

MONETARY POLICY AND CENTRAL BANKING IN THE CONSTITUTION

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ABSTRACT

La costituzione non introduce cambiamenti rivoluzionari per quanto riguarda la politica monetaria e la BCE. Come la BCE ha osservato con l'opinione resa il 19 settembre 2003 dopo la conclusione dei lavori della Convenzione, "funzioni, compiti, status e regime legale della BCE e del SEBC rimangono sostanzialmente inalterati". Nondimeno, la Costituzione introduce alcune interessanti novità, le cui implicazioni non sono agevoli da predire. La Costituzione indica la politica monetaria tra le competenze esclusive dell'Unione Europea. La rilevanza di siffatta qualificazione dipenderà dall'interpretazione delle disposizioni contenute nel capitolo relativo alla politica monetaria, contenuto nella Parte III della Costituzione. La BCE diviene un'istituzione sui generis dell'Unione, un cambiamento in linea con la decisione della Corte di Giustizia sul caso OLAF, che conferma l'appartenenza della BCE al sistema giuridico della Comunità Europea. La Costituzione, che inserisce fra le sue disposizioni la nozione di "Eurosistema", non offre indicazioni nuove sui ruoli del SEBC, dell'Eurosistema e della BCE. Come in passato, l'individuazione caso per caso delle funzioni rispettivamente delle Banche Centrali Nazionali e della BCE resterà affidata all'applicazione e all'interpretazione delle disposizioni dello Statuto, rimasto inalterato. Neppure è agevole precisare quale impatto avrà la nuova classificazione e gerarchia delle fonti sugli strumenti legali adottati dalla BCE. I Regolamenti della BCE diventano regolamenti europei. La legge europea avrà pertanto automaticamente prevalenza sui regolamenti della BCE? O si potrebbe essere autorizzati ad invocare il principio di specialità? Queste sono alcune delle questioni sollevate dalla Costituzione con riferimento alla politica monetaria e alle banche centrali. Lo studio vuole soltanto richiamare l'attenzione su esse e su altri aspetti di un certo interesse.

I THE EURO AND MONETARY POLICY

I.1 THE EURO

Article I-8 states that “the currency of the Union shall be the euro”. This makes the euro one of the key symbols of the Union, along with the flag, the anthem, the motto and Europe day. It is interesting to observe that the clear-cut formula relative to the currency is not to be found in the text of the Regulation that constitutes the pillar of the legal framework of the euro.¹ There, the euro is presented as the currency of participating Member States and as the unit of account of the ECB and the national central banks.² The word “euro” has also been substituted for the word “ecu” in all the provisions of the Constitution containing the name of the currency. So the primary law of the Union will at last be made to conform with secondary law and practice.

This mention among the first of the articles of Part I of the Constitution is in contrast to the lack of any reference to EMU among the objectives of the Union in Article I-3 and the formulation of Article I-15, which have lead one author to write that “the Constitution [at least in its first part – author’s observation] [...] avoids regarding the achievement of the EMU as the normal situation to which the provisions of the Chapter on economic and monetary policy should be addressed and the non-achievement thereof as an exceptional situation for which a specific regime should be needed.”³

The Convention introduced a provision on the symbols in the text of the Constitution during the last stage of its work with the purpose of promoting a single European identity. The euro can indeed be a “vector of identity”.⁴ However, the appropriation of the euro by the citizens of the euro area depends on a number of factors. There is a kind of dialectic relationship between identity shaping and the achievements of the euro. European identity is inseparable from the success of the single currency, and this success itself appears to be a consequence of the emergence of a European identity.⁵

The adoption of the euro is irreversible. Protocol 10 annexed to the EC Treaty by the Maastricht Treaty expressed this feature of Economic and Monetary Union. The Constitution does not include a similar provision or protocol, although this does not mean that the principle does not remain. What the Constitution does do is provide for the right of withdrawal from the Union by any Member State in Article I-60. René Smits has pointed to the element of insecurity for the euro involved in this possibility.⁶ So-called disaster clauses, taking on board changes in the membership of the euro area, will flourish. On

1 Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

2 Ibid., Articles 2 and 4.

3 See P. J. G. Kapteyn, “EMU and Central Bank: Chances Missed”, *European Constitutional Law Review* 1 (2005), pp. 123-30 (124).

4 See G. Koenig (ed.), *L'euro, vecteur d'identité européenne* (Strasbourg: Presses Universitaires de Strasbourg, 2002).

5 See P.-G. Méon, *ibid.*, p. 321.

6 R. Smits, *The European Central Bank in the European Constitutional Order* (Utrecht: Eleven International Publishing, 2003), p. 44.

the other hand, the agreement arrived at by the Union and the Member State wanting to withdraw⁷ can include maintaining the euro as the country's legal tender. Without this agreement, the outgoing Member State cannot keep the single currency. It is also important to remark that Article I-60 may contribute towards making the dissolution of the euro area an unrealistic hypothesis. Among other eventualities, it ensures that the withdrawal of a Member State does not affect the continuation of the integration process among the others.

1.2 MONETARY POLICY

The Constitution maintains the present asymmetry between the two pillars of EMU. It provides for a transfer of powers in the monetary field and the competence of the Member States as far as economic policy is concerned.

Article I-13, paragraph 1 (c) of the Constitution defines monetary policy as an exclusive competence of the Union for the Member States whose currency is the euro. Article I-12, paragraph 1, states that “When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts”.

1.2.1 THE CONCEPT OF MONETARY POLICY

The main question raised by the qualification of monetary policy as an exclusive competence resides in how the concept of monetary policy is interpreted. Is it monetary policy in the narrow sense of the expression, i.e. internal monetary policy, including the determination of interest rates, the supply of liquidity to the economy and the recourse to such instruments as the imposition of compulsory reserves, or should we adopt a broader concept and consider that under monetary policy one should include the competences provided in Section 2 on “Monetary policy” of Chapter II “Economic and Monetary Policy” in Title III “Internal Policies and Action” of Part III of the Constitution? René Smits lists four additional areas to monetary policy in its strictest sense that should be held as exclusive competences: exchange rate policy, the task of the European System of Central Banks (ESCB) in holding transferred reserves and conducting exchange rate operations, the oversight of payment systems, and the issuance of banknotes.⁸ The ECB took a position in its opinion of 19 September 2003 against a narrow and technical interpretation of monetary policy. It understood “monetary policy” as reflecting the title of Section 2 and “therefore consider[ed] that it encompasses all exclusive competences related to the euro ‘as described in the relevant provisions of the [...] Constitution’, in particular Articles III-[185] and [186].”⁹ As the wording of the draft of the Convention was not modified on this point by the IGC, it can be presumed that the ECB's interpretation has been

7 Under Article I-60, the Member State desiring to withdraw can also do so if the negotiation with the Union fails. However, it has to wait two years from the notification of its intention to withdraw.

8 R. Smits, *op. cit.* in footnote 13, pp. 39-41.

9 Opinion of the European Central Bank of 19 September 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe, OJ C 229, 25.9.2003, 7, point 9. Italics are ours.

validated by the IGC. In order to determine the allocation of competences between the EU and the Member States in a specific field, the meaning of the particular provision in Part III has to be interpreted. Indeed, under Article I-12, paragraph 6, the “scope of and arrangements for exercising the Union’s competences shall be determined by the provisions relating to each area in Part III”. This rule reflects the principle of conferred competences, included in the definition of the Union (Article I-1, paragraph 1), and reaffirmed by Article I-11, paragraph 1 of the Constitution. For example, Article III-186 provides for the possibility of both the ECB and the national central banks to issue banknotes. However, to make use of this possibility, the national central banks have to have authorisation from the ECB. Member States may issue coins¹⁰, but the ECB states the volume of the issue, while the Council harmonises the face values of these coins and adopts technical specifications for them. These provisions clarify the extent of the respective competences of the Union and the Member States. These are of course straightforward examples; a less obvious one is the delimitation of competences in the field of payment systems under Article III-185, paragraph 2, d). Moreover, it is not easy to define the precise role of the ECB and of the national authorities in the field of prudential supervision after reading Article III-185, paragraphs 5 and 6. From this last paragraph, to which we will return, this appears to be in effect a moving target.

1.2.2 EXCLUSIVE COMPETENCE AND EXTERNAL RELATIONS

Some authors have questioned the exclusive character of the external monetary competences of the Union. Doubts have been expressed in the field of external relations, in particular based on the wording of Article 111, paragraph 5 of the Treaty establishing the European Community (EC Treaty, reproduced in Article III-326, paragraph 4 of the Constitution, which states: “Without prejudice to Union competence and Union agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude agreements.”¹¹ Chiara Zilioli and Martin Selmayr list a series of fields in which the Member States have a residual competence to conclude agreements with third countries (agreements on foreign exchange working balances, on banking supervision, on coins and old agreements under Article 307 of the EC Treaty, and agreements with countries and territories with a special status).¹² We believe that most of the examples quoted are not pertinent. Either the Union (the Council or the ECB) has been given the competence to orientate, limit or effectively suppress by their action the so-called residual competence of the Member States whose currency is the euro, or it has enabled the states concerned to conclude an agreement, as was the case for the agreements on the introduction of the euro in European micro-states. Article 307 does not allow in principle new agreements to be concluded. The true exception is prudential supervision, as long as the

10 When Article I-30, paragraph 3 provides that the ECB “alone may authorise the issue of the euro”, it should more accurately have limited this sentence to the issue of banknotes. The Constitution, in Part III, directly authorises Member States to issue coins.

11 See F. Tuytschaever, *Differentiation in European Union Law* (Oxford: Hart, 1999), p. 171; C. Zilioli and M. Selmayr, *The Law of the European Central Bank* (Oxford: Hart, 2001), p. 213: “The insertion of such a paragraph in the last provision of the chapter on monetary policy can be interpreted only in the sense that there is still a certain competence of the Member States left in the field of monetary policy.”

12 C. Zilioli and M. Selmayr, *op. cit.* in footnote 18, pp. 213-28.

Union and the Bank have not used their competences in this field, and these competences have become exclusive under the doctrine of pre-emption that the Constitution confirms (Article I-13, paragraph 2).

Does the Constitution sufficiently take into account the exclusive character of monetary policy in the provisions on external relations specific to the euro area? Article III-196 provides for the adoption of common positions and unified representation in international financial institutions and conferences. However, although the wording implies that there is an obligation to adopt common positions, it is somewhat looser as far as “unified representation” is concerned, which is no more than an enabling clause. Of course, the provision refers to the whole of Economic and Monetary Union, and the competences of the institutions and conferences referred to are mixed from the viewpoint of Union law. These provisions are without prejudice to the exclusive nature of the monetary policy competence of the Union, but it would be difficult to quote one of any of these institutions and conferences that bears exclusively on monetary affairs *stricto* or *lato sensu*. Moreover, Member States are not very keen to admit their substitution by the Union, although they should be in favour of the euro area speaking with one voice and achieving a single representation for the whole field of EMU, as the question of the allocation of competencies between the Union and Member States is an internal question for the euro area.¹³

1.2.3 PRUDENTIAL SUPERVISION

Article 105, paragraph 6 of the EC Treaty provides for the attribution to the ECB of specific tasks concerning policies relating to prudential supervision of credit institutions and other financial institutions, with the exception of insurance undertakings. The decision should be taken by the Council, which must unanimously decide on a proposal of the Commission and obtain the assent of the European Parliament. The Convention introduced the legislative procedure in this field and thus substituted qualified majority voting for unanimity within the Council in Article III-185, paragraph 6. Unexpectedly, the Italian presidency of the IGC proposed to amend the procedure by requiring once more unanimity within the Council and a simple opinion of the European Parliament.¹⁴ This proposal was accepted by the IGC. Neither the Convention nor the IGC changed the content of the provision and, in particular, the rather odd exclusion of insurance companies from the field of application of the tasks to be conferred to the ECB.¹⁵

¹³ See European League for Economic Cooperation, “European Economic Governance Revisited”, *Cahier Comte Boël*, No 11 (2004), p. 43.

¹⁴ CIG 52/1/03 REV 1 (en), Annex 8 to Addendum 1, 25 November 2003.

¹⁵ See R. Smits, *The European Central Bank. Institutional Aspects* (The Hague: Kluwer Law International, 1997), p. 361.

2 THE ECB IN THE INSTITUTIONAL SYSTEM OF THE EU

2.1 THE ECB, THE ESCB AND THE EUROSISTEM

It is not purely by chance that the ECB and the ESCB are mentioned in an article (Article 8 EC, ex 4A) that is separate from the one (Article 7 EC, ex 4) on the (classic) institutions. Neither the ECB nor the ESCB are comparable to the main organs of the Community, which are endowed with decision-making power in all aspects of Community law. On the other hand, the choice of a specific article demonstrates the desire of the authors of the Treaty to underline the independence of the monetary authorities of the Community. Nevertheless, they are part of the Community's overall legal order. EMU should not be considered as a specific pillar like the ones on a Common Foreign and Security Policy or Justice in Home Affairs. The provisions on EMU are inserted into the EC Treaty. The institutions play their role in both pillars of EMU, notwithstanding some peculiarities owing to the specificity of the subject. The Court of Justice is competent for reviewing the acts of the ECB, under the provisions on the appeals to the Court and Article 35 of the Statute of the ESCB and the ECB.

The precise nature of the ECB has prompted much controversy in the literature. Zilioli and Selmayr have advanced the view, first in a series of articles, and then in a book¹⁶, that the ECB is “an independent specialised organisation of Community law”¹⁷, a “new Community” within the central Community pillar of the EU, on an equal footing with the other Communities.¹⁸ They argue that there is no hierarchy between secondary Community law and ECB law, and that the two legislations subsist at the same normative level.¹⁹ General Community legislation thus does not apply to the ECB, or in fields that do not lie within the spectrum of the ECB's competences. This doctrine has unsurprisingly been strongly contested.²⁰

Although the Bank has not adopted Zilioli and Selmayr's thesis as such, the position of the ECB was at the centre of a litigation case that placed the ECB in opposition to the Commission on the application to the Bank of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office.²¹ The ECB had adopted a Decision 1999/726/EC of 7 October 1999 on fraud prevention.²² This Decision established an anti-fraud committee within the Bank

16 See C. Zilioli and M. Selmayr, op. cit. in footnote 18.

17 Ibid., p. 31.

18 Ibid., pp. 29-30.

19 Ibid., p. 43.

20 See R. Torrent, “Whom Is the European Central Bank the Central Bank of? Reaction to Zilioli and Selmayr”, CML Rev. (1999), pp. 1229-41; F. Amtenbrink and J. De Haan, “The European Central Bank: An Independent Specialised Organisation of Community Law – A Comment”, CML Rev. (2002), pp. 65-76; R. Smits, op. cit. in footnote 13; A. Malatesta, *La Banca Centrale Europea. Gli aspetti istituzionali della banca centrale della Comunità europea* (Milan: Giuffrè, 2003), pp. 75-76.

21 OJ L 136, 31.5.1999, p. 1.

22 OJ L 291, 13.11.1999, p. 36. This Decision has been replaced by the Decision of the ECB of 3 June 2004 concerning the terms and conditions for the European Anti-Fraud Office investigations of the ECB, in relation to the prevention of fraud, corruption and any other illegal activities detrimental to the European Communities' financial interests and amending the Conditions of Employment for Staff of the ECB (ECB/2004/11), OJ L 230, 30.6.2004, p. 56, adopted in answer to the Court's judgment.

in charge of relations with the surveillance committee of OLAF, which excluded any power of investigation of this body within the Bank. The Commission, considering this Decision contrary to Regulation No 1073/1999, appealed to the Court of Justice to annul the Decision. For its part, the Bank invoked, among other arguments, its independence as well as the independence of national central banks and the fact that it had its own finances that were separate from the Community's budget.

Following the conclusions of Advocate General Jacobs, the Court declared the Decision null and void in its sentence of 10 July 2003.²³

The Court states that “the ECB, pursuant to the EC Treaty, falls squarely within the Community framework” (point 92). It specifies the independence recognised to the ECB by observing: “As is clear from the wording of Article 108 EC, the outside influences from which that provision seeks to shield the ECB and its decision-making bodies are those likely to interfere with the performance of the tasks which the EC Treaty and the ESCB Statute assign to the ECB. As the Advocate General has pointed out at paragraphs 150 and 155 of his Opinion, Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute” (point 134). It adds 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. First, it is evident from Article 105(1) EC that the ECB is to contribute to the achievement of the objectives of the European Community, whilst Article 8 EC states that the ECB is to act within the limits of the powers conferred upon it by the EC Treaty and the ESCB Statute. Second, as the Commission has observed, the ECB is, on the conditions laid down by the EC Treaty and the ESCB Statute, subject to various kinds of Community controls, notably review by the Court of Justice and control by the Court of Auditors. Finally, it is evident that it was not the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature, as is clear from, inter alia, Article 105(6) EC, Article 107(5) and (6) EC and Article 110(1), first indent, and (3) EC [...]” (point 135).

The Court does not qualify the ECB as an “institution” in the relatively technical sense of Article 7 EC; this is impossible under the EC Treaty. The Constitution takes the step of making a *sui generis* institution out of the ECB. Under Article I-30, paragraph 3, the ECB is defined as an institution with legal personality. This Article appears with the Court of Auditors²⁴ in Chapter II on “The other Union institutions and advisory bodies”. This can be contrasted to Chapter I on the institutional framework, which includes the traditional institutions, plus the

23 Case C-11/00, *Commission of the European Communities v European Central Bank* [2003] ECR I-7147. For more details on this judgement, see F. Elderson and H. Weenink, “The European Central Bank Redefined? A Landmark Judgment of the European Court of Justice”, *Euredia* (2003), pp. 273-99.

24 The Court of Auditors became an institution and was included in Article 7 (ex 4) EC by the Maastricht Treaty. The Constitution re-establishes some coherence in making a distinction between institutions with general competences and specialised institutions.

European Council. This distinction between the two chapters underlines the special features of the two “other institutions”.²⁵

Article I-30 also mentions the ESCB and the Eurosystem. On the ESCB, the Constitution maintains the same ambiguous situation as in the present wording of the Treaty. The ESCB is mentioned in the first and second paragraphs of the Article, while the four last paragraphs only refer to the ECB. Paragraph 1, which also alludes to the Eurosystem²⁶, states that the ESCB includes the ECB and (all) the national central banks. Paragraph 2 indicates that the ESCB shall be governed by the organs of the ECB, a provision that is already contained in the present treaty. It recalls the objectives of the ESCB (price stability and, without prejudice to this objective, to support the general objectives of the Community) and states that the ESCB “shall conduct other Central Bank tasks in accordance with Part III and the Statute of the European System of Central Banks and of the European Central Bank”.

Two remarks need to be made regarding these provisions. On the one hand, paragraph 1 attributes to the Eurosystem, i.e. the ECB and the national central banks whose currency is the euro, the task to “conduct the monetary policy of the Union”. On the other hand, paragraph 4 seems to confer the same powers to the ECB, although some of the Articles of Part III that it refers to mention that the ESCB is the bearer of these competences. These provisions accurately reflect the general perplexity about the nature of the ESCB. In this regard, we would like to quote René Smits, who wrote in 2003 that “the ECB is truly ‘the central bank of the European Community’. This is my preferred view of the ECB: as an organ of the Community [...] an independent agency for the performance of monetary policy attributed to the Community level of government and for the execution of several other tasks within the overall price-stability objective.”²⁷ He continues: “This view of the ECB extends to the larger ESCB [...] it is not itself endowed with legal personality. Yet, because of the combination of legal entities entrusted with Community policy and Community tasks, the ESCB can also be seen as a Community organ.” In a similar vein he concludes: “Thus, the ECB and the NCBs – in their ESCB functions – are organs of the Community.” This does not however prevent the author from observing that “the ESCB structure, although difficult to explain, does not require urgent adaptation in the context of the European Convention for reasons of transparency.”

Perhaps the above suggestion is correct: obviously the nature and the respective roles of the ESCB (Eurosystem) and the ECB are moving targets, depending on the tension between centralisation and decentralisation within the system. However, we would at this point like to make four additional observations. First, the phrase “conduct the monetary policy” used in Article I-30, paragraph 1, in

25 It should be noted that in its Opinion to the IGC as quoted already in this paper, the ECB expressly requested to be included in the “institutional framework”, but without being listed among the first category of institutions. See OJ C 229, 25.9.2003, p. 8, point 11.

26 It is also pursuant to a request of the ECB expressed in its Opinion quoted in the *note supra* that the IGC inserted the concept of the “Eurosystem” in the Constitution. This expression was used by the ECB in its legal and other texts in order to make a distinction between the ESCB, in which all national central banks participate, and the kind of collaboration uniting the national central banks whose currency is the euro, and the ECB.

27 R. Smits, *op. cit.* in footnote 13, pp. 24-25.

relation to the Eurosystem does not correspond to the legal situation if we give the verb “conduct” its ordinary meaning. It is the ECB, and not the (Euro)system or the national central banks and the ECB, which is in the driving seat with regard to deciding monetary policy. Second, the national central banks have a role in the implementation of monetary policy, but they are submitted in a clear hierarchy to the authority of the ECB. Third, all the legal acts adopted on the basis of Treaty (Constitution) provisions are acts of the ECB and not of the system. Fourth, the insertion of the concept of the “Eurosystem” in a single provision of the Treaty cannot clarify the legal situation. It is to be regretted that the opportunity was not taken to review systematically the provisions of the Statute of the ESCB and of the ECB, in order to replace, where convenient, the expression “ESCB” with “Eurosystem”. Obvious examples here are Article 14, paragraph 3 on guidelines and instructions that cannot be addressed to central banks other than the ones whose currency is the euro; or Article 15, paragraph 2, which imposes the establishment of a weekly consolidated financial statement of the ESCB, something that has never been done. In practice, the statements reflect only the situation of the Eurosystem, and rightly so. However, the “cleaning” exercise was perhaps politically difficult because of the different views held on what belongs to the competence of the System and what to the competence of the ECB, as became clear during the negotiation of the Maastricht Treaty.

2.2 THE APPLICATION OF COMMUNITY LAW TO THE ECB²⁸

The Court has ruled in its judgment of 10 July 2003, already quoted, “that there are no grounds which *prima facie* preclude the Community legislature from adopting, by virtue of the powers conferred on it by the EC Treaty and under the conditions laid down therein, legislative measures capable of applying to the ECB” (point 136). Elderson and Weenink observe that “the quotation is important as it recognises that the legislator can only adopt legislation of relevance to the ECB in so far as the Treaty allows for this.”²⁹ There is a case where the Treaty (Article 285) and the Constitution (Article III-429) expressly reserve the right of the ECB to adopt rules on its own for the establishment of statistics for which Article 5 of the ESCB Statute confers a competence to the ECB. But this explicit “non-prejudice clause” is the exception. In other hypotheses, it is a question of how to interpret the (general) provisions of the Treaty and the (specific) provisions on the ECB and monetary policy.

The question has been raised about the application of general Community law to the ECB, for example in the field of public procurement, competition, other rules of the internal market, civil servants, accounting and auditing. We cannot enter into an in-depth discussion on this subject, which is a complex one; nevertheless, some aspects appear clear. For example, EU institutions are not directly bound by the directives that apply to public procurement and which bind the Member States. However, they “have adopted their own set of procurement

²⁸ On this topic, see the sometimes contrasting views expressed by R. Smits, *op. cit.* in footnote 13, pp. 25-33, and F. Elderson and H. Weenink, *op. cit.*, pp. 287-91.

²⁹ *Op. cit.*, p. 287. The italics are the authors’.

rules in line with the principles of the Directive.”³⁰ If we examine Competition law, there is an agreement that the ECB and the national central banks are not “undertakings” in the meaning of Articles 81 and 82 EC.³¹ However, René Smits seems to be posing the right questions when he asks: “are the ESCB activities undertaken within its public authority or ancillary to its tasks? Or, does the Eurosystem also undertake activities which are normally engaged in by private companies for gain?”³² On the other hand, it is well-known how delicate and controversial the subject of the “anticompetitive State action in Community law”³³ is as treated by the case law of the Court of Justice, which may be transposed to the action of public authority in general. One has to take into account the fact that both the Treaty (the Constitution) and the ESCB Statute refer to “the principle of an open market economy with free competition” (Article 105, paragraph 1 EC and Article III-185, paragraph 1 of the Constitution; Article 2 of the Statute).

2.3 THE OBJECTIVES OF THE ECB AND ESCB (EUROSYSTEM)

Nothing has changed as far as the objectives of the ESCB/ECB are concerned (Articles III-185 and Statute, Article 2). The suggestion made by some participants in the Working Group on Economic Governance to add a reference to growth and employment was not accepted by the Group. So the primary objective remains price stability and, without prejudice to that objective, the support of economic policies in the Union that support the general objectives as laid down in Article I-3 and which include among other aims, a social market economy and sustainable development. This topic is covered by the contribution of Servais and Ruggeri in this volume. We will observe that the application of the objectives of monetary policy to the Member States whose currency is not the euro is not treated the same way in the Constitution as it is in the Statutes, which are an integral part of it. Under Article III-197, a transitory provision, which lists in paragraph 2 the provisions of the Constitution which do not apply to non-participating Member States, paragraph 1 of Article III-185, on the objectives, is declared to be inapplicable. In the ESCB Statute, under Article 43, paragraph 1, Article 2 on the objectives is not quoted in the list of inapplicable provisions. Which of these provisions should then prevail? It has to be observed that the situation is no different now, as the same inconsistency exists. Is the question only a theoretical one? Partly yes, because “stable prices”

30 Ibid., p. 288. There is an explicit exclusion of transactions carried out in pursuit of monetary, exchange rate or public debt management policy by “a Member State, by the ESCB, by a national central bank or by any other officially designated body, or by any person acting on their behalf” in Article 7 of the Directive 2000/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16. As far as the obligations of persons working at the ECB are concerned, see point 3.7 of the Code of Conduct of the ECB adopted in accordance with Article 11.3 of the Rules of Procedure of the ECB, OJ C 76, 8.3.2001, p. 12.

31 R. Smits, op. cit. in footnote 13, p. 27; F. Elderson and H. Weenink, op. cit., p. 288.

32 R. Smits, op. cit. in footnote 13, p. 27. The production of banknotes appears to be a case in point. The ECB has decided that a common Eurosystem competitive approach with tendering will be fully implemented by 2012 at the latest. The national central banks with in-house/public printing works will be allowed to opt out of this common approach, see *ECB Annual Report 2003*, p. 95. In 2004 the Euro Private Banknote Printers Association (EUPBA), created in 2002, submitted a complaint to the Commission against alleged anti-competitive behaviour by national central banks and other public printers, apparently on third markets, see *Het Financieele Dagblad*, 23 April 2004.

33 See the in-depth analysis by J. Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the Community* (Oxford: Hart, 2002), pp. 127-61.

is a requirement for all Member States under Article III-177, sub-paragraph 3 (ex Article 4, paragraph 3 EC). On the other hand, under Article I-30, “Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters”. They are able in the transition period to state their own priorities compatible with the Treaty in order to promote their economic recovery and to decide the path (or at least the rhythm) that they will follow in order to adopt the euro. “Price stability” as such has been promoted by the Constitution, but as one objective among others. There are reasons to admit some flexibility for the “Outs”. At any rate, there is no other sanction provided for them apart from critical convergence reports and delayed entry into Economic and Monetary Union.

2.4 INDEPENDENCE AND ACCOUNTABILITY

2.4.1 INDEPENDENCE OF THE ECB AND OF THE NATIONAL CENTRAL BANKS

Article I-30 confirms the independence of the ECB in the following terms: “it shall be independent in the exercise of its powers and in the management of its finances.” This provision is developed by Article III-188, which takes over the content of Article 108 EC. In a letter of 5 June 2003 and in its Opinion to the IGC of 19 September 2003, the ECB requested recognition of the independence of the national central banks in Article I-30. It wanted this provision to be in line with Article III-188. Obviously, the ECB feared the possible modification of Article III-188 under the simplified procedure. Nevertheless, the wording of Article I-30, paragraph 3, remains unchanged. It does not appear to be a threat to the independence of the national central banks, because, as observed in 1991 by Governor de la Rosière, one cannot conceive of an institution in charge of a single monetary policy which would include delegations with instructions that are possibly contradictory.³⁴

2.4.2 FINANCIAL INDEPENDENCE

The specific mention of financial independence is new and a welcome innovation because, although the budgetary independence of the ECB was recognised in practice, and by the Court in its already quoted judgment of 10 July 2003³⁵, it did not have special recognition either in the Treaty or in the Statute.³⁶ Article 26 of the Statute relates only to accounting and reporting. The word “budget” does not appear in the Statute. Budgetary independence was, and still is, held to be inherent in the nature of an independent central bank.

2.4.3 DEMOCRATIC ACCOUNTABILITY

No progress has been made with regard to the degree of accountability of the ECB, a natural complement of its independence.³⁷ The Constitution, by including

³⁴ Quoted by J.-V. Louis, “Union économique et monétaire”, *Commentaire J. Mégret*, Vol. 6, 2nd ed. (Brussels: Editions de l’Université de Bruxelles, 1995), p. 63.

³⁵ Point 132.

³⁶ One of the principles applicable to the (general) budget of the EC is the principle of unity, from which there are a certain number of exceptions, see “Les Finances de l’Union européenne”, *Commentaire J. Mégret*, Vol. 11, 2nd ed. (Brussels: Editions de l’Université de Bruxelles, 1999), p. 265, No 497.

³⁷ On this question, see C. Zilioli, “Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy? The Specific Case of the European Central Bank”, *Mélanges J.-V. Louis*, Vol. 2 (Brussels: Editions de l’Université de Bruxelles, 2003), pp. 395-422.

Article III-383, paragraph 3 (cf. Article 113 EC), creates the conditions for the continuation of what has been called the “monetary dialogue” between the ECB and the European Parliament.³⁸

The Italian presidency of the IGC has proposed to enlarge the scope of provisions covered by the existing enabling clause (the so-called simplified revision under Article 107, paragraph 5, which is under the present treaty limited to technical or financial provisions) for amending the ESCB/ECB statute.³⁹ The Articles which would have been added to the list were Articles 10 to 12, concerning the Governing Council and the Executive Board, as well as Article 43, which states the provisions of the Statute to be applied and those that do not apply to central banks of countries whose currency is not the euro. The ECB vigorously protested against this suggestion in a letter by its President of 26 November 2003. It argued that the simplified procedure would encompass any change to the basic provisions governing the decision-making bodies of the ECB. It would also do away with the need for each Member State to ratify, as currently foreseen in Article 10.6 of the Statute regarding the voting power within the Board of Governors. “This would imply a far-reaching change to the current constitution of the ESCB, which the Governing Council cannot support.” The IGC did not adopt the Italian suggestion. This means that most of the statutory rules governing the ESCB/ECB will remain at the level of primary (constitutional) law, which guarantees that the status quo will be preserved, but also represents a situation that is in stark contrast to the powers of the Legislature over the central bank in any state in the world.⁴⁰ This may be explained by the fact that the ECB is still a young institution that needs to strengthen its position.

2.5 OTHER INSTITUTIONAL ASPECTS AND LEGAL INSTRUMENTS

2.5.1 THE APPOINTMENT OF THE MEMBERS OF THE EXECUTIVE BOARD AND VOTING IN THE GOVERNING COUNCIL

Article III-382 substitutes a Decision of the European Council by qualified majority vote to the common agreement of the governments of the Member States at the level of Heads of State or Government, regarding appointing members of the Executive Board. This change will contribute to avoiding the appearance of “horse trading”. On the other hand, it will make it easier for larger states to form coalitions designed to assure the continuity of their “representation” on the Executive Board.

It should also be recalled that, on the basis of an enabling clause inserted in the Statute by the Treaty of Nice, the Council, at the level of Heads of State and Government, has adopted a Decision modifying Article 10.2 of the Statute from the perspective of enlargement.⁴¹ This Decision has been submitted to the

³⁸ See F. Martucci, “Le rôle du Parlement européen dans la quête de légitimité démocratique de la Banque centrale européenne”, *Cahiers de droit européen* (2003), pp. 549-95.

³⁹ See CIG 52/1/03 REV 1, Annex 9 to Addendum 1.

⁴⁰ See also the observations of R. Smits, *op. cit.* in footnote 13, p. 38.

⁴¹ Decision of the Council, meeting in the composition of the Heads of State or Government of 21 March 2003 on an amendment of Article 10.2 of the Statute of the ESCB and the ECB, OJ L 83, 1.4.2003, p. 66 (2003/223/EC). This Decision entered into force on 1 June 2004 and will be applicable as soon as the number of national central bank governors exceeds 15.

ratification of the Member States under their constitutional provisions. It establishes a system of asymmetric rotation within the Governing Council in which governors of national central banks exercise successively and at a distinct frequency their voting rights.⁴²

2.5.2 LEGAL INSTRUMENTS

The first part of the Constitution provides a new classification and hierarchy of legal instruments. Article I-33 lists the legal acts of the Union: European law, European framework law, European regulations, European decisions, recommendations and opinions. So the regulations and decisions of the ECB become respectively European regulations and European decisions in Article III-190 of the Constitution and in Article 34 of the Statute.

Like the present Treaty, the Constitution does not mention the guidelines and instructions that are addressed to the national central banks, and which are the main instruments used by the ECB within the System. They still are provided in Articles 12 and 14 of the Statute, as annexed to the Constitution, and there is no reason to believe that they will lose their prominent role among the instruments used by the ECB.

As far as recommendations are concerned, the Constitution innovates. Article I-35, paragraph 3, provides that the ECB adopts recommendations “in the specific cases provided for in the Constitution”. Such a condition has not been introduced in Article 34 of the Statute, but it seems obvious that the new wording of the Constitution will prevail. An example of a provision enabling the ECB to adopt a recommendation is Article III-187, paragraphs 3 and 4, which confers on the ECB the right of initiative for the adoption of legislative acts.

Another question is raised by the new classification and hierarchy of the legal acts, especially between a European law and an (autonomous) regulation, be it of the ECB or of the Council.⁴³ It is certain, as observed in the literature, that there are other principles than purely hierarchy to resolve a possible contradiction between two norms⁴⁴, such as the principle of *lex specialis*, the restrictive interpretation of an exception to a general rule, *lex posterior*, etc. Indeed, under the Constitution, laws and regulations have their respective domains. However, as the same author observes, although the Constitution does not explicitly establish the primacy of the law on regulations, it is most probable that the Court will be inclined to establish such a ranking between two legal acts, considering in particular that the conditions of appeal of private persons against regulations under Article III-365, paragraph 4, have been made easier than appeals against laws.⁴⁵ Of course, there is no problem when the Constitution itself includes a “no prejudice clause” that preserves the legal acts adopted by the ECB, but there is but one example (which we have already mentioned) of such a

42 F. Allemand, “L’audace raisonnée de la réforme de la Banque centrale européenne”, *Revue du Marché commun de l’Union européenne* (2003), pp. 391-98.

43 See S. Van Raepenbusch, “Les instruments juridiques de l’Union européenne”, in *Commentaire de la Constitution de l’Union européenne* (Brussels: Editions de l’Université de Bruxelles, 2005) p. 217, point 23.

44 *Ibid.*, p. 210, point 9.

45 *Ibid.*

favourable situation, namely the regulation of the establishment of statistics (Article III-429).

2.5.3 THE PRINCIPLE OF SUBSIDIARITY

As an institution of the Union, the ECB is bound by the principle of subsidiarity in the fields that are not within the exclusive competence of the Union (Article I-11, paragraph 3). It should not be considered as an innovation if one takes note that the ECB is already part of the Community, which under Article 5 EC is bound by this principle. What is new under Article 3 of the Protocol on the application of the principles of subsidiarity and proportionality is the obligation of the ECB to comply with the procedure of transmitting to the national parliaments its recommendations aiming at the adoption of a “European legislative act”, *insofar as the proposed act does not fall within the exclusive competence of the Union*. The ECB is indeed competent under Article III-187, paragraphs 3 and 4, for initiating, via recommendations, the legislative procedure for a simplified revision of the Statute and for adopting so-called complementary legislation on statistics, compulsory reserves, sanctions, etc.

The recommendation is transmitted through the Council (Protocol, Article 4). As with the legislative initiatives of the other EU institutions, groups of Member States or the European Investment Bank (EIB), the purpose of transmission is to enable national parliaments to issue, within six weeks, a reasoned opinion on whether the draft complies with the principle of subsidiarity (“Early warning procedure”).⁴⁶ The opinion will be transmitted to the ECB by the president of the Council (Article 6). If at least one-third of all the votes allocated to the national parliaments (two votes for each national parliaments, shared among the assemblies in case of bicameralism) consider that the draft does not comply with the principle of subsidiarity, then it must be revised (Article 7). The ECB may decide “to maintain, amend or withdraw the draft. Reasons must be given for this decision”. So, in principle, the ECB remains legally free to choose whether to follow the opinions of the national parliaments. To borrow a metaphor from football, these opinions function like yellow cards, rather than red ones. However, if there is widespread agreement in the national parliaments, then the pressure on the drafter of the text will be considerable.

2.5.4 OPENNESS AND TRANSPARENCY

Article I-50 of the Constitution enshrines the principle of openness and the right of access of citizens and residents of the Union to documents of institutions, bodies and agencies of the Union, whatever their medium. The right of access to documents is also provided in the Charter of Fundamental Rights (Article II-102). The principle of openness is recognised by Article 1, sub-paragraph 2, of the Treaty on European Union (TEU), and the principle of access to documents is taken from Article 255 of the EC Treaty, where it applies only to the European Parliament, the Council and the Commission, and enlarged to all the institutions, bodies and agencies. The conditions of application of the

⁴⁶ The justification of the draft legislation must also encompass the principle of proportionality. See Protocol, Article 5.

principle of access to documents are included in Article III-399. This article limits the obligation of access to documents of the Court of Justice, the ECB and the EIB to their exercise of administrative functions. The ECB has recently adopted a Decision on public access to the documents of the ECB.⁴⁷

2.5.5 THE IMPLICATION OF THE ECB IN REVISION PROCEDURES

We have already mentioned the role of initiative of the ECB in the simplified revision of its Statute. The Convention has introduced the legislative procedure in this field and modifies the rule of the existing treaty, which provides for unanimity in the Council if the act is based on a proposal from the Commission, and qualified majority if it is based on a recommendation of the ECB. In his letter of 16 April 2004, the President of the ECB requested equality of rights for the Commission and the ECB in the procedure. Article I-25, paragraphs 1 and 2, indeed makes it easier to reach a qualified majority in the Council when the act to be adopted is based on a proposal by the Commission than if it is not. This traditional rule expresses the philosophy of the initiative competence of the Commission under the treaties. However, the IGC did not agree to the request of the ECB.

In its letter of 16 April 2004 the ECB also asked the IGC to ensure that the ECB is consulted in the simplified procedure if the provisions of Title III of Part III of the Constitution on the internal policies and actions of the Union are amended, should an institutional change concerning the ECB be proposed. The ECB must indeed be consulted on such changes as part of the ordinary procedure (see Article IV-443 and Article 48 TEU). In its earlier opinion of 19 September 2003, the ECB also asked to be consulted in the negotiation of agreements with a Member State that has notified its decision to withdraw from the Union, if these arrangements include provisions that affect the institutional status of the ECB. The IGC accepted the first but not the second of these requests. It should be noted that the Constitution does not foresee the consultation of the ECB in the case of any change from unanimity to qualified majority voting or for the introduction of ordinary legislative procedure under the so-called passerelle (or cross-over) procedure, a simplified revision procedure under Article IV-444, notwithstanding the fact that the recourse to this procedure may affect the institutional balance in monetary policy.

CONCLUSION

The Constitution does not include any revolutionary changes as far as monetary policy and the ECB are concerned. As observed by the ECB in its opinion of 19 September 2003, delivered after the work of the Convention had been completed, “the tasks, mandate, status and legal regime of the ECB and of the ESCB remain substantially unchanged.” At the end of the IGC, Otmar Issing observed in an interview that “Die EU-Verfassung ist eine Bestätigung der

⁴⁷ Decision ECB/2004/3, OJ L 80, 18.3.2004, p. 42. This Decision replaced an earlier one (ECB/1998/12 of 3.11.1998, OJ L 110, 28.4.1999, p. 30).

entscheidenden Elemente der Europäischen Währungsverfassung: der Unabhängigkeit und des Mandats der EZB".⁴⁸ Nevertheless, as we have observed, it is not yet possible to foresee all the consequences for the ECB that will derive from recognition of its new institutional status, or the implications for its activities of the classification and hierarchy of norms introduced by the Constitution.

⁴⁸ *Handelsblatt*, 21 June 2004.