

THE ROLE OF THE DECENTRALISATION PRINCIPLE IN THE LEGAL CONSTRUCTION OF THE EUROPEAN SYSTEM OF CENTRAL BANKS

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ABSTRACT

L'obiettivo dello studio è di sottolineare gli aspetti principali che devono essere valutati quando ci si riferisce al "principio di decentramento", considerato una delle caratteristiche chiave alla base della struttura del Sistema Europeo di Banche Centrali.

Il sistema SEBC/BCE delinea un'unica struttura organizzativa che condivide elementi propri della decentramento e della delega, senza essere identificabile con nessuno dei due. Le competenze per l'esecuzione dei compiti da parte delle Banche Centrali Nazionali sono assegnate direttamente dallo Statuto e dalle rispettive legislazioni nazionali, mentre la competenza per la gestione del Sistema (dal punto di vista degli aspetti di decisione e controllo) è accentrata presso la BCE.

Nell'ultimo paragrafo dell'Articolo 12.1, lo Statuto stabilisce il principio del decentramento esecutivo, a condizione che esso sia "possibile ed adeguato". Pertanto, solo nel caso in cui tali requisiti non siano rispettati, la BCE può optare per la centralizzazione delle funzioni del Sistema che essa è in grado di svolgere da sola. Sia tale decisione, sia la possibile applicazione di un modello di "decentramento selettivo" comportano rilevanti problematiche legali, in considerazione delle caratteristiche istituzionali del sistema e dell'ambigua stesura dell'Articolo 12.1.

I INTRODUCTION

The legal configuration of the European System of Central Banks (ESCB) is an original construction given shape in the Treaty on European Union, passed in the Dutch city of Maastricht on 7 February 1992. The ESCB, which comprises the European Central Bank (ECB) and the national central banks (NCBs)¹ of the euro area, is charged with the implementation of the functions and activities envisaged in the Treaty establishing the European Community (“the Treaty”) and its Statute.² With regard to the management of the ESCB, it is stated that “The ESCB shall be governed by the decision-making bodies of the ECB”.³ One of the principles that the ECB needs to take into account when determining how the ESCB is to operate is the so-called principle of decentralisation, which basically derives from Articles 9.2 and 12.1, in the third paragraph of the Statute.⁴ In this paper we aim to analyse this principle, and to highlight how it represents one of the essential principles in the definition of the legal construction of the ESCB. The paper is organised as follows. In Section 2 we study the concept of decentralisation and how it differs from other similar concepts; in Section 3 we consider the treatment of the principle of decentralisation in the legal framework of the ESCB; in Section 4 we examine the issue of the different levels of decentralisation; and in Section 5 we offer some reflections on the ideas of selective centralisation and decentralisation. Finally, we end in Section 6, which provides some conclusions.

2 DECENTRALISATION: THE CONCEPT AND DISTINGUISHING FEATURES

THE CONCEPT OF DECENTRALISATION

As mentioned in the preceding section, there is no doubt that the principle of *decentralisation* is one of the essential defining features of the ESCB’s legal framework. Nevertheless, its definition, which belongs at national level to the realm of constitutional law and administrative law, has not received the treatment it deserves in either the Treaties or the secondary law of the European Union.⁵

1 Article 107, first paragraph of the Treaty, Article 1.2 of the Statute of the European System of Central Banks and of the European Central Bank (“the Statute”).

2 Article 8 of the Treaty, Article 1.1 of the Statute.

3 Article 107, third paragraph of the Treaty, Article 8 of the Statute.

4 Article 9.2 states that “The ECB shall ensure that the tasks conferred upon the ESCB under Article 105 (2), (3) and (5) of this Treaty are implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Articles 12.1 and 14.” Paragraph three of Article 12.1 states that “To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB”.

5 M. P. Chiti, *Derecho Administrativo Europeo* (Madrid: Civitas, 2002), p. 179, considers that there are basically two reasons for the scant attention paid to administrative organisation in Community law: “firstly, the original configuration of the Community as a variant of international organisations, which normally lack a structure of their own, and secondly, the emphasis placed on the production of regulations in the service of the development of Community policies and as the main instrument of integration. These are diverse reasons, to which must be added the fact that the tasks of the Community were limited and, at least initially, could not be interpreted in a broad sense, meaning that no particularly complex administrative apparatus was needed for their implementation” (text translated by authors). In addition, J. Schwarze, *European Administrative Law* (London: Sweet and Maxwell, 1992), p. 24, notes that “Taking into account also the many mixed forms of administration and the types of action which have developed within administrative practice, in particular in intra-administrative relations, a comprehensive and complete explication of the concept of European Administration hardly seems attainable”. This author outlines the massive recourse by the Community to the so-called *Indirect Administration*, that is to say, by means of the activities of the Member States.

To define the concept of decentralisation, it is therefore necessary to have recourse to doctrine and comparative law. As Giannini points out, decentralisation “has been the subject of discussion more among politicians and political sociologists than among lawyers, resulting in an uncommon degree of confusion”.⁶ No sooner does one try to tackle the issue, than one confronts the fact that there is no single unambiguous definition of it. As the World Bank says, “Decentralization – the transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent government organizations and/or the private sector – is a complex multifaceted concept. Different types of decentralization should be distinguished because they have different characteristics, policy implications, and conditions for success”.⁷

In this regard, an initial distinction is usually made, due to their differing scope, between political decentralisation and administrative decentralisation.⁸ Even though the dividing line between these two concepts is not clear-cut, it would seem to be the case that the former finds a natural place in constitutional texts, and customarily refers to the question of the *form* of the state, whereas the latter is generally found in the norms governing the principles of organisation of a government or public administration.

It is undoubtedly the legal/administrative doctrine that has made the most decisive contribution to the definition of the concept of decentralisation and other related concepts, such as that of *delegation*. Thus the most common feature of decentralisation is the *transfer* of a competence to another organisation. (This possibility must be envisaged by the relevant legislation.) This transfer takes place through a general provision; a resolution or administrative act by the body responsible would not sufficiently allow for such a transfer. This transfer of competence, which will be exercised in the name of the new holder of the competence, will nevertheless be under the supervision, oversight or control of the administration transferring its competence.⁹

DELEGATION

Delegation consists of the transfer of the mere exercise of a competence from one body or organisation to another. The distinctive features of the delegated competence are that it is exercised in the name and under the responsibility of

6 M. S. Giannini, *Derecho Administrativo* (Madrid: Ministerio para las Administraciones Públicas, 1991), p. 289, in F. Garrido Falla, *Tratado de Derecho Administrativo*, 3rd edition (Madrid: Técnos, 2002), p. 424 (text translated by authors).

7 World Bank, “What Is Decentralization?”, available at <http://www.ciesin.org/decentralization>.

8 In a similar way, the doctrine distinguishes between territorial decentralisation and functional decentralisation, or decentralisation according to services.

9 According to G. Ariño Ortiz (1988), “Principios de descentralización y desconcentración”, *Documentación Administrativa*, No 214, April/June, pp. 28-30, these powers of control “may have as their cause and purpose the upholding of the legal order (*control of legality*...) or they can be determined by reasons of a political or economic order, or for reasons of moral character or technical criteria (opportunity control...)” (text translated by authors).

the delegating body. The legal commission to exercise this competence is made through a simple administrative act or resolution.¹⁰

From the point of view of Community law, it should be pointed out here that Community precedent has tended to look unfavourably upon delegation to bodies other than Community institutions, following the precedent set by the Meroni case. However, the specific features of the legal structure of the ESCB, as expressly envisaged in the Treaty, means that it lies outside the scope of the aforementioned doctrine.¹¹

OUTSOURCING

The difference between decentralisation and outsourcing would seem to be clear-cut. The latter consists fundamentally of the external performance of a particular task, i.e. one that is entrusted to a third party, normally a private company, through a contract for the provision of services. In the case of outsourcing, the outsourced tasks are “instrumental” and in no way suppose the exercise of public functions or powers by the company receiving the commission.

SUBSIDIARITY

Lastly, regarding the relationship between the principle of decentralisation and subsidiarity, which is envisaged in the Treaty (Article 5, second paragraph), it should be noted that on occasions the two may share the same purpose, i.e. achieving greater efficiency, bringing decision-making by Community or national bodies closer to those they affect. However, subsidiarity is only applicable in the case of competences that are shared by the Community and the Member States, and not when the issue concerned is the sole competence of the European Community. There is no question that the functions of the ESCB are the sole competence of the Community, ruling out the application of subsidiarity. Nor should it be confused with decentralisation.¹²

10 See A. Gallego Anabitarte (2000), “Conceptos y principios fundamentales del Derecho de Organización”, in *Lecciones de Derecho Administrativo*, 1 (Madrid: Marcial Pons, 2000), pp. 79-80. Nevertheless, there is also a great deal of confusion surrounding the concept of delegation. Part of the doctrine conceives it as a legal agreement through which there is a “deconcentration” or bureaucratic decentralisation, which implies “the permanent transfer of competences from a higher to a lower body. Its essential characteristic is that it takes place between bodies within the same legal person. It therefore does not involve two different legislations, as in the case of territorial decentralisation, nor two different legal persons as in the case of functional or service decentralisation.” (Garrido, *op. cit.*) (text translated by authors).

11 Case 9/56 *Meroni v ECSC High Authority*, [1958] ECR, 133. Regarding the limits of delegation in Community law, see T. C. Hartley, *The Foundations of European Community Law* (Oxford: Oxford University Press, 2003). In addition, X. A. Yataganas (2001), “Delegation of Regulatory Authority in the European Union”, Jean Monnet Working Paper, 3/01, advocates the creation of European regulatory agencies to increase the efficiency and legitimacy of the decision-making process in the EU, indicating that the doctrine of the Meroni case, duly revised and corrected, does not present an obstacle to the creation of such bodies.

12 On this subject, see R. Smits, *The European Central Bank. Institutional Aspects* (The Hague: Kluwer Law International, 1997), pp. 111-12; C. Zilioli and M. Selmayr, *The Law of the European Central Bank* (Portland, OR: Hart Publishing, 2001), pp. 70-71.

3 DECENTRALISATION IN THE LEGAL FRAMEWORK OF THE ESCB

In the previous section we sought to approach the theoretical concept of decentralisation. We now need to assess the specific legal framework defined by the Statute. This is not the place to analyse the different conceptualisations of the system that have been put forward, which range from seeing it as a federal or quasi-federal structure, to regarding it as a system that is basically characterised by a hierarchy in which the NCBs are reduced to the role of mere operating arms of the ECB, without making a significant contribution to it.¹³ Moreover, it should be noted that there is also a degree of debate about the suitability of decentralisation, with positions ranging from those who see it as a weakness in the way the ESCB is constructed¹⁴, to those who consider it to be one of the elements giving it strength and credibility.¹⁵ In this paper we will limit our analysis to questions of *lege data*, as otherwise we would need to enter into a discussion of how the Maastricht Treaty should have defined matters.

What is clear is that the Articles of the Statute that deal with this issue (9.2, 12.1 and 14.3) are not reducible, *prima facie*, to any of the classic types of decentralisation or delegation.¹⁶ We can state already that they have elements of both, which in the end leads us to conclude that the legal structure is atypical. In our view, in order to analyse it, it is necessary to break down the different elements involved in realising the tasks of the ESCB by the NCBs.

1. From the point of view of the authorities involved in the process, we have on the one hand the ECB, a body created by primary Community law, whose governing bodies govern the ESCB¹⁷; and, on the other hand, the NCBs, which have their roots in the national legislation of their respective countries but form an integral part of the ESCB under Community law.¹⁸ Moreover, the legal framework applicable to the NCBs, as set out in their statutes, fully empowers them to contribute to the exercise of the functions of the ESCB. This gives them the legitimacy to carry out tasks not only by virtue of a legal instrument of the ECB, but from their status as national central banks within the legal framework of the ESCB.

13 Zilioli and Selmayr, *op. cit.*, pp. 53-81.

14 Thus, for example L. Bini Smaghi & D. Gros, in *Open Issues in European Central Banking* (London: MacMillan Press, 2000), pp. 5-26, hold that “the main reason for decentralization is the desire to protect the employment of specialized staff in the NCBs”, envisaging a progressive *de facto* centralisation among the NCBs that has an increasing impact on operations over time.

15 M. Goodfriend (1999), “The Role of a Regional Bank in a System of Central Banks”, Federal Reserve Bank of Richmond Working Paper, No 99-4 (July), pp. 18-28, holds that “A regional presence facilitates the acquisition of specialized information on the economy and positions the staff to reach out to the public with an explanation of the central bank’s policy objectives and practices. Presidents (Governors) of regional central banks bring analytical diversity to the monetary policy committee. Above all, a system of central banks promotes a healthy competition that stimulates innovative thinking on operational, regulatory, research, and policy questions. Federal Reserve experience teaches that a decentralized system needs a strong center”.

16 Zilioli and Selmayr, *op. cit.*, p. 66, appear to uphold the thesis of delegation. Nevertheless, the Statute uses the term delegation, but only to refer to the transfer of the tasks of the Governing Council to the Executive Board (Article 12.1, second paragraph).

17 According to Article 8 of the Statute, “The ESCB shall be governed by the decision-making bodies of the ECB”.

18 According to the Statute, the statutes of the national central banks must be compatible with the Treaty and the Statute (Article 14.1), and “the national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it” (Article 14.3).

2. From the point of view of the tasks transferred to the NCBs by the ECB, the following points should be made. The exercise of tasks is most commonly transferred by means of Guidelines. These instruments are legal acts under Community law, which are typical of the ESCB. The NCBs are obliged to translate the content of these Guidelines into their own national law and have sufficient powers to do so, not by virtue of the ECB Act transferring the task, but out of the national legal framework regulating the NCBs. Lastly, the ECB reserves powers of verification not only over the translation of the Guidelines into national legislation, but also in the execution of the transferred task, and it can appeal to the Court of Justice to demand compliance (Articles 14.3 and 35.6 of the Statute).

The tasks (contracts concerning monetary policy, operations in the payments system, etc.) are performed by the NCBs in their own right and in their own name, in accordance with national law, charged against their own balance sheet, and with responsibility for their actions out of their assets, without prejudice to the fact that in certain matters the provisions of the Statute allowing the sharing of the losses between the members of the ESCB may come into effect.¹⁹ This legal structure is not entirely compatible with the view of the NCBs as agents, which has no explicit support in any legal text.²⁰

4 THE DIFFERENT LEVELS OF DECENTRALISATION

Having reached this point, it makes sense to examine to what extent the Statute allows different levels of decentralisation.

Unfortunately, this is not a subject to which the various authors who have attempted to analyse the structure of the ESCB have devoted much attention, despite its being crucial to any evaluation of the ESCB's real (and not merely conceptual) functioning.

As noted earlier, the answer to this question can be found in Article 12.1, last paragraph of the Statute, which states that the ECB "to the extent deemed possible and appropriate [...] shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB".

At first reading, this wording offers little scope for doubt as to its imperative nature, which imposes the obligation that the System's tasks be executed in a decentralised way, unless, in the judgement of the Governing Council of the ECB, this is impossible or inappropriate.²¹

19 Article 32.4 states that "The Governing Council may decide that national central banks shall be indemnified against costs incurred in connection with the issue of banknotes or in exceptional circumstances for specific losses arising from monetary policy operations undertaken for the ESCB. Indemnification shall be in a form deemed appropriate in the judgment of the Governing Council; these amounts may be offset against the national central banks' monetary income".

20 See Zilioli and Selmayr, *op. cit.*, p. 78.

21 According to Smits, *op. cit.*, p. 112, "Article 12.1, last sentence, ESCB Statute, is evidence of a presumption that the operations and activities of the System should, where 'possible and appropriate', take place at a decentralized level rather than be centralized at the ECB". The same reasoning is followed by Zilioli and Selmayr, *op. cit.*, p. 116: "By this, the discretion enjoyed by the ECB under Article 9.2 of the Statute is directed in such a way that it makes a legal requirement ('shall') to choose indirect implementation of the ECB's monetary policy decisions".

Even though this interpretation does seem fairly clear, recourse to the use of ill-defined legal terms raises inherent difficulties in weighing up the degree of discretion open to the Governing Council when modulating the level of decentralisation of the System.

Obviously, the wording of the Article is clear in so far as the Governing Council's decision is not free, but must be justified by the degree to which the decentralised execution of a given task is impossible or inappropriate.

We shall not dwell upon the first of these requirements (i.e. regarding "possibility"), as its analysis is relatively free of shades of meaning. Indeed, it seems reasonable to take the view that the "possibility" requisite is related to the operating capacity of a particular NCB, which probably refers us to episodes of temporary centralisation linked to exceptional cases of force majeure. More doubts, however, are raised by the analysis of whether the decentralised execution of a given task is "appropriate" or not. In principle, the subjection of the ECB to the rule of law obliges it to decide on objective grounds in accordance with the principles underlying the System. In the event of a disagreement over the compliance of the decision with the Treaty, the last word obviously lies with the Court of Justice.²²

Independently from the above, however, it is undoubtedly the case that the use of a term in the Statute so closely linked to subjective considerations greatly widens the room for discretion by the Governing Council when delimiting its scope.²³ As we have already pointed out, "the two essential characteristics defining the institutional design of the ESCB are its uniqueness with respect to the traditional scheme in the Treaty and its open character, which places in the hands of the system, to a large extent, a noteworthy capacity for self-definition".²⁴

Although Article 12.1 is part of an instrument whose legal force is beyond doubt (the Statute), its deliberately ambiguous wording tends to empty it of concrete legal content, which approximates it de facto to what is known generically as "soft law".²⁵ This fact will determine in the final instance its real imperative scope, although, as has already been noted, "[o]ur binary law is well capable of handling all kinds of subtleties and sensitivities; within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less wide in scope, more or less pressing, more or less serious, more or less far-reaching; the only thing it cannot be is more or less binding".²⁶

22 See Articles 230 of the Treaty and 35 of the Statute.

23 In fact, the term "appropriate" is the same as that used generically in Recommendation No R (80) 2 adopted by the Committee of Ministers of the Council of Europe on the exercise of discretionary powers by administrative authorities, which defines "discretionary power" as that "which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate".

24 F. J. Priego, *El andamiaje institucional del Sistema Europeo de Bancos Centrales* (Madrid, La Ley, 1998), D-125 (text translated by authors).

25 An excellent exposition of the phenomenon of "soft law" at Community level can be found in R. Alonso García (2001), "El soft law comunitario", in *Revista de Administración Pública*, num.154.

26 J. Klabbers (1996), "The Redundancy of Soft Law", *Nordic Journal of International Law*, Vol. 65, Issue 2, February, p. 181, quoted by A. Mazuelos (2004), "El soft law: ¿mucho ruido y pocas nueces?", *Revista Electrónica de Estudios Internacionales*, No 8, p. 37, available at www.reei.org.

5 CENTRALISATION VERSUS SELECTIVE DECENTRALISATION?

Without prejudice to the answer to the question concerning the ECB's degree of discretion in determining the level of decentralisation of the System, the final paragraph of Article 12.1 of the Statute raises a number of further questions regarding the possible scope of the decision. It seems clear that, having observed the impossibility or inappropriateness of a task being carried out by the NCBs, the natural decision for the Governing Council to adopt would be to assign its execution to the ECB itself, in accordance with the provisions of Article 9.2 of the Statute.

However, could the ECB decide to centralise *all* ESCB tasks? In our view, the answer has to be negative. Not all the ESCB tasks may potentially be centralised. One task which is particularly significant in this regard is related to the holding and managing of the official foreign reserves of the Member States. Given that these foreign reserves have not been transferred to the ECB and undoubtedly remain assets of the Member States, it is the NCBs' responsibility, as national authorities, to implement this function.²⁷ Identical considerations would be applicable to the function of "conducting foreign exchange operations", in so far as these are executed using the national reserves held by the NCBs, and without prejudice to the fact that this management is subject to the decision-making powers of the ECB, "in order to ensure consistency with the exchange rate and monetary policies of the Community".²⁸

Concerning the remainder of the functions listed in Article 3 of the Statute ("to define and implement the monetary policy of the Community" and "to promote the smooth operation of payment systems"), the Statute shows careful neutrality with respect to the question of the possible attribution of its execution to the ECB or to the NCBs, with the exception of the decision-making power (which, as we have seen, always lies with the ECB). In this regard, it suffices to say that all Articles of Chapter IV of the Statute ('Monetary functions and operations of the ESCB')²⁹ systematically mention the ECB and the NCBs when defining the regulations for the executive functions in the framework of both ESCB tasks.³⁰

This technique is also the same as the one used in the Statute regarding the issuance of euro banknotes, a function jointly assigned to the ECB and the NCBs in Article 106, first paragraph of the Treaty and Article 16. In this case, however, the logistical requirements of the circulation of banknotes (which are intimately linked to the power of issuance) make it difficult to imagine this power being taken over solely by the ECB.

27 With regard to the foreign reserve assets transferred by the NCBs to the ECB pursuant to Article 30.1 of the Statute, and the relevant transactions conducted with them, the same considerations made in the following paragraphs related to the functions listed in Article 3 apply.

28 Article 31.1 of the Statute.

29 Apart from Article 20, which relates to a typical regulatory capacity.

30 Both the ECB and the NCBs can open accounts and accept assets as collateral (Article 17), perform open market and credit operations (Article 18), hold minimum reserve accounts (Article 19), enter into transactions with public entities (Article 21), and provide facilities to ensure efficient and sound clearing and payment systems (Article 22).

Now that we have tried to outline the potential decision-making scope under the last paragraph of Article 12.1 of the Statute, its application raises an additional question: is it possible that this decision might only affect certain NCBs?

Apart from exceptional and transitional cases of force majeure, “selective decentralisation” raises huge questions, even though future expansions of the Eurosystem make it legitimate to speculate about the possible advantages and drawbacks of the System in a scenario in which the ESCB comprises the ECB and 25 NCBs or more.

From a legal perspective, the first difficulty we face when considering selective decentralisation is that the Statute does not contain any clause enabling discrimination among NCBs. All the NCBs enjoy, as members of the System (Article 1.2 of the Statute), an identical legal position. It would certainly be difficult to question this statement by referring to the differing weight of the vote of the governors on patrimonial issues (Article 10.3 of the Statute). The same conclusion may be drawn regarding the voting differences that apply when the Eurosystem has 15 NCBs or more (Article 10.2 of the Statute in the version amended by Council Decision 2003/223/EC of 21 March 2003 on an amendment to Article 10.2 of the Statute – OJ L 83, 1.4.2003, p. 66), although the recitals of Decision 2003/223/EC seems to suggest a kind of ranking between NCBs.³¹

In view of the above, it is hard to imagine that the ECB would, when weighing up the requirements established in the final paragraph of Article 12.1 of the Statute, be able to decide that decentralisation was only “possible or appropriate” with respect to some NCBs, and not others. For these purposes, particular attention is merited by one of the basic principles (“*Equality before the law*”) in Recommendation No R (80) 2 adopted by the Committee of Ministers of the Council of Europe on the exercise of discretionary powers by administrative authorities. The Explanatory Memorandum of this Recommendation states: “(22) The purpose of this principle is to prevent unfair discrimination by ensuring that persons in the same ‘de facto’ or ‘de jure’ situations enjoy similar treatment where the exercise of a given discretionary power is concerned”; “(23) If a distinction in treatment is based on reasonable grounds whereby it can be objectively justified having regard to the purpose to be pursued, there is no infringement of the principle of equality before the law. There is unfair discrimination only where the distinctive treatment has no reasonable justification having regard to the purpose and consequences of the measure envisaged”.

31 Recital 5 of the above-mentioned Decision reads as follows: “The allocation of governors to groups is thus dependent on a ranking of their NCB’s Member State based on an indicator with two components: the size of the share of their NCB’s Member State (i) in the aggregate gross domestic product at market prices (hereinafter GDP mp) of the Member States which have adopted the euro; and (ii) in the total aggregated balance sheet of the monetary financial institutions (hereinafter TABS-MFIs) of the Member States which have adopted the euro. The economic weight of a Member State as reflected in its GDP mp is an appropriate component as the impact of central bank decisions is greater in Member States with larger economies than in those with smaller economies. At the same time, the size of a Member State’s financial sector also has a particular relevance for central bank decisions, since the counterparties of central bank operations belong to this sector. A 5/6 weight is attributed to GDP mp and a 1/6 weight to TABS-MFIs. This choice of weights is suitable, as this will mean that the financial sector is sufficiently and meaningfully represented”.

The above points refer exclusively to the capacity of the ECB in order to impose a specific selective decentralisation structure. Other possibilities, such as the establishment of different levels of execution to which NCBs could adhere on a voluntary basis, will not be subject to such legal constraints.

6 CONCLUSIONS

1. From a theoretical point of view, decentralisation entails the transfer of a competence to another organisation. Delegation, on the other hand, consists of the transfer of the mere exercise of a competence, but not the competence itself, which remains that of the delegating body. Both decentralisation and delegation should be distinguished from outsourcing, in that the latter does not have an effect upon public powers or functions and takes the form of the provision of an auxiliary service by a third party.
2. On the Community level, decentralisation should not be confused with the subsidiarity principle, to which Community institutions are subject in the case of non-exclusive competences.
3. The ESCB/ECB system is a unique organisational structure which shares elements proper to decentralisation and delegation, without being identifiably either. The competences for the execution of tasks by NCBs are assigned to them directly by the Statute and their respective national legislations, while the competence for the management of the System (in terms of its decision and control aspects) is centralised with the ECB.
4. In the last paragraph of Article 12.1, the Statute lays down a principle of executive decentralisation, provided that this execution by NCBs is “possible and appropriate”. Therefore, only in the case that these requirements are not met can the ECB decide to centralise those functions of the System that it is able to perform itself. Both this decision and the possible application of a selective decentralisation model raise difficult legal questions, given the institutional characteristics of the System and the ambiguous drafting of Article 12.1.