

## What Can the Law do for the European System of Central Banks? Good Governance and Comitology 'within' the System

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ZERP-Diskussionspapier 3/2010

# What Can the Law do for the European System of Central Banks?

Good Governance and Comitology

‘within’ the System

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## **I. Governance versus the rule of law: comitology under threat?**

Although the Lisbon Treaty has dispensed with much of the reformist lawyerly zeal of the draft constitutional treaty, Article 290 of the new Consolidated Treaty (TFEU) may yet give some measure of comfort to those who had hoped for comprehensive overhaul of the Community's Byzantine scheme of legislation and implementation.<sup>1</sup> Above all, although the cumbersome historical distinction made between regulations, directives, decisions, recommendations and opinions lives on in Article 288 TFEU (ex 249 EC), the new Article 290 may be argued to have at last established a nascent 'hierarchy of norms' within the Union, placing explicit Treaty limits, as well as operational conditions (to be determined by the Council and by the European Parliament), upon the exercise of delegated powers and implementing competences by the European Commission. Thus, for example, a delegation of powers to the Commission 'to adopt non-legislative acts of general application' may now only occur where so stipulated within an originating legislative act, and only to the degree that such a delegated power 'supplement[s]' or 'amend[s] certain non-essential elements of that legislative act' (Article 290(1)). Equally, Article 290(2a) TFEU imposes a duty upon Parliament and Council 'explicitly' to detail the conditions upon which a power is exercised (e.g., by means of a sunset clause detailing the temporal limits of the delegation); and further stipulates that 'delegated acts' may only 'come into force' where the Parliament and Council have raised no objections within a pre-determined time limit (Article 290(2)(b)).

Talk of the establishment of a hierarchy of norms may appear obscure to non-lawyers. Equally, the complexities of treaty language also obscure the immediate significance for the 'governance' of the European Union of Article 290 TFEU. Nonetheless, the Commission's urgent response to the entry into force of the Lisbon Treaty – airing its views on the best means of implementing Article 290<sup>2</sup> – at once reveals the practical institutional and political importance of a new hierarchy of norms within the EU. Thus, for the Commission, the vital underlying issue is one of the impact of Article 290 upon the system of 'comitology' formally established by the Comitology Decision,<sup>3</sup> and operated enthusiastically by the Commission as a framework within which it might exercise pow-

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1 Aided and abetted by Article 291 governing management of member state competences.

2 COM(2009) 673 final.

3 Decision 1999/468/EC, as amended by Decision 2006/512/EC, OJ L 255/11, 22.7.2006.

ers delegated to it by the Council under the former Article 145 EC Treaty. In the view of the Commission, the stipulations of Article 290 TFEU are comparable, though not identical, with ‘the regulatory procedure with scrutiny introduced by Decision 2006/512/EC<sup>4</sup>’, and may thus – reading between the lines of the argument – herald a possible curtailment of the huge variety of comitology procedures they deploy. However, they are not necessarily a threat to the system of delegated powers and comitology *per se*, especially since comitology is seemingly encouraged by the new Article 291 TFEU governing implementation at national level. Others are not so sanguine. For the European Parliament, a long standing enemy of comitology, which possesses an abiding suspicion that its arcane procedures have been deployed to subvert parliamentary competences,<sup>5</sup> the rationalising effects of Article 290 appear to be welcome as sounding the death-knell for the practice. In theory, Parliament might thus establish such egregious limitations to delegated powers within legislative acts that all further manifestations of the comitology system are strangled at birth.

Abstracting to the level of constitutional design, a post-Lisbon context of potential conflict between Commission and Parliament on the appropriateness or otherwise of comitology procedures might accordingly also be argued to be a context of retrenchment: a period of the revenge of the rule of law, and of a reassertion of a fixed hierarchy of norms against the *ad hoc* system of ‘governance’ that has come to characterise the latter stages of European integration. In other words, where the evolution of comitology has answered *unforeseen* demands within the legal structures of the European Treaties – for administrative capacity, for national/supranational co-operation and for expert advice – it has joined a host of contingently constituted executive bodies and procedures that are intrinsically foreign to the treaties; bodies and procedures such as semi-autonomous European agencies and the Open Method of Co-ordination whose legitimacy has generally been measured far less in formal normative categories of explicit treaty basis or clearly apportioned competence, and far more in terms of functional efficiency or an ability ‘to do the required job’.<sup>6</sup> Historically vulnerable to accusations of opaqueness or lack of transparency<sup>7</sup> and

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4 OJ L 255/11, 22.7.2006.

5 A suspicion often aired before the ECJ; see, for example cases, Case C-302/87 *European Parliament v Council of the European Communities* [1988] ECR 5615, and Case C-70/88 *European Parliament v Council of the European Communities* [1991] ECR I-4529 (Re: Radioactive Food), known as ‘*Chernobyl*’.

6 M. Everson, ‘Independent Agencies: Hierarchy Beaters?’, 1:2 (1995) *European Law Journal* 180-204.

7 J. Weiler, ‘Epilogue: “Comitology” as Revolution – Infranationalism, Constitutionalism, and Democracy’, in: Ch. Joerges & E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford 1999: Hart Publishing, pp. 339-350.

similarly viewed with suspicion by institutions of democratic representation, this *ad hoc* governance executive may now face a potentially fatal challenge in the guise of renewed assertion of traditional constitutional concepts such as the hierarchy of norms, which demands a clear and limited mandate of delegation within foreseen and foreseeable institutional structures.

Such an assessment is nonetheless premature. Although national governments may not wish to revisit treaty structures for at least a decade the EU clearly remains a work in progress, with its own operational demands for governance structures that lie outside the traditional rule of law. ‘The committee structure is a valuable contribution to the federal principle ensuring the involvement of all entities of the Eurosystem in the preparation of the ECB decision’.<sup>8</sup> far beyond the traditional reach of Commission’ comitology, various national central bankers have thus recently written in support of a new system of ‘consultative’ committees, established under the rules of procedure of the European Central Bank (ECB),<sup>9</sup> in order to aid the decision-making bodies of the European System of Central Banks (ESCB) and the ECB – more particularly the Governing Council and Executive Board – in the exercise of their decision-making competences. Made up of members of National Central Banks (NCBs) and members of the ECB, newly founded committees, such as the Legal Committee of the European Central Bank (LEGCO), have thus already played their own useful part in the slow unfolding, in particular, of the Eurosystem, which is growing up to govern the technical management of the single ‘Euro’ currency. Indeed, such would seem to be the utility of such ‘consultative’ committees within the evolving system, that a debate has now developed around the question of whether ECB/ESCB committees might usefully also be given properly delegated decision-making powers of their own, or a status as ‘management’ committees.<sup>10</sup>

The vital underlying point of this development for this paper is both operational and normative in character. ‘Governance’, or the simple fact of the creation of unforeseen executive or administrative structures for the management of integration processes, appears to remain an unavoidable functional characteristic of the European Union. For all that national governments may yet seek to imbue the Lisbon Treaty with an epoch defining finality, processes of European integration have not reached an end point or a *finalité* that might be easily captured by or reflected within finite institutional-constitutional structures. The

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8 Etienne de L’honneux (Secretary General, Banque Centrale de Luxembourg), 3 *Eure-dia* 2009, pp. 455-485, at p. 473.

9 Article 9 of the Rules of Procedure of the European Central Bank (ECB/2004/2).

10 Etienne de L’honneux (Secretary General, Banque Centrale de Luxembourg), 3 *Eure-dia* 2009, pp. 455-485, at p. 474.

operational demands of integration are still being met within *ad hoc* executive structures. At the same time, however, voices of normative suspicion have grown in volume and constitutional significance and point to Article 290 as a potent symbol of such reformist aspirations. In this contrasting analysis, governance is a simple analytical concept, deployed by political scientists, in order to categorise institutions of national, supranational and even global management and control,<sup>11</sup> but lacking in any deeper legitimating force of its own. Instead, as the provisions of the Lisbon Treaty forcefully remind us, executive or administrative legitimacy is still surely to be found within the historical notion of ‘transmission-belt’ control;<sup>12</sup> that is, the establishment of limited administrative mandates within a hierarchy of norms that are subject always to parliamentary and governmental recall, and that are policed by a rule of law that seeks to defend a polity, or its political competence, by strictly constraining and controlling the executive.

This clash between the normative and the practical, between a desire to establish more traditional means of legitimation for the *sui generis* EU and the contrasting demands of that unique body for the establishment of an executive that enables it to perform its allotted functions will undoubtedly outlive ratification of the ‘epoch defining’ Lisbon Treaty. Alternatively, for lawyers, the outstanding task unquestionably – if uncomfortably – remains one of adapting constitutional theory, constitutional practice, administrative law and the legal structures of executive design in order to ensure both the functionality and the legitimacy of the institutional structures of the European Union. The task is onerous and multidisciplinary, requiring both the forensic interrogation of traditional notions of constitutional theory, in order to identify the generic lines of constitutional legitimation that may yet transfer to a *sui generis* EU, and an understanding of patterns of social organisation that derive their own independent (non-normative) legitimacy by furnishing the EU with adequate institutional capacity to ensure that it can do its job. Certainly, in this regard, fact may not be allowed to lead norm: ‘invented’ institutions of European governance do not become legitimate simply by virtue of their ‘invention’. Nonetheless, the example of an emerging ‘comitology’ within the ESCB and ECB proves particularly instructive: as the ramifications of the recent financial crisis

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11 Pointing to the danger of this tendency, with specific reference to the OMC, Ch. Joerges, ‘What is Left of the European Economic Constitution?’, in: W. Matiaske, H. Brunkhorst, G. Grözinger & M. Neves (eds.), *The European Union as a Model for the Development of Mercosur? Transnational orders between Economical Efficiency and Political Legitimacy*, Mering 2007: Rainer Hampp Verlag 2007, pp. 19-52.

12 See, for details of the origins of the concept, M. Everson, ‘Independent Agencies: Hierarchy Beaters?’, 1:2 (1995) *European Law Journal* 180-204.

have amply demonstrated, nowhere is the demand for ‘empirical’ legitimation more potent than in the area of money management. Simply stated, and all traditional-historical notions of transmission belt executive control apart, the legitimacy of the ESCB and ECB resides firmly in its ability to ‘do its job’, or its ability to maintain the credibility of a youngish currency upon whose survival the interests of the continent as a whole rest.

## **II. A constitutional legitimacy for comitology: between functionality, representation and deliberation**

### *1. Transmission and the ban on delegation*

Contemporary notions of transmission-belt administration, norm-hierarchy and non-delegation have their common antecedents within the ‘Enlightenment’ constitution and, above all, within the concept of the representative democratic primacy of the people. Accordingly, where once the ban on non-delegation was designed simply to preserve the absolute powers of the despotic sovereign, the Enlightenment constitution imbued this power-consolidating construct with a far deeper normative meaning. Consequently, the powers that were and are now to be protected are those of the people: that is, the sovereign powers of a constitution-creating polity personified within its own institutions of representative democracy. As a result, highly technical legal formulas demanding, on the one hand, that legislative mandates to the administration be strictly constraining – allowing little if any administrative autonomy – and, on the other, requiring the law to police any alienation of legislative competence by means of rigorous application of the rule of law to the administration, have their own inspirational underpinnings within the constitutive building blocks of constitutional and democratic theory.<sup>13</sup>

The fundamental inspirational consequences of constitutionally derived notions of non-delegation may be readily identified within the modern European Union. Above all, the *Maastricht* and *Lisbon* Judgments of the German Constitutional Court, in their forensic examination of the legitimacy or otherwise of the delegation of powers by the Federal Government to the EU under Article 25(3) of the German Constitution, are clear embodiment of a rule of law, which extends far beyond application of arcane procedural legal formats, such as *ultra vires*, to investigate instead highly existential questions of the preser-

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13 M. Everson, ‘Independent Agencies: Hierarchy Beaters?’, 1:2 (1995) *European Law Journal* 180-204.

vation of the German polity in the face of the burgeoning competences of an external executive body (the EU).<sup>14</sup> Thus, German judicial emphasis upon Article 38 of the Federal Constitution – the stipulation that sovereign power derives from the people – similarly leads the Court into comprehensive and *empirical* analysis of German democratic process and the necessary conditions under which such democratic process might still properly be termed sovereign, even in the face of wide-scale transfer of executive competence to the European Union.<sup>15</sup>

As can be noted, the German Court's readiness to engage in empirical analysis, or the 'reality' of the vital sovereign giving qualities of representative democratic process, are an immediate indication that strict norm-fact divides are also elusive within traditional constitutional theory, such that the workings of the notion of transmission belt administration may be modified within the conventional confines of a constitutional court '*in the light of circumstances*'.<sup>16</sup> Nonetheless, and not to pre-empt such fact-norm complexities, simple legal extrapolations of the ban on delegation and the rule of law may yet prove to be an immutable barrier to delegation of powers, even where persuasive functional reasons for such a delegation exist; a potential problem that can immediately be highlighted by virtue of an initial, though basic, legal analysis of potential 'non-delegation' hurdles to establishment of comitology 'proper' within the workings of the ECB and ESCB system.

Accordingly, the Lisbon Treaty, and above all Articles 282-4 TFEU concretising the status of the ECB *as an institution of the European Union*, might now be argued to have ended all possible controversy on the autonomous character of the ECB and ESCB, and thus to have determined that the general ban on delegation applying within the EU will also apply squarely to executive conduct of its monetary policy. Alternatively, where once the ECB attempted to argue that its lack of institutional status and heightened independence under Article 108 EC (now, Article 130 TFEU) precluded application to it of the general scheme of Community law,<sup>17</sup> the inclusion of the ECB and ESCB within the Treaty Title enumerating the European institutions seems to confirm that the Bank is indeed subject to general Community law provisions. As a result, the conduct of monetary policy as laid down in the Treaty (Articles 127-133 TFEU) must now surely be considered to be subject to the general Com-

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14 *Brunner v European Union Treaty* CMLR [1994] 57 and 'Maastricht,' German Constitutional Court decision from 12 October 1993, BVerfGE 89.

15 See, *Brunner v European Union Treaty* CMLR [1994] 57.

16 See, *Brunner v European Union Treaty* CMLR [1994] 57.

17 Case C-11/00, 'OLAF', *Commission of the European Communities v European Central Bank* [2003] ECR I-7147.

munity prohibition on non-delegation established by the infamous *Meroni* doctrine of the European Court of Justice,<sup>18</sup> giving constitutional force to a principle of the balance of powers – or the ‘institutional balance’ – which includes a dual injunction that all institutions of the EU must work within the competences allotted to them and may never delegate those competences to institutions not named within the Treaty.

Reformulated within the Lisbon Treaty as a ‘conferral of powers principle’, the institutional balance and *Meroni* doctrine have long barred, for example, the establishment in the EU of true ‘autonomous’ decision-making agencies in the mould of independent US regulatory agencies, such as the Federal Trade Commission.<sup>19</sup> By the same token, the enumeration in Article 129 of the Lisbon Treaty of a limited number of decision-making bodies within the ECB and ESCB (Governing Council and Executive Board), may accordingly be argued – under the conferral of powers principle – to preclude establishment of further decision-making instances to aid in the operation of monetary policy. Further, although Article 45(1) of the Statute of the ECB and ESCB recognises the General Council as a ‘third decision-making body of the ECB’ – one including the governors of NCBs of countries who have not adopted the Euro – this just as surely completes a *finite* list of bodies, recognised within European law, who may actively exercise the monetary competences of the EU. Beyond its very informal recourse to ‘consultative’ committees in order to aid in the preparation of decision-making within the ECB and ESCB, the Bank – or so it can be argued – may not establish any formalised (decision-making) committees to conduct its monetary business.

## 2. *Transmission revised and the normative power of ‘functionality’*

All such projected legal pedantry law aside, the reality of historical processes of European integration is nonetheless one of the dominance – at least within the sphere of the Commission’s legislative initiative – of committee proceedings taking place *outside* the named institutions of the Treaty. As painstaking analysis has shown, approximately 50,000 decisions were taken by agricultural and regulatory committees between 1971 and 1995.<sup>20</sup> The years since passage of the Comitology Decision have similarly seen little if any abatement in

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18 *Meroni v High Authority*, [1962] ECR 73.

19 See, M. Everson, ‘Independent Agencies: Hierarchy Beaters’, 1:2 (1995) *European Law Journal* 180-204.

20 J. Falke, ‘Comitology and other committees: a preliminary empirical assessment’, in: R.H. Pedler & G.F. Schaefer (eds.), *Shaping European Law and Policy*, Maastricht 1996: EIPA, pp. 117-165.

committee activity, with the latest annual Commission Report on Comitology detailing that 2185 opinions were delivered by 270 comitology committees in the year 2008.<sup>21</sup> Is then, the European system – or at least to the degree that its operations are founded upon the opinions and decisions of committees – an affront to the rule of law, to the ban on non-delegation now implied within the principle of the conferral of powers?

The answer to this question is ‘no’, but a no that nonetheless exists within multiple tensions; tensions between intergovernmentalism and supranationalism, between ‘good’ and technical decision-making, between the tendency for intergovernmentalist bargaining and the need for political consensus-building, between a functional requirement for ‘appropriate’ and a normative demand for ‘legitimate’ decision-making, and between the realm of governance and that of the rule of law. In other words, although the ECJ has consistently confirmed the legality of comitology proceedings in the face of firm parliamentary opposition to them,<sup>22</sup> their exact normative or constitutional foundations remain highly elusive both within the literature and before the Court, with comitology appearing contrastingly as prosaic child of regulatory necessity, as reflection of political compromise and as creature of constitutional renewal.

The history of the establishment of comitology as a procedure formalised by the Comitology Decision,<sup>23</sup> is instructive. The administrative and technical capacities of the European Community and Union have always been small, and its competences broad. Accordingly recourse to external expertise, gathered informally together in committees, always suggested itself as a mode of bridging this ‘administrative gap’. With arrival of the Commission White Paper of 1985 for completion of the internal market,<sup>24</sup> however, the issue changed in both quantitative and qualitative dimensions. Historical modes of market integration such as regulatory approximation, mutual recognition or even regulatory competition were ill-suited to the wide-ranging ‘deepening’ of integration posited by the single market programme, especially in view of the member states’ continued recourse to their residual competences under Article 36 TFEU (ex 30 EC) in order to regulate their markets in defence of the health and safety of their own consumers. Accordingly, in addition to overcoming an administrative gap, the Commission was now also required to overcome a

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21 European Commission, (2008) *Report from the Commission on the Working of Committees during 2008*, COM(2009) 335 final.

22 Often in the face of parliamentary opposition, see, Case C-302/87 *European Parliament v Council of the European Communities* [1988] ECR 5615.

23 Decision 1999/468/EC, as amended by Decision 2006/512/EC (OJ L 255/11, 22.7.2006).

24 COM(85) 310 final.



‘regulatory gap’, or a mismatch between the supranational interest in market regulation (Article 32 TFEU (ex 28 EC)) and residual national regulatory competences. It chose to tackle this with the ‘New Approach’, whereby framework directives would be augmented by technical standards established within committees of interest groups, technical experts and national representatives and subsequently approved by the Commission. Approximation of market regulation would be achieved by means of a general framework of regulation, supplemented by administrative/executive technical standard setting, designed to achieve a ‘high level of protection’ for European citizens (Article 108(s) Single European Act).

The complicating factor within this new arrangement, however, was not simply the fact that the Commission was now explicitly exercising powers delegated to it by the Council under the then Article 145 EC, but rather the reality that the Commission, together with its extended cohort of interest groups, experts and national representatives, was similarly exercising the regulatory competences of the member states. In particular, as the technical complexities of EU regulation have increased to the degree that the Commission is itself now often identified as a ‘blind driver’, directed rather than informed in its decision-making by the eyes of its expert and scientific committees,<sup>25</sup> a dual problem of legislative pre-emption by the EU executive has thus grown ever more acute: on the one hand, with regard to the pre-emption of the legislative competences of the institutions of the Community, and particularly those of the Parliament within co-decision procedures;<sup>26</sup> and, on the other hand, in relation to the supranational colonisation of the residual competences – and thus popular sovereignty – of the member states.<sup>27</sup>

The problem of potential legislative pre-emption both at EU and at member state level may go some way to explaining the extraordinarily complex series of procedures that are to be found in the Comitology Decision.

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25 M. Everson & E. Vos, ‘The scientification of politics and the politicisation of science’, in: Vos & Everson (eds.), *Uncertain Risks*, Abingdon 2008: Routledge Cavendish, pp. 1-17.

26 Case C-70/88 *European Parliament v Council of the European Communities* [1991] ECR I-4529 (Re: Radioactive Food), known as ‘*Chernobyl*’.

27 Specifically with regard to the governance of GMOs, M. Everson & E. Vos, ‘The scientification of politics and the politicisation of science’, in: Vos & Everson (eds.), *Uncertain Risks*, Abingdon 2008: Routledge Cavendish, pp. 1-17.

### The effect of comitology opinions on the Commissions ability to adopt legislation

|                                    | Favourable opinion   | No opinion                                  | Negative opinion                            |
|------------------------------------|--|---|---|
| Advisory procedure                 | Adopts   | Can Adopt                                   | Can Adopt                                   |
| Management procedure               | Adopts   | Can Adopt                                   | Referral to Council                         |
| Regulatory procedure               | Adopts   | Referral to Council                         | Referral to Council                         |
| Regulatory procedure with scrutiny | Adopts (but can still be opposed by the European Parliament) | Referral to Council and European Parliament | Referral to Council and European Parliament |
| Safeguard procedure <sup>28</sup>  | N/A  | N/A   | N/A   |

Thus, in particular, the ‘regulatory procedure with scrutiny’ is designed to preserve the competences of the European Parliament in areas where Commission activity appears to impinge too greatly upon democratic processes at EU level, at least in the eyes of Parliament. Nonetheless, as continued parliamentary doubts about comitology indicate, procedural inventiveness is not sufficient to overcome legitimacy concerns. In short, comitology may very well be a necessary instrument of EU governance because it supplies the Commission with the necessary technical expertise for management of the internal market and likewise furnishes co-operative structures in an area of joint EU/member state competence. However, it still stands in a tense relationship with the deep-seated constitutional prerogatives of popular sovereignty.

In this latter respect then, the issue of an alternative form of normative legitimation for comitology becomes a pressing one. Certainly, ‘governance’, often dominated by soft law mechanisms such as ‘naming and shaming’, might, in its analytical character be argued to contain a normativity all of its own: governance arises as a form of management in circumstances that require problem-solving, yet defy intervention on the part of traditional governmental structures.<sup>29</sup> Most visible within the supranational or international setting,

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28 Where the safeguard procedure is used, the Commission does not have to convene a committee. However, its proposal will not become law unless the Council agrees to it within a specified time-limit.

29 De Búrca, G. and Scott, J. (eds.), *Law and New Governance in the EU and US*, Oxford 2006: Hart Publishing, pp. 4-10.

structures or vehicles of governance act to ensure that problems may be solved and, more particularly, that ‘patterns of co-operation’ may also be established between ‘sovereign’ instances of decision-making which would otherwise stand in an inimical relationship to one another. Alternatively, given that vehicles of governance furnish solutions and provide for co-operation beyond any traditional conceptual limitation or ascription of competence and sovereignty, they surely derive a positive – that is, normative – legitimacy in that they ensure that a necessary ‘job is done’.

Nonetheless, the normativity of functionality is likewise just as surely circumscribed: what price a job done, if it is not done well; what is the value of national/supranational co-operation if such co-operation produces arbitrary results with little or no cross-referencing – *Rückkopplung* – to the original normativity of the Enlightenment constitution, to the sovereignty of the people embodied in representative institutions? To this exact degree then, the dual affirmation by the ECJ of the normative significance of processes of national/supranational co-operation and of appropriate problem-solving,<sup>30</sup> is just as surely underpinned by legitimating considerations of a far deeper nature.

Thus, on the one hand, although the ECJ’s 1994 *WTO* Judgment confirmed that where competences ‘fall partly into the competence of the Community and in part within that of the member states it is essential to ensure close co-operation between the member states and the Community institutions’;<sup>31</sup> on the other hand, such co-operation must surely be of a quality that exceeds simple ‘bargaining’ between the member states and the Commission. By the same token, the Court’s acceptance in the case of *Chernobyl* of the principle that parliamentary co-decision competences may temporarily be sidestepped by an executive (in this case, the Council) in the interests of expeditious decision-making and problem solving,<sup>32</sup> must equally reside in a confidence that decision-making and problem solving occurring in this emergency mode is not simply ‘arbitrary’, but is rather the ‘best possible’ problem-solving available under the circumstances.

As a consequence, the most potent of theories seeking to identify a deeper normative legitimacy for governance, and more particularly, for comitology as

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30 See Opinion of the ECJ on the WTO, Opinion 1/94 [1994] ECR I-526 and Case C-70/88 *European Parliament v Council of the European Communities* [1991] ECR I-45297.

31 Opinion 1/94 [1994] ECR I-526.

32 Case C-70/88 *European Parliament v Council of the European Communities* [1991] ECR I-4529.

a vehicle of governance,<sup>33</sup> does not overly dwell on the most immediately apparent of legal justifications for the presence of comitology within the internal market setting: that is, the notion that the reintegration of national representatives within the supranational regulatory process does not, in fact, undermine the institutional balance, but instead reinforces it, as the regulatory gap between Articles 32 and 36 TFEU is closed with due respect for the need for the member states to be properly represented within supranational decision-making which impinges upon national competences. Certainly, such a reading of the compatibility of comitology with the institutional balance of powers has much to recommend it, in particular as it might thus also – in a real world of practical decision-making – be seen as a compromise ‘between the need for more effective Community decision-making and the member states’ desire to preserve national influence over Commission decisions.’<sup>34</sup> Nonetheless, this supranational/national act of co-operation, giving rise to a fusion of administrative and political systems, where committees work in partnership to jointly manage ‘situations of increasing independence’, might equally be argued to be an affront to the separation of powers – confusing administrative and political functions – and thus to the rule of law should such co-operation not be disciplined by an overarching norm of polity-building that is not only as powerful as the ‘we the people’ of Enlightenment thought, but which also actively aims to give effect to the claim to universality of the traditional constitutional settlement. Accordingly, in this theory, comitology gains its normativity, or its constitutionality, to the exact degree that it represents an act of enforced and disciplined co-operation between (national) political and (supranational) executive bodies that aims acts to ‘correct’ the in-built exclusionary tendencies of the national constitution. Alternatively, comitology is an answer to the paradox of a ‘universal’ settlement that limits itself within territorial boundaries, disregarding the interests, of those people who find themselves outside the sovereign polity. Comitology thus achieves constitutionality to the exact degree that it forces sovereign polities to recognise that their representative democratic processes also have impacts far beyond their own territorial boundaries, and to ameliorate them accordingly with reference to a wider community of ‘suprana-

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33 Ch. Joerges, ‘Deliberative Supranationalism – Two Defences’, (2002) 8:1 *European Law Journal*, pp. 133-151.

34 R. Pedler & K. Bradley, ‘The Commission, Policy Management and Comitology’, in: D. Spence & G. Edwards (eds.), *The European Commission*, London 2006: John Harper Publishing, pp. 240-241.

tional interest'.<sup>35</sup>

In other words, consensus building – or co-operation – within committees acquires its particular normative/constitutional character to the extent that interaction between a supranational administration, national political representatives, independent technical experts and social interests, not only provides formal cross-referencing to representative democratic process at national level, but also proceeds in line with a disciplining supranational 'conflicts norm'; or, a '*deliberative*' demand that the balancing of technical, executive and political interests – at the same time the balancing of national and supranational interests – occurs in a open and transparent manner, unmarred by the pursuit of hidden national self-interest and disciplined by commonly regarded and legally-recognised goals, such as market integration, rational decision-making, the maintenance of a 'high level' of protection for European consumers and continuing respect for the national peculiarities of regulation.<sup>36</sup>

In distinct rebuttal of common modes of intergovernmentalism, a normative form of governance thus proceeds apace in line with the legally-assured dominance of 'arguing' over 'bargaining'. Consensus is not of itself an independent value, but only becomes such where the rule of law is removed from a realm of formal legal application – such as the mantra of the transmission belt model of administration – and is reborn in *proceduralised* form; where application of legal *principles* of transparency and rationality joins with pursuit of legally-assured goals of market integration, consumer protection and respect for national political process, in order to ensure that consensus is built around 'good' decision-making. Fact and norm are entwined and the essential characters, both of the rule of law and of an analytical category of governance are altered in order to ensure that it is possible to meet the functional demand for problem-solving and decision-making outside the traditional abstract demands of the Enlightenment constitution, but, at the same time, to reinforce the substance of the primary historical value (universalism) that has informed that constitution.

Certainly, lying between functionality, representation and deliberation, comitology is inevitably vulnerable to empirical tensions between intergovernmentalism and supranationalism, between bargaining and arguing and between necessity and norm. Thus the countless studies – including those of the

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35 Denoted deliberative supranationalism (I) within the theory. See, Ch. Joerges, 'Deliberative Supranationalism – Two Defences', (2002) 8:1 European Law Journal, pp. 133-151.

36 Denoted deliberative supranationalism (II).

Commission<sup>37</sup> – which demonstrate a high level of consensus in comitology proceedings may always be countered by other studies highlighting a lack of deliberation in committee proceedings, especially in politically sensitive areas, such as the budget.<sup>38</sup> Equally, and vitally so, the complexities of modern regulation, especially in the fields of emerging technologies (GMOs) will likewise always raise a spectre of the negating ‘scientification’ of deliberation, as supranational and national interests cede to expert advice which can no longer be understood, let alone challenged.<sup>39</sup> Nonetheless and beyond these very important limitations, comitology – properly constructed and overseen by a proceduralised rule of law – can perhaps act to overcome the continuing tension between the need for effective decision-making within the EU and the demand for appropriate legitimation, and can further contribute to an amelioration of the antagonism between analytical categories of governance and the formal construction of the rule of law.

### III. The Challenge of ECB/ESCB Governance within the Treaties

There can be little or no doubt that the ECB, together with its partner ESCB, is not merely an immediate focus for the emergence of governance structures beyond the named institutions of the Treaty. Instead, taken together, the ECB and ESCB are just as surely a striking manifestation of the appearance of governance structures *within* the Treaty. In other words, it may be argued that, in addition to the high level of expertise that the operation of the Eurosystem demands – a degree and level of expertise that defies the very limited resources of the ECB itself<sup>40</sup> – governance beyond traditional modes of governmental

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37 Thus, for example, the 2008 Annual Report of the Commission on Comitology reports that of 2185 opinions delivered in 2008, only one was negative. Similarly, in only 35 cases did committees fail to issue an opinion. See, also Ch. Joerges & J. Neyer ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, (1997) 3 *European Law Journal* 273, reporting on consensus building and respect for rationality in foodstuffs committees.

38 R. Pedler & K. Bradley, ‘The Commission, Policy Management and Comitology’, in: D. Spence & G. Edwards (eds.), *The European Commission*, London 2006: John Harper Publishing, pp. 240-241, at p. 241.

39 M. Everson & Ch. Joerges, ‘Consumer Citizenship in Postnational Constellations?’, in: Kate Soper & Frank Trentmann (eds.), *Citizenship and Consumption*, New York 2007: Palgrave Macmillan, pp. 201-222.

40 Ch. Zilioli & M. Selmayr, ‘Recent Developments in the Law of the European Central Bank’, in: P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2006* (Oxford: Oxford University Press 2006), pp. 63-64.

operation is a simple given within the current provisions of the Treaty and the ECB Statute. Most strikingly in this regard, primary Community law assigns the pursuit and management of EU monetary policy, not to a single identifiable supranational institution, but rather to a ‘system’ of banks, comprising NCBs and the ECB (Article 127(2) TFEU & Article 3(1) Statute). Certainly, the Governing Council and the Executive Board of the ECB are recognised as ‘decision-making bodies’ and apportioned the ‘responsibility’ for ‘performance of the tasks of the ESCB’; yet, this centralising supranational impulse within Community law immediately contrasts with the stark fact that the Governing Council of the ECB is made up of the governors of NCBs who maintain their own institutional personality (Article 14(1) Statute), are shareholders of the ECB, are the primary conduit for implementation of the monetary functions and operations of the ESCB (Articles 17-33 Statute) and retain competence to perform tasks outside the ESCB; or at the least, do so to the degree that such functions do not ‘interfere with the objectives and tasks of the ESCB’ (Article 14(4) Statute).

In an explicitly radical departure from the ‘community method’, the Treaty dictates that a ‘system’, made up of executive banking bodies at national and supranational level performs all of the tasks associated with the aim of pursuit of a Community monetary policy, from legislative initiative through to regulatory decision-making and technical implementation of policy; and further performs these tasks within a highly uncertain and fluid complex of national and supranational competences. To be sure, such an uncertain complex of competence also owes much to the fraught history of the establishment of monetary union and the Eurosystem, and to a commonly exercised mode of European integration that continues to overcome fundamental political disagreement on the future nature of the Union itself by means of legal arrangements which appear, implicitly at least, to encourage ‘stealthy’ processes of institutional spillover.<sup>41</sup> However, this often seen functional imperative for ever closer national/supranational co-operation, as well as for pooling of technical/executive expertise, appears nonetheless to be much heightened in the particular case of monetary union and given explicit, rather than implicit, recognition within the institutional provisions of the TFEU and ECB/ESCB Statute.

In other words, it may be argued that, in contrast to the stated aims of a community method founded in supranational legislative initiative (by the Commission), national/supranational policy-making (by the Council) and na-

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41 In terms of an ‘inevitability’ of closer co-operation, and the dangers attached, see, G. Majone, *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth*, Oxford 2005: Oxford University Press.

tional implementation, the institutional architecture of monetary union itself entails an integral treaty commitment to an open-ended or evolutionary process of ever closer national/supranational policy-making and administrative co-operation, and thus to a form of European integration, which can no longer be conceived of with reference to a clear apportionment of competences between sovereign polities, and can instead only be captured within analytical categories of governance. At this one level of treaty structure, it may then likewise be asserted that an analytical category of governance inevitably wins in normative character within monetary policy as an imperative for its existence may be inferred directly, rather than indirectly, from the Treaty. However – and taking important note of the logical inconsistency or constitutional irony that arises when a political failure to establish a clear normative scheme of government becomes an argument in favour of ascription of normative value to an analytical category of governance – such a conclusion must also be immediately re-examined. More particularly, it must be carefully re-examined within the context of the Treaty’s further framing of the architecture of monetary union within a dual and interconnected commitment to pursuit of price stability, or a *credible* monetary policy, in institutional isolation – or full *independence* – from political process.

### 1. *A Credibility of Independence*

To recap: the vital lesson taught to us by comitology theorists is one that norm cannot be derived from fact, that a constitutional legitimacy for comitology cannot simply be established out of a functional need for co-operation and technical expertise. Instead, an analytical category of governance can only attain constitutional legitimacy where the rule of law, reborn in proceduralised form, establishes cross-referencing or *Rückkopplung* to the Enlightenment polity; where, within a supranational context of a universalised commitment to ‘good’ decision-making beyond the nation state, arguing replaces bargaining in a legally-disciplined supranational context of transparency, rationality and pursuit of commonly established goals. And yet, it is precisely this normative lesson which is seemingly most challenged by the peculiarities of the constitutional framing of EU monetary policy.

Mirroring the international political consensus established during the 1980s, the Treaty of European Union and its associated Growth and Stability Pact established an economic regime of fiscal discipline at national level to be partnered by a supranational monetary policy dedicated to the maintenance of price stability, and ultimately to the establishment and maintenance of a credible common European currency. Now concretised within Article 127(1) TFEU, the positive legal commitment to price stability still reflects the post-



inflationary consensus that economic growth and stability is best served by removal of control of monetary policy from the short-sighted and inept realm of political gain and advantage, and its subsequent lodging within a realm of technical expertise and competence committed by a constitutional mandate to the long term goals of growth and stability.<sup>42</sup> The underlying challenge to the Enlightenment polity was and is clear and was founded, in Europe at least, within the happy coincidence between a pragmatic desire to correct the clear failures of the welfare and social state to furnish sustained economic growth and the renewed popularity of sections of a post-war economic philosophy, which argue that societal freedom is not only to be secured within the collective political community but must rather also be sought within an economic and monetary realm constituted, regulated and protected by positive law.<sup>43</sup> With further political machinations overshadowed by the various prices to be paid for German re-unification,<sup>44</sup> economic and monetary union within the EU was thus also given a further ‘ordo-liberal’ flavour by means of the establishment of the ECB, whose independence was clearly guaranteed by the Treaty, and a further establishment or strengthening of the independence of the NCBs making up the ESCB from their own national authorities (now enshrined in Article 130 TFEU).

From political direction of economic affairs to independent management of a legally constituted market: the establishment of an independent ESCB/ECB in large part mirrors the general efficiency-oriented management trend within modern government, whereby large sections of economic activity are now overseen by independent regulatory authorities. And yet, the depoliticisation of monetary policy, the apparent denial of the sovereign power of the Enlightenment polity – or at least the political power of its representatives – can in this case be identified as posing a far more heightened challenge to traditional notions of government and the rule of law; or at least can be so to the exact degree that the leading theorists of independent economic management, or of the ‘autonomous economy’ are also distinguished by their refusal to engage with the ‘system of money’, or the institutional structures of independent central banks. At one level, as Niklas Luhmann concedes, this is a simple result of the ‘complex’ nature of money, a nature which defies rational analysis.<sup>45</sup> At another level, however, Giandomenico Majone reveals to us the residual reliance of institutional economic theory on traditional notions of government and

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42 G. Majone, *Regulating Europe*, London 1996: Routledge.

43 Alternatively: the renewed interest in Hayek.

44 F. Snyder, *EMU Revisited: Are we Making a Constitution? What Constitution are we Making?* EUI Working Paper in Law 98/06.

45 *Die Wirtschaft der Gesellschaft*, Frankfurt/M. 1988: Suhrkamp.

transmission belt models of administration when he concedes that central banks – although a prime example and result of the logic which seeks to rid economic management of the disruptive risk of political short-sightedness – must nonetheless be starkly contrasted with independent regulatory authorities. In other words, they may not be inserted into his scheme of an ‘independent fourth branch of government’ since they are implicated in decision-making, which is not simply *pareto* efficient, but is, instead, explicitly ‘redistributive’ in nature.<sup>46</sup>

With this concession, the primary mantra of institutional legitimation for independent regulatory authorities – the notion that an agency is legitimate ‘when nobody controls the agency, yet the agency is under control’<sup>47</sup> – is unmasked not as a legitimating tool of governance but rather as a cross-reference to the vital normative underpinnings of government. Independent technical or economic management is permissible *only* where a polity can commit itself on a long-term basis to regulatory action which will necessarily bring *equal* benefit for all. In this regard then, the dual institutional scheme of ‘independence’ and ‘accountability’ which seeks to legitimise regulatory agencies is predicated upon the effort to ensure that the narrow mandate afforded to such institutions by the polity is not alienated either by political actors or as a result of the poor technical decision-making of the experts gathered within an agency. Regulatory agencies are creatures of rather than an exception to the *ultra vires* rule: legal guarantees of independence shield the agency and its mandate from political interference; at the same time, accountability securing mechanisms, such as budgetary control by parliamentary bodies, the appointment of agency chiefs by the executive arm of government, judicial review and a very high level of transparency during agency operations, ensure constant review of the technical adherence of expertise to its mandate by political actors, expert epistemic communities and a wider public.<sup>48</sup>

By stark contrast, and despite the dedication of the ESCB to the principle of an ‘efficient allocation of resources’ (Article 126(1) TFEU) controversy must still rage over the *pareto* efficient status of monetary policy. For all that it is embedded within a regime of fiscal discipline, monetary policy can and does have redistributive consequences, at the very least as a lack of European labour mobility continues to perpetuate economic imbalances between the core and

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46 G. Majone, *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth*, Oxford 2005: Oxford University Press.

47 Terry M. Moe, ‘A Theory of Political Control and Agency Discretion’, 79:4 (1985) *The American Political Science Review*, pp. 1094-1116.

48 M. Everson, ‘Independent Agencies: Hierarchy Beaters?’, 1:2 (1995) *European Law Journal* 180-204.

periphery of monetary union. Equally, the inevitable object of attention from aggressive global finance markets, monetary policy can never be conducted within a regime dedicated to comprehensive transparency. The ESCB and ECB are thus far more to be regarded as bodies placed outside a constraining *ultra vires* rule, bodies with a substantive decision-making competence lying far beyond the narrow mandates of political process, whose institutional independence serves polity restraining goals of a far more fundamental nature. The link to governance, to the establishment of ‘ruling’ beyond government, is at once apparent as the framing of the ECB/ESCB defies and supersedes even the radical reframing of the transmission belt model of legitimation to be found within theories of the fourth branch of government. Such tensions, however, are similarly given concrete expression in the very visible and potent institutional tensions which characterise the system’s current operations within the EU.

Given the structural similarities between the ECB/ESB and autonomous regulatory authorities, it is no surprise that the Treaty on European Union, and now the Lisbon Treaty deploy a legal framework of independence and accountability reminiscent of schemes applying generally to the fourth branch of government. As a consequence, the strong statement of ECB independence found in Article 130 TFEU is similarly balanced by provisions within the Treaty and ECB/ESCB Statute which lay down the concrete mandate of the ESCB (Article 127(1) TFEU), the role of the member states, Commission and Parliament in the appointment of the President and Vice-President of the ECB (Article 50 Statute), the possibility for judicial review of the operations of the ECB (Article 35 Statute), and likewise establish a reporting requirement from the ECB to the Council, Parliament, Commission and European Council (Article 284(3) TFEU). Nonetheless peculiarities and tensions remain that appear to confirm the *sui generis* nature of the ECB/ESCB system.

Such hidden tensions may initially be noted in the relationship between the ECB and the European Parliament. Accordingly, although individual commentators have noted that over the years of the operation of EU monetary policy a co-operative relationship has been established between Bank and Parliament, Parliament has not effectively asserted its role of expert review of the ECB’s pursuit of price stability and has instead tended to treat the Bank as a political actor with a potential influence upon the general economic policies of the EU.<sup>49</sup> Alternatively, although ‘co-operative’ relations have clearly been established between Parliament and Bank, whereby the lack of any positive legal

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49 F. Atembrink & K. van Duin, ‘The European Central Bank before the European Parliament: theory and practice after ten years of monetary dialogue’, (2009) *European Law Review* 561.

obligations notwithstanding, the President takes part in debates on the annual report and the ECB appears before parliamentary committees, expert monetary reports commissioned by the Parliament seem not to have had a quantifiable impact upon the ECB's pursuit of price stability. Meanwhile, in relation to general economic policy, or growth and employment in the Euro area, it is also noted that the 'falling number of inquiries in this regard either suggests that over time the ECB has worn out MEPs in their efforts to have the ECB place more emphasis on its *secondary* objective, or that MEPs increasingly trust the ECB to make the right assessments and to take the right decisions (*emphasis added*).'<sup>50</sup>

The tension here is accordingly twofold. Firstly, and perhaps inevitably so given the fact that Parliament has no powers of sanction over the ECB – or, more particularly has no power of veto over the budget of the Bank or the ESCB, which is, instead subject only to 'independent external audit (Article 27(1) Statute)<sup>51</sup>– the power of the Parliament to subject the bank's pursuit of price stability to forensic scrutiny is necessarily limited. With this, a primary technical plank within schemes of accountability – the holding of an independent body to its mandate by means of budgetary veto – is accordingly weakened. At the same time, however, the weakened position of the European Parliament in terms of technical oversight is likewise matched by parliamentary confusion over the role of the ECB within the general economic policy of the EU. Certainly, Article 127(1) TFEU also commits the ESCB to 'support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty of European Union'. In doing so, it appears also to commit the ECB to pursuit of Community policies such as employment and growth. Yet, such support is to be exercised 'without prejudice to the objective of price stability'. Meanwhile, the Treaty in any case offers few concrete institutional or normative indicators on how the ECB might offer such support. Alternatively, such support can only ever be considered a 'secondary' task of the ESCB; a task at best perhaps only ever to be viewed as a restraining element within discussions on anti-inflationary measures. By the same token, Parliament's distracting concern with this secondary task is surely only to be categorised as a part of continuing and evolutionary efforts to establish effective elements of co-ordination, if not of direct economic influence, between pursuit of EU eco-

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50 F. Atembrink & K. van Duin (2009: 567-568).

51 Vitality, the system is self-financing. See, AG Jacobs and his confirmation that the ECB possess a special status by virtue of this fact, Case C-11/00, *Commission of the European Communities v European Central Bank*, [2003] E.C.R. I-7147, AG Jacobs on 3 October 2002.

conomic and EU monetary policy. In short: an evolving instrument of governance ‘light’.

Commentators on the relationship between ECB and European Parliament have cautioned that their results cannot be regarded as conclusive and should not be overstated, being largely based on quantitative rather than qualitative review of the Bank-Parliament dialogue. Nonetheless, they are also confident enough to assert that the lack of effective monetary review plus parliamentary obsessions with secondary ECB tasks do not ‘necessarily point towards an effective scrutiny by the EP of the ECB activities.’<sup>52</sup> At the same time, however, the continuing lack of clarity on the ECB’s role within general EU economic policy-making has also led to further tensions within the institutional framework of the EU as doubts have been raised as to the exact extent to which Community law applies to the operations of the ECB. ‘There is only one criterion on which the ECB..[.]..will be and should be judged, and that is whether it delivers what it is instituted for, namely price stability..[.]..That is the only judgment on which the ECB should be judged.’<sup>53</sup> Expressed within the context of Parliament’s continuing efforts to interrogate the Bank on growth and employment, the ECB’s implicit assertion that its independence from political process is legitimised since it serves and must *only* serve to ensure price stability, thus finds further expression within the *OLAF* Judgment of the ECJ and the efforts of the Bank to establish its own heightened independence within the institutional scheme of the European Treaty.<sup>54</sup>

The controversy highlighted within *OLAF*, decided prior to the recognition of the ECB as an institution of the EU, stems from the wording of Article 130 TFEU (ex 108 EC):

“When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank..[.]..shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body..[.]”

In establishing its own anti-fraud measures and thus failing to recognise Regulation 1073/1999 endowing the Community anti-fraud body, OLAF, with wide-ranging investigative powers, the ECB asserted a very wide measure of autonomy for itself in relation to the application of Community law. Chal-

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52 F. Atembrink & K. van Duin (2009: 568).

53 Monetary dialogue of November 9, 1999, cited in F. Atembrink & K. van Duin (2009), 567.

54 Case C-11/00, Commission of the European Communities v. European Central Bank, [2003] ECR I-7147.

lenged before the ECJ by the Commission, the Bank sought to justify this position, arguing that whilst ‘it does not exist in a legal world totally distinct from that of Community law’, it was nonetheless to be regarded as distinct from the institutions of the EU. In support of this argument, the ECB pointed – amongst other things – to the failure of the Treaty to recognise the ECB as an institution of the EU, the ECB’s legal personality, the measure of independence afforded to the institution by the then Article 108 EC, the ECB’s independent competence to make regulations and take decisions, and, interestingly, the failure of the Treaty to subject ECB accounts to review by the Court of Auditors.<sup>55</sup>

With this non-exhaustive list of justifications, the ECB was seemingly arguing in favour of a wide interpretation of Article 108 EC (now 130 TFEU) and asserting a unique degree of autonomy for itself within the EU. Commentators have reacted with a degree of disdain towards the arguments of the Bank,<sup>56</sup> citing isolated elements within articles written by employees of the institution that seem to suggest that the Bank was seeking to place itself fully beyond the reach of Community law. And certainly, statements arguing that the ECB constitutes a ‘Community of its own’, a ‘Community within the Community’<sup>57</sup> do appear to suggest reluctance on the part of the ECB to accept conventional application of the Community’s legal regime to it. Nonetheless, such critique and, indeed, the degree of *Schadenfreude* expressed at the ECJ’s rejection of the Bank’s case and its limitation of the institution’s autonomy to a ‘functional independence’ in order to ensure price stability,<sup>58</sup> perhaps fails fully to appreciate the normative conundrum facing the Bank, or indeed the wide range of independence in fact endowed upon the Bank by the Court.

[T]he Treaty and the Statute confer upon the ECB a high level of independence. [...] However, the principle of independence does not imply a total isolation from, or a complete absence of co-operation with, the institutions and bodies of the Community. The Treaty prohibits only influence which is liable to undermine the ability of the ECB to carry out its tasks effectively with a view to price stability, and which must therefore be regarded as undue.<sup>59</sup>

Advocate General Jacobs gives an accurate account of the ECJ’s recognition of the ‘limited functional independence’ of the Bank. As such, the Court does speak directly to the primary concerns of the ECJ’s. Recalling Parlia-

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55 See, for comprehensive review of the arguments presented, N. Lavranos, ‘The Limited Functional Independence of the ECB’, (2004) *European Law Review* 115.

56 N. Lavranos (2004: 118).

57 C. Zilioli & M. Selmayr, ‘The external relations of the euro legal area: legal aspects’, (1999) *CMLR* 273, at 284.

58 N. Lavranos (2004: 118).

59 Case C-11/00 Commission v ECB, AG Jacobs, paragraph 155.

ment's efforts to assess the operation of the Bank predominantly on the basis of its 'secondary' contributions to general EU economic policies, statements from Bank supporters asserting that the 'independence in Article 108 EC does not provide for any exceptions or restraints'<sup>60</sup> are more readily understood. From the viewpoint of the Bank, where the *only* clear and unequivocal mandate afforded the ECB by the Treaty is pursuit of price stability, its enduring credibility as an institution of monetary management is surely *only* to be assured, if it may pursue this goal in full independence from the influence of *all* other institutions of the Union, including such influence that may be expressed within Community law. Certainly, degrees of co-ordination between monetary and economic policy may be necessary – think only of the potentially inflationary process of bond buying engaged in by the ECB during the 2010 sovereign debt crisis. Yet, such co-ordination must surely be a matter for the ECB alone: 'the decision-making process inside the ECB is not even subject to a politician's suspensory right of veto.'<sup>61</sup>

Between fact and positive law, the Bank is a potential victim of indeterminate political compromise, of the vagueness in the drafting of Article 127(1) TFEU, of the failure of the EU to establish clear institutional modes of co-ordination between economic and monetary policies, of increasing political pressures for co-ordination and its own credibility-securing demand for clarity within EU primary law. To this exact degree then, the ECB must retain credibility by forcefully asserting its unequivocal Treaty-based independence to pursue price stability. Equally, this strategic/factual quest for credibility is one that is supported by an ECJ, who, by virtue of their formula of 'limited functional independence' also create room for case by case analysis of the legality or otherwise of application of Community law to the ESCB and ECB.<sup>62</sup>

Between fact and norm, this preliminary conclusion nonetheless also leaves vital questions open. In the aftermath of *OLAF*, Bank supporters were keen to reiterate that '[t]o view the ECB as an independent specialised organisation of Community law therefore expresses its subordination not to the political proc-

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60 C. Zilioli & M. Selmayr, 'The European Central Bank: an independent specialised organisation of Community Law', (2000) 37 *CMLR* 591.

61 N. Lavranos (2004: 118).

62 C. Zilioli & M. Selmayr, 'Recent developments in the Law of the European Central Bank', in: P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2006* (Oxford: Oxford University Press 2006), pp. 63-64, detailing the careful empirical analysis the *OLAF* regulation is subjected to by the ECJ. The Court is serious in its stated intentions to ensure that application of Community laws will not impact upon the ability of the Bank independently to pursue monetary policy.

ess, but to the *rule of Community law*.<sup>63</sup> At the one level, such a statement might be read as a strategic effort to assert the Treaty-based independence of the Bank with regard to pursuit of price stability. At another, however, the statement can also be read as a plea: placed outside the modern reformulation of transmission belt administration, challenged by the equivocal nature of an evolving economic and monetary policy, the ECB and ESCB are creatures of governance seeking to evolve their own normative framework in order to overcome the inconsistencies and impossibilities posed by the process of European integration. Which form of rule of law can then aid them in this process?

## 2. *A Credibility of Expertise*

Throughout the global system, a primary justification for the establishment of independent central banks has been the recognition that the complexities of monetary management are such that politicians and the political system can no longer master the vast body of technical detail required to establish a credible monetary policy. As a consequence, and once again highlighting the complex interplay between norm and fact within schemes of modern governance, it can thus be argued that establishment of an independent central bank and system of central banks is also commensurate with a normative commitment of the EU to the establishment of a high level of expertise in order to ensure the credibility of EU monetary policy in general and the operation of the Eurosystem in particular. Fact appears to dictate norm: the TEU committed the EU to price stability; the unstated yet vital element within this construction is the integral commitment of the system to the establishment of a high level of expertise which might ensure credible pursuit of this aim.

By the same token, however, this underlying factual-normative commitment to the maintenance of a high level of expertise both increases the need for and creates its own tensions within the evolving scheme of governance that focuses upon the ECB and ESCB. On the one hand, the minimal technical resources of the ECB create a pressure for ‘decentralisation’ within the system, with the ECB being heavily reliant upon the expert resources of the NCBs in order to ensure that the ESCB might fulfil its tasks.<sup>64</sup> This requirement for decentralised expertise is at once apparent within the nature and number of *ad hoc* consultative committees already established by the Bank under Article 9 of

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63 C. Zilioli & M. Selmayr, ‘Recent developments in the Law of the European Central Bank’, in: P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2006* (Oxford: Oxford University Press 2006), pp. 63-64.

64 Etienne de L’honneux (Secretary General, Banque Centrale de Luxembourg), 3 *Eure-dia* 2009, pp. 455-485.



the ECB's rules of procedure. Charged with assisting 'the work of the decision-making bodies of the ECB' as regards monetary policy, banknotes and statistics, the 12 committees already established deal with highly technical tasks, such as payments and settlements (Payment and Settlement Systems Committee), which could not otherwise be managed within the ECB. Nonetheless, made up of two representatives of the NCBs who are a part of the Eurosystem and two from the Bank, and reporting to the ECB's Governing Council via the Executive Board, doubts may nonetheless be raised about the impact of such committees upon the credibility of the Eurosystem as a whole. Doubts arise at both a practical and political level. Do committees act as 'Trojan horses' for the NCBs and member states:<sup>65</sup> do they detract from the ability of the system to furnish one coherent system of establishment of undisputed technical expertise; do they furnish national interest with a conduit of influence over supranational decision-making?

On the other hand, however, the dedication of the ECB and ESCB to the establishment of a high level of expertise also raises far wider issues of governance within the context of the general co-ordination of EU economic and monetary policy. As both the private credit crisis and sovereign debt crisis have amply demonstrated, the monetary system within which the ECB and ESCB operate is subject to systemic shock and governed by systemic *risk*. Complex risk, as both a vast risk literature and even Community policy teaches us,<sup>66</sup> entails elements both of technical assessment and of *political* management; particularly with regard to the question of which level of risk are we prepared to tolerate. To what degree then, must the ECB/ESCB be receptive to societal impulses or 'messages' from a political realm, which reflect concerns far beyond the structure of price stability?

#### **IV. Eurosystem Governance within the Rule of Law**

This final point perhaps provides the key to the conundrum: in contrast to schemes of European governance commonly associated with the Commission's exercise of national/supranational competences (comitology), governance within the ECB/ESCB – and more pressingly, within the Eurosystem –

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65 C. Zilioli & M. Selmayr, 'Recent developments in the Law of the European Central Bank', in: P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2006*, Oxford 2006: Oxford University Press, pp. 63-64.

66 M. Everson & E. Vos, 'The scientification of politics and the politicisation of science', in Vos & Everson, *Uncertain Risks*, Abingdon 2008: Routledge Cavendish, pp. 1-17.

exists not within the multiple tensions of intergovernmentalism versus supranationalism, arguing versus bargaining, and good versus technical decision-making, but rather within a more streamlined, but arguably far more immanent tension between the constitutional aspiration for expert conduct of autonomous monetary policy and continuing, if more diffusely stated, concerns that the actions of the ECB/ESCB should be ‘controllable’, both in terms of application to it of the regime of community law, and with regard to ‘political influence’ in the matter of the co-ordination of the economic and monetary policy of the Union. At the time of writing, banking and sovereign debt crises have hogged the headlines and have determined that the question of the ‘political’ place of the ECB/ESCB within the governance of the European Union has morphed from a topic of purely academic concern into an issue of popular consternation. Nonetheless, this belated public spotlight on Bank activities should not detract from the simple fact that the ECB/ESCB has been navigating this tension for over a decade and has similarly done so within the further complicating context of a fluid division of competences between the NCBs and the ECB.

As a result, the vital question is not one of the identification of a mode of governance, which might aid the Eurosystem to overcome the current crisis. Rather, the core issue is one of the pinpointing of a suitable manner of legitimating the day-to-day governance structures of the ECB/ESCB, and Eurosystem, *as well as* the Bank’s capacity to manage a crisis; and, more particularly, doing so within a proceduralised rule of law, which establishes, if not a mode of reference to, at least a degree of congruence with the Enlightenment polity – i.e., to its universal and ‘rationalist’ aspirations. The analysis accordingly proceeds in three stages. First, a potential normative structure for governance of the ‘system’ is elaborated; secondly, normative lessons learned are practically applied to the establishment of comitology ‘proper’ within the Bank. In a final section, however, the essay also concludes with a far broader consideration of the problem of the political co-ordination of monetary and economic union and a critical appraisal of the history of the establishment of European monetary union.

### *1. The primacy of ECB accountability for and within the system*

As noted, the treaty structure established to govern monetary union remains indistinct in two particular regards:

- (a) Article 127(1) TFEU, although committing the ECB/ESCB to price stability, appears also to suggest that the Central Bank should play a supporting role within general Union economic policy;
- (b) Equally, however, the supranational impulse which deems the Govern-

ing Council to be the architect of monetary policy is – to a degree at least – open to question, as NCBs are not apportioned distinct subordinate competences, but instead play an integral part within and beyond the Eurosystem.

This leaves the analysis with two particular questions: is the ECB a general or economic actor; and, further, is the ECB/ESCB a decentralised, federal or unitary system? At the normative level, the answers to these questions must initially appear to be unsatisfactory.

- (a) Notwithstanding Treaty’ referencing to ‘general economic policies, the ECB/ESCB can only be regarded as a specific economic actor, dedicated by means of its heightened independence to pursuit of price stability.
- (b) The ECB/ESCB must be considered a unitary system, dominated by the decision-making of the Governing Council and Executive Board, and dedicated, at decentralised level, simply to the best possible integration of necessary national expertise within such decision-making.

Thus, not only is the bank placed beyond the modern reformulation of the transmission-belt model by virtue of heightened independence, it is also seemingly wholly alienated from the Enlightenment polity with regard to the purely technocratic definition of its mandate. Equally, the relegation of nation influence within the system to a status of a ‘pure technical input’ seemingly severs all possible links with representative process at member state level, and further appears to deny the paradoxical reality of an expert process of decision-making, which, confronted always with issues of systemic risk, must surely always be implicated within redistributive, rather than simply *pareto* efficient allocation of resources.

However, and making renewed call to the German Constitutional Court’s preparedness to evaluate its application of constitutional norms to a complex European reality ‘in the light of circumstances’, such a stark formulation may nonetheless be argued to be the best currently available to allow us to bridge the gap between facts and norms, to ease the integral tension between governance imperatives *within* the ESCB/ECB and assertion of the rule of law *over* the ECB/ESCB and likewise, and vitally so, in order to ensure the credibility of the young Euro currency. At one level, such an assertion derives from the wholly positive lessons of traditional constitutional theory: certainly, independent central banks may lie outside the transmission-belt model of legitimation; yet, in Europe, at least, we may identify one highly successful historical model of an independent bank – the *Bundesbank* – whose autonomous status was ‘constitu-

tionalised' by the German Constitutional Court,<sup>67</sup> the selfsame Court which recognised the transfer of competences to the ECB within an ordo-liberal reading of the Maastricht Treaty.<sup>68</sup> Although the particular conditions for the success of this model will be treated in more detail in a concluding section, it may nonetheless be asserted here that to the primary legal commitments of the TFEU represents the extension beyond the national constitutional settlement of a polity-restraining goal of depoliticised monetary stability. As such, it similarly makes cross-reference to the goals of the Enlightenment constitution, to a 'universal' or cross-border commitment to a shared goal of fiscal restraint, governed by an equally universal commitment to the transparency of de-politicised technical expertise. To the extent that monetary union is governed by technical criteria, it may be measured and monitored, not only for its effectiveness, but also for its 'civility'; that is for its resilience towards disruptive political influence, at national or at supranational level.

Directly related to this point, however, more defensive considerations may be identified which require us to view the ECB/ESCB system – for the purposes of effective application of the rule of law – as a unitary, independent system for which and within which, the ECB must retain a primary accountability. Alternatively, although the facts of governance may yet require a certain degree of co-ordination between monetary and economic policy, the strictures of the rule of law nonetheless demand that such co-ordination must be visible and transparent. To this exact degree then, the 'Trojan horse' of political influence over and within the Bank must be firmly resisted. On the one hand, the universalism of the common European commitment to price stability would be undermined were the Bank to be subject to institutionalised political pressures at supranational level or within the Eurosystem itself (national influences). On the other hand, public transparency over the day-to-day operations of monetary policy is self-defeating in terms of the credibility of the Eurosystem. Money and money markets are complex and volatile, such that currency governance must be conducted behind closed doors in order to ensure the *fact* of a credible currency. Accordingly, the primary counterweight to the system's independence – at the same time its constitutionalised guarantor for a universal commitment to the rationality of technical decision-making – needs must reside in a dual of accountability, not of annual budgetary control, published agendas and immanent expert/public review of daily decision-making, but rather in an

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67 Rather than by the Constitution itself. See, for details, M. Everson, 'The Constitutional Law of the Euro? Disciplining European Governance', in: P. Beaumont & N. Walker (eds.), *Legal Framework of the Single Currency*, Oxford 1999: Hart Publishing, pp. 119-139.

68 *Brunner v European Union Treaty* CMLR [1994] 57.

internal guarantee of technocratic excellence, and an external guarantee of accountability for the *results* of autonomous monetary decision-making. *Normatively*, only one institution and one institution alone can be held politically and legally accountable for the conduct of monetary policy, for its technical excellence and co-ordination with the general economic policy of the European Union – the highly visible ECB.

## 2. *Committees of technical excellence*

This normative condition for a single institution to be held accountable for the operation of the ESCB is expressed in Article 129 TFEU which states that ‘The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.’ While the NCBs are an integral part of the ESCB, they are required by the ESCB Statute to act ‘in accordance with the guidelines and instructions of the ECB’ and the Governing Council is given the authority to ‘take the necessary steps to ensure compliance with the guidelines and instructions of the ECB’.<sup>69</sup>

*External* accountability, from a strict rule of law perspective rather than a results-based norm, is calibrated in terms of reporting obligations. According to the ECB website, ‘To retain legitimacy, an independent central bank must be accountable to democratic institutions and the general public for its actions in the pursuit of its mandate. The ECB has precise reporting obligations ... [which] are laid down in Article 15 of its Statute’.<sup>70</sup> *Internal* accountability may be derived from Article 9(2) of the Statute which gives the ECB the responsibility for ensuring that all its Treaty-specified tasks ‘are implemented either by its own activities ... or through the national central banks.’ However, this responsibility is not seen to detract from ‘the principle of decentralisation which is at the root of the System’. Hence the ‘Organisational principles for the fulfilment of Eurosystem functions by all members of the Eurosystem’ emphasise cooperation and teamwork and enjoin all members to contribute strategically and operationally to the goals of the Eurosystem while ‘act[ing] and appear[ing] as a cohesive and unified entity ... speak[ing] with a single voice...close to the citizens of Europe’.<sup>71</sup>

These organisational principles contain the seeds of a *sui generis* Eurosys-

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69 Article 14.3 ESCB Statute (Protocol 4, TFEU).

70 See <<http://www.ecb.int/ecb/orga/accountability/html/index.en.html>>. Accessed on 14 June 2010.

71 See <<http://www.ecb.int/ecb/orga/escb/html/principles.en.html>>. Accessed on 14 June 2010.

tem comitology immediately distinguishable from Commission comitology. The act of delegation in the former may be seen to be an *intra-organisational* allocation of functions in a context where the organisation's – in this case the Eurosystem – boundaries and objectives are specified by law. For the latter, delegation takes the form of an *inter-organisational* apportionment of responsibilities between the Council, Commission and committees and the interaction of the three defines the boundaries and objectives of a particular piece of legislation. The contrast between the two types of comitology has its origins in the high premium placed on ECB independence: whereas Commission comitology is aimed at creating a deliberative forum where political, executive and administrative concerns can be comprehensively aired, any Eurosystem comitology will fundamentally be aimed at accomplishing its depoliticised monetary objectives by the deliberations of committees of technical excellence. The ESCB organisational principles recognise these aims and identify effectiveness and efficiency in decision-making, cost-efficiency, developing control systems and performance indicators and exploiting ECB/NCB synergies as critical organisational goals.

What path then should Eurosystem comitology take? Its intra-organisational character provides an important point of departure allowing for flexibility in the construction of its deliberative procedures. ECB committees are currently established by the Governing Council under the Rules of Procedure.<sup>72</sup> Each committee may have up to two members from each of the Eurosystem NCBs and the ECB. The Governing Council lays down each committee's mandate and appoints the chair, while the ECB provides the necessary secretarial assistance.<sup>73</sup> Committees report back to the Governing Council via the Executive Board.<sup>74</sup>

Each committee has a purely advisory function. They do not have decision-making powers although some committees have implementation powers. To underline this point, the ECB's Rules of Procedure are careful to refer to committee 'members', and not 'representatives' or 'experts'. The mandates granted to committees by the Governing Council may have varying amounts of detail. In the case of monetary policy, for instance, there are no implementation requirements. The mandate is so detailed so as to make the task of the Monetary Policy Committee effectively no more than an administrative one. By contrast the Payment and Settlements Systems Committee will have the authority to

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72 Adopted by Decision of the European Central Bank (ECB/2004/2), OJ L 80/33, 18.3.2004.

73 ECB Rules of Procedure, Article 9.2.

74 ECB Rules of Procedure, Article 9.1.

implement specified tasks, as it is impractical for the Governing Council to decide on the technicalities of the payment and settlement systems.

The need for internal technical excellence to deliver externally credible results may be seen to require ECB committees to develop beyond their current structures to create their own form of comitology. Despite the independence of each NCB from its own polity and the supranational independence of the ECB, tensions within the system can arise at least at three points: (i) conflicts around the perceived needs and views of various Member States (e.g. those of the core versus the periphery) in deliberations within a committee's mandate; (ii) interpretation of the terms of the committees mandate itself; and (iii) the scope of the actual decision-making or implementation powers that it may be possible for each committee to have. While not every manifest tension will lead to an absence of consensus at committee level, the independence and credibility of the system will depend on achieving consensus on every point that counts.

Eurosystem comitology requires not so much a 'regulatory procedure with scrutiny' as the ability to use its intra-organisational flexibility to produce consensual, externally-visible results with internal accountability. Several ground rules may be outlined for such a comitology (and, indeed, traces of these rules may already be found in the ESCB's organisational principles):

- (1) Consensus is king. The ESCB must speak with 'a single voice'. While dissenting views may be aired and even encouraged, such dissent must be expressed and resolved within the system.
- (2) While a politicisation of views along national lines may be considered to be inevitable, the normative treaty basis for each committee has to be supranational price stability.
- (3) Members are not national representatives, but function in a technical capacity with clear knowledge of conditions prevailing in national markets and their knock-on effect on EU and world markets.
- (4) Publication of best practice guidelines for committees in order to ensure 'internal' transparency and technical dominance and the promotion of external credibility.
- (5) Failures at committee level to reach a consensus should be flagged to the Governing Council with detailed reasons provided for both the majority view and the reasons for dissent. The Governing Council should then have a fixed period to provide its own (binding) view. The length of the fixed period would be determined by the urgency and gravity of the matter under consideration.

The final point is perhaps determinative: although and fluid competences be-

tween national and supranational instances notwithstanding, the ECB remains the one institution which can be held politically and legally to account for the results of the Eurosystem. The ECB can and must never be placed in a position whereby it is held to account for the actions of others. The system must remain a unitary system for the independent pursuit of monetary credibility through technical excellence.

## **V. Comitology's sting in the tail: the deliberative place of the ECB within the European Union**

In a final analysis, however, there is still much about economic and monetary union within the EU that remains unsatisfactory, if not suspect. At a time of extreme crisis within the Eurosystem, European publics might be justified in expressing extreme dissatisfaction with a mode of European integration that has consistently masked lack of political agreement upon the goals of union (federal or supranational?) within structures that invite governance beyond a conventional understanding of the rule of law, but which are – at core – a reflection of the EU's continuing inability fully to integrate political with economic will, to step beyond a piecemeal integration *telos* and properly to integrate the infinite range of European social, cultural, political and economic interests within a coherent and co-ordinated constitutional structure. Traditional voices of normative suspicion have grown in intensity since the failure of the constitutional convention and have been correct to do so.

In the particular case of the Eurosystem, European publics are similarly correct to vent their varying frustrations with a process of stealthy spill-over, which – at a moment of extreme – crisis has seen various national interests in fiscal sobriety, in democratically, rather than market driven deficit reduction and in statistical exactitude undone by a political lack of leadership and honesty, both at the time of the coming into force of the Maastricht Treaty and during subsequent enlargements of the Eurosystem area. The political indecision that haunts the entire process of European integration has now been painfully unmasked as the Euro – the cornerstone of future European integration – has been attacked by world money markets unimpressed by the continents' continuing political timidity and normative indecision.

Nonetheless, it should equally be noted, that the ECB/ESCB are victims rather than a party to political failings within Europe. Seen from the perspective of the upholding of the rule of law, the ECB's unwavering historical commitment to its own independence and the pursuit of monetary stability cannot but be applauded as an act of constitutional courage. Equally, however, the Bank's relative success in maintaining the stability of the Euro at a time of



crisis, of ensuring the integrity of a system containing various by now competing national interests (individual NCBs have spoken largely with one voice<sup>75</sup>) and of co-ordinating its monetary policies with the economic policies of the Council, European Council and individual member state governments is also highly instructive for the analysis.

In this latter regard then, a final reference must be made to the historical conditions for the success of an ordo-liberal conduct of monetary policy within the Federal Republic of Germany. As the fathers of German constitutionalism and ordo-liberalism taught us, normative commitments to monetary stability drew their enduring force from the dual constitutional commitment to entwined social and economic ordering. Walter Eucken highlighted the interconnection between the German economic constitution and the Republic's *Sozialstaat*.<sup>76</sup> In its transference to the supranational realm, the positive legal commitment to price stability lost its cross-referencing to the social and the political formulation of the social within the Enlightenment polity: the social competence – even post Lisbon remains firmly anchored at national level. Nonetheless, even at this ‘culturally denuded’ supranational level, it would appear that the constitutional values of co-ordination and social/economic integration are possible, or at least are possible to the degree that the ECB and its President have managed and continue to manage to overcome tensions between the political, economic and social aspirations of Europeans and their representatives.

In short then, the vital lesson to be learned from Commission comitology – or at least, the most refined of theories legitimating Commission comitology – may be one of the need to ensure and secure ‘deliberative supranationalism’ within European governance. Certainly, where the talk is of deliberative discussion and co-operation between the ECB and politicised nodes of European governance, the analysis has moved far beyond the sphere of application of the rule of law. Nonetheless, this might still be a realm within which the *values* inherent to a *proceduralised* rule of law have important application. Firstly, since the vital recognition of universalism within deliberative supranationalism would require national governments and the ECB to ameliorate the impacts of their sovereign decision-making upon other sovereign instances (i.e. upon individual member states, as well as on the pursuit of a supranational monetary policy). But secondly, since co-operation between autonomous instances of

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75 One important exception is found at: <<http://eulaw.wordpress.com/2010/06/01/axel-weber-attacks-ecb-decision-to-buy-bonds/>>.

76 See, for details of Eucken's work and for details of the tradition, M. Wegmann, *Früher Neoliberalismus und europäische Integration: Interdependenz der nationalen, supranationalen und internationalen Ordnung von Wirtschaft und Gesellschaft (1932-1965)*, Baden-Baden 2002: Nomos.

monetary decision-making and representative instances of political decision-making might thus also be elevated beyond ‘bargaining’ to a process of ‘arguing’, governed by values of rationality, transparency and the pursuit of common aims.

Certainly, we cannot hope for wholesale transference to the supranational level of the social ties, cultural mechanisms of review (national press scrutiny) or, indeed, concrete normative structures (dual constitutional ordering), which ensured that the President of a *Bundesbank* would – where appropriate – coordinate that Bank’s actions with those of the *Bundesregierung*. Nonetheless, where all European and national organs commit themselves publicly to shared European values of deliberation, and such deliberation is constantly scrutinised within the fragmented and common European public realm, might we not hope that governance at European level will continue to give us sufficient cross-referencing to the government of the Enlightenment polity? Perhaps the simple fact that the name of Jean-Claude Trichet is now one known to all Europeans, and his actions and those of the ECB are subject to heightened public scrutiny, is a significant step in this direction.

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