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THE BANK INSOLVENCY DIRECTIVE (DIRECTIVE 2001/24/EC) HALFWAY BETWEEN SCYLLA (POLITICS) AND CHARYBDIS (FINANCE): A COMPARATIVE AND EMPIRICAL ANALYSIS

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ABSTRACT: *Politics, finance and bank insolvency procedures! It is a trite statement that Britain, in 2008, was caught off guard by the financial collapse of its banking sector. The distinct lack of bank insolvency procedures and the scramble to reshape overnight the relevant legal instruments bears testament to the weakness of the system at that time. Yet, this paper, through an analysis that is both doctrinal and empirical, seeks to boldly challenge this assertion. Thus, the lack of bank insolvency procedures, also in part due to the weak harmonisation of the Bank Insolvency Directive (Directive 2001/24/EC), presented the British Government with a stroke of luck and the good fortune to be in a position to re-organise in a more flexible way its banking industry. Accordingly, the significant power left in the hands of the Government, and the de facto public money bail-out, contributed tellingly to the comparatively successful performance that the UK banks are currently demonstrating. Nor has Britain departed from the legacy of the financial crisis: the new Special Resolution Regime, shaped by the Banking Act 2009, still leaves room for significant political discretion. The comparison with Italy, a traditional counterpart manifesting opposing national characteristics, particularly in terms of legal systems and cultural background, may confirm this assumption, rather than dispel it. Ultimately, there are many of the opinion that the legislative framework in this area should be revamped so that a proper*

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harmonisation of the Bank Insolvency Procedures is achieved. The conclusions drawn in this contribution may, however, present a more prudent course of action which is undertaken at the pace of the proverbial snail rather than with the velocity of Achilles.

1. The insolvency of a corporation, in either its commercial form (the inability of the debtor to honour its debts, thus effecting illiquidity) or its absolute form (in the balance sheet of an entity, an excess of liabilities when compared with its current assets) is not entirely perspicuous in company law.[1] In applying such a notion to credit institutions, a range of intriguing and problematic issues emerge, given some specific features: (a) the existence of a set of macro-prudential rules governing the banking sector;[2] (b) the presence of an authority supervising the industry and cardinal principles; (c) the depositors' protection distinctly enshrined in the sectoral legislation.[3]

Against this background, the fundamental research question entailed in this contribution requires an examination as to whether there is a connection and/or interplay between bank insolvency procedures, politics and the EU. More specifically, in a scenario of 'softly' harmonised rules in the area of the

[1] See GOODE, *Principles of Corporate Insolvency Law*, 4th edn, Sweet & Maxwell 2011, pp. 109-147. See also FINCH, *Corporate Insolvency Law,* 2nd edn, Cambridge University Press 2009, pp. 144-177.
[2] See M HAENTJENS - DE GIOIA-CARABELLESE, *European Banking and Financial Law,* Routledge 2015, p. 112.
[3] See AVGOULEAS, *Banking Supervision and the Special Resolution Regime of the Banking Act 2009: the Unfinished Reform,* 2009, 4, in *Capital Markets Law Journal,* pp. 201-235; ID., *The Global Financial Crisis, Behavioural Finance and Financial Regulation: in Search of a New Orthodoxy,* 2009, 9, in *Journal of Corporate Law Studies*, pp. 23-59.

bank insolvency,[4] hinged upon the entrenched Directive 2001/24 (the 'Bank Insolvency Directive'),[5] the analysis of this paper seeks to assess the level of politics existing at home and the influence that may exert towards two possible directions: on the one hand, the way in which the relevant rules governing this area are conceived; on the other hand, the ways in which these rules are applied. In connection with this, a further consideration is whether a role played by politics in the bank insolvency procedure is a benefit, rather than a hindrance: in this respect the mass tax-payers bail-out of the British banks in 2008 is critically revisited.

In assessing the aforementioned deliberations, the paper tackles the phenomenon by employing a comparative law methodology. Therefore, the influence of politics on the bank insolvency is discussed and analysed from the perspective of two countries, the UK and Italy, and their supervisory bodies, the Bank of England (and its ancillary bodies)[6] and the Banca d'Italia, respectively, and the 'invisible hands' operating behind them, the respective Governments.

The conclusions, based on a doctrinal analysis, are reinforced by some findings, of an empirical nature, relating to the number of financial institutions subject to an insolvency procedure. The figures gleaned at the time the contribution was drafted (2014) are compared with those relevant to the previous period (2008), when the financial crisis originated. This empirical data is cross-examined in light of the legal background of a theoretical nature existing in the two jurisdictions.

[4] These rules are going to be briefly described under Section 3 below.
[5] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the winding up of Credit Institutions. OJ L 125/15.
[6] As a result of the Financial Services Authority 2012, both the Prudential Regulation Authority and the Financial Conduct Authority. See C Proctor, *The Law and Practice of International Banking* (2nd edn, OUP 2015) 175-188.

Finally, the analysis does not extend so far as to contemplate the new legal provisions of the Bank Recovery and Resolution Directive (BRRD).[7] Directive 2014/59 merely caters for a regime the purpose of which is 'to stave off future likelihood that banks will fail in a disorderly manner.'[8] Thus, technically speaking, the two pieces of EU legislation respond to two distinct needs: how to organise insolvency procedures that exhibit a cross-border magnitude (Bank Insolvency Directive); how to avoid a time-consuming bank insolvency procedure, where, in keeping with any other insolvency procedure, the scope of the procedure is the maximisation of the creditors' interests.[9] Yet, the prospective scenario of a cohabitation of the two Directives (Directive 2001/24 and BRRD) is briefly discussed in the paper, with conclusions that, surprisingly, may not concur with the prevailing train of thought maintained by the consolidated literature.

2. It is well known that the approach to bank insolvencies can take many different forms. The differences reflect the variation in legal traditions existing in the respective jurisdictions.[10]

Additionally, EU rules governing cross-border bank insolvencies have been in place since as early as 2001: these are hinged upon an influential piece of legislation, the Bank Insolvency Directive. This legal framework, albeit not

[7] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council. OJ L 173/190. In the vast literature already built up on this topic, see M HAENTJENS - WESSELS (eds.), *Research Handbook on Crisis Management in the Banking Sector*, Edward Elgar Publishing 2015; M HAENTJENS - WESSELS (eds.), *Bank Recovery and Resolution. A Conference Book*, Eleven International Publishing, 2014; HAENTJENS, *Bank Recovery and Resolution: An Overview of International Initiatives,* in *International Insolvency Law Review,* 2014, pp. 255-270; GRUENEWALD, *The Resolution of Cross-Border Banking Crises in the EU. A Legal Study from the Perspective of Burden sharing,* Kluwer 2014; MEZZACAPO, *Towards a New Regulatory Framework for banking Recovery and Resolution in the EU,* in *Law and Economics Yearly Review,* 2013, 2, pp. 213-241; MOONEY - MORTON, *Harmonizing Insolvency Law for Intermediated Securities: the Way Forward,* in KEIJSER (eds.), *Transnational Securities Law,* Oxford University Press, Oxford 2014, pp. 193-239.

[8] See HAENTJENS - DE GIOIA-CARABELLESE, *European Banking and Financial Law,* n 2, p. 119.

[9] *Ibid*, p. 119.

[10] See HAENTJENS - DE GIOIA-CARABELLESE *European Banking and Financial Law,* n 2, pp. 112-113.

designed to 'influence the content of the substantive or procedural law' applicable to the banking crisis,[11] offers forth a definition of the insolvency crises of financial institutions. In this respect, two procedures are identified: the 'reorganisation measures'; the 'winding-up' process.

The reorganisation measures shall be applicable not only to financial institutions, but also now to investment firms,[12] in cases where the recovery of the financial institution is remains feasible. In this scenario, the measures will seek to 'preserve or restore the financial situation of a credit institution and…… could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims'.[13]

The second hypothetical outcome of a crisis, the winding-up process, is designed as a collective proceeding 'opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure [..]'.[14] Also, the winding-up process is now applicable to the investment firms too, as per amendments encompassed within the BRRD.

3. The concept of reorganisation measures and the winding-up process is implemented in the two jurisdictions under scrutiny, the UK and Italy, along significantly different channels, courtesy of the 'soft' harmonisation prompted by Directive 2001/24, as highlighted previously in Section 2. In this comparative analysis, intertwined with an element of empirical research, it would stray too far from the purpose of the research to dwell on an extensive description of

[11] See PROCTOR, *The Law and Practice of International Banking,* n 6, p. 266.
[12] The extension to the investment firms of the Bank Insolvency Directive is the outcome of the BRRD, particularly its art 106(3). The investment firms now subject to the Winding-up Directive are those with a minimum capital requirement of Euro 730.000.
[13] Art. 2 of the Bank Insolvency Directive.
[14] Bank Insolvency Directive, *ibid*.

these occurrences.[15] Nonetheless, some main characteristics of the procedures in the two countries are certainly worthy of a brief mention.

3.1.3.1.a. In Italy, the special administration, or amministrazione straordinaria,[16] is codified under article 70 of the Legislative Decree 185/1993 (The Consolidated Banking Act).[17] It is worth highlighting that there are three main alternative conditions, according to article 70(1) of the Consolidated Banking Act (Italian CBA): (a) 'serious administrative irregularities, or serious violations of laws, regulations or bylaws governing the bank's activity are found'[18]; (b) serious capital losses are expected'[19]; (c) 'the resolution has been the object of a reasoned request by the administrative bodies or an extraordinary general meeting'.[20]

In these circumstances, the Italian 'special administration' shall receive the recommendation of the Bank of Italy and thereupon be adopted by the 'Italian Treasury' (Ministero dell'Economia) in force of a specific decree.[21] The outcome of the procedure will be the dissolution of the management and control bodies of the bank. Further, the functions of both the general meetings and the other governing bodies of the financial institution concerned will be suspended[22], in light of the fact that an appointment of the special administrator or special administrators is required.

The ultimate aspiration pursued by the bodies overseeing the procedure under discussion is to steer the bank away from the precipice and, hopefully,

[15] The Italian literature on bank insolvencies is vast: see, among the others, BOCCUZZI, *L'Unione Bancaria Europea. Nuove Istituzioni e Regole di Vigilanza e di Gestione delle Crisi Bancarie,* Bancaria Editrice 2015. The lack of specific bank insolvency procedures in Britain, until 2009, seems to be testified by a dearth of textbooks in this area. Nevertheless, contributions tangentially dealing with the bank insolvency procedures are PROCTOR, *The Law and Practice of International Banking,* n 6, pp. 199-316 and, in Scotland, ST CLAIR - DRUMMOND YOUNG, *The Law of Corporate Insolvency in Scotland,*4th edn, W. Green, 2011.
[16] Our translation.
[17] Legislative Decree no 185 of 1st February 1993 and following amendments.
[18] Our translation.
[19] Our translation.
[20] Our translation.
[21] Art. 70 of the Consolidated Banking Act.
[22] Art. 71(2) of the Consolidated Banking Act.

accomplish a turnaround in its fortunes. Should that positive scenario materialise, the mandate to the administrator will be regarded as having naturally expired. At the end of the procedure, the special administrator, alongside the oversight committee, will prepare its own reports to the Bank of Italy.[23] The latter, in turn, shall arrange for the closure of the special administration. Entailed in this is the possibility that the financial institution may return to its normal business, with its own management bodies. This procedure is, mutatis mutandis, what the EU legislature defines as a 'reorganisation measure'.

3.1b. It is also well known that the Italian corollary of the special administration is the compulsory administrative procedure. This, in many ways, mirrors the EU legal notion of winding-up, already detailed above. Remarkably, as regards the conditions for Italian LCA to apply, art. 80(1) laconically refers to the same conditions of the special administration (namely, administrative irregularities, violation of laws, regulations or bylaws; or losses), although they must be exceptionally 'serious'.

3.2. Across the Chanel, prior to the major 2007-2008 financial crisis, legislation applicable to bank insolvencies was conspicuous by its absence. Yet, the Bank Insolvency Directive had already been implemented in Britain as a result of the Credit Institutions (Reorganisation and Winding-up) Regulations (SI 2004/1045). Therefore, as the 2007/2008 financial crisis dawned on its banking sector, Britain did have a basic system of cross-border bank insolvency procedures, although the domestic insolvency rules governing the credit institutions were merely those applicable to ordinary businesses.

[23] Art. 75(1) of the Consolidated Banking Act.

However, dramatic events unfolded in the Summer and Autumn of 2008 as the near collapse of two major British banks[24] marked one year on from Northern Rock's demise.[25] The ensuing huge tax payers' bail-out by the Government of the major British Banks prompted the British legislature to step up to the plate and to provide ad hoc rules, better equipped to deal with the circumstances of the banking crisis. These events represent the genesis of the Banking Act 2009.[26]

Indeed, the Banking Act 2009 was preceded by the enactment, a year before, of the Banking (Special Provisions) Act 2008 (BA 2008).[27] The purpose of this piece of legislation, which received Royal Ascent on 21 February 2008, was to allow the Treasury 'to bring any UK deposit-taker into public ownership'. This power would have been exercised in cases where such a measure appeared opportune and desirable, 'in order to maintain the stability and/or to protect the public interest where the Treasury has provided financial assistance to a deposit-taker for the purposes of preserving the stability of that system.'[28]

To summarise, within this congested period of contemporary financial history, it is authoritatively affirmed[29] that the Northern Rock collapse provided a good litmus test for the British banking system in order to implement rules that, ultimately, allowed the 'orderly handling of the second and most important phase of the global crisis'. Notoriously, this has come at a serious cost to the taxpayer.[30]

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[24] See HBOS - RBS. As to the latter, the injection of public money in the capital resulted in being £ 45.5 billion: see GRACIE - CHENNELS - MENARY, *The Bank of England's Approach to resolving Failed Institutions*, Bank of England, in *Quarterly Bulletin,* 2014 Q4, p. 410.
[25] See SONG SHIN, *Reflections on Northern Rock: the Bank Run that Heralded the Global Financial Crisis,* 2009, 23, in *Journal of Economic Perspectives*, pp.101-119.
[26] See AVGOULEAS, *Banking Supervision and the Special Resolution Regime of the Banking Act 2009: the Unfinished Reform,* n 3, pp. 201-235.
[27] See PROCTOR, *The Law and Practice of International Banking,* n 6, p. 229.
[28] Banking (Special Provisions) Act 2008, s 2.
[29] See AVGOULEAS, *Banking Supervision and the Special Resolution Regime of the Banking Act 2009: the Unfinished Reform,* n 3, pp. 231-235.
[30] See GOODE, *Principles of Corporate Insolvency Law,* n 1, p. 45.

As a result of these events, the Special Resolution Regime (SRR) is the new architecture applicable to banks in Britain, should they face any future difficulties. Its pillars are: the three stabilization options; the bank insolvency procedure; the bank administration procedure.[31]

3.2.a. As highlighted by Scholars,[32] the stabilization option branches out to encompass: (a) the private sector purchaser;[33] (b) bridge bank;[34] (c) temporary public ownership.[35]

In the first option (a), there is the transfer by operation of law of 'all or part of the business of the bank to a commercial purchaser.'[36] In the second option (b), the transfers shall be to a company 'which is wholly owned by the Bank of England.'[37] In the last option (c), the stabilisation option is 'to take the bank in temporary public ownership.'[38]

Technically, the means by which the three options above may be achieved is twofold: the share transfer power; the property transfer power. In the former, shares shall be deemed as transferred to a third party regarded by the supervisor as eligible; in the latter, the transfer will relate to the 'property, rights or liabilities, in other words the business undertaking of the financial institution.'[39]

[31] The practical instructions relating to the SRR are provided by the same British Treasury. See TREASURY, *Banking Act 2009: Special Resolution Regime Code of Practice,* March 2015, available at *www.gov.uk.*
[32] See PROCTOR, *The Law and Practice of International Banking* (n 6) 233-258. See, in the Italian literature, DE POLI, *Crisi Finanziaria e Salvataggio delle Banche Inglesi. Il Banking Act 2009,* 2009, 1, in *Rivista Trimestrale di Diritto dell'Economia,* pp. 29-30.
[33] S 11 of the BA 2009.
[34] S 12 of the BA 2009.
[35] S 13 of the BA 2009.
[36] S 11(1) of the BA 2009.
[37] S 12(1) of the BA 2009.
[38] S 13(1) of the BA 2009. Practically, this option seems to be similar to what the British Treasury did in dealing with the Northern Rock crisis.
[39] See GOODE, *Principles of Corporate Insolvency Law,* n 1, p. 47.

3.2.b. The Bank insolvency represents the second pillar of the bank insolvency procedures. It gives rise to a liquidation of the bank and is legislated upon under section 90 of the BA 2009.

The notion in comment is applicable in cases where the insolvency of the bank is declared as a result of a court order,[40] with the ensuing appointment of a bank liquidator.[41] The ultimate purpose of the Bank Insolvency'[42] will be for the bank liquidator to wind up the credit institution.[43] More specifically, the Court is empowered to prescribe a bank insolvency order in two cases: (a) upon request of the Bank of England,[44] if the bank concerned with the request has eligible depositors and, coupled with this, either the bank is unable, or is likely to become unable, to pay its debts or the winding up of a bank would be fair;[45] (b) upon request of the Secretary of State, in circumstances where the bank has eligible depositors and either the winding-up of that bank would be in the public interest or the winding-up would be fair. The liquidator shall pursue two objectives, according to the procedures specified under section 99 of the BA 2009: particularly the possibility that, 'as soon as reasonably practicable each eligible depositor (a) has the relevant account transferred to another financial institution, or (b) receive payment from (or on behalf of) the F[inancial] S[ervices]C[compensation]S[cheme]'[46].

[40] S 90(2)(a) of the BA 2009. Section 92 clarifies that the 'court' shall be the High Court in England Wales, the Court of Session in Scotland, the High Court in Northern Ireland.
[41] S 90(2)(b) of the BA 2009.
[42] See the Heading of Part 2 of the BA 2009.
[43] S 90(2)(d) of the BA 2009.
[44] In the original wording of the BA 2009 mention was made to the Financial Services Authority too. As a result of the abolishment of this authority (Financial Services Act 2013), the reference, *mutatis mutandis*, should be referred to its successor, the Financial Conduct Authority. In the literature (C Proctor, *The Law and Practice of International Banking* (n 6)), mention is still made to the previous body (the FSA).
[45] See combined reading of Sect. 97(1) and Sect. 96(1)(a) or 96(1)(c).
[46] Section 99(2). The second objective, according to section 99(3) is 'to wind up the affairs of the bank so as to achieve the best result of the bank's creditors as a whole.' Among Scholars (R Goode, *Principles of Corporate Insolvency Law* (n 1) 47), it is highlighted that the BA 2009 'does not preclude the presentation of an ordinary winding up or administration petition, but the court may instead make a ban insolvency order on the application of the FSA with the consent of the Bank of England or on the application of the Bank of England, while a resolution for voluntary winding up has no effect without the prior approval of the court.' (Ibid, 47).

3.2.c. The bank administration is the procedure, stipulated under section 136 ff of the BA 2009, whereby a bank administrator is appointed to oversee the activities of a credit institution, in cases where part of the business of the insolvent bank is sold to third parties. In this case, it is obvious that the residual bank (ergo, the part of activities not sold to third parties) will require competent management in order to provide 'services or facilities required to enable the commercial purchaser … or the transferee … to operate effectively.'[47] Should this need arise, a qualified insolvency practitioner shall be appointed. The process shall proceed in a similar vein to that of normal administration legislated under the Insolvency Act 1986, subject to the variations and adaptation of the BA 2009.[48]

4. Having detailed the legislative scenario of the banking crisis procedure, it is possible at this stage to test the legislation against the background of some empirical data.

As of 11th February 2015, a significant number of Italian banks had fallen under the 'reorganisation measure'. Amongst these banks, there was even a listed one: the Banca Popolare dell'Etruria e del Lazio. Furthermore, amidst a special category of banks, called Savings Banks (Casse di Risparmio), three were subject to special administration. Moreover, eight cooperative banks were undergoing the procedure at stake while, in addition to the typical cooperative banks, a further two cooperative banks belonging to the special category called banche popolari met with the same fate. The final toll of Italian credit institutions subjected to special administration, as of 2014, stood at 17 financial institutions.[49] As far as the compulsory administrative procedure

[47] BA 2009, s 136(c).
[48] BA 2009, s 136(2)(d). The analogies between the two procedures are correctly emphasised in the recent literature. See PROCTOR, *The Law and Practice of International Banking,* n 6, p. 255.
[49] See BANCA D'ITALIA, *Relazione sulla Gestione sulle Attività della Banca d'Italia*, Rome, 26 May 2015, pp. 104-105.

is concerned, five Italian banks have encountered the commencement of this procedure in 2014.[50]

These figures contrast markedly with those existing in Britain. At the same time, in Britain there was no credit institution under the Special Resolution Regime.[51] Remarkably, in the intervening seven years since the BA 2009 came into force only two British institutions were subjected to the instruments of the SRR.[52] However, it is also true to say that, in 2008 and 2009, the British banking industry endured, as a result of the financial crisis and the ensuing bank losses, a 'huge diet'. In this respect, the British Government relied heavily on the BA 2008, in order to furnish British banks with tax payers' money. Fundamental to this provision, in 2008, all the banks and building societies, with very limited exceptions,[53] were somehow subject to forms of public money rescue.[54] Conversely, within the same time period, in Italy the insolvency measures adopted amounted, roughly, to the same figure as those in 2015: 20 banks subjected to the Italian reorganisation measures, with no process of compulsive administrative procedure adopted.[55]

A caveat is necessary in dealing with the data under this current section of the contribution. The British market of the financial institutions is concentrated, with a few banks occupying a large share of the market,[56] whereas the Italian banking system is traditionally dispersed across a larger number of operators.[57] It can be inferred, without any pretence of rigor in the analysis of the

[50] Banca d'Italia, Relazione sulla Gestione sulle Attività della Banca d'Italia, Rome, 26 May 2015, 106-107.
[51] See BANK OF ENGLAND, *Previous Resolutions under the Banking Act 2009,* available at *www.bankofengland.co.uk.*
[52] It is the case of the Dunfermline Building Society. See BANK OF ENGLAND, *Report under Section (80)1 of the Banking Act 2009 on the Dunfermline Building Society (DBS) Bridge Bank*, July 2010, available at *www.bankofengland.co.uk.* The second case is Southsea Mortgage and Investment Limited. See BANK OF ENGLAND, *Previous Resolutions under the Banking Act 2009,* available at *www.bankofengland.co.uk.*
[53] Abbey, Barclays, Clydesdale, HSBC, Nationwide and Standard Chartered.
[54] See TREASURY, *Treasury Statement on Financial Support to the Banking Industry,* 13 October 2008.
[55] See BANCA D'ITALIA, *Relazione sulla Gestione sulle Attività della Banca d'Italia,*(May 2009, p. 254.
[56] See BANK OF ENGLAND, *Prudential Regulation Authority, 'List of Banks as Compiled by the Bank of England* as at 30 June 2015, available at *www.bankofengland.co.uk.*
[57] See Banks in Italy at *www.tuttitalia.it*.

statistics, that the UK and Italy reflect two distinct patterns in the area of the bank insolvencies.

In the Italian banking market, within the period of observation, a significant number of banks have been subjected to bank crisis procedures and, additionally, no significant variation in the number has occurred. Conversely, in Britain, a very different unfolding of events can be observed. Only one bank has been subjected to the SRR,[58] in its seven years of application, subsequent to the Dunfermline Building Society 'crisis', in 2009.[59] However, in the middle of the financial crisis, a near nationalisation of the entire banking sector occurred, based on the powers granted by the BA 2008 to the British Government and the recapitalisation of their capital with public money. Yet, seven years after such Draconian measures were implemented, the sector appears to have totally 're-covered', as demonstrated by no procedure having been adopted in the meantime.

5. First and foremost, the British system of insolvency of the banks seems to place emphasis, from what has been highlighted in this paper, exclusively on deficiencies of a financial nature of the bank (the insolvency), rather than on those of a legal or administrative nature. Yet, the British system allows for more discretion in carrying out the liquidation of a credit institution, given the parameters of 'fairness' and 'other circumstances' enshrined in the legislation. Such parameters are defined in this paper as political weapons that the British Government may employ on discretionary basis.[60]

Further, the mass bail-out of the British banks, organised in 2008 with the deployment of public money, may be the empirical corroboration of the

[58] It is Southsea Mortgage and Investment Company Limited. See BANK OF ENGLAND, *Previous Resolutions under the Banking Act 2009,* available at *www.bankofengland.co.uk.* The bank was placed on the bank insolvency procedure on 16 June 2011, upon decision of the then Financial Services Authority and subsequent application to court of the Bank of England.
[59] See Bank of England, *Report under Section (80)1 of the Banking Act 2009 on the Dunfermline Building Society (DBS) Bridge Bank,* July 2010, available at *www.bankofengland.co.uk*
[60] See previous Section 3.

above sentiments. The underpinning philosophy of the BA 2008 is reminiscent of the intervention of politics in the market and the Machiavellian support of national interests and, therefore, the national players. The BA 2009, which closely follows in the footsteps of its predecessor, does not discard that spirit and so retains 'fairness' and the 'public interest' as strong reasons for justifying the utilisation of the bank crisis instruments. Conversely, it does not appear that these scenarios can be replicated in Italy, where the administrative authority (the banking sector supervisor) is the only body which, eventually, decides if and where to open the procedures. Ultimately, the mechanism in place in Britain, despite the BA 2009, is more 'contractual'. The relevant instruments, albeit formalised in law, may be regarded as belonging to the realm of private law or, simply, to the common law tradition.[61]

Additionally, it appears that the British legislature, in dealing with the insolvency of the bank, and also the less problematic one (the reorganisation measures), does not necessarily engage in a legitimate procedure. The only concern of the authority is to ensure that, by virtue of fast and straightforward contractual mechanisms,[62] the consequences arising from the insolvency of the bank can be minimised. Actually, paradoxically, it can be said that of the three bank insolvency procedures introduced in Britain, one (the stabilization option) is not a 'bona fide' procedure either, but rather the mere legislative categorisation of contractual instruments.

From a different angle of observation, the Italian procedures (including the amministrazione straordinaria), hinged upon a public officer and with specific bodies (including the insight body), appear rather too rigid in their structure. Due to the lack of codified contractual instruments, they do not ben-

[61] The British peculiarity, therefore, may be due to Britain belonging to the common law tradition. For the perennial divergence between common law and civil law, see the entrenched but still actual LEGRAND, *European Legal Systems are not Converging,* 1996, 45, in *International and Comparative Law Quarterly*, pp. 52-81. See also, more recently, CARNEY, *Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions,* 2015, 36, in *Statute Law Review*, pp. 46-58.
[62] The aforementioned 'share transfer power' and 'property transfer power'.

efit from the same level of speed and effectiveness as their British counterparts.

Ultimately, this paper somehow advocates the view[63] that the 'soft' harmonization of the bank insolvency procedure turned out to be a benefit for some countries, such as Britain. In its darkest moments (2008), this vacuum allowed British politics (ergo, the British Government) to manoeuvre in ways that, probably, would not have been imaginable in other countries. In turn, this flexibility, possible also because of the very tenuous EU rules in this area, has allowed Britain to save its renowned industry, to autonomously reshape its procedures in line with its common law tradition, and, ultimately, to mastermind a turnaround of its banking sector. In 2015, seven years on from the onset of the financial crisis, only two British banks have been under a reorganisation measure or winding-up procedure,[64] whereas, as highlighted under Section 4 above, Italy has still to reach the light at the end of the tunnel following the significant level of insolvency measures already existing in 2008.

6. In a contribution where the ontological driver was the interaction between politics and the financial system, it is hoped that sufficient evidence has been provided on the influence which political systems can exert over the way in which the banking business, in cases of insolvency, can be reorganised (reorganisation measures) or even terminated (winding-up).

The area of the bank insolvency was never designed to be harmonised at EU level by the Bank Insolvency Directive, given the scope of this piece of legislation: to merely 'synchronise' the cross-border bank insolvency procedures, rather than the internal national procedures. The peculiarity of the Directive at

[63] Such a provocative assertion should be tested against the more authoritative literature flourished in the wake of the 2008 financial crises. Among the contributions: ANDENAS - CHIU, *The Foundation and Future of Financial Regulation: Governance for Responsibility,* Routledge 2013; WYMEERSCH - HOPT - FERRARINI, *Financial Regulation and Supervision. A Post-Crisis Analysis,* OUP 2012; FERRAN – MOLONEY – HILL - COFFEE, *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge, 2012.

[64] As mentioned above under Section 4, the first SRR regime was applied to the Dunfermline Building Society in 2009 and the second one to the Southsea Mortgage and Investment Company Limited.

stake has been highlighted by virtue of a comparison of the two jurisdictions under discussion and also by the empirical evidence provided in the two periods under observation.

In Britain, a laissez-faire approach to the codification of the bank insolvencies has been apparent, with the two main procedures clearly market-oriented, market-friendly and fast-tracked. The velocity of the procedure is confirmed by the codification of contractual instruments that may represent the legacy of the 2007/2008 financial crises that heavily affected the credit institutions, and more generally speaking, the banking sector across the Channel. In Italy, the bank insolvency procedures seem to be saddled with bureaucracy, handled in a much too heavy handed fashion by the supervisor and reliant upon a lengthy procedure. Surprisingly, given what was highlighted in this paper, the bank insolvency procedures in Britain rely on much more political discretion, whereas those in Italy confer on the administrative authority all the required powers to initiate the procedure.

The very recent case of the Co-operative Group may confirm this possible theory of a double-standard. Although this credit institution was found responsible for serious irregularities,[65] the Financial Conduct Authority, in a pragmatic/political way, decided to waive a £ 120 million fine, given the possible impact that this decision would have on financial stability.[66]

More practically, the performance of British banks in the last seven years seems to be better than that of the Italian counterparts, if this was assessed merely on the basis of the insolvency procedures in place. Nevertheless, from a pure financial point of view, the profitability of the British banks would need a proper assessment of an economist, rather than a jurist.[67]

[65] A serious mismanagement in the way investors were given informations.
[66] See TREAMOR, *Co-op Bank Praises Move to Waive £120m Fine as "Pragmatic Solution",* in *The Guardian*, available at *theguardian.com*.
[67] See WILSON, *British Banks among the Most Unprofitable in the World*, in *The Telegraph*, 7 June 2012, available at *telegraph.co.uk.*

Beyond this, it is certainly possible to affirm that the political discretion, coupled with the lack of proper harmonization of the procedures, might have caused a 'perfect storm', not of calamity, but of fortunate circumstances which aided the British economy in 2008 to successfully emerge relatively unscathed from the worst crisis to hit its shores since WWII. To elaborate, Britain, during the financial crisis, because it was not shackled by rigid EU rules, was in a position to reorganise and reshape its domestic system of bank insolvency and to orchestrate a bail-out of banks uninhibited by any legal constraint. Indeed, a significant volume of tax payers' money has been deployed.

In light of this, the paper carries with it not simply an analysis but also a warning. The BRRD Directive has been recently enacted and, as has already been emphasised, it is aimed at averting the bank insolvency procedures, rather than setting out common rules relating to the way they should be organised. Given that the lack of harmonisation has been a relative success in the case of Britain, the EU would do well to take note and think twice before introducing, parallel to the BRRD, a pure harmonised system of bank insolvency procedures.

THE INDEPENDENCE OF THE EUROPEAN CENTRAL BANK BETWEEN MONETARY UNION AND FISCAL UNION: THE OMT CASE AS A CONFLICT AMONG NON-MAJORITARIAN INSTITUTIONS

Stefano Lombardo*

ABSTRACT: *Given the complex relationship between politics and finance, this Article deals with the independence of the European Central Bank in light of the decision of the European Court of Justice of June 2015 on the OMT program. The Article analyses the economic reason for granting independence to a central bank and takes the economic variables of independence as a point of reference for analyzing the relevant Treaty provisions and the OMT decision. It then describes the OMT case as a conflict among non-majoritarian institution for the (supposed) transformation of the monetary union into a fiscal union.*

1. It is well know that the establishment of the Economic and Monetary Union (EMU)[1] has provided the Eurozone with an incomplete architecture, because the

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[1] By way of the Maastricht Treaty of 1992 and the Stability and Growth Pact, SGP, of 1997, on which see HAHN, *The stability pact for European Monetary Union: Compliance with deficit limit as a constant legal duty*, in *Common Market Law Review*, 35, 1998, pp. 77-100.

monetary union is not accompanied by a fiscal union.[2] In essential economic terms, the problem is that the current monetary union does not represent an optimum currency area. Possible economic shocks of some Member States are not corrected and absorbed by wages/prices flexibility, factor (particularly labor) mobility or fiscal transfers.[3] While the first years of the Euro were quite promising, it is only with the emergency of the sovereign debt crisis of 2010 that followed the economic and financial crisis having started in 2008 that the Eurozone is confronted dramatically with this incompleteness. The reaction of the Member States (of the Eurozone) and of the European Union to the crisis has concretized in several responses that have (maybe) partially modified the (development of the) constitutional architecture of the European Union.[4] In particular, interventions include, among others,[5] in June 2010 the establishment of the European Financial Stability Facility (EFSF)[6] and of the European Financial Stabilization Mechanism (EFSM)[7] followed in February 2012 by the establishment of the European Stability Mechanism (ESM)[8] for the provision of financial

[2] On the relationship between the monetary union and the fiscal union discussing several possible solutions, see HINAREJOS, *Fiscal federalism in the European Union: evolution and future choices for EMU*, in *Common Market Law Review*, 50, 2013, pp. 1621-1642.

[3] The reference point is MUNDELL, *A Theory of Optimum Currency Areas*, in *American Economic Review*, 51, 1961, pp. 657-665. See also KRUGMANN, *Revenge of the Optimum Currency Area*, in *NBER Macroeconomics Annual*, 27, 2013, pp. 439-448. For a comparison of the development of five currency areas, reviewing also theories of fiscal federalism (USA, Canada, Germany, Brazil and Argentina) and the conditions of their success, see BORDO - JONUNG - MARKIEWICZ, *A Fiscal Union for the Euro: Some Lessons from History*, in *CESifo Economic Studies*, 59, 2013, pp.449-488. On the incompleteness of the European monetary union, see also GERNER-BEUERLE - KÜÇÜK - SCHUSTER, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, in *German Law Journal*, 15, 2014, p. 8.

[4] See CHITI - TEIXEIRA, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *Common Market Law Review*, 50, 2013, pp. 683-708. See also RODI, *Machtverschiebungen in der Europäischen Union im Rahmen der Finanzkrise und Fragen der demoktraischen Legitimation*, in *Juristen Zeitung*, 70, 2015, pp. 737-744, particularly with respect to the modification of powers of the EU organs and a possible problem of democratic deficit.

[5] Like the creation of the European Banking Union, including the Single Supervisory Mechanism and the Single Resolution Mechanism, on which see MOLONEHY, *European Banking Union: Assessing its Risks and Resilience*, in *Common Market Law Review*, 51, 2014, pp. 1609-1670.

[6] Created as intergovernmental agreement by the euro area Member States as a temporary crisis solution institution as a company under Luxemburg law.

[7] Created on the basis of Art. 122(2) TFEU, Council Regulation (EU) No 407/2010 of 10 May 2010 establishing a European financial stabilization mechanism.

[8] Established on the basis of an amendment of Art. 136 TFEU (see European Council decision of 25 March 2011 amending article 136 of the Treaty on the Functioning on the European Union with regard to a stability mechanism for Member States whose currency is the euro, 2011/199/EU).

help to Member States in difficulties.[9] The coordination of more stringent budgetary rules was achieved with the so-called Six-Pack[10] and Two-Pack,[11] and more importantly with the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG, or Fiscal Compact) in March 2012.[12] Also the European Central Bank did intervene on the market with some operations, namely the LTRO program and the SMP program.[13] Furthermore, the ECB announced the OMT program in September 2012 and started in March 2015 its "quantitative easing" program.[14]

In the complex relationship between politics and finance, this Article deals with the issue of the independence of the European Central Bank as shaped by the sovereign debt crisis and in particular in relation to the OMT decision which is the first important decision of the ECJ in this field.[15] The Article takes economic theory on the independence of central banks, that focuses on one aspect of the complex relationship between politics and finance, for justifying the supremacy of finance (i.e. of the central bank and its technical expertise) in this particular regulatory field (Section 2) and analyses the relevant Treaty provisions related to the ECB (3). The analysis confirms that the ECB was designated as an extremely independent institution devoted to price stability. This characteristic has been reinforced by the OMT decision of the ECJ that presents some interesting points for the qualification of the operative

[9] For a first legal judgment on these instruments, see the opposing views of RUFFERT, *The European Debt Crisis and European Law*, in *Common Market Law Review*, 48, 2011, pp. 1777-1806 and HERMANN, *Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts*, in *Europäische Zeitschrift für Wirtschafsrecht*, 23, 2011, pp. 805-812.

[10] Including five regulations (1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/20119 and one directive (2011/85/EU).

[11] Including two regulations (472/2013, 473/2013).

[12] On the TSCG, see PEERS, *The Stability Treaty: Permanent Austerity or Gesture Politics*, in *European Constitutional Law Review*, 8, 2012, pp. 404-441. Provided the apparent deficit bias of democratic governments, for an empirical evaluation of constitutional budget provisions, see BLUME - VOIGT, *The economic effects of constitutional budget institutions*, in *European Journal of Political Economy*, 29, 2012, pp. 236-251.

[13] On LTRO and SMP programs see SESTER, *The ECB's Controversial Securities Market Programme (SMP) and its role in relation to the modified EFSF and the future ESM*, in *European Company and Financial Law Review*, 9, 2012, pp. 156-178

[14] See ECB, Press release of 22 January 2015. On the quantitative easing and its compatibility with the mandate of the ECB, see LAMMERS, *Die Politik der EZB an den Grenzen ihres Mandats?*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 26, 2015, pp. 212-217. The quantitative easing program is already object of a *Verfassungsbeschwerde* at the Federal German Constitutional Court (n. 2BvR859/15).

[15] See Case C-62/14, *Peter Gauvailer and others v Deutscher Bundestag*, (*OMT*), of 16 June 2015.

independence of the ECB (4). The ECJ stresses the independence of the ECB, shaping the complex relationship between politics and finance by (re)affirming the supremacy of the monetary technical expertise over the political sphere. The Article then describes the current situation deriving from the OMT case as a conflict among non-majoritarian institutions for the possible transformation of the monetary union into a fiscal union (5). Short conclusions follow (6).

2. In the complex relationship between politics and finance, the essential objective of an independent central bank in modern democracies is traditionally qualified in terms of price stability, i.e. the capacity of the central bank to successfully fight inflation in the medium and long term.[16]

2.1. Monetary history helps explaining the development toward central bank independence. Indeed, historically, there have been three monetary systems.[17] The first one relied on metallic coins that reflected the full intrinsic value of silver or gold, the quantity of which was limited by extraction capacity. The second one developed with the creation of paper notes (issued by banks or governments) and the legal rule (obligation) of convertibility at a fixed parity of these notes into gold (gold standard). During these two periods price stability was a direct consequence of legal rules, respectively on the metal content of coins and of convertibility at a fixed parity.[18] The third period, the current one, sees the monopoly of money creation delegated to a central bank. The traditional argument economists use to justify the creation of an independent central bank runs as follows. Since the convertibility of banknotes at a fixed parity into gold is no longer possible, the government could have an incentive to

[16] See the literature reviewing article by DE HAAN - MASCIANDARO - QUINTYN, *Does central bank independence still matter*?, in *European Journal of Political Economy*, 24, 2008, 717-721. From an hystorical perspective for the pros and cons of an indipendent central bank, see also CAESAR, *Die Unabhängigkeit der Notenbank im demoktratischen Staat*, in *Zeitschrift für Politik*, 27, 1980, pp. 347-377.
[17] See BERNHOLZ, *Independent central banks as a component of the separation of powers*, in *Constitutional Political Economy*, 24, 2013, pp. 199-214, p. 202.
[18] As argued by BERNHOLZ, *supra*, p. 202, in the first period inflation was still possible to the extent that legal rules on full metal content were changed by diminishing the content of precious metal in the coins (so-called debasement).

expand its budget to finance public expenditures and/or to try to fight unemployment (so fostering the economy) simply by convincing the central bank to print banknotes (money). In this context, a time inconsistency problem arises between short run and the medium to long term run. This is a situation where rational agents are able to anticipate policy outcomes and to react to them so eliminating their results.[19] Indeed, given the anticipation of government's behavior by rational agents and considering the (fixed) potential GDP growth ratio, a higher average inflation rate in the medium-long run is the result of the government printing money.[20] This means that the government is not the best actor in deciding how much money to print because high inflation is the consequence (s.c. government inflationary bias).[21] As an alternative, an (independent) central bank is a better actor to define and enforce monetary policy in terms of long run price stability.[22] In regulatory terms, an independent central bank is a non-majoritarian institution able to credibly commit itself to a future appropriate level of inflation.[23] Furthermore, the independent central bank does not create costs for society in terms of macroeconomic performance.[24] In this way, in the complex relationship between politics and finance, the financial sphere (i.e. the central bank and its technical expertise) is considered superior to the political sphere.

[19] The time inconsistency problem goes back to the article of KYDLAND - PRESCOTT, *Rules Rather than Discretion: the Inconsistency of Optimal Plans, in Journal of Political Economy*, 85, 1977, pp. 473-490 and evidences the possible actual anticipation of agents based on their rational expectations with respect to policy-makers' action.

[20] The reference model of this literature are BARRO - GORDON, *Rules, Discretion and Reputation in a Model of Monetary Policy*, in *Journal of Monetary Economics*, 12, 1983, pp.101-121.

[21] Again, the basic model is ROGOFF, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, in *Quarterly Journal of Economics*, 110, 1985, pp. 1169-1189, where the central bank is "conservative" meaning, in short, that it prefers a future lower rate of inflation than the government.

[22] The commonly accepted economic justification of central bank independence from political pressure as best device to keep price stability, has been doubted in historical perspective with respect to the cases of the United States and the United Kingdom by HOWELS, *The U.S. Fed and the Bank of England*, in *International Journal of Political Economy*, 42, 2014, pp. 44-62

[23] See MAJONE, *Non majoritarian Institutions and the Limits of Democratic Governance: a Political Transaction Costs Approach*, in *Journal of Institutional and Theoretical Economics*, 157, 1998, pp. 57-78.

[24] The reference point is ALESINA - SUMMERS, *Central Bank Independence and Macroeconomic Performance*, in *Journal of Money, Credit and Banking*, 25, 1993, pp. 157-162. See also WALSH, *supra*, p. 6.

Provided the theoretical framework for justifying central bank independence as the best device to grant price stability, economists have studied independence with respect to its qualitative dimension.[25]

2.2. When speaking about central bank independence, the economic literature distinguishes between *political independence* (or *goal independence*) and *economic independence* (or *instrument independence*).[26] Political (i.e. goal) independence means the capacity for the central bank "to choose the final goal of monetary policy".[27] A goal of low inflation is a goad proxy for central bank independence.[28] Political (i.e. goal) independence relates to the degree of freedom a central bank enjoys vis a vis the government. This dimension includes three aspects:[29] (i) no government appointment of the central bank governing bodies (governor and board) and office periods of more than 5 years; (ii) no mandatory presence of government representatives in the board and no provision for government approval of monetary policy; and finally (iii) formal responsibilities of the bank in terms of statutory requirements for price stability (among other possible goals) and legal provisions that protect the bank from the government in case of conflict.[30]

[25] See WALSH, *supra*, 3.
[26] See WALSH, *supra*, 3. The terms political independence and economic independence go back to the article of GRILLI - MASCIANDARO - TABELLINI, *Political and Monetary institutions and Public financial Policies in the Industrial Countries*, in *Economic Policy*, 6, 1991, pp. 341-392. The synonymous terms of respectively goal independence and instrument independence were used by DEBELLE - FISCHER, *How Independent Should a Central Bank Be?,* in FUHRER (eds.), *Goals, Guidelines and Constraints Facing Monetary Policymakers*, Boston, 1994, pp.195-221, p. 197.
[27] See GRILLI - MASCIANDARO - TABELLINI, *Political, supra*, p. 366 and Table 12, p. 368.
[28] See GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 367. For DEBELLE - FISCHER, *supra*, goal independence refer to the freedom granted to a central bank "to set the final goals of monetary policy" (197) meaning that the goal has not necessary to be the one of price stability but could also be for instance output stability (197). This is in contrast to Grilli GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, where price stability is the proxy for political independence.
[29] See GRILLI - MASCIANDARO - TABELLINI, *Political, supra*, p. 366.
[30] According to the result of GRILLI - MASCIANDARO - TABELLINI, *Political, supra*, p. 368, of the 18 OECD countries analyzed in their study "West Germany and the US, but also the Netherlands, Canada and Italy, enjoy the highest degree of political independence. At the other end are Austria, New Zealand, the UK, Belgium and Portugal, and not far above Greece, Spain and France".

Economic (i.e. instrument) independence is the central bank's capacity to choose the instruments used to pursue the chosen goals.[31] This dimension includes two aspects:[32] (i) the (im)possibility for the government to obtain credit facilities from the central bank[33] and for the central bank to participate to the primary public debt market; (ii) the nature of the monetary instruments at the disposal of the central bank in terms of the discount rate set by the central bank and banking supervision not entrusted with the central bank.[34]

A more elaborated index for measuring the *de jure* independence of a central bank includes four groups of legal elements.[35] This index combines some of the elements of the former study but covers substantially the same factors. In short, the first group includes four legal variables related to the "quality" of the office of the members of a central bank.[36] The second group relates to three variables in relation to the competence about policy formulation.[37] The third group deals with the objectives of

[31] See GRILLI - MASCIANDARO - TABELLINI, *Politica, supra*, p. 367. The corresponding notion in Debelle and Fischer, *supra*, 197, is the one of instruments independence and refers to the central bank freedom to choose the "means by which it seeks to achieve it goals".

[32] See GRILLI - MASCIANDARO - TABELLINI, *Political*, *supra*, p. 368 and Table 13, p. 369.

[33] Credit facilities to the government should be not automatic, provided at market interest, temporary and in limited amount.

[34] According to GRILLI - MASCIANDARO - TABELLINI, *Political, supra*, p. 370, "Economic independence of the central bank is high in West Germany, Switzerland, the US, but also in Austria and Belgium. Conversely, central banks in Italy, New Zealand, Portugal, Greece and Spain have very little economic independence". Furthermore, the authors point out that political independence and economic independence do not necessary coincide in all countries.

[35] See CUKIERMAN - WEBB - NEYAPTI, *Measuring the Independence of Central Banks and its Effects on Policy Outcomes*, in *The World Bank Economic Review*, 6, 1992, pp. 353-398, pp. 356-359. This study covers 72 countries in 4 periods. According to WALSH, *Central bank independence*, 2005, prepared for the New Palgrave Dictionary, 4, this index is the most used in the related literature (for a survey of which, see CUKIERMAN, WEBB - NEYAPTI, *supra*, p. 355). To be sure, CUKIERMAN - WEBB - NEYAPTI, *supra*, stress (p. 355) that the level of the actual (*de facto*) central bank independence "depends not only on the law, but also on many other less structured factors, such as informal arrangements between the bank and other parts of government, the quality of the bank's research department, and the personality of key individuals in the bank and the (rest of the) government". For assessing independence, their study takes also in consideration actual governor turnover and a questionnaire to the central banks. A description of the importance of *de facto* independence to measure real independence, is provided by BLANCHETON, *Central bank independence in an historical perspective. Myth, lessons and a new model*, in *Economic Modelling*, in press 2015.

[36] Which relate to the (i) appointment, (ii) dismissal, (iii) term of office of the chief officer and (iv) the regime of incompatibility with other government offices. Independence is higher where the government has less authority over these decisions and the term of office is up to 8 years with a strict regime of incompatibility, see CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 358, Table 1.

[37] It includes (i) who formulates monetary policy (ii) who decides about conflict resolutions and (iii) the role of the central bank in the government budgetary process. Independence is higher if the central bank alone decide on monetary policy, the final word belongs to the central bank inside a certain legal framework about its objectives

the central bank. This group considers price stability as the major objective and includes six combinations in relation to the possible mix of different objectives. Independence is higher where price stability is the only or major objective (as opposed e.g. to a situation where price stability is not an objective or is combined with others like full employment). The fourth and last group of legal elements relates to the limitations on lending to the government and includes eight variables.[38] For all the eight variables the stricter the limitation the higher the central bank independence.[39]

3. The variables used by economists to evaluate central bank independence in terms of goal independence and instrument independence are useful for analyzing the legal notion of independence of the European Central Bank (ECB) and the European System of Central Banks (ESCB) as "constitutionally" fixed in the Treaties (TEU and TFEU) and in the Statue of the ESCB-ECB.[40] The TFEU does mention the independence of the ECB in positive terms, stating that it is *independent in the exercise of its powers and in the management of its finances* (Art. 282(3) TFEU) and in negative terms, stating that *union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence* (Art. 282(3) TFEU). The TFEU does not provide for an explicit notion of independence with respect to the ECB (and the ESCB). Nevertheless, a qualification of independence can be identified on the basis of the different legal provisions related to the powers assigned to it.

Starting the analysis with goal independence in terms of price stability, this is statutorily granted. Indeed, the Treaty directly sets the goal of price stability as the

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and the central bank is active on the government budgetary policy, see Cukierman, Webb and Neyapti, *supra*, 358, Table 1.

[38] These eight variables are: (i) permissibility of non-securitized lending, (ii) permissibility of securitized lending, (iii) control of the terms of lending, (iv) number of subjects who are potential borrowers from the bank, (v) definition of limits on central bank lending, (vi) maturity of loans, (vii) quality of interest rates on loans, and (viii) activity on the primary markets, see CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 359, Table 1.

[39] So for instance, with respect to the first and second group, independence is higher if advances and securitized lending are prohibited. Independence is also higher if the terms of lending (maturity, interest and amount) is controlled by the central bank (third group) and the lending limits are defined in currency terms (fifth group): see CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 359.

[40] Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank.

principal goal of monetary policy.[41] This feature differentiates the mandate of the ECB-ESCB from the mandate of the U.S. Federal Reserve where price stability is formally not prioritized with respect to maximizing employment and moderating long-term interest rates.[42] In the European system, provided the principal goal of price stability is preserved, the ESCB shall support the general economic policies in the Union (e.g. Art. 127(1) TFEU, Art. 282(2) TFEU). Price stability is not defined in the Treaties, but it is from a legal perspective normally understood as a situation where no inflation and deflation take place.[43] Goal independence is also ensured because it is the competence of the ESCB to define and to implement the monetary policy of the Union (Art. 127(2) and Art. 282(1) TFEU). The ECB competence for the definition of monetary policy includes also the numerical definition of price stability and so the proper level of inflation. It is well know that the ECB sets a target inflation rate "below, but close to, 2% over the medium term".[44] Goal independence in the European system also considers the composition and appointment of the Governing Council. This is composed by the Governors of the national central banks of the Member States whose currency is the euro and by the six members of the Executive Board, nominated by qualified majority by the European Council (Art. 283(2) TFEU and Art. 11 Statute). The extent to which independence from the government (the political actor) in the appointment procedure is achieved in reality, is difficult to asses. Economic theory seems to rely on an ideal system where the political actor does not

[41] See Art. 3(3) TEU, *balanced economic growth and price stability*; Art. 119(2) TFEU, *single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability*; Art. 127(1) TFEU *the primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability*; Art. 2 of the Statute, *the primary objective of the ESCB shall be to maintain price stability*; Art. 282(2) TFEU the *primary objective of the ESCB shall be to maintain price stability.*

[42] Federal Reserve Act: Section 2A. Monetary Policy Objectives: *The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates*. For the extent to which the FED "plays" among the different objectives, providing in any case for price stability, see Debelle and Fischer, *supra*, for a comparison between the FED and the Bundesbank. See also Blancheton, *supra*.

[43] See WALDHOFF, *Art. 127*, in SIEKMANN, *Kommentar zur Europäischen Währungsunion*, Tübingen, 2012, pp. 263-322, p. 277.

[44] See EUROPEAN CENTRAL BANK, *The Monetary Policy of the ECB*, 2011, p. 65: the notion of price stability is defined "as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%. Price stability is to be maintained over the medium term".

appoint the board and the Governor. This ideal model is probably difficult to find in the real world.[45] Indeed, in Europe, the procedure for nomination of the national Governors is in the hand of national legislators and possibly subject to government approval (even within the limit of Art. 131 TFEU and Art. 14 Statute). The President, the Vice President and the other four members of the Executive Board are appointed by the European Council, which is the highest political actor of the Union (Art. 15 TEU).[46] The mandate of the members of the Executive Board is eight years and they cannot be reappointed (Art. 283(2) TFEU and Art. 11 Statute).[47] The term of office of the governors of the national central banks is not directly regulated but Art. 14.2 Statute sets a period of no less than five years, without prohibiting the possibility of re-appointment.[48] Governors are protected against dismissal by Art. 131 TFEU and Art. 14 Statute, while the members of the Executive Board by Art. 11.4 Statute. Connections between the political actors and the ECB that could prejudice goal independence are provided for (Art. 284 TFEU), but their real consequences should be of limited importance.[49] Goal independence in terms of prohibition of political pressure over monetary policy is granted to the members of the ESCB-BCE by Art. 130 TFEU. This provision insulates the mandate of the Governing Council members (and of the members of the national central banks) from political influence coming from

[45] Indeed, in the study of GRILLI - MASCIANDARO - TABELLINI, *supra*, p. 368, Table 12, the only country where the Governor was not appointed by the government was Italy. Furthermore, only in Greece and Italy all the board was not appointed by the government.

[46] Of course, in the context of the European Union the traditional tripartition of powers between parliament, executive and judiciary is altered and the government cannot be identified with precision like in a national State. According to Rodi, *supra*, 740, the role of the European Council has increased as a consequence of the crisis to become a kind of economic government. See Van ESCH and DE JONG, *Institutionalisation without internalisation. The cultural dimension of French-German conflicts on European Central Bank Independence*, in *International Economics and Economic Policy*, 10, 2013, pp.631-648, p. 639, for political disagreement about the nomination and the composition of the Executive Board in the recent past.

[47] Which is the optimal term office in by CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 358, Table 1.

[48] The term of at least five years correspond to what GRILLI - MASCINADARO - TABELLINI, *supra*, p. 368, Table 18, consider a good proxy for independence while in the study of CUKIERMAN - WEBB - NEYAPTI, *supra*, p. 358, Table 1, the optimal term is eight years. According to SIEKMANN, *Art. 130*, in SIEKMANN (hrsg.), *Kommentar zur Europäischen Währungsunion*, 2012, pp. 402-452, 411, the five years term and the possibility of reappointment may weaken the "personal" independence of the governors.

[49] For the development of this connections during the crisis, see BEUKERS, *The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, in *Common Market law Review*, 50, pp. 1579-1620.

the national level and the European level.[50] Finally, goal independence is also granted because in the case of conflicts the European Court of Justice is competent to decide (Art. 263(1) and (3) TFEU and Art. 35 Statute).

With regard to instrument central bank independence, i.e. the central bank's capacity to choose the instruments used to pursue the chosen goals, this is also granted by the Treaty. The possibility for the government(s) (at European level or national level) to finance itself from resources provided by the central bank (i.e. monetary financing) is strictly prohibited by Art. 123 TFEU (prohibiting *overdraft facilities or any other type of credit facility*) and Art. 21.1 Statute. The same articles prohibit also the participation of the central bank to the public debt primary market of a Member State (*the purchase directly from them by the European Central Bank or national central banks of debt instruments*). Art. 123 TFEU represents the core article for instrument independence and has to be read in connection with Article 125 TFEU that contains the no-bail out clause: both of them are contained in Chapter 1 on economic policy. This clause is the expression of the current incompleteness of the currency area of the European monetary union that does not include fiscal transfers of any type among Member States or a central budget. Indeed, the monetary union was based on the premise (and hope) that each Member States keeps a strict regime of fiscal discipline (Art. 119(3) and Art. 126 TFEU). The extent to which this premise was credible (in terms of credible commitment for the Member States and for the procedures laid down for its enforcement and the possible resulting moral hazard problem) is of course highly debatable.[51] The *Pringle* case decided by the European Court of Justice in November 2012 was the milestone to clarify the interpretation of

[50] Also the ECJ already stressed the importance of Art. 130 TFUE (former Art. 108 EC Treaty) in terms of independence from political pressure ECJ, C-11/00, 10 July 2003, *Commission v ECB* (*OLAF*), par. 134: "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".

[51] For comparative purposes, see the historical analysis for six federal systems by BORDO - JONUNG - MARKIEWICZ, *supra*. On the credible commitment problem of budgetary discipline and the deriving moral hazard problem, see HINAREJOS, *supra*, p. 1625 and p. 1628.

this article with respect to the moral hazard problem.[52] In short, the (Full!) Court decided that the ESM does not distort incentives for Member States. There is no mutualization of debt and Member States remain fully responsible for their obligations, so that the no-bail out clause is not circumvented.[53]

Instrument independence is granted also because the discount rate is set by the Governing Council of the ECB on the basis of its monetary competence (Art. 12.1 Statute). The setting of the key interest rates is not considered an explicit instrument of monetary policy but a natural precondition for its realization.[54] Key interest rates are, indeed, explicitly mentioned together with intermediate monetary objectives and the supply of reserves to the ECSB, as the core decisions related to the formulation of monetary policy (Art. 12 Statute), which is mandated to price stability as the primary goal. Indeed, the monetary functions and operations of the ESBC are regulated in Art. 17-24 Statute. In particular, the instruments of monetary policy are subject to a *numerus clausus* rule.[55] They are described in Art. 18 Statute (*open market and credit operations*)[56] and Art. 19 (*minimum reserves*).[57] The instrument independence of the ECB in relation to open market and credit operations (i.e. their conformity with Art. 123 TFUE) has to be measured and evaluated according to the terms of the conditions it sets when (i) it takes public debt securities as collateral for

[52] Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, of 27 November 2012. On *Pringle*, see e.g. DE WITTE - BEUKERS, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order*: Pringle, in *Common Market Law Review*, 50, 2013, pp. 805-848; CRAIG, *Pringle*: *Legal Reasoning, Text, Purpose and Teleology*, in *Maastricht Journal of European and Comparative Law*, 20, 2013, pp. 3-11; BECK, *The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the* Pringle *Case*, in *Maastricht Journal of European and Comparative Law*, 20, 2013, pp. 635-648; Ruffert, 2013, *Anmerkung*, in *Juristen Zeitung*, 68, pp. 257-259; THYM, *Anmerkung*, in *Juristen Zeitung*, 68, 2013, pp. 259-264.

[53] See in particular par. 129-147. The Court stresses the difference between mutualization (i.e. real fiscal transfer) and maintenance of the full obligation to repair the debt. The second is considered as a legitimate financial help by way of an international agreement as the ESM.

[54] The typical instrument of monetary policy is the setting of the discount rate at which banks can obtain credit from the central bank, GRILLI - MASCIANDARO - TABELLINI, *supra*, p. 369, Table 13.

[55] Art. 20 Statute provides the possibility for the Governing Council, by a majority of two thirds of the votes cast, for other monetary instruments but within the limits of Art. 2 Statute (price stability as primary goal) and the possible intervention of the Council.

[56] On these instruments, see Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (recast), OJEU, 2.04.15, L 91/3.

[57] See ECB Regulation EU 1376/2014 of 10 December 2014 amending Regulation (EC) 1745/2003 on the application of minimum reserves ECB/2003/9, ECB/2014/52.

credit operations in favor of banks and (ii) it purchases public debt securities on the secondary market.[58]

All in all, the analysis has shown that the Treaties grant to the ECB a high degree of goal independence and instrument independence, so that in this regulatory field the technical expertise of the financial sphere is protected from the political sphere.[59]

4. For the first time in its history on 14 January 2014, the Federal Constitutional Court of Germany referred a case to the European Court of Justice for a preliminary ruling under Article 267 TFEU in relation to the OMT program of the European Central Bank. In the recent past, the Federal German Constitutional Court already considered some issues related to the provisions taken by the Member States and the European Union to deal with the economic crisis.[60] Nevertheless, the Federal German Constitutional Court did not bring an action for a preliminary ruling to the European Court of Justice. The OMT request for a preliminary ruling was highly debated among German legal scholars with respect to the *ultra vires* and national constitutional identity issues as well as the proper role of the ECB as an independent central bank.[61] This debate is not a surprise. History shows that the monetary dimension of the German economic

[58] On the point, see also SESTER, *supra*, p. 26, for the SMP program.

[59] Finally, the extent to which instrument independence in banking supervision is organized at the ECB is a more complex issue. Indeed, in the study of GRILLI - MASCIANDARO - TABELLINI, *supra*, banking supervision should not be entrusted with the central bank (369, Table 13) because administrative instruments like portfolio constraints can facilitate the financing of government borrowing (370). On the contrary, the study of CUKIERMAN - WEBB - NEYAPTI, *supra*, does not contain such variable. Banking supervision in relation to prudential requirements rules (the CRR and CRD IV) is indeed in the competence of the ECB. The SSM provides a separation between monetary policy and supervision (Art. 25 and 26 of Council Regulation 1024/2013); for the extent to which this separation is effective, see MOLONEY, *supra*, p. 1634. On the more recent economics of central bank supervision, see MASCIANDARO - QUINTIN - TAYLOR, *Inside and outside the central bank: independence and accountability in financial supervision. Trends and determinants*, in *European Journal of Political Economy*, 24, 2008, pp. 833-848.

[60] See WENDEL, *Exceeding Judicial Competence in the Name of Democracy: the German Federal Constitutional Court's OMT Reference*, in *European Constitutional Law Review*, 10, 2014, pp. 263-307, with respect in particular to the ESM and TSCG and to the activity of other constitutional courts (p. 266).

[61] In favor of the decision of the Federal German Constitutional Court and against the operations of the ECB, see e.g. SCHMIDT, *Die entfesselte EZB*, in *Juristen Zeitung*, 70, 2015, pp. 317-327; STÄDTER, *Das OMT-Verfahren in Luxemburg und Karlsruhe – ein wesentlicher Schritt der europäischen Krisenbewältigung?*, in *Recht und Politik*, 51, 2015, pp. 20-28 Against the decision and in favour of the operation of the EZB, see e.g. HEUN, *Eine verfassungswidrige Verfassungsgerichtsentscheidung – die Vorlagebeschluss des BVerfG vom 14.1.2014*, in *Juristen Zeitung*, 69, 2014, pp. 331-337; WENDEL, *supra*.

constitution after the second Word War has always been of determinant importance, shaping the national identity. The German Bundesbank has always been considered among the most independent political central banks in the world.[62] Both legal doctrine and the public opinion in Germany see this "constitutional" dimension of the Bundesbank as a fundamental element of the German cultural model of the *soziale Marktwirtschaft*.[63]

The German Court asks essentially two questions to the ECJ:[64] (i) whether the OMT program exceeds the monetary policy mandate of the ECB and encroaches upon the economic policy competence of the Member States and (ii) whether the OMT program involves monetary financing. In short, both questions refer to the possible transformation of the monetary union into a fiscal union.[65]

The European Court of Justice provides a judgment which strengthens the independence (particularly, instrument independence) of the European Central Bank and serves as strong precedent for future possible cases.[66] The Court reformulates the questions for a preliminary ruling into a single question asking whether the OMT program is compatible with Artt. 119, 123(1), 127(1) and (2) TFEU and Artt. 17 to 24 Statute.[67] In short, the European Court of Justice answers that the OMT program is a monetary program and that it is in conformity with the prohibition of monetary fi-

[62] See GRILLI - MASCIANDARO - TABELLINI, *supra*, p. 368.
[63] See VAN ESCH - DE JONG, 2013, *supra*, describing the different attitude of the several Member States toward the independence of the central bank and in particular to the different approaches of France and Germany, pointing out the cultural dimension in explaining these differences. See also See KALTENTHALER, *German Interests in European Monetary Integration*, in *Journal* of *Common Market Studies*, 40, 2004, pp. 69-87.
[64] See also Mayer, *Zurück zur Rechtsgemeinschaft: Das OMT-Urteil des EuGH*, in *Neue Juristische Wochenschrift*, 68, pp.1999-2003, p. 2000; HERMANN - DORNACHER, *Grünes Licht von EuGH für EZB-Staatsanleihenkäufe – ein Lob der Sachlichkeit*, in *Europäischen Zeitschrift für Wirtschaftsrecht*, 26, 2015, pp. 579-583, p. 580.
[65] The short statement has to be understood as possible circumvention of the prohibition of the monetary financing provision of Art. 123 TFEU and refers to the doubts expressed by the Federal German Constitutional Court (see par. 87 of the decision of the German Court). Circumvention means essentially that there is a mutualization of resources.
[66] For first comments on the OMT decision of the ECJ, see: Mayer, *supra*; HERMANN - DORNACHER, *supra*; ROSSANO, *Legittimo il programma "OMT": La Corte di Giustizia dà ragione alla BCE*, in *Rivista trimestrale di diritto dell'economia*, 2/15-II, 2015, pp. 75-93; PRINCIPE, *Gli strumenti di intervento della BCE e le prospettive dell'Unione europea*, in *Rivista trimestrale di diritto dell'economia*, 2/15-II, 2015, pp. 94-107; critical, see KLEMENT, *Der geldpolitische Kompetenzmechanismus*, in *Juristen Zeitung*, 70, 2015, pp. 754-760.
[67] Par. 32 OMT decision.

nancing. More particularly, with respect to the core economic questions,[68] the Court makes four essential points: (i) in the ESCB-ECB system it is the task of the Governing Council to formulate the monetary policy and of the Executive Board to implement that policy under no threat of political pressure;[69] (ii) in the distinction between economic policy and monetary policy,[70] the OMT program has the direct aim of improving the transmission mechanism of monetary policy and the indirect consequence of improving the stability of the euro area supported by the ESM;[71] (iii) the proportionality of the OMT program is given because there is a sound relationship between instruments and objectives;[72] (iv) there is a clear distinction between forbidden primary market bonds purchases and allowed secondary market bonds purchases, and the conditions of the OMT program do not violate the prohibition of monetary financing.[73]

The OMT decision is of relevant importance because it starts to trace the limits of the powers of the ECB that may be better refined in future cases.[74] In particular, with respect to the proportionality test (which is apparently of decisive importance in this context)[75] and the analysis of Art. 123(1) TFEU, the ECJ grants the ESCB-ECB a high level of technical discretion for the definition and implementation of the monetary policy. The general principle one can derive from the OMT decision is the following. Court review of ECB decisions requiring a high level of *technical* discretion, provided *the highly controversial involved choices of a technical nature as well as the forecasts and complex assessments* (par. 68 OMT decision), is and will be limited to a control more focused on the respect of procedural issues rather than content issues.

[68] On these core economic questions and the conformity of the operations of the ECB with the relevant Treaty provisions, see the analysis of Gerner-Beuerle, Küçük and Schuster, *supra*; see also THIELE, *Die EZB als fiscal- und wirtschaftspolitischer Akteur*, in *Europäischen Zeitschrift für Wirtschaftsrecht*, 25, 2014, pp. 694-812.
[69] Par. 34 to 46 OMT decision.
[70] The distinction was already treated in *Pringle*.
[71] Par. 47 to 65 OMT decision.
[72] Par. 66 to 92.
[73] Par. 93 to 126.
[74] See ROSSANO, *supra*, for a possible application of the principle of the ruling to the quantitative easing program started in March 2015.
[75] As noted by MAYER, *supra*, 2001, the proportionality test was not problematized by the German actors. It was discussed by the General Advocate Cruz Villalón (see par. 159-202 of the opinion)

In this way, the Court recognizes its (objective) limits and a substantial "agnostic" attitude with respect to complex issues of monetary policy.[76] This interpretative approach can be criticized but it is in line with the (new?) approach used for evaluating the discretion of the exercise of the powers of European agencies.[77] If the ECJ grants some discretion in deciding technical issues to European agencies that for sure do not have the same legal status as the ECJ, it is reasonable to assume that the discretion enjoyed by the ECB is of a more comprehensive nature, both with respect to its limits and contents. Indeed, in the constitutional system of the European Union, the ESCB-ECB is precisely the actor in charge (in term of both, the right and the duty to act) of the monetary policy and judicial review of the ECB's technical decisions has to respect this primacy, precisely with respect to technical discretion.[78] In this way the ECB has stressed the prevalence of the technical monetary expertise over the political sphere and the independence of the ECB from politics, so granting autonomy to finance in the complex relationship between politics and finance.

5. Experience shows that independent central banks have developed in recent years in more or less developed countries as the best actors to run monetary policy in terms of price stability.[79] This means that the delegation of power to this non-majoritarian institution in this particular regulatory area has proven to be quite efficient. Functionally, even if not legally, independent central banks can be considered as the fourth actor in the separation of powers together with the legislature, the ex-

[76] This attitude is difficult to criticize in a context where the same academic, economic profession is divided between about 240 people in favor of the OMT program, (see *berlinoeconomicus.diw.de*) and about 140 against it (see *www.vwl.uni-mannheim.de*)

[77] See case C-270/12, *United Kingdom v. European Parliament and Council*, 22 January 2012 (Short Selling Regulation), on which see BERGSTROM, *Comment*, in *Common Market Law Review*, 52, 2015, 219-242. With respect to the relationship between technicalities and expertise, see e.g. par. 83, ESMA is vested *with certain decision-making powers in an area which requires the deployment of specific technical and professional expertise*.

[78] See also LAMMERS, *supra*, p. 215.

[79] See for recent empirical evidence CROWE - MEADE, *The Evolution of Central Bank Governance around the World*, in *Journal of Economic Perspectives*, 21, 2007, 69-90; DAUENFELD - HELLSTRÖM - LANDSTRÖM, *Why Do Politician Implement Central Bank Independence Reforms?*, in *Atlantic Economic Journal*, 41, 2013, pp. 427-438.

ecutive and the judicative.[80] It is apparent that their success resembles the widespread development around the world of another particular institution: the Constitutional Court. Also this non-majoritarian institution has proved to be an extremely successful (and hence efficient) one, because in the recent past more and more countries introduced the constitutional review of legislation.[81]

The paradigm of delegation of power to non-majoritarian institutions, in the case of the OTM decision is interesting for two reasons.[82] The first one is that the OMT decision is the first ECJ decision on the independence of the ECB on a delicate issue such as the borders between monetary union and fiscal union and serves as a strong precedent. The ECJ has ruled that the ECB enjoys a high level of goal and instrument independence. The second reason is that it shows the potential problems that this independence can entail when the non-majoritarian[83] actors with an open-ended commitment to broad objectives, are "playing a game" without precise specification of their mandate in limit situations.[84] Indeed, some scholars have criticized the Federal German Constitutional Court for having acted unconstitutionally.[85] The Federal German Constitutional Court doubts that the European Central Bank has act-

[80] See BERNHOLZ, *supra.*

[81] For a review of the several legal theories justifying the emergency of constitutional courts providing also an empirical test, see RAMOS ROMEU, *The Establishment of Constitutional Courts, A Study of 128 Democratic Constitutions*, in *Review of Law and Economics*, 2, 2013, pp. 103-135.

[82] The theory of delegation of powers to non-majoritarian institutions is a paradigm used both in political science (deriving from economics) and constitutional political economy. For political science, see Thatcher and Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in *West European Politics*, 25, 2002, pp. 1-22; for the delegation of power to the constitutional court, see STONE SWEET, *Constitutional Courts and Parliamentary Democracy*, in *West European Politics*, 25, 2002, pp. 77-100. For the political economy of constitutional courts (or economic analysis of constitutional courts), see GINSBURG, *Economic Analysis and the Design of Constitutional Courts*, in *Theoretical Inquiries in Law*, 3, 2002, pp. 49-85.

[83] The qualification of the European Court of Justice as non-majoritarian institution, is provided by MAJOINE, *supra*, p. 68, who qualifies the same European community Treaty as non-majoritarian institution, because of its nature as "framework Treaty".

[84] See MAJONE, *supra*, p. 72, suggests that non-majoritarian institutions have an open-ended commitment to broad objectives because the nature of the delegated mandate cannot be specified in detail ex ante. The relationship between delegating political actor and delegated institution can be described as a relational contract and is based on fiduciaries duties the latter owns to the former in a context he qualifies in terms of trustee-property-duty (74). The point of open-ended commitments resembles the notion of general clauses in private law (like good faith or the diligence of the good family father). This point is probably better understandable in the present context if we assume that, provided the price stability objective of the ECB which is something simply identifiable in a number, the ECB keeps independence in reaching the objective. On the contrary, the open-ended commitment of constitutional courts is more pronounced because they have the monopoly of constitutional interpretation that is something intrinsically more flexible in its results.

[85] See HEUN, *supra*, who speaks of an unconstitutional decision.

ed within the limits of its competence transforming the monetary union a fiscal union. The Federal German Constitutional Court challenges the same preliminary ruling mechanism of the European Court of Justice, admitting the possibility (at least indirectly) of a different interpretation for national purposes.[86] Of course, by definition as independent, non-majoritarian institutions all three actors are supposed to have monopolistic power in their competence sphere and this is the reason of the conflict. In this case, the Federal German Constitutional Court, the European Court of Justice and the European Central Bank "play a game" where the Federal German Constitutional Court questions the behavior of the ECB. In essence, in legal terms, the Federal German Court doubts the legitimacy of the OMT program with respect to a supposed transformation of the monetary union in a fiscal union. The ECJ did decide for the legitimacy of the OMT, thus also defining the limits of this status by arguing that, as far as technical issues are concerned, the evaluation and the action of the ECB includes a high degree of permitted independence. For the ECJ the tension between monetary union and fiscal union is only apparent and not present. In economic terms, this case is interesting because the conflict is between non-majoritarian, independent institutions about rules related to the incompleteness of the monetary union as described in Section 1. It is not possible to evaluate here whether this conflict was anticipated as a possible future scenario by the delegating actors (the politicians establishing EMU). In other words, it is not possible to evaluate whether the delegating politicians were aware of the fact that the incompleteness of the monetary union would have caused sooner or later a case where a possible transformation into a fiscal union would have been decided by the interaction of delegated non-majoritarian institutions. Two cases are possible. In the first case, which is less probable given the open ended commitment of non-majoritarian institutions, the possible conflict was non anticipated by the delegating politicians because of the supposed clarity of the delegation of powers to all there institutions about their mandate and competences.

[86] See par. 102 of the decision for preliminary ruling of the German Constitutional Court for the issue of national identity. On the point, see also HEUN, *supra*, p. 336.

In this case, the conflict is something outside the delegation and should go back to the political actors for a proper, political solution. In the second case, the more probable one given the open-ended commitment of non-majoritarian institutions, the conflict was anticipated as possible future scenario and the delegation of powers included also the (implicit) assumption that the three actors would find the non-majoritarian (correct?) solution. In this case, it is now up to the Federal German Constitutional Court to decide whether the conflict can find a proper solution among non-majoritarian institution.[87] Based on the ruling of the Federal German Constitutional Court, only (economic) history will show whether the OMT decision is a first step toward the transformation of the European monetary union into a fiscal union[88] and whether the OMT decision has transformed the role of the ECB.[89]

6. In the complex relationship between politics and finance, this Article has analyzed the issue of the independence of the European Central Bank taking into consideration the economic foundations that justify the delegation to this non-majoritarian institution of the task of price stability, so granting to finance supremacy over the political sphere. A review of the relevant Treaty provisions has shown that the ECB enjoys a very high level of independence that has been confirmed by the European Court of Justice. In a game among non-majoritarian institutions, the ECJ has ruled that the OMT program is not transforming the European monetary union into a fiscal union as doubted by the Federal General Constitutional Court. In the relation-

[87] For possible solutions of Federal German Constitutional Court more or less open to collaboration or confrontation with the European Court of Justice, see HEUN, *supra* p. 336; KLEMENT, *supra*, p. 760, HERMANN, *supra*, p. 582; MAYR, *supra*, 2003.

[88] On the future development, see HINAREJOS, *supra* See also MADURO, *A new governance for the European Union and the euro: democracy and justice*, Robert Schuman Center for Advanced Studies, 2012/11, 11. For the current impossibility to have Eurobonds because of Treaty prohibitions, see HEUN - THIELE, *Verfassungs- und europarechtliche Zulässigkiet von Eurobonds*, in *Juristen Zeitung*, 67, 2012, pp. 973-982. For possible developments, see also JUNKER, *Completing Europe's Economic and Monetary Union*, 2015, p. 14. See also the interview of the French Economy Minister Macron of Monday 31 August 2015 in the German newspaper *Süddeutsche Zeitung* about the necessity of a new foundation of the Eurozone toward a fiscal union.

[89] From an economic perspective for the pros and cons of the transformation of the ECB into a lender of last resort, see DE GRAUWE, *The European Central Bank as a Lender of Last Resort in the Government Bond Markets*, in *CESifo Economic Studies*, 59, 2013, pp. 520-535. See also BLANCHETON, *supra*, who reviews the history of central bank independence and argues that the system is in continuous evolution having now reached a stadium of low-degree independence for all the relevant central banks (i.e. USA, UK, and EU).

ship between politics and finance, the OMT decision reinforces the independence of the ECB, so (re)affirming the primacy of the technical monetary expertise over the political sphere. It is now up to the Federal German Constitutional Court to rule on the case.