States would tend to influence ECB decisions more when the ECB could act as lender of last resort than at the moment. This role would require a modification or deletion of Article 123 TFEU.

The ECB, however, should not be granted any right to impose structural and fiscal reforms on Member States. This is not a role for a central bank and especially not for a central bank that is independent from political institutions. This being said it might be questioned whether the role of a classical lender of last resort is still convincing or whether such a role should rather be given to instruments such as the ESM.⁴

The equal support of other objectives than price stability also conflicts with the independence guarantee. As such measures are of political importance a central bank whose mandate is extended to more political fields must be accountable to democratically elected political institutions. Therefore, any extension of the ECB's mandate would require an in-depth modification of the law of the ECB. The independence guarantee and the composition of the Governing Council would then need to be modified; rules for accountability have to be established.

All in all, looking at the construction and the functioning of the ECB its objectives should be limited to maintaining price stability. Any other extension of the ECB's role would conflict with the principle of democracy and require in-depth modification of the ECB. Enhanced EU activities in the field of economic policies and imposing fiscal and structural reforms on Member States should be assumed by the political EU institutions such as the European Parliament, the Council and the European Commission rather than by the European Central Bank. The lack of competences of the political EU institutions should not be compensated by extending the competences of the ECB.

2.3. Legal challenges to the ECB governance by the establishment of a Single Supervisory Mechanism

The ECB was originally modelled after the German *Bundesbank* and designed in order to conduct the monetary policy of the Union. Its legal framework as well as its governance structures was built in order to carry out this task properly. They were not made for implementing a prudential supervision of credit institutions and other financial institutions within the whole internal market. Whilst monetary policy should be conducted free from any political influence banking supervisory decisions are highly political and have a direct impact on individuals. This requires a democratic accountability which could interfere with ECB's independence guarantee (2.3.1). Furthermore, as the ECB is an institution which is designed to serve the Euro area, the non-eurozone Member States do not take part in its decision-making process. The conferral of supervisory power from non-eurozone Member States to the ECB requires their inclusion into the decision-making process (2.3.2).

⁴ The ESM has already the role of a lender of last resort once a Member State is submitted to an ESM programme as the ESM has the right to purchase government bonds on primary markets. The ESM has, however, not enough capital to be real lender of last resort.

2.3.1. The scope of application of the independence guarantee

The scope of the independence guarantee in Article 130 TFEU is of particular importance with regard to the current legislative proposal to confer supervisory competences over credit institutions on the ECB based on Article 127(6) TFEU. If the independence guarantee applies in this case the ECB cannot be subject to the European Banking Authority (hereinafter: EBA), a Union agency established on the basis of Article 114 TFEU, and it cannot be subject to any kind of democratic control.

The independence guarantee in Article 130 TFEU, however, does not apply to the ECB when carrying out specific tasks of banking supervision (Häde 2011a: para 18). The scope of Article 130 TFEU is limited to “exercising the powers and carrying out the tasks and duties conferred upon them [the ESCB and the ECB] by the Treaties and the Statute of the ESCB”. The prudential supervision of banks is according to Article 127(5) TFEU a task assigned to the ESCB. Its competence, however, is restricted to “contribute to the smooth conduct of policies pursued by the competent authorities”. The implementation of banking supervision remains with the national competent authorities with the reservation of a later conferral of specific tasks upon the ECB. As long as banking supervision is a Member States’ task Art. 14.4 of the Statute applies, according to which the application of Article 130 TFEU to NCBs is excluded.

If now specific tasks of banking supervision are conferred upon the EU level the EU legislator is free in its decision to whom it will assign these tasks. Article 127(6) TFEU gives the possibility to also assign these tasks to the ECB without violating Article 130 TFEU. If the EU legislator assigns these tasks to a Union agency the Treaty does not require granting this Union agency independence comparable to Article 130 TFEU. It would now appear contradictory if the independence required in order to carry out specific tasks of banking supervision differs from the institution or agency on which they are conferred (Gnan/Wittelsberger 2003: 40).

Furthermore, the non-application of the independence guarantee for the ECB to specific tasks of banking supervision is convincing with regard to the purpose of this guarantee. As mentioned above the independence guarantee and the implementation of monetary policy of the Union are closely linked to each other. Its main purpose is to protect the monetary policy of the Union. Banking supervision is rather remote from monetary policy *strictu sensu*. The legal framework for the ECB in the Treaty was formed according to the German model of the “Bundesbank”.

According to German Constitutional law the principle of democracy requires an unbroken chain of democratic legitimation of any executive action. Gaps in this chain have to be justified. An independent ECB carrying out certain tasks creates such a gap. The interruption of the chain of democratic legitimation can be accepted with regard to monetary policy as the stability of a currency can be better achieved if it is deprived of politics. Banking supervision, however, is a highly political field and supervisory decisions have direct impact on individuals. Therefore, even under former German law the independence of the Bundesbank would be accepted with regard to monetary policy but not with regard to banking supervision.

2.3.2. Inclusion of non-eurozone Member States into ECB’s decision-making process

The new draft proposal for a Council regulation conferring specific tasks on the ECB concerning banking supervision provides for a new decision-making process. The newly

created "Supervisory Board" shall be composed of a Chair and a Vice Chair being also a member of the Executive Board of the ECB, four representatives of the ECB and one representative of the supervisory authorities of the participating Member States. This includes non-eurozone Member States who will opt for the SSM by establishing a "close cooperation" with the ECB. This Supervisory Board, however, will only present draft supervisory decisions to the Governing Council. These decisions are considered to be adopted unless the Governing Council objects within a certain period of time.

This solution reaches the limits set by EU Primary law. The decision-making and the voting procedures in the ECB are defined by Articles 10 and 12 of the Statute. They cannot be modified without a Treaty change as both provisions are not mentioned by Article 129 TFEU. Whilst the Governing Council still has the final say as it can object any decision proposed by the Supervisory Board the change of voting modalities remains questionable. It makes a difference whether the Governing Council has to vote with a simple majority in favour of a proposed measure or whether it has to vote with a simple majority against a proposed measure. This so-called "reverse majority voting" was already criticised when it was introduced by the "six pack" (Häde 2011b: 30).

3. OPPORTUNITIES OF THE ECB IN THE MULTI-TIER GOVERNANCE

The case of the SSM showed the limited opportunities of the ECB in the multi-tier governance. The distinctive features of the ESCB with its assignment of tasks to a system and its implementation by the ECB - having its own legal personality and being protected against political influence, and NCBs, having their own national legal personalities, and the graduated exclusive competence of the ECB and its decision-making bodies in relation to certain tasks assigned to the ESCB - only applies when the ECB is carrying out tasks conferred upon the ESCB. New tasks, except for the banking supervision, can only be conferred on the ECB by a Treaty change.

Granting the ECB a greater role in the multi-tier governance would require major changes of its inner-institutional architecture. The decision-making process and the decision-making bodies are designed for a responsible conduct and implementation of the monetary policy of the Union. An extended role for the ECB in the economic governance for eurozone Member States would require a strict separation of decision-making procedures and bodies from those that have to deal with the monetary policy of the Union. Otherwise, the independence and the credibility of the ESCB and the ECB would be endangered.

The extension of the role of the ECB to a real lender of last resort including the right to impose fiscal and structural reforms on Member States or the extension of the primary objectives of the ESCB to economic objectives such as employment would require a higher democratic accountability of the ECB. By such an extension measures taken by the ECB would have political impacts that have to be controlled by democratically elected bodies. This, however, conflicts with the independence guarantee of the ECB. It is therefore submitted that in the multi-tier governance the independent ECB should remain restricted to the conduct of the monetary policy of the Union under the objective of maintaining price stability. Competences needed for a Europeanization of economic and fiscal policies of the Member States should be granted to the political EU institutions such as the European Parliament, the Council and the European Commission.

An expansion of the ECB to multi-tier governance structures with regard to non-eurozone Member States (either pre-ins, who are committed and legally obliged to join the euro zone eventually, or the outs such as the UK and Denmark) would require an even more intense change of ECB's decision-making procedures and bodies. The ECB's architecture was built for the Euro area and not for an eventual inclusion of non-eurozone Member States.

REFERENCES

- Buiter, Willem and Rahbari, Ebrahim (2012), "The European Central Bank as Lender of Last Resort for Sovereigns in the Euro Area", (2012) *Journal of Common Market Studies* 50, p. 6
- De Grauwe, Paul (2011), "The European Central Bank as a lender of last resort", VoxEU.org, 18 August 2011
<http://www.voxeu.org/article/european-central-bank-lender-last-resort>
- European Court of Justice (2003), Case C-11/00, Commission v ECB, [2003] ECR I-7147
- European Court of Justice (1958), Case 9/56, Meroni v High Authority [1958] ECR 11
- Gnan, Ernest and Wittelsberger, Helmut (2003), "Artikel 108 EG", in: von der Groeben, Hans and Schwarze, Jürgen, *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edition, München 2003
- Häde, Ulrich (2011a), "Artikel 130 AEUV" in: Calliess, Christian and Ruffert, Matthias, *EUV/AEUV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 4th edition, München 2011
- Häde, Ulrich (2011b), "Rechtsfragen der EU-Rettungsschirme", *Zeitschrift für Gesetzgebung* 2011, p. 1
- Marks, Gary (1993), "Structural policy and multilevel governance in the EC" in: Cafruny, Alan and Rosenthal, Glenda, *The State of the European Community*, Vol. 2, 1993, p. 391
- Smits, René (2003), "The European Central Bank in the European Constitutional Order", Utrecht 2003.
- Zilioli, Chiara and Selmayr, Martin (2000), "The European Central Bank: An Independent Specialized Organization of Community Law", (2000) *Common Market Law Review* 37, p. 591

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu/studies>

PHOTO CREDIT: iStock International Inc.



ISBN
doi: