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Some reflections about the language of EU law and its interpretation

Robert Bray

Foreword

The present paper reflects the content of the lecture held by Robert Bray, former head of the secretariat of the Committee on Legal Affairs of the European Parliament, on 24 April 2018 at the Law Department of the University of Verona within the PhD Course on International and European Legal Studies. In the context of its academic programme the selected cross-cutting topic has dealt with interpretation and its multifaceted application at different levels and in various sectors. The lecturer was thus invited to provide an insight of the European Union legal framework resulting from his high-qualified experience and knowledge of the law-making process where difficulties in the legislative developments are mainly linked to the different languages and respective different meanings.

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Some reflections about the language of EU law and its interpretation

Robert Bray*

In the spring of 1980, British trawlers cast their nets in international waters (albeit claimed by the Poles) the lines of which were passed to waiting Polish vessels and their nets trawled, after a time the British trawlers drew up alongside the Polish vessels and the lines are taken on board. The nets were taken on board and 2500 tonnes of cod were discharged into the holds of the British trawlers. In return the British recompensed their Polish partners with mackerel and herring not found in those waters. This, at first sight somewhat bizarre, arrangement had a simple explanation: in 1979/1980 the fishing industry in the Community was in difficulties owing to declining catches, in particular of cod, and overcapacity in terms of fishing vessels. In the absence of an agreement between the EEC and Poland permitting Community vessels to fish in those waters, participation in joint fishing operations with Polish vessels seemed to be the means of enabling Community vessels to gain access to them.

In 1984, the Commission brought an action against the United Kingdom[1] which turned on the interpretation of Article 4 of Council Regulation No 806/68 on the common definition of the origin of goods[2]. That provision reads as follows:

> "Article 4
>
> (1) Goods wholly obtained or produced in one country shall be considered as originating in that country.
>
> (2) The expression "goods wholly obtained or produced in one country" means: …
>
> (e) products of hunting or fishing carried on therein,
>
> (f) products of sea-fishing and other products taken *from the sea* by vessels registered or recorded in that country and flying its flag." (emphasis supplied)

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[1] Opinion of Advocate General Mancini in *Commission* v *United Kingdom* Case 100/84, ECLI:EU:C:1985:60.

[2] Official Journal, English Special Edition 1968 (I), p. 165.

Whereas the English version of letter (f) refers to the vessel which *takes the fish from the sea*. The French and Italian versions use the verbs "*extraire*" and "*estrarre*" whilst the German more prosaically falls back on "*gefangen*" (caught).

After reporting minutely on the linguistic and philological arguments of the parties, Advocate General Mancini states as follows:

> "Perhaps the Court will allow me to make a modest literary reference: I doubt whether Marguerite Yourcenar or Graham Greene would be prepared to read each morning a piece or two of Community legislation *'pour prendre le ton',* as Stendhal used to read articles of the *Code Civil*. In other words, I admire the wisdom of the Community legislature but not its careless and too often imprecise language. For instance, in the past I have had to interpret a regulation in which the chemical transformation of white or raw sugar into substances other than sugar is termed purely and simply 'disposal'. I am sure that each one of you can recount similar experiences. In those circumstances mobilising all the resources of Romance and Teutonic philology in order to read one meaning or another into the participle '*extrait*' seems to me a slightly absurd exercise: all the more so since, in my view, each of the meanings contended for by the parties ('drawn out' and 'separated from their environment') is legitimate and the secondary arguments — *'gefangen'* in Article 4 (2) (f) as against *'gewonnen'* in Article 4 (2) (h) — are equivalent and cancel each other out like the elements of certain zero-sum operations."

The Advocate General went on by noting that that, in Italy at least, the origins of the use of the term "*estrazione*" in this context went back to the late nineteenth century and stemmed from a dispute between various departments of State as to which of them should be responsible for fisheries. In the end, fishing was determined to be an industry based on a resemblance which someone perceived between fishing and mining.

In this engaging opinion, Mancini even resorts to 19th Century English case law on the law of trespass[3] to conclude that it is common sense that catching and netting amount to the same thing, irrespective of the risk that the net will tear. But, after this exegesis, the Advocate General makes his determination on the basis of the "essential feature" of the rule defining the origin of the fish, that is to say, the nationality of the vessel doing the fishing. "Vessel", he points out, does not signify merely the hull but the hull with all its accessories and appurtenances, including *the nets*.

[3] *Young* v. *Hichens*, 1843,1843, 6 QB 606.

The Court agreed with its Advocate General in a particularly clear judgment. After pointing out that a comparative examination of the various language versions of the regulation did not enable a conclusion to be reached in favour of any of the arguments put forward and so no legal consequences could be based on the terminology used, it stated that in the case of divergence between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part[4].

Moving now to 1998, there is the "*Man in Black*" case[5]. Under the relevant Community legislation[6], where cigarettes (subject to certain limits) are acquired by private individuals for their own use and transported by them, excise duty is charged in the Member State in which they are acquired. The Man in Black company offered to act as an agent for individuals in the United Kingdom in buying a maximum of 800 cigarettes for them in Luxembourg, where the excise duty was considerably lower, and transporting them to the United Kingdom in return for a fee.

The Court of Justice rejected the argument that the maxim of Roman law *qui facit per alium facit per se* should be applied in this case even though neither the English version of the directive nor the French, Italian, Spanish, German, Dutch or Portuguese versions excluded the possibility of using an agent.

First, the Court pointed out that the Community legal order did not, in principle, aim to define concepts on the basis of one or more national legal systems unless there was express provision to that effect.[7] Secondly, *qui facit per alium facit per se* derives from civil law and does not necessarily fall to be applied in the sphere of fiscal law, where the objectives are of a quite different nature. Thirdly, where the Community legislature intended the directive to apply in the event of the involvement of a third party it did so by means of an express provision.

As far as the provision of the directive at issue was concerned, none of the language versions expressly provided for such involvement and, on the contrary, the Danish and Greek versions indicated particularly clearly that, for excise duty to be payable in the country of purchase, transportation must be effected personally by the purchaser of the products subject to duty.

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[4] *Regina* v. *Pierre Bouchereau* Case 30/77 ECLI:EU:C:1977:172.

[5] *The Queen* v. *Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* Case C-296/95 ECLI:EU:C:1998:152.

[6] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124.

[7] *Corman* Case 64/81 ECLI:EU:C:1982:5.

The applicants in the main proceedings submitted, however, that if the Danish and Greek versions were not consistent with the other versions, they were to be disregarded, on the ground that, at the time when the directive was adopted, those two Member States represented in total only 5% of the population of the 12 Member States and their languages were not easily understood by the nationals of the other Member States.

After pointing out that the contradiction between the Danish and Greek versions on the one hand and the other language versions on the other only arose if the argument put forward by the applicants in the main proceedings was accepted, the Court pointed out that to discount two language versions would run counter to the Court's settled case-law to the effect that the need for a uniform interpretation of Community regulations made it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages.[8] All the language versions must, in principle, be recognised as having the same weight. Union "legislation is drafted in several languages and […] the different languages are equally authentic. An interpretation of a provision of [EU] law thus involves a comparison of the different language versions."[9]

Thus, although Danish and Greek are never used to draft Union legislation, recourse to the Danish and Greek versions may be had in order to interpret it. This reflects the principle of linguistic equality, which enjoys a "quasi constitutional" status.[10] It does not mean, however, that the Court of Justice "gives precedence to certain language versions over the others, simply that those versions may serve to strengthen the contextual and/or teleological interpretation upon which the ECJ's reasoning primarily rests".[11]

All the legislation which fell to be interpreted in the judgments discussed above was drawn up before Declaration No 39 on the quality of the drafting of Community legislation, annexed to the final

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[8] *Wörsdorfer, née Koschniske,* v. *Raad van Arbeid* Case 9/79 ECLI:EU:C:1979:201, para. 6.

[9] *Srl CILFIT and Lanificio di Gavardo SpA* v. *Ministry of Health* Case 283/81 ECLI:EU:C:1982:335, para. 18.

[10] See D. Hanf and E. Muir, "Le droit de l'Union européeen et le multilinguisme", in D. Hanf, E. Muir and K. Malacek (eds), *Langue et construction européenne* (Cahiers du Collège d'Europe, Bruxelles, 2010 at 23), cited in K. Lenaerts and J. A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Paper AEL 2013/9, Academy of European Law Distinguished Lectures of the Academy, http://hdl.handle.net/1814/28339. See in particular, section 2. Textualism and Multilingualism, at 8.

[11] K. Lenaerts and J. A. Gutiérrez-Fons, n. 10, at 10, citing *Henke* v. *Gemeinde Schierke and Verwaltungsgemeinschaft Brocken* Case C-298/94 ECLI:EU:C:1996:382, para.15: [t]his interpretation, moreover, is borne out by the terms used in most of the language versions of the Directive […] and *is not contradicted by any of the other language versions of the text*" (emphasis supplied).

act of the Amsterdam Treaty[12], which followed on from the 1992 Edinburgh European Council Conclusions[13] and the common guidelines for the quality of drafting of Community legislation adopted by the European Parliament, the Council and the Commission in 1998[14]. In 2000 the Legal Services of those three institutions published the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation[15] pursuant to that agreement in order to develop the content and explain the implications of those guidelines, by commenting on each guideline individually and illustrating them with examples. It was intended to be used by everyone who was involved in the drafting of the most common types of Community acts.

Indeed, the three institutions have long employed lawyer-linguists, persons who have both a legal and a linguistic qualification, to carry out legal-linguistic revision of legal texts. The experts from the Council and the European Parliament vet all legislation adopted under the ordinary legislative procedure. Representatives of the Parliament's lawyer-linguistics attend committee meetings and trilogues[16] with a view to dealing with any legal or linguistic problems that might arise in the course of the adoption of legislation. There are, however, one or two shortcomings which are worth mentioning.

First, the Commission's lawyer-linguists verify only Commission acts, for instance decisions in competition cases, and not legislative proposals. This has sometimes given rise to difficulties as Union legislation is drawn up in a *langue de base* (English or French, but most often now English[17]) often by non-native speakers, the various language versions are not cross-checked against each other and sometimes translations are not updated to take account of changes made in the basic version following the inter-service consultation which takes place prior to the adoption of the proposal by the College of Commissioners.[18]

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[12] OJ C 340, 10.11.1997, p. 139.

[13] https://www.consilium.europa.eu/media/20492/1992_december_-_edinburgh__eng_.pdf.

[14] Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17.3.1999, p. 1. This had been preceded by Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, OJ C 166, 17.6.1993, p. 1, and the Commission's general guidelines for legislative policy of 18 January 1996, document SEC(1995) 2255/7.

[15] The latest version of 18 July 2016 is available here: https://publications.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a0-55c14e2ba732/language-en.

[16] The meetings held between the European Parliament, the Council and the Commission with a view to reaching first- or second-reading agreements on proposals for legislation. See R. Bray, *Better Legislation and the Ordinary Legislative Procedure, with Particular Regard to First-Reading Agreements*, The Theory and Practice of Legislation, Vol. 2, 2014 – Issue 3, 283-291.

[17] In all likelihood, English will continue to be an official language of the European Union after the United Kingdom has left if only because Regulation No 1 determining the languages to be used by the European Economic Community (OJ English special edition: Series I Volume 1952-1958 p. 59), as amended, can be amended only by a unanimous vote (Article 217 EEC, now Article 342 TFEU).

[18] This gave rise to difficulties in particular in the case of the proposal which give rise to Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107. This text

Secondly, the verification of the final text takes place after the vote in the parliamentary committee but before the vote in the plenary session and in the Council. If this is not possible, the revised text becomes the subject of a corrigendum adopted by the legislating institutions. In this context, it is worth bearing in mind the "*laying hens*" judgment[19] in which a directive was annulled because the General Secretariat of the Council had made amendments to the statement of reasons of the instrument after the Council had voted which went beyond "simple corrections of spelling and grammar".

Lastly, although there has been a certain amount of case law on impact assessments,[20] none of it has dealt with regulatory impact assessments as an aid to the interpretation of specific pieces of legislation, namely as part of the *travaux préparatoires*. As Lenaerts and Gutiérrez-Fons point out "Externally, contextual interpretation examines the (legislative) decision-making process that led to the adoption of the EU law provision in question. Thus, it makes use, in particular, of *travaux préparatoires*."[21]

Ever since the first Interinstitutional Agreement on Better Law-Making,[22] the legislative institutions have considered that more frequent use of impact assessments (both ex ante and ex post) will help towards the objective of securing good quality legislation. The 2016 Interinstitutional Agreement on Better Law-Making[23] stipulates that

> "the Commission will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts. The initiatives included in the Commission Work Programme or in the joint declaration will, as a general rule, be accompanied by an impact assessment. …. The final results of the impact assessments will be made available to the European Parliament, the Council and national Parliaments, and will be made public along with the opinion(s) of the Regulatory Scrutiny Board at the time of adoption of the Commission initiative."
>
> The European Parliament and the Council are to "take full account of the Commission's impact assessments. To that end, impact assessments shall be presented in such a way as to facilitate the consideration by the European Parliament and the Council of the choices made by the Commission."

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contained difficult legal concepts which were hard to translate and there were discrepancies between the various language versions of the original Commission proposal. With a view to dealing with potential drafting/translation problems, it should be noted that two of Parliament's lawyer-linguists attended every meeting of the negotiating team and had even taken part in the earlier informal meetings (see R. Bray, n. 16).

[19] *United Kingdom* v. *Council* Case 131/86 ECLI:EU:C:1988:86, para. 31 et seq.

[20] *BASF Agro BV and Others* v. *Commission* Case T-584/13 ECLI:EU:T:2018:279; *Afton Chemical Limited* v. *Secretary of State for Transport* Case C-343/09 ECLI:EU:C:2010:419; *Poland* v. *Parliament and Council* Case C-5/16 ECLI:EU:C:2018:483.

[21] K. Lenaerts and J. A. Gutiérrez-Fons, n. 10, at 13.

[22] Interinstitutional agreement on better law-making, OJ C 321, 31.12.2003, p. 1.

[23] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1

The Interinstitutional Agreement goes on to provide that the European Parliament and the Council may carry out impact assessments in relation to their substantial amendments to the Commission's proposal. In addition, the Commission may, on its own initiative or upon invitation by the European Parliament or the Council, complement its own impact assessment or undertake other analytical work it considers necessary and the co-legislators are to take full account of any additional elements provided by the Commission in that context.

It is noteworthy in this connection that ever since the establishment of the European Parliament's Directorate-General for Parliamentary Research Services (EPRS, the acronym standing for "European Parliamentary Research Service") [24] on 1 November 2013 [25] it has provided the legislative select committees systematically with appraisals of the Commission's impact assessments. On request, it will produce more detailed appraisals. These documents are presented in committee and made available to the public on-line.

This would suggest that impact assessments have the potential to become a useful tool for the interpretation of Union legislation. As Lenaerts and Gutiérrez-Fons observe:

> "the more public access to *travaux préparatoires* is granted, the more the ECJ will take them into account. This may explain why at the beginning of the European integration project, *travaux préparatoires* did not play a major role when the ECJ was called upon to interpret secondary EU law, as they were not generally published in the Official Journal. As Kutscher noted when he was the President of the Court, the interpretation of EU law cannot be based on documents which are not accessible to the public.[26]"

[24] The Directorate General consists of the Directorate for the Library, the Directorate for Impact Assessment and European Added Value and the new Members' Research Service, which provides briefing and research services for individual MEP publishes a range of synoptic publications. The Directorate for Impact Assessment and European Added Value consists of four units, for (i) ex-ante impact assessment, (ii) ex-post impact assessment, (iii) European added value and (iv) science and technology options assessment (STOA).

[25] See Preparing for Complexity – European Parliament in 2025 – Final report by the Secretary-General, http://www.europarl.europa.eu/the-secretary-general/en/activities/documents/docs-2013/docs-2013-april/documents-2013-april-2.html and the EPRS webpage http://www.europarl.europa.eu/the-secretary-general/en/organisation/directorate-general-for-parliamentary-research-services.

[26] H. Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice' in *Reports of a Judicial and Academic Conference held in Luxemburg on 27-28 September 1976*, at 1-21.

Economic law and democratic inclusion

Matteo Ortino

Abstract

The underlying issue addressed in this paper concerns the link between democracy, market-based economic systems, and the relevant legal institutions. Economic law contributes to the crisis of democracy if, and to the extent that, it fails to ensure an adequate level of inclusion to the rule-making process governing economic activities. The spreading sentiment across many western democratic countries is that the people's interests are not being sufficiently represented in these processes. Economic regulation is seen as being increasingly shaped by the interests of minorities or by foreign interests.

Economic law and democratic inclusion

Matteo Ortino*

CONTENTS: 1. Introduction. – 2. Democracy as inclusion. – 3. Private vs. public interests. The cases of financial institutions and the automotive industry. – 4. National vs. foreign interests. – 5. Democracy and the EU banking administrative architecture.

1. Introduction.

On June 2018, in cooperation with the Max Planck Institute for Innovation and Competition in Munich, the *Association Internationale de Droit Economique* (AIDE) held a workshop on the role of economic law with respect to the current crises of democracy. The underlying issue addressed by the workshop and by similar discussions and studies concerns the link between democracy, market-based economic systems, and the relevant legal institutions. This paper develops the ideas presented in that workshop.

2. Democracy as inclusion.

Democracy is about inclusion. The inclusion of the people in the decision-making process regarding the public affairs and in the sharing of the benefits deriving from these decisions. The main conceptions of democracy – the liberal or representative, the participatory and the deliberative democracy – provide for different ways of including the people in the decision-making process. True inclusion implies equality. Without a sufficient degree of equality the system is not really inclusive: it is tilted to the advantage of some and to the disadvantage and potentially de facto exclusion of the others. Democratic political system must grant equal rights of vote and of being elected, just as democratic economic system must ensure a level playing field not only among firms but also between a firm and its clients (as opposed to abuse of dominant position and information asymmetries and the like).

Democracies are in crisis when the reality, or the perception of it, is instead one of exclusion. People increasingly feel excluded; they do not control the decision-making process, they do not have a voice in the matter; somebody else decides for his own interests and impose their preferences and interests on the general public. The spreading sentiment across many western democratic countries is that the people's interests are not being sufficiently represented in the decision-making processes, especially decisions governing economic activities. Economic regulation is seen as being increasingly shaped by the interests of minorities or by foreign interests.

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This is at least one of the *fils rouges* underlying the anti-globalisation movement of the 1990s and 2000s, the Occupy Wall Street and Los Indignados protest movements in the US and in Spain, Brexit, the anti-EU or anti-Euro votes in several European countries (e.g. Netherlands, Italy), the campaigns against international trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA), and so forth. Most of the so-called populist parties invoke national sovereignty against international rules and decision-making fora, EU included, and claim the democratic duty to bring policy-making back to the state level and political process.

Wide proportions of the population not only feel excluded from decision making processes, but they have to bear much of the costs resulting from such decisions. We can borrow an economic concept, that of negative externality, to describe this democratic failure. It refers to the cost that affects a party who did not choose to incur that cost. For example, costs from private activities imposed on the whole community. This a case of 'regulation without representation'[1]. This phenomenon also includes situations in which negative externalities are caused by the violation of rules.

As far as the regulation of economic activities is concerned, economic law is at the centre of the democratic failure.

Economic law has a double dimension: on the one hand it consists of institutional and procedural law, thus setting out who is in charge of taking decisions and how (e.g. EU rules governing the powers of the ECB, EU legislation establishing regulatory agencies or distributing the powers among Member States and between them and the EU); and on the other hand it consists of substantive law rules (e.g. competition law rules or financial regulation). Especially, in its former dimension economic law is instrumental in producing inclusion or, instead, exclusion. And in its latter dimension economic law is a product of such inclusion/exclusion.

Economic law contributes to the crisis of democracy if, and to the extent that, it fails to ensure an adequate level of inclusion to the rule-making process governing economic activities. The spreading sentiment across many western democratic countries is that the people's interests are not being sufficiently represented in these processes. Economic regulation is seen as being increasingly shaped by the interests of minorities or by foreign interests.

In the EU legal and political system, the weak link between economic regulation and democratic representation has been officially recognised by EU institutions in specific areas. Financial regulation and the regulation of the automobile industry can be taken as case studies. In the EU these are sectors in which EU institutions have recognised the failure of the democratic process and is trying to address the problem by introducing institutional reforms.

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[1] P. TUCKER, *Unelected Power. The Quest for Legitimacy in Central Banking and the Regulatory State*, Princeton University Press, 2018.

At least two groups of democratic failures could be highlighted in the governance of the EU banking sector. They both represent different forms of «negative democratic externalities». This concept refers to the situation in which the general community is being burdened with costs resulting from activities carried out by specific subjects for their own purposes, disregarding the community's will and general interest. As regards the banking regulation, these other subjects are in particular national authorities and financial institutions (e.g. banks). The governance of the banking system at the time of the financial and euro crises was not democratic to the extent that it allowed political and private interests to be pursued without effective democratic control and to the detriment of the public good.

3. Private vs. public interests. The cases of financial institutions and the automotive industry.

The first democratic externality that was present in the governance of the banking sector concerns the conflict between private and public interests: this can be referred as the 'private/public externality'. It is the conflict between the interests of a limited number of (legal or physical) persons, acting and organised in a 'professional' capacity, on one hand, and the interests of a much wider group of un-organised and 'unprofessional' individuals or of the general public at large, on the other hand. The former group is exemplified by politicians and bankers, while the latter by retail clients, investors and taxpayers. This is a conflict underlying the exercise of all public powers concerning the banking field that form banking regulation *lato sensu*. The private/public negative democratic externality occurs when banking regulation *lato sensu* allows the financial industry to dump its costs on others (e.g. the public at large). For example, a weak crisis-prevention regulation increases the risks of individual and systemic bank failures, to the detriment of third parties who will bear most of the costs of these failures (e.g. real economy firms severely damaged by the credit crunch triggered by a banking systemic crisis). Another example is the political management of a banking crisis that is mainly based on the use of public resources to bail out (mostly private) financial institutions, and more generally to try and correct their mistakes and excessive risk-taking profit-oriented conduct.

The above scenarios constitute not only market failures, but also failures of the democratic process. The political decision-making organisational set-up fails to ensure an adequate degree of representation, accountability and/or effective protection of the public good. The political decision to structure banking regulation *lato sensu* so as to allow the financial industry to externalise most of the costs (e.g. risks) of their activities does not surely represent the will/interest of the community at large, nor the protection of fundamental private rights. Banking regulation *lato sensu* is often being shaped by politicians' (political and personal) objectives and by the interests of the financial industry at the expense of public interests (e.g. financial stability, interests of banks' clients and of taxpayers). In many respects the (formal and informal) links between the political system and the banking system are stronger than the links

between the former and its citizens. National political institutions, in charge of laying down banking legislation, find it difficult to deprive themselves of levers to influence banking activities for political reasons. National independent supervisory authorities have not solved the problem. Furthermore at EU level, the governance of the legislative process has a poor record in representing general interests such as those of retail banking clients.

As mentioned, the same phenomenon of private interest prevailing over the public good has been recently recognized at EU level also in the automotive sector. It concerned the so-called 'dieselgate' that began in September 2015 when the United States Environmental Protection Agency found that German automaker Volkswagen Group had concealed the true level of polluting emissions of some of its models through the use of 'defeat devices' that would be activated during laboratory controls. In the 2017 Report on the inquiry into emission measurements in the automotive sector by the Committee of Inquiry into Emission Measurements in the Automotive Sector of the European Parliament[2], the finger has been pointed to various deliberate failures by the public authorities that were in charge of protecting the public interest. It highlights the overrepresentation of experts from car manufactures and other automotive industries in the working group involved in the EU public decision-making with regard to the development and introduction of real driving emissions (RDE) testing with portable emission measurement systems (PEMS). The Report quite explicitly denounces that «[t]he excessive length of the process leading to the introduction of regulatory RDE tests cannot be sufficiently explained only by the complexity of the development of a new test procedure, the time needed for the technological development of PEMS, and the length of the decision-making and administrative processes at EU level. The delays were also due to choices of political priorities, lobby influence and constant pressure from the industry that directed the focus of the Commission and the Member States to avoiding burdens on industry in the aftermath of the 2008 financial crisis»[3].

4. National vs. foreign interests.

The second group of democratic negative externalities can be referred to as the 'national/foreign externality'. It originates from the mismatch between the wide integration of European markets and the narrow scope of democratic decision-making processes. Because of the interconnection and overlap between national banking systems within the EU, inadequate national regulation and supervision of banks in one Member State may easily produce negative consequences on another State's citizens, but without

[2] *Report on the inquiry into emission measurements in the automotive sector by the Committee of Inquiry into Emission Measurements in the Automotive Sector*. Rapporteurs: Jens Gieseke, Gerben-Jan Gerbrandy, 2 March 2017, (2016/2215(INI)).

[3] *Report on the inquiry into emission measurements in the automotive sector*, cited above, p. 5.

the former State having to take into account the interests of these citizens in its decision-making process[4]. Again, costs are imposed on others who do not have the democratic means to have a say in the matter. In Maduro's words, «[t]he scope and level of politics has not mirrored the scope and level of the political problems facing Europe»[5]. For this type of externalities both myopic/selfish Member States and inadequate EU decision-making architecture share the blame. The underlying causes are rooted in the design and/or in the functioning of the institutional mechanisms that fail to ensure the right degree of democratic representation, accountability and public interest protection.

5. Democracy and the EU banking administrative architecture.

The recent institutional reforms introduced by the EU in the banking sector can be analysed and assessed in relation to their ability to address the two above-said types of democratic externalities.

The most important banking institutional reforms recently enacted in the EU are the establishment of a EU agency, the European Banking Authority (EBA), and of the Banking Union (BU).

Established in 2010, the EBA's tasks are to improve the functioning of the internal market, in particular by ensuring a high, effective and consistent level of banking regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions[6].

The EBA's central organ is the Board of Supervisors: its voting members are the heads of national banking supervisory authorities (the BU has not altered this national-based voting membership: the EBA Board of Supervisors comprises one representative nominated by the ECB Supervisory Board, but he/she shall be non-voting[7]). It approves technical standards by qualified majority voting, and by double simple majority of Member States participating and non-participating in the BU[8].

In 2011 the euro crisis forced a second wave of institutional banking reforms, which, unlike EBA, are not involving all Member States (but only Member States whose currency is the euro and some non-Euro Member States). The Euro Area Summit of June 2012 approved the BU project proposed by the Commission. Currently, two of the three pillars of the BU have been realized: the Single Supervisory Mechanism (SSM)[9] which revolves around the ECB as the new supervisor; and the Single Resolution

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[4] M. POIARES MADURO, *A New Governance for the European Union and the Euro: Democracy and Justice*, in *EUI/RSCAS Policy Papers*, 2011, no. 11.

[5] M.P. MADURO, *A New Governance*, cited above.

[6] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, *OJ* L 331 of 15 December 2010, pp. 12-47 [2010 EBA Regulation]. As regards EBA's tasks, see 2010 EBA Regulation, Recital 11 and Arts. 8-9.

[7] 2010 EBA Regulation, Art. 40(1)(d).

[8] 2010 EBA Regulation, Art. 44 (as amended with the establishment of the Banking Union).

[9] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, *OJ* L 287 of 29 October 2013, pp. 63-89 [2013 ECB/SSM Regulation].

Mechanism (SRM)[10], managed by a Single Resolution Board (SRB), a newly established EU agency, in charged of taking decision concerning the resolution of banks. The third pillar, i.e. the Common Deposit Insurance, is still being negotiated.

The lack of consistent banking regulation *lato sensu* in the EU was one of the main problems that prompted the EU to introduce the EBA as a new actor in the governance of the EU banking sector. The EBA has been created mainly to deal with deficiencies of the banking regulatory process following the legislative phase, consisting of technical/national specification and implementation of legislative rules, and application of the resulting body of (legislative and administrative) law. The fundamental problems were, *inter alia*, «the lack of a consistent set of rules»[11] throughout the EU, and the lack of consistent supervisory practices among national authorities. The two main causes behind the divergent national banking rules stemmed, firstly, from the implementation options left to Member States by EU legislative acts (directives), and secondly, from the diverse interpretations of EU rules, even when national options were not included.

At the root of (almost) all deficiencies is the national-based approach to banking regulation. National-based regulatory and supervisory models have failed in dealing with the integrated and interconnected reality of European financial markets[12]. They have failed in protecting the people's interest, in its European and national dimension (the public power was not exercised 'for the people'). National financial markets were not adequately monitored and national authorities failed to address, unilaterally and in cooperation with each other, cross-border issues and risks. The national based models also failed in democratic representation (the public power was not exercised 'by the people'). Under this model, national authorities are able «to unduly favour their own national banking system and economy, regardless of outward spill-overs that lie beyond their mandates»[13]. «The regulatory approach based on minimum harmonisation coupled with the home-host cooperation allowed national authorities to use the regulatory lever to favour national champions and attract business to national markets, thus weakening the overall regulatory framework»[14] and damaging the realisation of an EU-wide internal financial market by ring-fencing domestic markets and by creating an uneven playing field.

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[10] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, *OJ* L 225 of 30 July 2014, p. 1-90 [2014 SRM Regulation].

[11] *The High-Level Group on Financial Supervision in the EU, chaired by J. de Larosière. Report*, 25 February 2009 [De Larosière Report (2009)].

[12] 2010 EBA Regulation, Recital 1.

[13] C. ENOCH ET AL. (eds.), *From Fragmentation to Financial Integration in Europe*, IMF 2013.

[14] A. ENRIA, *The Single Rulebook in banking: is it 'single' enough? Lectio Magistralis at the University of Padova*, 28 September 2015.

In response to the democratic failings of national-based governance structure, the EU has increased the degree of centralization of non-legislative rule making, supervision and enforcement. The EU-wide reforms revolve around the work of the EBA and the Commission, but the Council, the EU Parliament, and national government's representatives (through comitology committees) are also involved.

The EBA is the engine behind the new EU power of setting binding technical standards aimed at increasing the level of harmonisation[15]. It is the EBA that drafts technical standards, which then have to be endorsed by the Commission. In case of regulatory technical standards, once adopted by the Commission, the Council or the European Parliament may veto their entry into force (Art. 290 TFEU and Art. 13 EBA 2010 Regulation). In case of implementing technical standards, the Commission's exercise of implementing powers is subject to the comitology-based control of Member States (Art. 291(3) TFEU and Regulation (EU) No 182/2001).

The question is whether the new governance is able to prevent the two negative democratic externalities from occurring in the post-legislative phases of banking regulation *lato sensu*. Doubts about its full effectiveness are due to the seemingly insufficient degree of centralisation and independence, in addition to structural fragilities in the accountability mechanism.

As regards the public/private externality, some of its underlying causes still persist. The new governance has not severed the structural features allowing or even favouring the 'special' relations between policy/rule-makers and financial institutions. First, with (especially continental) European economic systems still bank-based and the sovereign debt risks still looming, financial industry lobbies continue to have 'bargaining power' in the regulatory process. Such power can be used to extract concessions from regulators and supervisors, both at national and at EU level. Second, the governance is still dominated by national authorities (as will be explained below). To the extent that in the past these authorities favoured banks over the public good because of national politics, the new governance will not stop them now. In other words, as national interests are still able to find their way in the regulatory and supervisory process within the reformed EU institutional framework, so will the disproportionate political weight of the financial industries that come with those interests. Third, and strictly connected to the previous point, the performance accountability of national competent authorities (NCA) to national political institutions is bound to be stronger than to EU political institutions (EU Parliament and Council). Strictly speaking NCAs are accountable to the latter only indirectly: under Art. 3 of the 2010 EBA Regulation, it is the EBA – not the NCAs – to be accountable to the European Parliament and to the Council. Furthermore, NCAs are expression of national legal and political decisions (e.g. the heads

[15] E. AVGOULEAS, *Governance of Global Financial Markets*, Cambridge 2012, refers to «maximum harmonisation». However, the EBA's President has highlighted the various obstacles that are still obstructing the achievement of such level of harmonisation, see A. ENRIA, *The Single Rulebook in banking*, cited above.

of such authorities are nominated by national institutions) and mainly work in the national social and economic environment (e.g. subject to the scrutiny of national media). To the extent that the national political institutions, in turn, continue to be more responsive to the demands of the financial industry than to the public good, the public/private externality will persist.

The fact that national authorities are still in control of post-legislative phases of banking regulation gives rise not only to public/private externality, as just mentioned, but also to the 'national/foreign' one. Within the new governance framework national authorities still enjoy enough regulatory space to create costs for other Member States without the latter's consent.

As far as centralisation is concerned, the shift of power from national to EU level is incomplete: it is not deep enough to iron out undue differences between national regulations and between national supervisory practices. There are various factors at play. Some have to do with the specific mandates given to the EBA by the co-legislators. In some cases, the EBA is tasked with developing technical standards from minimum harmonisation directives. «Implementing those Directives through immediately applicable Regulations is a source of complexity and it is often used to refrain from full harmonisation»[16]. Other factors concern the scope of EBA's powers, as provided for by its foundational legal act. Member States remain in charge of implementing and/or applying the common rules and standards adopted at EU legislative and administrative level. Differentiated national practices can preserve legal fragmentation and thus regulatory competition and cross-border externalities or spill-overs within the EU banking sector. Enforcement of banking regulation against financial institutions is still a national competence. Only the enforcement against Member States is centralised. In this regard, however, the EBA has no enforcement powers. In case of non-compliance, only the Commission can act against a Member State on the basis of general enforcement procedures provided for by Art. 258 TFEU[17]. The Commission's intervention, with the possible involvement of the Court, certainly represents the highest form of centralisation; however it is questionable whether that system is able to manage effectively all the cases for non-implementation of EU banking law arising from the activities of national authorities in the 28 Member States[18].

Insufficient independence is the second weakness of the new EU governance of the banking system. In order for the national/foreign externality to be corrected, shifting power from the national to the EU level is not the only necessary condition. The 'national/foreign' logic must also be removed from the exercise of power at EU level. And its place must be taken by the 'EU as a whole' logic.[19] The EBA's

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16 A. ENRIA, *The Single Rulebook in banking*, cited above.

17 Besides private enforcement against the State or the national competent authority at national level.

18 E. WYMEERSCH, *The European Financial Supervisory Authorities or ESAS*, in *Financial Regulation and Supervision*, edited by E. Wymeersch, Oxford 2012.

19 According to Art. 42 of the 2010 EBA Regulation, «[w]hen carrying out the tasks conferred upon it by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and

internal decision making is still dominated by national perspectives and national tendencies: the 28 voting members of the Board of Supervisors are the heads of national supervisory authorities[20]. Standard-making decisions are taken by qualified majority of its members. The Board of Supervisors' composition and voting system are likely to raise the risk that nationally-focused politics steer the Board's decisions. As regards the standards drafted by the EBA, the national/foreign externality may be removed from the action of individual Member States, but not from the collective action of Member States forming the majority. Decisions might be taken to further the common national interests of the majority, instead of the interests of the EU as a whole. The existence of such risk finds confirmation in the 2013 amendment of voting procedures within the EBA Boards of Supervisors: because of fears that the group of national authorities participating in the ECB/SSM might dominate the EBA's rule-making function, the revised Art. 44 of 2010 EBA Regulation provides that a double majority (participating/non participating States) is required.

Besides the relation between the ECB and the EBA, if the latter were to act with a view to furthering the banking interests of the majority of its members, it would be liable for exercising its powers in violation of its duties: the Chairperson and the voting members of the Board of Supervisors are under the obligation to «act independently and objectively in the sole interests of the Union as a whole»[21]. The issue here is not so much the illegality of EBA's actions, but the undemocratic structure of its decision-making mechanism. The democratic failures are rooted in the very structure of EBA's internal governance. The people's input is not implemented: non-majoritarian authorities, like the EBA, are legitimate if and to the extent that they enact policy decisions taken by the people's representatives. In this case, the latter, i.e. the Parliament and the Council, have imposed the EBA the duty to pursue the «sole interests of the Union as a whole». As its decision-making process de facto leads the EBA instead to act not in pursuit of that goal, but of other – possibly conflicting – goals (i.e. the interests of the majority of States), the governance of the EBA is not in line with the requirement of democratic representation. The second failure concerns the protection of the people's interest. As the EBA is structurally biased in favour of the majority's interests, possibly in conflict with what has been democratically determined to be the public interest to be pursued, i.e. the interests of EU citizens as a whole, the governance of EBA contrasts an exercise of public power 'for the people'.

objectively in the sole *interest of the Union as a whole* and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body» (emphasis added).

[20] EBA Chairman, Andrea Enria, has warned that national tendencies in the Supervisory Board may negatively affect the Authority's tasks, in P. JENKINS, S. FLEMING, *Euro bank watchdog attacks unwieldy governance*, in *Financial Times*, 17 November 2013.

[21] 2010 EBA Regulation, Art. 42.

It could be argued that the role of the Commission ensures the EU governance of the banking system with adequate independence. The Commission has in fact the last word on most of the EBA's proposed measures. It is the Commission that adopts the technical standards (Arts. 290-291 TFEU), that forces a Member State to comply with EU banking rules[22] and that adopts emergency measures[23]. The central role of the Commission certainly increases the likelihood that a supranational perspective on the governance of the EU banking system is adopted, without however providing absolute guarantees of that. The technical regulatory standards must meet the (tacit) approval of the Council (national interests) (Art. 290 TFEU), and the implementing technical standards have to go through the comitology process (national interests) (Art. 291 TFEU). Furthermore, because of its specific banking expertise and information, it is likely that on the more technical aspects of EU banking regulation *lato sensu*, it is the EBA that will be in the driver's seat.

Will the EBA's accountability regime be able to steer the EBA towards the protection of EU interests from conflicting domestic interests? As far as the effectiveness of performance accountability is concerned, what said above about the private/public externality applies here as well. As regards judicial accountability, it is not likely to have a significant impact on the exercise of most relevant powers of the EBA, that is, the quasi-regulatory powers. Technical standards are formally adopted by the Commission and, besides respecting the legal limits of the EU legislators' delegation, the degree of discretion inherent in their creation will leave them mostly outside the reach of judicial review.

As regards the Banking Union, within its the personal and material scope, centralisation deficits have been reduced, but not eliminated. And the independence of decision-makers within the BU is still fragile.

The BU project has been conceived exactly to increase the degree of European integration as regards prudential supervision, enforcement and crisis management. The conviction is that in the field of prudential supervision and bank resolution, powers need to be transferred to the EU level in order to be effective, and the exercise of national powers need to be subject to a stronger control and management by EU authorities. Past models of governance based on mere coordination/cooperation have proved to be insufficient for ensuring effective prudential supervision, crisis management and consistent application of EU common rules[24]. For this reason, some of the national decision-making powers have been transferred to the ECB (e.g. authorisation of credit institutions) and to an EU agency, the Single Resolution Board (SRB) (e.g. adoption of resolution plans for banks), within the framework of the single supervisory mechanism (SSM)[25] and the single resolution mechanism (SRM)[26], respectively. Both

[22] 2010 EBA Regulation, Art. 17.
[23] 2010 EBA Regulation, Art. 18.
[24] 2013 ECB/SSM Regulation, Recitals 5 and 87.
[25] 2013 ECB/SSM Regulation, Art. 6.
[26] 2014 SRM Regulation, Art. 1.

mechanisms are composed also of national competent authorities (and, in the case of the SRM, the Commission and the Council): the logic behind them is not just an upward shift of powers, but an EU-led stronger multi-level integration and cooperation. For example, the ECB's decision to authorise a bank to take up its business is based on a draft decision proposed by the relevant national competent authority[27].

The goal of addressing negative democratic externalities underlies the political decision to step up centralisation through the SSM and the SRM. For space constraints, examples from the SSM will be used in the following analysis. The preoccupation with the national/foreign negative externality is particularly clear. As regards the SSM, the EU legislators justify replacing national competences with EU powers by making an explicit reference to the risk of «the impact of failures of credit institutions on other Member States"[28]. In the context of a single currency, an EU governance based on mere coordination between national authorities is particularly ineffective, and the risk and consequences of negative externalities of the national/foreign type are particularly serious[29]. Because of «the close links and interactions»[30] between Euro-area Member States, the concerns of negative externalities are not only related to the banking markets, but also to the sovereign debt market and the functioning of the single currency and monetary policy. For this reason at least all Euro-area Members State must join the BU.

Centralisation through the BU has reduced without eliminating negative democratic externalities. The SSM leaves open the possibility of negative cross-border externalities between participating and non-participating Member States. Inadequate supervision of banks outside the BU can give rise to instability in the banking markets within the EU, and vice-versa. Again, in theory the member of the SSM are to protect not simply the interests of the euro-area and those of other participating Member States, but the interests of the whole EU. But in practice priorities may be different.

Furthermore, centralisation does not necessarily equate with independence. The composition of the Supervisory Board is for the most part made of 'representatives' of the national competent authorities of each participating Member State[31]. In theory, they are supposed to act in the sole interest of the Union as a whole, disregarding the interests of their home country. «The members of the Supervisory Board (…) shall act independently and objectively in the interest of the Union as a whole and shall neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or form any other public or private body»[32]. «All member of the Supervisory Board shall act in the

[27] 2013 ECB/SSM Regulation, Art. 14.
[28] 2013 ECB/SSM Regulation, Recital 87.
[29] 2013 ECB/SSM Regulation, Recital 5 and 11.
[30] 2013 ECB/SSM Regulation, Recital 11.
[31] 2013 ECB/SSM Regulation, Art. 26.
[32] 2013 ECB/SSM Regulation, Art. 19.

interest of the Union as a whole»[33]. Will they comply with this obligation? There seems to be a contradiction: on one hand, supervisory tasks have been taken away from individual national authorities also because they were carried out with too much focus on national interests; on the other hand, however, the planning and execution of supervision in the SSM is still to be undertaken by a body composed by a majority of national authorities[34]. True supranational decisions are needed to pursue a truly European interest, and cannot be trusted to a body composed of national authorities. It leaves too much room for national-oriented perspectives, and conflicts both between national interests and between national interests and the interest of the EU as a whole[35]. The ECB might be accused of carrying out its supervisory tasks without impartiality if, for example, its decisions would favour the banking systems of certain Member States to the detriment of the others. By focusing on credit risk and ignoring market and legal risk, the ECB has already been 'suspected' of favouring northern European Member States in which banks focus more on trading and/or are currently involved in costly lawsuits (like Deutsche Bank)[36].

Majority/minority negative dynamics can also arise in the adoption of decisions by the ECB's Governing Council (GC), which is the SSM final decision maker, and in which non-euro SSM participating Member States are absent. For this reason, the GC is expected to invite representatives from those Member States whenever it is planning to object to a Supervisory Board's draft decisions or whenever the concerned national competent authorities inform the GC of their reasoned disagreement with a draft decision of the Supervisory Board addressed to national authorities concerning banks from non-Euro SSM participating Member States[37]. The GC must promptly decide on any draft decision of the Supervisory Board with which a non-euro participating Member State disagrees, taking fully into account the latter's reasons and explain in writing its decision to the Member State concerned. The latter may request the ECB to leave the close cooperation with immediate effect and will not be bound by the ensuing decision[38]. These special rules are double-edged sword. On one hand, they increase democratic

[33] 2013 ECB/SSM Regulation, Art. 26.

[34] It is commonly believed that, because of the *Meroni* case-law, the Supervisory Board may not be delegated to take supervisory decisions. It is tasked with preparatory works and with proposing to the ECB Governing Council complete drafts decisions (2013 ECB/SSM Regulation, Art. 26(8)). Formally, it is always the ECB Governing Council that adopts such decisions. However, the latter may only approve or object (but not modify) the proposals of the Supervisory Board; in case of objections it has to state its reasons in writing, and it has only a 10 working days (or 48 hours in case of emergency) timeframe to present its objections. For these reasons, it is reasonable to assume that, normally, the Governing Council will not have time to review day-to-day supervision and approve the Supervisory Board's proposal by silence, making it «in practice a co-decision-making body», L.M. HINOJOSA-MARTINEZ, *The Role of the ECB in the Supervision of Credit Institutions*, in *European Banking Union. The New Regime*, edited by L.M. Hinojosa-Martinez, J.M. Beneyto, Alphen aan den Rijn 2015.

[35] See L.M. HINOJOSA-MARTINEZ, *The Role of the ECB*, cited above, who believes that «the supranational context of this decision-making and its highly technical background provide an environment that favours objectivity».

[36] A. BAGLIONI, *The European Banking Union. A critical assessment*, Basingstoke 2016.

[37] ECB/SSM 2013 Regulation, Recital 72.

[38] ECB/SSM 2013 Regulation, Art. 7(8).

representation and attenuate the risk of majority/minority externality. On the other hand, by identifying a national supervisor with its Member State, a Member State with 'its' banks, and by allowing a Member State to threat leaving the BU for individual decisions concerning its banks, show how the nationally-focused perspective can still permeate EU decision making, thus weakening the pursuit of the interests of the EU as a whole.

A particular obligation aimed at ensuring impartiality in the exercise of supervisory tasks by national authorities, and thus preventing the national/foreign externality, is exemplified by Art. 31 of the 2013 ECB/SSM Regulation. The ECB has the power to impose a multi-national composition of supervisory teams of national authorities taking supervisory actions regarding a financial institution. Requiring the involvement of staff from foreign supervisory authorities, thus making possible for national authorities to monitor and keep in check one another on an on-going basis[39], is meant to ensure that supervision is carried out for the interests of the EU as a whole, as oppose to national interests. The EU wants to avoid conflict of interest situations[40], in which, in particular, national authorities may be tempted to subordinate EU interests to the protection of national champions.

Overall, ECB's accountability safeguards provided for by EU legislation appear to be of a good standard[41]. The ECB is accountable to both sources of democratic legitimacy in the EU: the totality of EU citizens (EU Parliament) and Member States' democratically organized peoples (Council and national parliaments)[42]. Of particular interest is a national parliament's possibility of inviting the Chair or a member of the Supervisory Board for «an exchange of view in relation to the supervision of credit institutions in that Member State»[43]: this is certainly an important means to enhance transparency and thus accountability and a crucial moment to correctly understand and manage in practice the possible duality between national interests and EU interest. To make ECB's accountability (and independence) more effective, the transparency of its activities should be enhanced, for instance, by providing through its website a level of information adequate enough to enable the general public – through the intermediation of market analysts, academic commentators, consumer associations and the media – to evaluate the ECB's conduct, in terms of impartiality, coherence and effectiveness.

One aspect deserving particular attention is the power of the EU Parliament and of the Council to 'pressure' the ECB into removing the Chair or the Vice Chair of the Supervisory Board when he no

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[39] 2013 ECB/SSM Regulation, Recital 79.

[40] SSM 2012 Commission Proposal, Recital 40 («Where necessary to avoid conflicts of interest, particularly in the supervision of large banks»).

[41] See D. MASCIANDARO, M.J. NIETO, *Gouvernance du Mécanisme de Supervision Unique: quelques réflexions*, in *Revue d'economie financière*, 2013, no. 4, p. 51 ff.

[42] 2013 ECB/SSM Regulation, Arts. 20-21.

[43] 2013 ECB/SSM Regulation, Recital 26 and Art. 21.

longer fulfils the «conditions required for the performance of his duties»[44]. These conditions are not sufficiently clear.

The ECB is also accountable to judicial and administrative review mechanisms, activated by individual persons who are subject to or affected by its supervisory decisions. Legal instruments like the duty of due process, the internal administrative review and the right to bring proceedings before the Court of Justice, are particularly important for keeping the ECB in check as regards the correct implementation of its mandate.

[44] 2013 ECB/SSM Regulation, Art. 26(4).