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The European boards of Bank supervision and Bank resolution: Balancing independence with democratic accountability?

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ECB's Council of Supervision, Single Resolution Board, Independence, Democratic Accountability

ABSTRACT:

This paper reviews the complex balance between democratic accountability and independence of the European Boards of Bank Supervision and of Bank Resolution, within the core of the European Banking Union. For that purpose, it first examines the legal bases of such attribution of independence to each of these Boards. It also reviews the dialectics between independence and democratic accountability in the appointment and resignation regime of the members, and in oversight of the performance, of the respective Boards. The analysis differentiates between both organs because the ECB is not the independent body to which the SRM Regulation confers the managing and implementing of its provisions, but to an ad hoc body, the SRB, whose direct source of creation is the SRM Regulation itself. In this scenario, the balance between the independence unfolds in a different legal setting to that of the SSM, provided that such independence (like the ECB itself) is a direct creation of EU primary law. In addition to this peculiarity, another, no less significant, lies in the fact that the funding of the SRF is governed by an intergovernmental Treaty between the Member States participating in the SRM. Such difference concerning the SSM has specific implications for the SRM precisely from the standpoint of the European democratic legitimacy, in terms of institutional origin, but also of appointment and dismissal of its members, as well as of performance, all of which are also dealt with in this paper. Finally, the paper reaches the consequent legal conclusions, the main of those being the resulting imbalance between democracy and 'technocracy'.

PALABRAS CLAVES:

Consejo de Supervisión del Banco Central Europeo, Junta Única de Supervisión, Independencia, Rendición de cuentas democráticas

RESUMEN:

Este artículo examina el complejo equilibrio entre la legitimidad democrática y la independencia de las agencias europeas de supervisión y de resolución bancarias. Se examinan en primer lugar las bases jurídicas de tal atribución de independencia a cada una de estas instancias. También se aborda la dialéctica entre independencia y responsabilidad democrática en el régimen de nombramiento y dimisión de los miembros, y en la supervisión del desempeño, de las respectivas formaciones independientes. El análisis distingue entre ambas, ya que el BCE no es el órgano independiente al que el Reglamento del MUR confiere la gestión y aplicación de sus disposiciones, sino a un órgano ad hoc, la JUR, cuya fuente directa de creación es el propio Reglamento del MUR. En este escenario, el equilibrio entre la independencia se desarrolla en un marco jurídico diferente al del MUS, dado que, en este último, tal independencia (como el propio BCE) es una creación directa del Derecho originario de la UE. Además de esta peculiaridad, otra, no menos significativa, radica en el hecho de que la financiación del FUR se rige por un Tratado intergubernamental entre los Estados miembros participantes en el MUR. Esta diferencia con respecto al MUS tiene implicaciones jurídicas específicas para el MUR precisamente desde el punto de vista de la legitimidad democrática europea, en términos de origen institucional, pero también de nombramiento y destitución de sus miembros, así como del control de su actuación, que se abordan en este trabajo. Por último, se extraen las pertinentes conclusiones jurídicas, la principal de las cuales es el desequilibrio resultante entre democracia y tecnocracia en el MUS y en el MUR.

MOTS CLES :

Conseil de Surveillance de la Banque Centrale Européenne, Conseil de Surveillance Unique, Indépendance, Responsabilité démocratique

RESUME :

Cet article examine l'équilibre complexe entre la légitimité démocratique et l'indépendance des agences européennes de supervision et de résolution bancaires. Il examine d'abord la base juridique de l'attribution de l'indépendance à chacun de ces organes. Il aborde également la dialectique entre l'indépendance et la responsabilité démocratique dans le régime de nomination et de résignation des membres, et dans la supervision des performances, des formations indépendantes respectives. L'analyse distingue les deux, car la BCE n'est pas l'organe indépendant auquel le règlement MRS confie la gestion et la mise en œuvre de ses dispositions, mais plutôt un organe ad hoc, le CSR, dont la source directe de création est le règlement MRS lui-même. Dans ce scénario, l'équilibre entre l'indépendance s'inscrit dans un cadre juridique différent de celui du SSM, étant donné que, dans ce dernier, cette indépendance (comme la BCE elle-même) est une création directe du droit primaire de l'UE. En plus de cette particularité, une autre, non moins importante, réside dans le fait que le financement de la SRF est régi par un traité intergouvernemental entre les États membres participant à la SRM. Cette différence par rapport au SSM a des implications juridiques spécifiques pour le MRS, précisément du point de vue de la légitimité démocratique européenne, en termes d'origine institutionnelle, mais aussi en termes de nomination et de révocation de ses membres, ainsi que de contrôle de ses performances, qui sont abordés dans ce travail. Enfin, les conclusions juridiques pertinentes sont tirées, la principale étant le déséquilibre qui en résulte entre démocratie et technocratie dans le MSS et le MRS.

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1 ORIGIN OF THE BANK SUPERVISION AND OF THE BANK RESOLUTION BOARDS

The EU's reaction to the economic and financial crisis unleashed in 2007 and 2008 promoted the Banking Union, what besides sped up the until then still-delayed implementation of the internal market of financial services (Teixeira, 2017, p. 536). After the Internal Market, the Monetary Union, and the Area of Freedom, Security, and Justice, the Banking Union is one of the most outstanding European achievements (Howard & Quaglia, 2014, p. 125) since it entails the 'Europeanisation' of bank supervision and resolution (not only 'communitization' for provisions of secondary EU law, but also intergovernmental instruments, are interwoven in the applicable legal framework), whose respective Single Mechanisms (SSM and SRM) were established almost at the same time (Busch, 2015: pp. 283-284; Georgosouli, 2021: p. 82; Timmermans, 2019: p.158).

For the euro area Member States and the other EU Member States that have signed a cooperation agreement with the SSM (which is also applicable to the SRM under Article 4 of the SSM Regulation), the decision of resolving a bank does not correspond to the ECB, in contrast to what happens in the SSM, but to a new Agency created for such purpose, the Single Resolution Board (SRB), albeit subject to the approval, or more precisely, the lack of positive opposition, of the Council and the Commission. However, the implementation of SRB decisions is attributed to the respective National Resolution Authority (NRA) in accordance with its domestic legislation (including transposing the Bank Recovery and Resolution Directive 2015/2019). But in the absence of enforcement by the NRA, such enforcement passes to the hands of the SRB (Lintner, 2017: p. 593).

2 DEMOCRATIC LEGITIMACY AND THE CHOICE OF FUNCTIONAL INDEPENDENCE OF THE ECB'S SSB AND THE SRB

From the standpoint of democratic legitimacy and accountability, the choice of THE EBC to lead the SSM is not trivial, due to the former's independence 'constitutionally' attributed by the TFEU. As far as the SRB is concerned, the problem is essentially the same, but the legal methodology followed to provide it with functional independence is different, since the leadership of the SRM is conferred on a new Agency (the SRB) created by

secondary legislation, and not by the Treaties. Let us now distinguish one case from the other.

2.1 THE TENSION BETWEEN SUPERVISORY INDEPENDENCE AND DEMOCRATIC ACCOUNTABILITY *EX ANTE* (APPOINTMENT) OR *EX POST* (FUNCTIONAL PERFORMANCE) OF THE ECB'S SUPERVISORY BOARD

Recital 13 of the Regulation conferring specific tasks on the ECB policies relating to the prudential supervision of credit institutions[1] (henceforth, the SSM Regulation) states that 'as the euro area's central bank with extensive experience in macroeconomic and financial stability issues, the ECB is well placed to carry out clearly defined supervisory tasks with a focus on protecting the stability of the financial system of the Union. It goes on to add that 'many Member States´ central banks are already responsible for banking supervision, to finally conclude, in view of both arguments, that 'specific tasks should therefore be conferred on the ECB concerning policies relating to the supervision of credit institutions within the participating Member States'.

Balancing the independence of the ECB's Supervisory Board, on the one hand, and its democratic *accountability*, on the other hand, is complex. It constitutes a 'quasi-oxymoronic' endeavor. To be properly dealt with, it must first be examined whether and to what extent such attribution of independence has a basis within EU primary law. Then, it is necessary to distinguish how this complex balance between independence and democratic control/legitimacy reflects itself over the appointment and resignation regime of the ECB's Supervisory Board members and over the performance of the such body.

A further distinction still needs to be made, this time only within the functional level, between how the requirements of democratic legitimacy and accountability impact on the independence of the ECB's Supervisory Board in the face of the specific types of functions it exercises under the SSM Regulation. There are two such functional types. The first one relates to the enactment of rules implementing the SSM Regulation, whose parameters of validity include, logically, those deriving from EU primary law, which precisely encompasses, in turn, the respect for democracy as an essential fundamental value common to the Union and its Member States (Article 2 TEU). The second functional type is given by the executive and applicative activity of the SSM Regulation by the ECB's Supervisory Board.

2.1.1 Legal bases covering the independence of the ECB's Supervisory Board: do they lie in EU primary law, or only in EU secondary law?

Article 282(3) TFEU grants independence to the ECB for the proper exercise of its competences. Such are those attributed by the Member States through the Treaties, according to the principle of conferral: Article 5(2) TEU. Article 282(1) TFEU states that the ECB and the national central banks of the Member States whose currency is the euro (i.e., what the same Treaty refers to as the Eurosystem) conduct the Union's monetary policy. It is also envisaged, as the teleological factor delimiting the ECB's field of competence, that its fundamental purpose is to maintain price stability, without prejudice to the support of the Union's general economic policies in the pursuit of its objectives (second paragraph of Article 282 TFEU).

Although placed outside the provisions relating to the ECB in the TFEU, Article 127(6) thereof, within the Title governing Economic and Monetary Union, allows conferring specific tasks upon the ECB concerning policies related to the prudential supervision of credit institutions and other financial institutions (except for insurance undertakings, an

1 Council Regulation (EU) No 1024/2013 of 15 October 2013, *OJ* L 287, 29.10.2013, 63-89.

issue which is beyond, the scope of this paper). However, this additional conferral is not to be carried out directly by the Treaty itself, for it requires the endorsement of Regulations following a special legislative procedure: by unanimity of the Council, after non-binding consultation to the European and to the ECB itself.

But does all this mean that such independence is limited only to the competences *directly* conferred by the Treaty to the ECB? To those that constitute the defining core of the ECB's functional status? Does the ECB's independence only extend itself to the ECB's conduct of monetary policy -Article 282(1) TFEU- with the objective of maintaining price stability and of supporting the EU's general policies in the pursuit of its objectives -Article 282(2) TFEU-? That's to say, does the EU's primary law limit ECB's independence only to the conduct of monetary policy, and therefore exclude such independence in the exercise of other possible ECB's powers, like those relating to bank supervision?

Legally, the answers to those questions are all negative. Although Article 130 TFEU grants independence to the ECB's for the exercise of the competences conferred on it by the Treaty and by the Protocol on the Statutes of the ESCB and the ECB, and such restriction leads to the doctrinal doubt as to whether or not this independence can be extended to the SSM (Türk, 2019: p. 50; Ferran & Babis, 2019: p. 70), provided that such competences (additional to those the ECB has on monetary policy) are conferred by a Regulation, the fact is that such Regulation specifies a possibility expressly provided for by its legal basis on EU primary law: Article 127(6) TFEU. In as much, the ECB's banking supervision tasks also correspond to competences attributed to it by the Treaty (i.e., according to its provisions). However, the exegesis should not be limited only to Article 130 -or to Article 130 plus Article 127(6) TFEU-. Article 283(2) TFEU should also be considered.

In accordance with the latter -Article 283(2) TFEU-, the ECB's independence is for the proper exercise of its powers. It should be noted that such provision is not one of those dedicated in the Treaty to the Union's policies. Therefore, it does not apply only to a specific one of them: the monetary policy, for example, just because it is the one that characterizes the existence and status -that's true- of ECB. Article 282(3) TFEU located in Part Six of the TFEU, on institutional provisions, which are 'horizontal', i.e., common to all Union policies, without being limited to one of them. In particular, it is not confined to the monetary policy and may perfectly also encompass that of banking supervision.

This means that banking supervision is also a competence exercised by the ECB in accordance with EU primary law, and therefore, legally speaking, such thing implies the application of the 'horizontal' institutional provisions of the Treaties also to the tasks over bank supervision conferred, in accordance to the TFEU, to the ECB: that is, Article 282(3) TFEU, and, consequently, the ECB's status of functional independence applies not only to monetary policy *stricto sensu*, but to all of the ECB's competences. A different issue lies in whether the SSM Regulation remains within the functional scope that can be attributed to the ECB according to the EU's primary law, or goes beyond what it allows, thereby incurring (or not) in *ultra vires*. But such judgement, whether Article 127(6) TFEU has been exceeded or respected in the attribution of banking supervision tasks to the ECB, is strictly judicial.

That judgement has not yet taken place at the EU's level (i.e., by the EU Court of Justice), but it has in Germany: its Federal Constitutional Court (*BVerfG*) has considered that the SSM Regulation does not incur in *ultra vires.* And according to Karlsruhe's Court, it is so precisely because of the provisions set forth by the SSM Regulation on the ECB's Supervisory Board democratic accountability. These mechanisms of parliamentary oversight legally established within the ECB's banking supervision are even more robust than those regulated by the Treaties concerning the monetary policy (Ferran & Babis, 2013: p. 271; Türk, 2019: p. 51), whose weakness, indeed, has been scholarly highlighted and criticized (Amtenbrink, 2002: pp. 147-163; Chalmers, 2010: p. 732-734).

After having examined the legal bases allowing the attribution of banking supervision tasks to the ECB, it is now necessary to distinguish between the democratic legitimacy of origin (or appointment) and the democratic legitimacy of functioning, in both cases, of the own ECB's Supervisory Board. This is because, as will be seen below, the ECB's *status* in the SSM differs from that of its monetary policy.

Disparities do not only lie in the different name given to the ECB's body entrusted with the attributed tasks: its Supervisory Board, a new ECB's formation created by the SSM Regulation specifically for the exercise of the banking supervisory function. The composition of the ECB's Supervisory Board is also partially different from those of the ECB's Governing Council and of the ECB's Executive Board (both acting in the field of monetary policy). Moreover, the ECB's banking supervision tasks must mandatorily be kept separate from those of monetary policy within the own ECB (Article 25 of the SSM Regulation), whereas the members of the Supervisory Board appointed as representatives of the ECB are prohibited from exercising powers related to the monetary policy -Article 26(5) of the SSM Regulation-.

Although there are important exceptions to this principle where the separation is not so clear, such as with regard to the implementing regulatory powers conferred by the SSM Regulation, the functional separation within the ECB is due to the fact that it was not decided to amend primary law, which attributes the exercise of the ECB's regulatory power, in general, to its Governing Council, a rule that could not, therefore, be contradicted by secondary legislation (i.e., by the SSM Regulation, in this case).

2.1.2 The (slight) enhancement of the SSM's democratic legitimacy stemming from the involvement of the European Parliament in the appointment of the ECB's Supervisory Board Chair and Vice-Chair persons

In terms of democratic legitimacy by appointment, the differences in the denomination of the various kinds of members of the ECB's Supervisory Board, compared to those of other ECB's bodies (Executive Board, Governing Council), are to be deemed positive. This is owed to the fact that the ECB's Supervisory Board has a type of members, although a minority of them (something which tempers the initial positive assessment), for whose appointment the European Parliament's favorable or unfavorable opinion is binding. This does not happen with the EB's Governing and Executive Boards, where the opinion of the European Parliament, although legally required, lacks all binding effect. Moreover, ECB's Supervisory Board members, in whose appointment the EP's opinion has binding effects, are none other than the Chairperson and the Vice-Chairperson. This veto power of the European Parliament to the appointment of the Vice-Chairperson of the ECB's Supervisory Board contrasts with the non-existent veto power of the European Parliament to the appointment, for example, of the members of the ECB's Executive Board, the body from which, as mentioned above, the Vice-Chairperson of the ECB's Single Supervisory Board must come (Amtenbrink & Makakis, 2019: pp. 14-15; Maricut, 2020: p.1202).

Firstly, the Chairperson has the casting vote in the event of a tie, which intensifies the element of democratic legitimacy derived from the role of the EP in his or her appointment. No less relevant (perhaps the contrary) is the position of the Vice-Chairperson, for he or she takes part in the preparatory work and draft decisions of the ECB's supervisory tasks -Article 26(8) of the SSM Regulation-.

Given that the Vice-Chairperson, in turn, must be elected from among the members of the ECB's Executive Board -Article 26(3) of the ECB Regulation-, and this simultaneously implies that he or she must also be a member of the ECB's Governing Council -Article 283(1) TFEU-, it results that, in such multiple simultaneous conditions. The Vice-Chairperson of the ECB's Supervision Board is also involved in the remaining procedural steps of the supervisory function.

As a member of the Executive Board, he/she contributes to preparing the meetings of the ECB's Governing Council -Article 12(2) of the Statute of the ESCB and of the ECB-. And as a member of the Governing Council, he/she takes part in the deliberations and decision-making on proposals of resolution coming from the own Supervisory Board -Article 26(8) of the SSM Regulation-, of which he/she is also its Vice-Chair. This 'ubiquitous' institutional position makes the ECB's Supervisory Board Vice-Chair, and not the Chair, the person with the most influential position in the ECB's supervisory tasks.

In any case, as regards the legitimacy of the members of the ECB's Supervisory Board, which is determined by the extent of parliamentary involvement in the procedure to observe for their appointment, or *accountability ex ante*, and dismissal, or *accountability ex post* (Bovenschen, Ter Juile, & Wissink, 2015: p. 170), a distinction must be made between the diverse types of such members. According to Article 26 of the SSM Regulation, the Supervisory Board is composed of a Chair and a Vice-Chair, four representatives of the ECB,[2] and one representative of the competent national authority of each Member State participating in the SSM (those whose currency is the euro, and those others which, upon request and in compliance with the conditions set out in Article 7 of the SSM Regulation, have established close cooperation with the ECB).

The European Parliament has a binding role in appointing the Chair and Vice-Chair of the Supervisory Board. The Eurochamber's consent to the ECB's proposal of appointment is required. However, once such parliamentary support has been obtained, the formal appointment must be made by an EU Council's implementing decision, as provided for by Article 26(3) of the SSM Regulation. On the other hand, the initiative (i.e., the proposal of the specific names to be appointed) does not lie with the European Parliament but with the ECB. The EP's role is thus limited to giving or denying its approval to the ECB's nomination, even though such parliamentary opinion is binding. Nevertheless, it is the ECB the institution that effectively selects the names to be proposed.

Regarding the Chair of the Supervisory Board, the ECB makes its proposal after choosing among candidates from a prior open selection procedure, which is also established by the ECB alone. The ECB must inform the European Parliament and the Council of this procedure, and it is legally required that the candidates be persons of recognized prestige and expertise in banking and financial matters not belonging to the ECB's Governing Council (again, paragraph 3 of Art. 26 of the SSM Regulation).

By contrast, the Vice-Chairperson must be appointed precisely from among the members of the ECB's Executive Board, who in turn are appointed by the European Council acting by a qualified majority among the nationals of the Member States with recognized prestige and professional expertise in monetary or banking matters, based on a recommendation from the Council, and the prior non-binding consultation to the ECB as well as, precisely, to the European Parliament (Article 283.2 TFEU), who only has a consultative say on such selection.

However, the Interinstitutional Agreement between the European Parliament and the ECB on practical arrangements for the implementation of democratic accountability and oversight of the exercise of the tasks entrusted to the latter within the SSM of 6 November 2013[3] sets out further obligations for the ECB (in the benefit of the European Parliament) as

2 Appointed by the ECB's Governing Council, pursuant to Article 20.5 of the SSM Regulation, as implemented by Decision 2014/427/EU of the European Central Bank, of 6 February 2014, on the appointment of representatives of the European Central Bank to the Supervisory Board, OJ L 196, 3.7.2014, pp. 38-39. The procedure for appointing these four ECB representatives to the Single Supervisory Board does not involve the European Parliament in any way, not even in a consultative capacity, and consequently lacks any democratic legitimacy by way of intervention by the institution that embodies popular representation at EU level, given its direct election by universal suffrage of the European citizens.

3 2013/694/EU, OJ L 320, 30.11.2013, p. 1-6.

regards the determination of the procedure for the submission and pre-selection of candidates to the position of ECB Supervisory Board.

As material guidelines on the issue, the Interinstitutional Agreement provides that the ECB should specify and publish the selection criteria, including the right balance between qualifications, knowledge of financial institutions and markets, and experience in financial and macro-prudential supervision, whereby the highest professional standards should be reconciled with the appropriate safeguard to the interest of the Union as a whole, as well as with a suitable diversity in the composition of the own ECB's Supervisory Board. As regards the procedural obligations established for the ECB by the Interinstitutional Agreement, these cover all stages of the mechanism for appointing the Chair of the ECB's Supervisory Board.

Regarding the initiation of the selection procedure, the Governing Council of the ECB is required to inform the competent Committee of the European Parliament, two weeks before the vacancy notice is published, of the selection criteria, the specific job profile, the open selection procedure, and other details. In the next stage, the Governing Council of the ECB is obliged to inform the competent Committee of the European Parliament about the applications submitted (number of candidates, qualifications, gender balance, nationality, in a list of details that the Interinstitutional Agreement leaves open with a significant 'etc.'), the method used for examining the applications, the selection criteria, the specific profile of the post, the open selection procedure, the method used to examine them, the need for the Governing Council of the ECB itself to shortlist at least two candidates in accordance with this method, and to provide the list of candidates thus shortlisted to the competent Committee of the European Parliament at least three weeks before submitting its formal proposal for the appointment of the ECB's Supervisory Board Chairperson.

In addition, the Interinstitutional Agreement gives this Parliamentary Committee one week from receiving the shortlist of candidates to submit questions to the ECB on the selection criteria and the shortlist itself, with the ECB having to provide a written reply within two weeks. As regards the appointment procedure, the ECB must transmit to the European Parliament its proposals for the Chair and Vice-Chair of the Supervisory Board, accompanied by written explanations of the reasons underlying such proposals.

This is followed by a public hearing of the proposed candidates before the competent Committee of the European Parliament. By means of a vote in that Committee and in plenary, the European Parliament will decide on its approval (or denial) to the ECB's proposed candidates for Chair and Vice-Chair of the own ECB's Supervisory Board within an indicative timeframe of six weeks from receipt of the proposal. In case of parliamentary rejection of the proposal of the Chairperson, the ECB may either turn to candidates who originally applied for the post (and discarded in the first proposal) or restart the selection process with a new vacancy announcement.

The different institutional origins of the Chair and Vice-Chair of the ECB Supervisory Board (the latter necessarily comes from the ECB's Executive Board, whereas the former must come from outside the ECB, as already seen) means that the procedure for their respective removal is also different, and that, consequently, the degree and intensity of the European Parliament's involvement differs in each case, both being greater in the case of the removal of the Chair than in the case of the Vice-Chair.

For this reason, it is provided that the Council, acting by a qualified majority of the votes of the representatives of the Member States whose currency is the euro, may adopt an implementing decision removing the Chair of the Supervisory Board because of his/her no longer fulfilling the conditions under which he/she was appointed, or for committing severe misconduct, on a proposal by the ECB alone, but endorsed by the European Parliament, as provided for by the first sentence of Article 26(4) of the SSM Regulation.

Thus, in removing the ECB Supervisory Board's Chairperson, the European Parliament has a binding role to play. But it is only in the intermediate stage of the procedure, as the initiative lies solely with the ECB, and the decision pertains exclusively to the EU Council. However, neither of them (ECB and EU Council) can proceed without the consent of the European Parliament. There lies the factor of European democratic legitimacy 'embedded' within the institutional removal or dismissal mechanism of the Chairperson of the ECB's Supervisory Board.

This is different, by contrast, for the Vice-Chairperson of the ECB's Supervisory Board, as the SSM Regulation links his or her term of office as such Vice-Chairperson to the end of his or her original position as a member of the ECB's Executive Board. Such legal text does not foresee the intermediate possibility: that the ECB Supervisory Board's Vice-Chairperson might be removed for reasons linked to his or her performance within the SSM without necessarily being connected to whether or not he or she remains on the ECB's Executive Board, as he or she could be replaced by another member of the latter ECB's formation if it were decided to remove him or her from his or her position as Vice-Chair of the Supervisory Board.

What certainly is provided for by the SSM Regulation, therefore, is the replacement of the ECB's Supervisory Board Vice-Chairperson when he/she ceases to be a member of the Executive Board in accordance with the Statutes of the ESCB and the ECB. To this purpose, the initial appointment procedure is, of course, essentially reproduced. That is to say, the termination is enacted through an implementing decision of the Council, adopted by a qualified majority of the votes from only those Member States whose currency is the euro, based on a proposal from the ECB endorsed by the European Parliament. The reflections made above about the degree of European democratic legitimacy presupposed by the admittedly limited, but at the same time binding, participation of the European Parliament is suitable, therefore, to be reproduced here with regard to this procedure.

In turn, Article 11(4) of the Protocol on the Statute of the ESCB and of the ECB confers to the EU Court of Justice the power to decide on the removal of members of the Executive Board, at the request of the ECB's Governing Council or of the ECB's Executive Board itself, without any involvement of the European Parliament. In such case and given the 'knock-on effect' that this dismissal as a member of the ECB's Executive Board has on that of the same person as Vice-President of the ECB's Supervisory Board, by connecting this second dismissal exclusively with the first one, the European democratic legitimacy disappears due to the lack of intervention on the part of the European Parliament.

Despite this, an element of European democratic legitimacy can be considered to be faintly present, in a very indirect fashion, through the intermediation of the requirements of the rule of law, which make themselves present in the fact that the dismissal is agreed by a Court in the application of the predetermined legal rules of previous parliamentary endorsement. However, those rules are, as we have seen, so open in the definition of the determining causes (serious breach of duties, or failure to meet the requirements for appointment, both imprecise notions if ever there was one) that all this confers a very high degree of discretion to the institutions involved (neither of them being the European Parliament, by the way).

That's to say, discretion is legally given to the bodies endowed with the initiative to activate the dismissal mechanism (which are exclusively ECB bodies: either its Governing Council or its Executive Board, which excludes the European Parliament). And discretion, too, is conferred by EU law to the institution to which the power to decide the dismissal is attributed, the EU Court of Justice (and not, once again, the European Parliament), given the broad terms, as already highlighted, used by the legal rules governing the issue. However,

such judicial power is conditioned by the fact that the initiative is given to other (non-judicial, and also non-parliamentary) EU institutions.

However, the European Parliament counts on a sort of 'initiative of the initiative' of the removal procedure by allowing it to 'inform' (note the *soft law* connotation intrinsic to the term) the ECB that they consider the conditions for removing the ECB Supervision Board Chairperson or Vice-Chairperson from office are fulfilled. The only binding legal effect given to this *provocatio* of the initiative is that the organ entitled to launch it, the ECB, must provide a response. Such a response, however, does not necessarily have to follow or accept the criterion for dismissal expressed in the EP communication. This drastically reduces the capacity of the democratic representation of the European citizens, limiting it to only being able to request, without binding force, to the independent technocratic body, the ECB, to exercise its initiative for dismissal, an initiative that the relevant EU's legislation attributes solely to that body, and not to the parliamentary representation of the citizens of the Member States.

The above-mentioned Interinstitutional Agreement between the ECB and the European Parliament provides that the former shall refer to the latter any proposal to remove the Chairperson and/or the Vice-Chairperson of the ECB's Supervisory Board from office, together with the relevant explanations that a draft resolution shall be voted on in the competent parliamentary Committee, and that a decision shall be taken in plenary session by the EP on the adoption or rejection of such Committee resolution. With regard to the Vice-Chairperson of the Supervisory Board, consistently with its different appointment mechanism and institutional origin, the aforementioned Interinstitutional Agreement adds that, in the event that the European Parliament or the Council inform the ECB that the conditions for his or her dismissal are met, the latter shall send its considerations to the former in writing within four weeks.

In any event, once the respective resignations have taken place, the substitution mechanism is activated once again, which does grant, in the intermediate phase, the European Parliament the capacity to veto or endorse the candidacy proposed by the ECB to the Council. The Council decides by a qualified majority of the Member States participating in the SSM, which is, as stated above, those whose currency is the euro, as well as those other Member States not belonging to the Eurozone but that cooperate within the SSM, in accordance with the Regulation of the latter.

2.1.3 Democratic legitimacy ex post: the complex relationship between the functional independence of the ECB's Supervisory Board and its democratic accountability

Once reviewed the democratic legitimacy in terms of the involvement of the European Parliament in the procedure of the ECB Supervisory Board's members appointment and early dismissal, we will now go on to examine, from the same perspective of democratic legitimacy and accountability, the monitoring system on the functional performance of this body. To that end, a distinction must be established between the two types of essential tasks pertaining to the ECB's Supervisory Board. That is, between those issuing implementing provisions of the SSM Regulation and those executing through individual decisions, the SSM rules to each singular case in the exercise of its bank-supervising functions.

2.1.3.1 Democratic oversight of the ECB's regulatory tasks within the SSM

As regards the exercise of the ECB's regulatory function within the SSM, it should be noted firstly that, in principle, it is limited to adopting Regulations only to the extent necessary to organize or specify the procedures for conducting the tasks entrusted to it by the same

Regulation (in accordance with the second paragraph of Article 4.3 of the SSM Regulation' last sentence). This is a regulatory power that, moreover, does not lie with the ECB's Supervisory Board but with the ECB's Governing Council, a circumstance which, in the absence of any specific provision of the SSM Regulation in this respect, derives from Article 17 of the Protocol on the Statute of the ESCB and of the ECB.

The ECB may also, within the field of the SSM, adopt guidelines and recommendations in accordance with the applicable Union law, as prescribed in the first sentence of the second paragraph of Article 4(3) of the SSM Regulation, or even with national law implementing EU Directives or choosing among options expressly open to the Member States by EU Regulations pursuant to the first paragraph of Article 4(3) of the SSM Regulation, in particular, as regards non legislative acts latter referred to in Articles 290 and 291 TFEU (delegated and implementing acts), in accordance with the first sentence of the second paragraph of Article 4.3 of the SSM Regulation. Specifically, the ECB is subject to the binding regulatory and implementing technical standards developed by the European Banking Agency (EBA) and formally adopted by the Commission in accordance with Articles 10 to 15 and Article 16 of Regulation (EU) 1093/2010, as well as to the provisions of the European supervisory handbook developed by the EBA, according to the second sentence of the second paragraph of Article 4.3 of the SSM Regulation.

Operating within those material and subjective constraints, the exercise of the regulatory function conducted by the ECB in the application of the SSM Regulation bears the same relation to the imperative of respect for democracy as any other type of performance, by a Union institution or body, of a regulatory function implementing another EU's secondary law which so provides. This means, in particular, that there is no need for prior scrutiny by the European Parliament on the ECB's drafts of legal provisions within the scope of the SSM in which it can operate as described in the previous paragraph, nor for subsequent approval, confirmation or validation of such drafts by the European Parliament (except, of course, in the case of delegated acts, by application of the general provisions on this type of non-legislative normative acts of the Union laid down in Article 290 TFEU and, under it, and where appropriate, by the corresponding basic legislative act.).

Thus, apart from the actual normative implementation of the SSM Regulation itself, or of the rest of the applicable EU law, or of national law transposing EU Directives or enacted to make a choice among options expressly opened to the Member States by EU regulations, the ECB does not have any other regulatory powers, except in relation to the self-organization of its own Supervisory Board. The latter also constitutes a normative development of the SSM Regulation, which, as such, isn't subject to authorization or validation by the European Parliament either, but only to judicial review by the EU Court of Justice in all matters relating to compliance with and non-violation of the SSM Regulation itself, as well as any other formal or material parameter of EU legal validity (Timmermans, 2019: pp.165-ss.).

The rest of the legislation governing the Banks subject to supervision, as well as the supervisor itself (the ECB's Supervisory Board for systemic institutions; the National Supervisory Authorities, or NSSA's, for the others), is produced outside the ECB, as has already been seen. In particular, the rules of the EBA (European Banking Authority) must be abided by banks in their organization and activities and by the supervisors of Banks (ECB's Supervisory Board, NSAB's), as clearly derived from Article 4(3) of the SSM Regulation. The EBA normative acts are adopted under the so-called 'Lamfalussy process' (or 'Lamfalussy-Larosière process'). It is a specific method of regulatory production in the field of financial services, including those of banking, which incorporates the technical expertise of regulators and consultations with private market participants and stakeholders, while seeking to maintain democratic and inter-institutional balances within the Union (Chatzimanoli, 2011; Molloney, 2008; Mollers, 2010; Vaccari, 2009).

As regards the areas in which the ECB's regulatory powers in the field of banking supervision may be deployed and exercised, the Interinstitutional Agreement between the ECB and the European Parliament was reached in accordance with what is provided for by Article 20(9) of the SSM Regulation, establishes reporting obligations on the ECB and in the benefit of the EP (as well as the corresponding rights for the counterparty institution).

The agreements between the ECB and the EP within the SSM are certainly not mere *soft law*, for they have an enabling basis in the SSM Regulation. Accordingly, they can be considered a development of that Regulation insofar as they comply with it (a matter on which the final word obviously rests with the EU Court of Justice). The normative nature of these Interinstitutional Agreements is clear, and it is not called into question by the fact that the Interinstitutional Agreement was published in the C series of the Official Journal of the European Union (that which publishes non-legally binding acts) and not in the L series (which publishes normative acts with binding legal content). This place of publication in the Official Journal is merely an administrative practice and not a binding interpretation of the SSM Regulation, which can only be done by the General Court and, above all, by the Court of Justice of the EU.

Together with its normative nature, the bilateral and reciprocally binding dimension of this Interinstitutional Agreements for its two parties (ECB and EP) should not be forgotten, as it arises from the formal commitment of both institutions. Consequently, it also has a contractual nature for them, which makes its content legally binding and, therefore, legally enforceable for its contracting parties. Unlike the MoU's[4] signed between the European Stability Mechanism (ESM) and one of its Member States in case of financial assistance asked by the latter to the former, the Interinstitutional Agreement reached between the ECB and the EP within the scope of the SSM is not an instrument of international law (treaty), because both parties (the ECB and the EP) are not themselves subjects of international law, for they belong to the same international subject: the European Union.

However, such Interinstitutional Agreements do have the character of EU legislation (Gortsos, 2019: p. 36), similar, *mutatis mutandis,* to that possessed by the MoU's signed by the financially assisted States and the EU itself (the latter acting through the Commission) within the framework of the EU's mutual assistance mechanism envisaged by Article 143(2) TFEU for the Member States with a derogation to adopt the euro as their currency, when they are in the serious balance of payments difficulties (or when there is a threat thereof), which may jeopardize the functioning of the internal market or the common commercial policy. Within EU secondary law, such a mechanism is governed by the Council Regulation (EC) No 332/2002 of 18 February 2002. The twofold legal value that the existing Interinstitutional Agreement between the ECB and the EP has within the SSM (both normative and contractual at the same time, as already seen) means that its provisions are legally enforceable and thus justiciable, depending on the case, before the EU's General Court or before the EU's Court of Justice. The validity parameter for such an Interinstitutional Agreement is clearly given in the first place by the SSM Regulation itself because of the referral that the former makes to the latter to implement some of its provisions[5].

4 Although they are not acts of Union law, but of the ESM as a distinct international organization (which, for its part, does not prevent the Commission and the ECB from acting on behalf of that distinct international organization as 'borrowed institutions'), as the Court of Justice stated in its Grand Chamber Judgment of 20 September 2016, Joined Cases C-8/15 P to C-10/15 P Ledra Advertising and Others v European Commission and ECB, paragraph 54, these Memoranda of Understanding are of a normative nature and can be considered as international agreements under general treaty law, as they are concluded between two subjects of international law (the EU Member State financially assisted by the ESM, on the one hand, and the ESM itself, as an international organization with legal personality, on the other hand).

5 In a non-exhaustive list, Article 20(9) of the SSM Regulation makes the referral to the Interinstitutional Agreement and determines what are its provision to be implemented by the latter. After stating in the first sentence that these Agreements shall cover the practical modalities of democratic accountability

In a non-exhaustive list, Article 20(9) of the SSM Regulation refers to the Interinstitutional Agreement. After stating in the first sentence that these Agreements shall cover the practical modalities of democratic accountability and oversight over the exercise of the tasks conferred on the ECB by this Regulation, the second sentence of such Article makes a non-exhaustive material delimitation, stating that '[t]hose agreements shall cover, inter alia, access to information, cooperation in investigations and information on the selection procedure for the Chair of the Supervisory Board'.

Of course, the rest of the EU law's parameters of validity are applicable when judicial review is sought against any irregularities that may arise through omissions or specific acts implementing the provisions of the Interinstitutional Agreement. Such validity parameters include, of course, EU primary law itself and, within it, the Charter of Fundamental Rights. In particular, the Charter may indeed have a particular impact within the legal validity parameter insofar as any deviations from the provisions of such Interinstitutional Agreement to the detriment of the European Parliament and its Members may entail infringements, among other rights, of that to stand as a candidate, in its dimension of protecting the proper exercise of his/her functions as MEP's, once the candidate is elected up until his or her mandate ends, in the terms that those functions are defined by the law (which precisely includes this Interinstitutional Agreement, and more rules, of course). I. e., the also known as the *ius in officium* of each MEP.

However, the powers of democratic control granted to the European Parliament by the SSM Regulation (and, in its deployment and implementation, by the Interinstitutional Agreement between the own Eurochamber and the ECB) do not go so far as to be consultative, much less to provide the European Parliament and/or its Members with binding possibilities to influence the final wording of ECB's legal acts in which the corresponding initiatives may culminate.

With these important nuances, in terms of reinforcing the ECB's independence in exercising its normative powers and the parallel undermining of democratic legitimacy due to the lack of regulatory capacity (or binding influence) on the part of the Chamber elected by direct universal suffrage of the European citizens, the aforementioned Interinstitutional Agreement establishes that the ECB will inform the competent Committee of the European Parliament, including the corresponding timetable, about the procedures that the ECB has the legal commitment to establish for adopting its regulations, decisions, guidelines, and recommendations that are subject to public consultation in accordance with the SSM Regulation, and that it shall do so before initiating such consultation.

Pursuant to the Interinstitutional Agreement, the information must encompass, in order to increase transparency and consistency in the ECB's policies, the principles and types of indicators or data it normally uses for the preparation of policy acts and recommendations (in this context, of course, within its supervisory banking policy, not within the monetary one). EP is entitled to submit comments, with the possibility of exchanges of views ('informal exchanges', the Agreement restrictively limits) to be held at the same time as the open public consultations are in progress. There is a striking contrast between the informality of these exchanges of views and the openness of the said public consultations (as well as the formality of these latter, since they are conducted through a procedure).

Once the ECB has adopted the legal act, it must, in accordance with the Interinstitutional Agreement, send it to the competent Committee of the EP, which can only be seen as a specific manifestation of the general function of (European) parliamentary

and oversight over the exercise of the tasks conferred on the ECB by this Regulation, the second sentence of such Article makes a non-exhaustive material delimitation, stating that [t]hose agreements shall cover, *inter alia*, access to information, cooperation in investigations and information on the selection procedure for the Chair of the Supervisory Board'.

scrutiny. Besides such specific act-by-act referrals, the Interinstitutional Agreement closes the circle of communication between the ECB and the EP with a regular obligation on the former to inform the later, in writing, and on a regular basis, to update previously adopted legal acts.

In addition to the fact that there are no pre-conditioning powers (i.e., there is no *ex ante accountability*) with regard to the exercise of the ECB's normative powers within the SSM, the European Parliament's tasks of democratic control do not include the possibility to revoke legislative measures already adopted by the ECB (i.e. there is no *ex post accountability* either). In other words, the European Parliament does not have any *overriding* powers over the ECB within the SSM (Ter Kuile, Wissink & Bovenschen, 2015: p. 173).

2.1.3.2 Democratic accountability in the decision-making within the SSM: the scrutiny by the European Parliament over the interactions between the ECB's Supervisory Board and the ECB's Governing Board

Decisions implementing the SSM Regulation have a complex adoption procedure, which involves the ECB's Supervisory Board and the ECB's Governing Council. The first of these two bodies, the Supervisory Board, is responsible for preparing and implementing the decisions assigned to the ECB (Article 26.1 of the SSM Regulation). By contrast, the ECB's Supervisory Board is not responsible for adopting such decisions but only for the complete drafts of such decisions, which it must propose to the ECB's Governing Council -Article 26(8), first paragraph of the SSM Regulation-. Formally, it is up to the Governing Council to decide.

It can do so either through a sort of tacit approval ('positive silence') or by means of a reasoned written refusal, within a general period of no more than ten working days -third paragraph of Article 26(8), again-, or within no more than 48 hours in urgent cases (fifth paragraph of the same regulatory provision). In the latter case of explicit and written negative, the ECB' Governing Board must specify the reasons for monetary supporting such negative. But there may be other reasons for the negative, since Article 26 of the SSM Regulation is not specific about the grounds for the ECB Governing Council's refusal of the draft submitted by the ECB's Supervisory Board).

Such is the extent of the rules on the decision-making system in the SSM, according to its governing Regulation, which does not provide for any involvement of the European Parliament. However, there exists such a rule within the Interinstitutional Agreement, which in the first paragraph of Section I.4 establishes a specific case of accountability.

It provides that, in case of an objection by the ECB's Governing Council to a project of decision submitted to it by the ECB's Supervisory Board, the President of the ECB shall inform the President of the competent Committee of the European Parliament of the reasons for this objection, albeit subject to the confidentiality requirements mentioned in the Interinstitutional Agreement itself. Such provision of the Interinstitutional Agreement does not go beyond what is permitted by the SSM Regulation because it falls within the broad terms of the reference made therein -Article 20(9)- to the Agreements between the EP and the ECB.

This means that the ECB's Governing Council must explain its reasons, not only to the own ECB's Supervisory Board, which is nothing in terms of democratic accountability (as none of the ECB's bodies is democratically elected by suffrage), but also to the European Parliament, which, by contrast, is a relevant factor from the perspective of accountability. However, the recipient part of the explanation only reaches the Chair of the competent parliamentary Committee and does not call into question the decision-making power of the ECB's Governing Council, since the obligation of the latter does not go beyond having to explain itself, but without the possibility of the Parliament being able to change the direction of the decision already taken by the ECB's Governing Council, at least in terms of a legally

binding force that the Eurochamber' intervention precisely lacks here (Ter Kuile, Wissink, & Bovenschen, 2015: p. 179).

As regards the implementation of the decisions already taken following the procedures described above, which is the responsibility of the ECB's Supervisory Board, as mentioned above, they constitute the quantitatively most abundant and statistically 'ordinary' exercise of power within the field of the prudential supervision of banks. They include both the granting of the banks of authorizations to start their operations and, where appropriate, the withdrawal of such authorizations as the initial and final terms, respectively, of the financial and corporate life of banks institutions.

Between both ends along the lifespan of banking institutions, with the respective decisions (authorization; revocation), the ECB's Supervisory Board's actions applying the SSM Regulation and other relevant legislation include the broad series of administrative decisions that may be taken in relation to these same institutions, the banks, in the exercise of its supervisory function in the full range of situations regulated by the aforementioned legislation, and corresponding to the day-to-day activity of the supervised banks in the performance of their respective business within the market.

The European Parliament (the institution embodying direct supranational democratic legitimacy, given its election by universal suffrage by the peoples of the Member States) must, however, not take part in the procedures of the implementing decisions of the ECB's Supervisory Board to conduct its tasks of prudential supervision of European banking institutions. The clearest reason for such parliamentary, but probably not the most straightforward, lies in the own independence conferred by Article 19 of the SSM Regulation on the ECB's Supervisory Board vis-à-vis the European Parliament as far as the latter's banking supervisory function is concerned.

It is surprising, however, if one follows the logic of the higher o lesser democratic legitimacy of origin(or, what is the same, the direct or indirect nature of such democratic legitimizing basis), that, while no delegation or representative of the European Parliament can take part in the meetings of the ECB's Supervisory Board (not even as an observer with a voice but without a vote), the Commission may precisely be invited by the ECB's Supervisory Board to its meetings as an observer -Article 26(11) of the SSM Regulation-, despite the fact that the EU Commission's democratic legitimacy is mediate or indirect, (precisely through its investiture by the European Parliament), as it is not elected by universal suffrage, unlike the Eurochamber.

But the most general operational reason (and regardless of the independence of the ECB's Supervisory Board vis-à-vis other European or State institutions) for the European Parliament's inability to intervene in the procedures to the enactment of ECB's Supervision Board decisions over banking institutions go linked to the very principle of separation of powers. Adopting such enforcement decisions is simply the execution of legal/normative acts. And the European Parliament, like any other parliamentary assembly within the framework of constitutionalism, is excluded from this function.

On the contrary, and as it is customary in all models framed within the coordinates of constitutionalism, the only control with binding legal effects even on the validity and consequent effectiveness of the administrative decision implementing the applicable legislation (in this case, the decisions of the ECB's Supervisory Board exercising the administrative powers over banking institutions that the SSM Regulation confers on it) is judicial control. This is a matter for the EU Court of Justice or the EU General Court, as the case may be. It is a simple question of separation of powers, then.

Another issue is, as will be seen later, that this enforcement, administrative or executive action, in which the Parliamentary Assemblies cannot participate prior to, or

simultaneously with, the procedures of banking supervision, can be the object of a typically parliamentary task. It is the classical parliamentary function of control or monitoring of the executive branch, organs, and bodies, which is exercised *ex post*, both on persons (the members of the ECB's Supervisory Board, asking them about the reasons, motivations, data, etc., which led to the supervisory action which in each case may be subject to parliamentary scrutiny), as well as on the actions themselves (adequacy of the sense and content of the actions, their effects, and consequences, etc.).

By exercising such monitoring, the EP (its Members) are entitled to question (and to criticize) the technical correctness and timeliness of the monitored executive body (here, the ECB's Supervisory Board) and even to include assessments of legality, although without binding effect, as such assessments are officially the responsibility of the Court of Justice or, where appropriate, of the General Court.

By contrast, the SSM Regulation does not confer the European Parliament powers to demand political responsibility through censure, residence, or removal from office. Or no other of such powers except the own Eurochamber's partial intervention that, as already seen before, involves its necessary approval to the initiative and final decision of other institutions (respectively, the ECB itself and the EU Council) on the removal of the Chairperson of the ECB's Supervisory Board. But the EP lacks such capacity over, but the larger number of other members of the same Board.

2.1.3.3 Parliamentary control over the functional performance of the ECB's Single Supervisory Board: reports, hearings, answers to questions posed by the European Parliament and by national Parliaments. Other transparency and accountability obligations

Linking with what has already been said above and raising the phenomenon to a category, the acts of the ECB's Supervisory Board are certainly subject to the political control of the European Parliament. This is done through specific accountability instruments devised and governed by the SSM Regulation, which compel such Supervisory Board to submit reports to the EP proactively and to hold parliamentary hearings equally on the own Board's initiative.

But the Eurochamber's oversight within the scope of the SSM can and must also be conducted through the general instruments of parliamentary control at the initiative of the European Parliament itself, for, as they can be exercised with respect to any Union institution, it is then possible to conduct them as regards the ECB' Supervisory Board. The common accountability mechanisms for all the tasks of the ECB's Supervisory Board are, in the first place, those provided for by EU primary law itself with respect to the ECB in general. That is to say, with respect to all ECB's functions and formations.

Thus, Article 284(3) TFEU provides that the President of the ECB shall submit an annual report to the Council, the Commission, and the European Council on the activities of the Bank (including those tasks carried out within the SSM) and on the Monetary Policy during the previous and the current year. The provision also envisages that the EP may hold a general debate based on this report. In addition, the same Article also states that the President of the ECB and the other members of the ECB's Executive Board may be heard by the competent committees of the European Parliament on their own initiative, but also on the initiative of the EP'S plenary.

These are archetypical tasks in the exercise of the traditional parliamentary oversight function of the executive, but also of those other bodies performing similar executive, governmental or administrative functions in legally circumscribed areas, although these bodies may benefit from the recognition, by law, of independence *vis-à-vis* other bodies or subjects, either of public or private nature, either supranational or national. The

independence exceptionally conferred to such bodies (scholarly labelled as 'independent administrations') is not synonymous, however, with a lack of control, nor is it an antonym of such control.

Nevertheless, a distinction should be made here between the parliamentary function of political control and that of demanding political responsibility through removal (which can be considered as a manifestation and consequence of the former function, but only in qualified cases explicitly predetermined by the applicable legislation).

The ECB's independence is compatible with the political control exercised over it by the European Parliament, understanding such parliamentary control as the continuous monitoring and follow-up through various legally regulated mechanisms, a part of which is the interaction with the heads of the independent bodies subject to scrutiny by the corresponding representative parliamentary assembly. Nor is the ECB's independence incompatible with additional mechanisms of political control, other than appearances, hearings, and debates, conducted in documentary form (questions for written answer, requests for relevant documentation on the subject matter, and activities of the ECB's Supervisory Board).

Quite the contrary, the ECB's functional independence is legitimized precisely by its submission to such controls carried out by the democratic representation of the sovereign citizenry, as the Explanatory Memorandum of the SSM Regulation does not fail to point out (Recital 55)[6], even though, somewhat contradictorily, the own SSM Regulation's Explanatory states later on, in Recital 75, that 'In order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence and from industry interference which would affect its operational independence'.

What the ECB's independence turns out to be in principle incompatible with is any parliamentary mechanism of political accountability, whereby the EP would be legally entitled to remove the members of the independent body due to disagreements over the appropriateness of the decisions taken by them in the legitimate exercise of their duties. Unless, of course, an exception to the contrary is expressly provided for by law. Precisely, EU primary law does not provide for such exceptions for the ECB in general terms.

However, the SSM Regulation does so with the ECB's Supervisory Board, one of the ECB's formations, bodies, or organs. When we previously examined the legitimacy of origin (by appointment of the members of such a Board), we mentioned the limited role given to the European Parliament. It was noted there that the Eurochamber lacks both the initiative and the final decision on the removal of the Chair and Vice-Chair of the ECB's Supervisory Board, as it results from article 56(9) of the SRM Regulation when it attributes to the Council the decision for such dismissal, which must be adopted by a qualified majority of the institution (meaning that if the such majority is not reached, the dismissal does not take place). However, as it has also been pointed out when examining the legitimacy of origin (appointment and dismissal), the European Parliament's opinion for or against the removal of one or the other officers at the ECB's Supervisory Board (or both officers) is binding under the SSM Regulation.

A further limitation of the role of the European Parliament within this context lies in the fact that all the members of the ECB's Supervisory Board (including those who simultaneously must be either member of the ECB's Executive Board or representatives of

6 Echoing, in turn, the positions of the Basel Committee on Banking Supervision (BASEL COMMITTEE ON BANKING SUPERVISION, Core principles on effective banking supervision, Sept. 2012, "Principle 2: Independence, accountability, resourcing and legal protection for supervisors", p. 22, available online at http://www.bis.org/publ/bcbs230.pdf) and of the International Monetary Fund (IMF STAFF POSITION NOTE, The making of Good supervision: Learning to say 'no', 18 May 2010, p. 16, available on-line at http://ssrn.com/abstract=1670831), as noted by TER KUILE, WISSINK, and BOVENSCHEN, 2015: 164.

the NSAA), the Eurochamber only intervenes in the removal (and consequent political accountability) of the Chair of the ECB's Supervisory Board. The EP is also involved in the removal of the Vice-Chair of the Supervisory Board, but with additional limitations due to his or her mandatory simultaneous membership of the ECB's Executive Board since the decision on his or her removal from the latter Board is taken by the Court of Justice, as provided for in the Protocol on the Statute of the ESCB and of the ECB -Article 11(4)-.

In addition to the applicability of the general rules dedicated by the TFEU to the ECB's accountability, there are also specific mechanisms provided for in the SSM Regulation with respect to the ECB's Supervisory Board activity. As has already been seen, the legal basis invoked by that Regulation (which therefore covers, in particular, its provisions on the democratic control and accountability of the ECB's Supervisory Board) is Article 127(6) TFEU, which is placed within the Title governing EMU, and not, however, within the part of such Treaty devoted to the institutions, one of which is, obviously, the ECB.

Specifically, Article 20 of the SSM Regulation, which provides for such specific democratic control and accountability mechanisms of the ECB's Supervisory Board, does not have its legal basis in Article 284 TFEU, which deals with the accountability of the ECB in general. Consequently, the legal basis for the ECB Supervisory Board's accountability within the SSM can only be found in its governing Regulation itself. That means that its legal basis in EU primary law is only Article 127.6 TFEU, the sole provision which, moreover, is expressly invoked as the basis of EU primary law for the entire SSM Regulation in its Explanatory Memorandum.

Therefore, under Article 20 of the SSM Regulation, the ECB's Supervisory Board is accountable before the European Parliament for the activity of the former within the SSM. But such legal rule adds a specific obligation not provided for in EU primary law (Article 284 TFEU, as has already been mentioned): that the ECB's Supervisory Board should send this report not only to the European Parliament but also to the Commission, and even to the Eurogroup.

Moreover, the report must cover only the year in question (without including the previous year and forecasts for the following year, unlike the report provided by Article 284 TFEU, which by contrast, must effectively do so). Finally, the report referred to in Article 20 of the SSM Regulation is not presented by the President of the ECB, unlike it is stated by Article 284 TFEU as regards the general ECB's report on its activities and on monetary policy.

The final report provided for by Article 20 of the SSM Regulation is publicly presented before the European Parliament by the Chair of the ECB's own Supervisory Board (not by the ECB's President). And he or she must also submit a such final report before the Eurogroup in the presence of representatives of any participating Member State in the SSM: the EU Member States whose currency is the euro, plus those representing other Member States that have established cooperation within the framework of the SSM, in accordance with Articles 2(1) and 7 of the SSM Regulation.

In addition to the obligation placed on the Chair of the ECB's Supervisory Board to report to the aforementioned institutions, paragraphs 4 and 5 of the SSM Regulation grant the European Parliament and the Eurogroup a right of initiative to hear that Chair on the performance of the supervisory functions by the Board which he or she heads. Oddly enough, a similar right of scrutiny and accountability is also granted to the Eurogroup, despite its more than dubious representative nature, given its governmental rather than parliamentary composition.

From the viewpoint of democratic legitimacy, it is questionable that this body (Eurogroup) be granted the same right as the European Parliament to hear the ECB's Supervisory Board on the exercise of its tasks. But even more questionable is the fact that

the EU Court of Justice has denied the Eurogroup the legal status of being an institution of the Union and regarded it only as an intergovernmental ministerial formation[7].

Fulfilling the various calls in the SSM Regulation for cooperation between the ECB and the EU institutions to which it is accountable, the Interinstitutional Agreement of the ECB's Supervisory Board with the EP adds that the report to be presented by the Chair of such Board must be made available to the latter, on a confidential basis, in one of the official languages of the Union four working days before the hearing and that translations will subsequently be provided in all the other official languages.

The same legal text also sets out a list of such annual report's minimum contents: the execution of supervisory tasks and the sharing of these tasks with the national supervisory authorities, cooperation with other competent national or Union authorities, the separation of supervisory tasks from monetary policy functions, the evolution of the supervisory structure and staff, including the number and composition of seconded national experts, the implementation of the code of conduct for the members of the Supervisory Board to be adopted by it according to Article 19(6) of the SSM Regulation[8], the method of calculation of supervisory fees and their amount[9], the budget allocated to supervisory tasks, and the experience with complaints lodged under Article 23 of Regulation 1024/2013 (reporting of infringements).

In addition, the Interinstitutional Agreement requires the ECB to publish the Annual Report on the SSM website, provides for the ECB's email information service to be expanded to address SSM-related issues specifically, and mandates the ECB to convert the information received via such email into a Frequently Asked Questions (FAQ) section on the SSM website.

The accountability obligation that Article 20 of the SSM Regulation establishes for the ECB's Supervisory Board has a multi-subjective addressee. It combines, in a somewhat heterodox manner, democratic obligations of control and accountability before the European Parliament, as we had already seen, with other types of accountabilities (before the Eurogroup, with the objection already noted: its non-parliamentary but intergovernmental composition, governed by the respective national laws.

Article 20(6) of the SSM Regulation confers on the European Parliament -also on the Eurogroup, with equal *caveats*: it is not an elected body but a governmental one; it is not even a Union institution, according to the Court of Justice - the right to submit questions to the ECB (that is, to its Supervisory Board). The provision is for the latter to reply orally or in writing to such questions from either body (Parliament, Eurogroup), in accordance with its procedures, with the additional requirement, in the case of the Eurogroup, that representatives of any participating Member State whose currency is not the euro also be present.

This is the classic parliamentary instrument of *question time*, or simply the possibility of supervising and controlling governmental action (that is, the activity conducted by the ECB's Supervisory Board within the scope of its tasks under the applicable regulations).

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7 Judgment of the Court of Justice (Grand Chamber) of 16 December 2020, Joined Cases C-97/18 P, C-598/18 P, C-603/18 P and C-604/18 P, Council v. Chrysostomides and Others.

8 The Interinstitutional Agreement itself stipulates that, prior to its adoption by the ECB -specifically, through its Governing Council, according to Article 19(6) of the SSM Regulation-, the ECB shall inform the competent Committee of the European Parliament of its main elements and, once adopted, the ECB shall inform the European Parliament of the need to update it. Note that the European Parliament, according to this Interinstitutional Agreement, only has the initiative to request the ECB to report in writing on the implementation of this Code of Conduct, to not adopt, to amend or to update it. The Agreement also specifies the content of the Code, something that the SSM Regulation does not, which is a serious shortcoming from the perspective of the principle of legality and of democratic legitimacy.

9 The same obligation to inform the European Parliament about this concept is reiterated in Article 17 of Regulation (EU) No 1163/2014 of the European Central Bank of 22 October 2014 on supervisory fees, OJ L 311, 31.10.2014, p. 23.

Although with the nuance of the independence of this body. Independence which, although it does not bar parliamentary control by means of questions, in principle excludes the demand for political responsibility consisting in removing the institutional heads supervised by the Parliament.

The Interinstitutional Agreement between the ECB and the EP provides that written questions shall also be answered in writing. It adds that they shall be addressed to the Chair of the Supervisory Board via the Chair of the competent Committee of the European Parliament, with a maximum deadline for reply of five weeks from their transmission to the ECB and a general principle that the reply should be given in the shortest possible time. Furthermore, and as an additional element of publicity or transparency, the same Interinstitutional Agreement compels the European Parliament and the ECB to dedicate a specific section to these questions and answers on their respective websites.

Article 20(7) of the SSM Regulation states that when the European Court of Auditors examines the management of the ECB's operational efficiency under Article 27(2) of the Statute of the ESCB and of the ECB, it shall also consider the supervisory tasks conferred on the ECB by the SSM Regulation. Although labelled as 'Accountability and reporting', this provision does not fit into the figurative sense in which the term is used in the case of scrutiny, which a representative parliamentary assembly elected by universal suffrage conducts. It does, conversely, into the purely literal sense: i.e., the rendering of "accounting" (textually speaking) accounts. In fact, and in accordance with the aforementioned regulatory provision, the Court of Auditors also audits the ECB's Supervisory Board, and this function appears in the same Article, mixed with political accountability, as has just been pointed out

After carrying out such methodologically heterodox 'encrustations' of bodies which, according to the schemes of constitutionalism, should not receive but render, democratic accounts (Court of Auditors; Eurogroup, given its intergovernmental composition), the last two paragraphs of Article 20 of the SSM Regulation once again address genuine cases of parliamentary control over the ECB's Supervisory Board. Article 20(8) provides for the possibility of holding parliamentary hearings, albeit confidential and *in camera*, on the tasks of the ECB's Supervisory Board, before the Chair and Vice-Chairs of the competent Committee of the European Parliament. Likewise, Article 20(9) of the SSM Regulation refers to other traditional instruments of parliamentary scrutiny, the Committees of Inquiry, and compels the ECB to cooperate sincerely with the EP for this purpose.

The Interinstitutional Agreement envisages two public hearings with the ECB's Supervisory Board Chair within the year following the relevant audited activities. Their celebration dates must be agreed upon between the ECB's Supervisory Board and the EP's competent Committee. The same Interinstitutional Agreement adds the possibility for the Chairperson of the ECB's Supervisory Board to be invited to additional *ad hoc* exchanges of views with the competent Committee of the European Parliament on supervisory issues.

The Interinstitutional Agreement also foresees special confidential meetings at the request of the Chairperson of the competent Committee of the European Parliament to be held on a date previously convened by both parties, whose participants are all subject to confidentiality obligations equivalent to those applicable to the members of the ECB's Supervisory Board and the supervisory staff of the ECB. The meeting must be held according to the principle of openness and the need to be explicit about the specific circumstances.

These last two principles are inherent to the proper exercise of parliamentary powers of governmental political control, in this case, exerted over the independent body entrusted with the exercise and, to the limited extent indicated above, also with the regulation of banking supervision: the ECB's Supervisory Board. Attendance at such confidential meetings is subjectively restricted by the Interinstitutional Agreement, both for the European Parliament and for the ECB's Supervisory Board itself.

Accordingly, only the Chair of the former and the Chair and Vice-Chairs of the latter's competent Committee may take part in them and be accompanied by two staff members from the ECB and the Secretariat of the EP, respectively. Moreover, and notwithstanding the principle mentioned above of openness, which means the necessary transmission of information between both parties' representatives, the confidential information so exchanged must comply with the limits set by EU law. The corresponding obligations extend to persons who have had access to the information on behalf of both the European Parliament and the ECB, even after they have ceased to hold office or employment in either body.

Furthermore, the Interinstitutional Agreement between the ECB and the European Parliament requires that no minutes or records be kept of confidential meetings, that no statements be made to the press or other media, and that all participants in these meetings sign a solemn declaration on each occasion undertaking not to pass the content of the discussions to a third party. As it is well known, such secrecy is, as a general rule, in direct conflict with the publicity inherent in parliamentary work, which is essential for forming free public opinion in a democratic system.

However, there may be exceptions to that rule of public disclosure of parliamentary works because of pressing general interests that so may require but without undermining core requirements of constitutionalism. Nevertheless, as such an exception to the key principle of publicity of parliamentary work (and through it, to the proper exercise of the rights of suffrage, active for all voters, and passive consisting in the proper exercise of the functions inherent to the elective office for which the representative has been elected), its interpretation must be restrictive, and therefore opt for the principle of publicity to the detriment of secrecy in hermeneutically dubious cases.

The Interinstitutional Agreement parliamentary places the parliamentary Committees of enquiry addressed to the ECB's Supervisory Board within the general framework of Article 226 TFEU and Decision 95/167/EC, Euratom, ECSC, of the European Parliament, the Council, and the Commission. The same Interinstitutional Agreement compels the ECB to attend the parliamentary Committee in accordance with the principle of sincere cooperation. Article 20(9) of the SRM Regulation reiterates such obligation of loyal cooperation, specifically with regard to the parliamentary enquiries, by adding that the ECB shall enjoy the same protection as that provided by the Interinstitutional Agreement to confidential meetings (a fact which, moreover, takes away to a large extent the effectiveness of such committees, which precisely lies in the publicity of enquiries and interrogations made to the examinees by the MEPs acting on behalf of the citizens).

The Interinstitutional Agreement furtherly adds that the recipients of information provided by the ECB to the EP through these Committees of Enquiry are subject to confidentiality requirements equivalent to those applicable to the members of the Supervisory Board and to the ECB staff responsible for banking supervision, whose implementing measures must bee agreed by the EP and the ECB. In particular, the European Parliament is committed to ensuring the protection of a public or private interest acknowledged by Decision 95/167/EC as an interest required of preservation of confidentiality and to non-disclose the concerned information's content.

The same conclusion applies here about the difficult relationship between the confidentiality of this information and the publicity of parliamentary work, especially that carried out in these Committees of Enquiry. However, legitimate interests, including the reputational ones, of the entities subject to oversight must be preserved. The balance reached in the Interinstitutional Agreement between these two opposing values is the viability of parliamentary enquiry and oversight, but with the filter of confidentiality *ad extra* on the part of the commissioners themselves and that of the staff who issue, handle, and

transmit the information, provided that this confidentiality serves a legitimate interest, as described above.

Article 20.9 of the SSM Regulation refers to the enactment of practical implementing rules on the obligations of democratic accountability and supervision over the ECB to conclude agreements between the latter and the European Parliament. As for the content of such agreements, reference to it has already been made in the relevant places of this paper, depending on the diverse types of accountability mechanisms, except what relates to the general rules on access to information.

In this latter respect, the Interinstitutional Agreement places an obligation on the ECB to provide the EP's competent Committee with at least a detailed and significant record of the procedures conducted by its Supervisory Board which allows any interested stakeholder to understand the deliberations, including an annotated list of decisions. As regards credit institutions in liquidation, it is foreseen that non-confidential data will be disclosed *ex post* once the restrictions on relevant information arising from confidentiality requirements cease to apply. The SSM Regulation also compels the ECB to publish the supervisory fees on its website, with an explanation of their calculation, as well as guidance on its practices of bank supervision.

Finally, an intergovernmental logic overlaps with the supranational one in what relates to democratic accountability. While the latter manifests itself in the oversight of the SSM by the European Parliament, as discussed above, the former of such both logics, the intergovernmental one (that will be discussed below), emerges in the envisaging, by the SSM Regulation, of a procedure involving national parliaments, similar to the *early-warning system* in the field of the EU policies related to the Area of Freedom, Security, and Justice, or more generally speaking in the Protocol on the role of national parliaments in the European Union.

Article 21(1) of the SSM Regulation provides that national parliaments may send motivated observations to the ECB on the annual report, which, as has been seen, the latter must prepare and send to them, as well as questions or comments -Article 21(2) of the same Regulation-. Alternatively, each Member State's legislative chamber(s) may participate in an exchange of views on the supervision of credit institutions in the respective country with the Chair or a member of the ECB's Supervisory Board and a representative of the NCA, without prejudice to the accountability of the same NCA *vis à vis* its respective State Parliament in accordance with its national law as regards the bank supervision tasks that the SSM Regulation has not conferred on the ECB, or in relation to cases where, according to Article 6 of the same Regulation, the NCA prepares and implements ECB decisions when requested to do so by the own ECB (for more details on such national parliamentary oversight, see HÖGENAUER, 2021).

Again, these are informative and advisory tasks with no possible legally binding outcome. This lack of binding effectiveness is more logical in the case of the supervision of national parliaments than when the European Parliament conducts similar tasks (those provided for in Article 20 of the SSM Regulation, as we have already seen), since in the case of the Member States in general, and their national parliaments in particular, there is a transfer of their competences to the Union in the terms that, as we have seen, are provided for and permitted by Article 127(6) TFEU.

However, this justification (the transfer of competences from the States to the Union) for the absence of binding results of national parliamentary control is clearly invalid to explain why all the results of the solely European democratic-parliamentary control also lack such binding force since the European Parliament belongs to the Union that receives these competences transferred by the Member States (at least, and most certainly, by those whose currency is the euro), and, in fact, is also one of its main institutions.

3 DEMOCRATIC LEGITIMACY AND ACCOUNTABILITY WITHIN THE SRM

In apparent symmetry with the SSM, the management and governance of the SRM are also assigned to an independent body, the Single Resolution Board (SRB), by the SRM Regulation[10]. This organizational-functional parallelism between both European single mechanisms is due to the interdependence between banking supervision and banking resolution, as highlighted, for example, in the Explanatory Memorandum of the SRM Regulation[11], and has been scholarly pointed out even prior to the adoption of such Regulation (Kern, 2013: 90-ss.; Ferran, 2014: p. 11; Veron And Wolff, 2013: *passim*).

However, from the perspective of legitimacy and democratic accountability, it is very significant to note that the ECB is not the independent body to which the SRM Regulation confers the managing and implementing of its provisions (in the broadest sense, including from typical and purely executive and administrative actions or resolutions to elements, as will be seen, of regulatory emanation and *soft-law* instruments within the scope of its tasks). By contrast, the responsibility and powers to implement the SRM Regulation are conferred to an *ad hoc* body, the SRB, whose direct source of creation is the SRM Regulation itself.

The fact that the SRB is not created by EU primary law, but by a text of secondary law, is the fundamental reason why the parameters of validity of the attribution of independence to the SRB must be sought, fundamentally, in the legal basis of that Regulation, which is none other than Article 114 TFEU, whose suitability to give coverage to the creation of independent agencies by secondary legislation has been accepted by the case law of the Court of Justice of the EU[12]. In this scenario, therefore, the balance between opposing (oxymoronic) legal coordinates such as the independence of an extra-parliamentary agency on the one hand, and democratic legitimacy and control through, essentially, the European Parliament, on the other hand, unfolds in a different legal setting to that of the same opposition between democratic legitimacy and the independence of the ECB, provided that such independence (like the ECB itself), even with the nuances analyzed above in relation to its performance within the SSM, is a direct creation of EU primary law.

In addition to this peculiarity, there is another, no less significant. It lies in the fact that the funding of the SRF is governed by an (intergovernmental) Treaty between the Member States participating in the SRM. In other words, the 'embedding' of an *a se* Treaty into a mechanism created by the EU following the communitarian legal method. This significant difference with respect to the SSM has specific implications for the SRM from the perspective of the European democratic legitimacy, in terms of institutional origin but also of performance.

10 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 on uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ *L 225, 30.7.2014, p. 1-90.*

11 Recital 11 of Regulation 806/2014: '[...] Supervision and resolution are two complementary aspects of the establishment of the internal market for financial services whose application at the same level is regarded as mutually interdependent'.

12 Judgment of the Court of Justice of the European Union (Grand Chamber) of 2 May 2006, Case C-217/04, United Kingdom v. European Parliament and Council of the European Union, paras. 44 and 45, upheld the creation of the European Network and Information Security Agency by Regulation (EC) No 460/2004 on the basis of the then Article 95 TEC (now Article 114 TFEU). Similarly, the Judgment of the Court of Justice of the European Union (Grand Chamber) of 22 January 2014, Case C-270/12, United Kingdom v. European Parliament, paras. 104 and 105, upholding the creation of the European Securities and Markets Authority by Regulation (EU) No. 236/2012 on the basis of Article 95 TEC (now Article 114 TFEU).

3.1 Democratic legitimacy and the EU's legislative choice of creating an independent agency for the management of the SRM and the SRF

The decision to create the SRM is itself one of several possible economic and financial policy options (such as, for example, the public assumption of the economic consequences of the resolution of credit institutions in irreversible crisis). In this respect, the SRM differs fundamentally from the SSM. The difference lies in the original EU law itself. In fact, Article 127(6) TFEU envisages the possible assumption of banking supervision competences by the EU and, should such transfer or assumption happen, that these competences would be attributed to the ECB. By contrast, legally speaking, nothing like that has happened with the SRM.

Its creation (that of the SRM) lacks any specific provision in EU primary law, not even as a mere possibility dependent upon its activation by enacting secondary legislation, unlike what has happened with the SSM. Article 114 TFEU, the legal basis of the SRM, does not specifically prescribe that measures relating to the resolution of credit institutions operating within the EU may be adopted under it. Nor does it provide for the *ad hoc* creation of a body to which such tasks may be attributed or that these tasks might be conferred on the ECB, unlike Article 127.6 TFEU with respect to the SSM and the ECB itself.

The level of the democratic basis of the SRM's origin, since it is not as such expressly provided for in EU primary law (hence excluding the joint national legitimacy that would come from the prior national parliamentary ratifications of the Treaties on which the Union is based), stems here from the procedures followed for the drawing up of the legal instruments that have given rise to this Single Mechanism (of Bank resolution). And once again, there is another peculiar difference between the SRM and the SSM: the partially different legal nature of one and the other, as well as the different origin of these normative instruments creating and regulating the SRM with respect to those that do the same with the SSM.

On the one hand, we have the Regulation establishing the SRM, which enjoys the democratic backing of the European Parliament's participation within the ordinary legislative procedure in accordance with which, as required by Article 114 of the TFEU, this Regulation was adopted. Such procedure includes the binding intervention of the European Parliament, exercising its capacity for co-decision with the Council.

But, on the other hand, we have the intergovernmental agreement on the transfer and mutualization of contributions to the SRF signed between the respective EU Member States participating in the SRM -the same Member States as in the SSM, according to article 4(1) of the Regulation governing this latter Single Mechanism). And precisely because of its intergovernmental and paracommunitarian nature (i.e., it does not belong to the system of sources of the European Union's law), the such intergovernmental agreement lacks any democratically legitimizing intervention at the level of the Union, for the European Parliament does not participate in the enactment in this type of Treaties among the own EU Member States.

The democratic legitimacy of the intergovernmental Agreement for the funding of the SRF is a pooled legitimacy resulting from the sum of each national legitimacy, which is channeled through the respective parliamentary ratifications to that Agreement. Such a pooling of multiple national democratic legitimacies displaces supranational legitimacy, given the fact that the European Parliament does not intervene in the procedure for drawing up this international instrument (Ruccia, 2016: p. 326).

However, any change in the conditions for transferring funds to and from the SRF must be made through an amendment of the funding Agreement, which in turn requires, once again, the respective ratifications of all the involved EU Member States' national parliaments. While this is not necessarily an objection from the point of view of democratic

legitimacy, it does constitute an operational disadvantage compared to the communitarian method since, should it have been chosen exclusively, only the intervention of the European Parliament would have been sufficient.

From a democratic perspective (this cannot be said from the point of view of European integration), such a shift from the supranational (European Parliament) to the national level (parliaments of the Member States that are signatories to the intergovernmental SRF's funding Agreement) may seem *prima facie* indifferent when it comes to giving concrete regulatory content to the collection, transfer, and mutualization of financial resources to the SRF.

'Better' alternatives, based on democratic considerations, to the intergovernmental SRF's funding Agreement? As relative as this qualifier ('better') may be, there are two main choices.

One of those solutions is the full regulation of the SRM by secondary EU law (RUCCIA, 2016: 326), including the SRF in all its element (its funding, especially), which involves the essential disadvantage of the democratic deficit usually attributed to the EU's decision-making methodology, a circumstance to which reference was made earlier in this work, and to which we can only indicate that this deficit is relative and is in gradual regression, for indeed each and any amendment of the EU primary law has increased the legislative role of the European Parliament and at the same time reduced that of the Council, although there is still much work to be done ahead.

But, on the other hand, the communitarian method has the advantage of adding a vision of the Union's interests as a whole, and although the negotiating balance between the EU Member States (within the Council, still the institution with the greatest share of legislative power) does not mean that the respective national bargaining positions are equal (especially in the case of decisions by qualified majority according to primary law). Those positions are certainly equal when deciding unanimously, although such cases are in decline to the benefit, precisely, of qualified majority voting after each amendment of the EU Treaties). Anyway, the imbalance among the Member States in the communitarian decision-making methods is at any rate minor than in the 'pure and simple' international negotiation of intergovernmental agreements, where the mere facticity weighs to the detriment of the theoretical legal equality of all States as sovereign entities within the international sphere.

Alternatively, in order to maintain the level of secondary legislation without 'touching' EU primary law, the use of Article 352 TFEU (governing the so-called EU's subsidiary powers) would also be possible where the Union may wish to achieve one of the objectives assigned to it by the Treaties, and these have not provided specific powers to do so. The share of democratic legitimacy is exactly the same as that deriving from Article 114 TFEU, insofar as Article 352 TFEU also requires the approval of the corresponding secondary legislation by the European Parliament through the ordinary legislative procedure, although its use might raise fewer technical doubts as to whether this legal basis of primary legislation allows the creation of an independent agency such as the SRB) than if that basis is, as has indeed been the case, Article 114 TFEU. Scholars' opinions differ (Ter Kuile, Wissink & Bovenschen, Willem, 2015: p.163 Wellerdt, 2015: p. 78-ss).

In addition to the option of full regulation of the SRM, including the SRF, only by means of secondary Community law (with its breakdown into the two possible legal bases just analyzed: respectively, Articles 114 and 352 TFEU), a second alternative is possible for providing EU rules to the whole SRF in detriment of the intergovernmental way: the

amendment of the Union's primary law itself, in order to introduce a specific legal basis for bank resolution, in parallel to that offered by Article 127.6 TFEU for bank supervision[13].

3.2 The (more complex) organic-functional democratic legitimacy within the SRM due to the peculiarities of the SRB compared to the ECB's Supervisory Board in the SSM

As regards the 'organic' democratic legitimacy of SRM, it should be noted that the parallel of such a Single Mechanism with that of Supervision necessarily turns out to be limited for several reasons. First, due to the specific existence of the SRB as an independent body for the management and implementation of SRM rules, which is a separate, different agency from the ECB (even when the latter acts through its Supervisory Board in the context of the SSM). This determines the existence of differences as regards the provenance (i. e., the procedure for the appointment) of some of the SRB members compared to those of the ECB's Supervisory Board. This, in turn, places the issue of the democratic legitimacy of the selection of SRB members in different coordinates from those applying to the ECB's Supervisory Board as regards the same issues, as will be discussed below.

Another difference lies in the decision-making method for day-to-day functioning, where the SRB's independence does not result in a similar share of decision-making within the SRM as the ECB's Supervisory Board has within the SSM. As additional but related, differentiating elements between both organs, the SRB's decisions are dependent upon the non-opposition of the Commission and the Council, as will be seen below, which is not the case for the ECB's Supervisory Board within the SSM (within the latter, the veto is of the ECB's Governing Council, a different body or formation of the same institution, the ECB, to which the Supervisory Board also belongs). And finally, the existence of the Intergovernmental Agreement on the transfer and mutualization of funds to the SRF is a key differential element within the SRM's legal regime which, plain and simple, does not exist within that of the SSM. Each of these issues will be analyzed hereafter from the perspective of democratic legitimacy and accountability.

3.2.1 Democratic legitimacy in the appointment and dismissal of SRB members. Differential aspects with respect to the ECB' Supervisory Board

From a legal standpoint, there exist institutional differences between the SSM and the SRM, as opposed to the usually repeated emphasized (even in this paper) interrelation of both mechanisms within the fields of the Banking Union and the EMU. The first of the two differences are obvious: the dissimilar names of the respective competent organs (the ECB's Supervisory Board and the SRB) and, with them, the diverse composition of the two bodies.

More importantly, the SRB is not a formation of the ECB but a new body: its creation as an Agency endowed with its own legal personality is laid down in Article 42 of the SRM Regulation. This is significant not only as an SRB's differentiating factor in itself with respect to the ECB's Supervisory Board but also as a result of the different respective legal bases of the creation of both bodies upon the EU's primary law: Article 114 TFEU (on harmonization of legislation within the internal market of financial services provided by banking institutions in this case) with regard to the SRB, as opposed to Article 127.6 TFEU, which does the same for the ECB's Supervisory Board.

Indeed, the latter provision, Article 127.6 TFEU, allows banking supervision functions to be attributed to the ECB, as has already been pointed out. On the other hand, the generic terms of Article 114 TFEU do not include any institutional reference as to what institution,

13 The European Council of 18-19 October 2012 discarded this path, EUCO 156/12, para 5, p. 7. But there is nothing in theory to impede a future change of approach and to make use of this alternative.

organ, or body may be the addressee of the functions according to secondary legislation enacted upon such legal basis of EU's primary law. This means that the ECB cannot be the body to which the tasks assigned by Regulations adopted upon the legal basis of article 114 TFEU are addressed, for the ECB's powers are expressly limited by the EU's primary law to the conduct of monetary policy -Article 282(1) TFEU- and to the execution of the banking supervision powers conferred on it (as has effectively occurred) by Regulations adopted in accordance with the ordinary legislative procedure, as envisaged by Article 127(6) TFEU.

Since the SRB is a body of new creation by secondary legislation and not envisaged in the EU's primary law, the restrictions derived from the Court of Justice's *Meroni* doctrine (the content of which is detailed below) on the creation of independent agencies by means of secondary legislation apply. The consequences of that case-law, as will be seen shortly after, are visible more in the SRB's decision-making mechanisms and functional aspects than in its name and the system for appointing its members.

Therefore, the first aspect of democratic legitimation to be examined within the institutional sphere of the SRM is not so much (or not only) the name of the body with the implementing functions of the Regulation governing the Mechanism (and the implementing functions of the Intergovernmental Agreement on the transfer and mutualization of the participating EU Member States' contributions to the SRF). Rather, it is a question of the composition of the SRB and, above all, of whether there is any involvement in the way the SRB's various components are appointed, of the Union's institution that directly represents the citizens: the European Parliament.

In this respect, the SRB's composition and the respective denominations of its various kind of members differ from those of the ECB's Supervisory Board. Pursuant to Article 43.1 of the SRM Regulation, the SRB consists of a Chair, a Vice-Chair, and four members as regard its elective members, in addition to its *ex officio* members, who in the SRB, as in the ECB's Supervisory Board, are representatives of the National Competent Authorities: in the case of the SRB, the bank resolution authorities.

However, in contrast to the ECB's Supervisory Board within the SSM, the four SRB's elective members other than the Chair and the Vice-Chair do not have to come from the ECB, for they are chosen following the same selection procedure as the Chair, in accordance with Article 56.4 of the SRM Regulation. According to the same provision (Article 56.4 of the SRM Regulation), the same applies to the SRB's Vice-Chair.

The SRB's Vice-Chairperson is also an elective position. But it does not have to come from the ECB, unlike the Vice-Chair of the ECB's Supervisory Board in the context of the SSM, who, as seen above, has to be elected from among the members of the own ECB's Executive Board, which, in turn, makes more rigid his or her appointment and (even more) his or her removal from office, since the latter is in the hands of the Court of Justice, as seen above.

All these requirements are not demanded for the SRB's Vice-Chairperson's selection (and even dismissal). Moreover, the six elected SRB's members are subject to a regime of exclusivity that deprives them of the right to hold any other function or office in the Union or at the national or international level (last sentence of Article 56.5 of SRM Regulation). This, among other consequences, prevents ECB's members or representatives from being elected simultaneously as members of the SRB.

Article 56 of the SRM Regulation deals with the election of the SRM's members. According to it, the Chairperson, the Vice-Chairperson, and the four other SRB's elective members are appointed based on merit, skills, knowledge of banking and financial matters, and experience relevant to financial supervision, regulation as well as bank resolution through an open selection procedure respecting the principles of gender balance, experience, and merits. The term of office is five years non-renewable as a general criterion,

except for the first Chairperson, who is elected for three years with a possible renewal for a further five years period, pursuant to Article 56(5) and (7) of the SRM Regulation.

What is, therefore, the involvement of the European Parliament in the selection procedure of the SRB's elective members as a democratic legitimizing factor of origin (appointment) in their functional performance? Article 56(4) of the SRM's Regulation, with similar provisions in this respect to those established by the SSM Regulation for the elective members of the ECB's Supervisory Board, provides that the European Parliament (and also the Council) shall be kept duly informed at all stages of the procedure. The role of the European Parliament in the pre-selection system for candidates for elective positions on the SRB is thus limited to such right of information.

As regards the actual appointment and dismissal stages, Article 56(6) and (9) of the SRM Regulation provide for a procedure identical to that laid down in Article 26 of the SSM Regulation. The European Parliament has a binding power of authorization over the Commission's proposal for appointing candidates to the SRB. Once the European Parliament's consent to the Commission's proposal has been obtained, the appointment is formally made by the Council through an implementing decision to be adopted by a qualified majority.

The same applies to the removal of these SRB's elective members: there is clear parallelism with the SSM Regulation as regards those of the ECB's Supervisory Board. The European Parliament has the same power of prior binding consent to the Commission's proposal with respect to the possible removal of SRB's elected members, but in this case, on grounds specified by the law: Article 56(9) of the SRM Regulation. That is if the corresponding SRB's elective officeholder no longer fulfils the conditions required for performing his or her duties or commits serious misconduct.

The Council must finally decide the removal of a proposal from the Commission authorized by the European Parliament through an implementing decision approved by a qualified majority. And, as in the SSM Regulation, the European Parliament counts on something of an 'initiative of the initiative' power to inform the Commission that, in the opinion of the Eurochamber, the grounds for dismissal have been met (Article 56.9 *in fine* of the SRM Regulation). Although it is beyond the scope of this paper, which is confined to considerations of direct democratic legitimation linked to the role of the European Parliament, it should be noted here that an equal 'initiative of the initiative' for the dismissal or removal of elected members of the SRB is granted in the same provision to the EU Council.

The European Parliament's authorizing powers over the proposal of the SRB's elective members are similar to those it enjoys as regards the ECB's Supervisory Board, but with a different nuance in relation to the SRB's Vice-Chairperson, by contrast with the same office in the ECB's Supervisory Board. Such difference does not refer to the decision-making status of the European Parliament but rather to the institutional origin of each Vice-Chair capacity.

In the case of the ECB's Supervisory Board, its Vice-Chairperson, who must also be proposed by the Commission, authorized by the European Parliament, and appointed by the Council, must necessarily come from the ECB's Executive Board -Article 26(3) of the SSM Regulation, which severely limits the selection options: not only for the European Parliament, of course (but also for it), as well as for the Commission and the Council themselves.

However, this limitation does not apply to the SRB's Vice-Chairperson position. On the contrary, its provenance from the ECB not only isn't an obligation but even an option, in view of the absolute incompatibility rule that the SRM Regulation establishes for the SRB's elective members -once again, according to Article 56(5), second paragraph-. With this sole exclusion, the range of elective options grows quantitatively.

Mutatis mutandis, what has been said about the meaning, in terms of democratic legitimacy, of the European Parliament's participation in the appointment and dismissal of the ECB's Supervisory Board members can be applied to those of the SRB's. The European Parliament's decision is certainly binding, but the Eurochamber lacks the powers of both 'initiative of the initiative' and pre-selection of candidates (which in this case is granted to the Commission), as well as the final decision on their appointment, which is left to the Council.

In other words, the final decision corresponds to a Union's institution with a national governmental composition, the Council, and is not politically accountable to the European Parliament. Instead, the democratic legitimacy of such an EU institution, more or less indirect according to the specific terms of each of the respective applicable national legislations, derives (and depends) on what is determined precisely by such legislations.

3.2.2 Democratic accountability of the SRB's functional performance, and of its interactions with the Commission, the Council, and the ECB within the SRM

The SRM Regulation devotes recitals 42 and 43 of its Explanatory Memorandum, as well as Articles 20 and 21) to the democratic legitimacy of the SRB at the functional level, which faithfully transposes or reproduces those devoted to the same issues by the SSM Regulation with respect to the ECB's Supervisory Board. Therefore, *mutatis mutandis* (i.e. essentially replacing the references to the ECB's Supervisory Board within the SSM Regulation with parallel references to the SRB within the SRM Regulation), the type of provisions relating to these aspects (that's to say, those regulating the reciprocal obligations and rights of the European Parliament and the SRB) are very similar, if not identical in content.

Thus, reference will be made henceforth to what has already been said above about the ECB's Supervisory Board but replaced by the SRB; the references are then made to the former and addressing the differential aspects where appropriate. Nevertheless, does it suffice to make here reference to what the SSM Regulation provides for in terms of democratic accountability to deal with such the same issue within the SRM? Not really. Article 19 of the SRM Regulation expressly grants the SRB a status of independence, whereas its Explanatory Memorandum (Recital 31) states that '[i]n order to ensure a swift and effective decision-making process in resolution, the Board should be a specific Union agency, with a specific structure, corresponding to its specific tasks, and which departs from the model of all other agencies of the Union'. But despite all this, the decision-making mechanism devised by the SRM Regulation, in fact, calls openly such independence into question.

Just as the SRB, generally speaking, does not implement but supervises the implementation of the resolution arrangements by the national authorities and may only issue enforcement orders to the bank under resolution if the national authority does not properly comply with the SRB's resolution decision - Articles 18(9), 28 and 29 of the SRM Regulation-, the SRB proposes these arrangements but does not decide on them. This is done by the Commission and the Council as a result of Article 18(7) of the SRM Regulation.

The reasons were set out above and stem from the well-established *Meroni* doctrine of the EU Court of Justice[14], according to which only the Union's institutions and bodies created by the Treaties can be held responsible for adopting legally binding decisions of a general nature or individual decisions involving a margin of discretion in their adoption

14. Judgment of the Court of Justice of the European Communities (now the Court of Justice of the European Union) of 13 June 1958, Joined Cases C-9/56 and 10/56, Meroni & Co., Industrie Metallurgiche, SpA v. High Authority.

(Georgosouli, 2021: p. 82; Lintner, 2017: p. 603). Moreover, the SRB is not the only body with the power to trigger the resolution procedure; the ECB may also do so, albeit by informing the SRB, as stated by Article 18(1), fourth paragraph of the SRM Regulation.

However, the SRB has the right of initiative, as it is solely responsible for producing the formal proposal to trigger the resolution procedure -Article 18(6) of the SRM Regulation-, including the choice of the resolution scheme to be applied -Article 18(7) of the SRM Regulation- from among those provided for by the SRM Regulation. This means that the ECB shares with the SRB a kind of 'initiative of the initiative', or 'pre-initiative', and must also be notified by the SRB when the idea of carrying out the bank resolution comes from this latter organ, according to Article 18(2,) *in fine*.

Indeed, as noted by Lintner, it is normally the ECB who triggers the decision if it considers that an institution under its direct supervision within the SSM is in serious difficulties or is likely to be in serious difficulties, while the SRB may exceptionally determine the same if it informs the ECB of its intention to do so and the latter has not acted within a maximum of three days (Lintner, 2017: p. 599). This is without prejudice to the fact that the procedure laid down in the Regulation governing the SRM encourages the Board's proposals to 'come to fruition' in the sense that it makes it easier for them to become the content of the final decision.

However, to do so, such SRB's proposal must pass through two binding decision-making 'filters', as provided by Article 18(7) of the SRM Regulation. The Commission must firstly accept as its own proposal the adoption of the resolution scheme communicated to it by the SRB, but the own Commission can also reject it: Article 18(7) of the SRM Regulation. Secondly, it is up to the EU Council to endorse (or not) the Commission's proposal.

The simplification comes from the noticeably short deadlines for the total or partial veto of both EU institutions (Commission: 12 hours; Council: 12 hours from receipt of the proposal; and 8 hours for the SRB if the Commission proposes and the Council endorses a significant modification in the amount of the proposed scheme of resolution). Such simplification, envisaged in Article 18(7) of the SRM Regulation, is also a result of the *quorum* set for a favorable vote by the Council: a simple majority is sufficient, with the Commission and/or the Council (as the case may be) having to justify the reasons for their respective objection.

The measure will be deemed to have been adopted when neither the Commission nor the Council raise objections within 24 hours of the SRB's transmission of the proposal. Conversely, in case of objection by the Council, where they consider that it is not fulfilled the public interest criterion consisting in the inability of the relevant banking institution to meet its debts or other liabilities as they fall due, or in the existence of objective elements indicating that it will not be able to do so in the near future, the relevant entity shall be wound up in an orderly manner, and in accordance to the applicable national legislation -Article 18(8) of the SRM Regulation-.

From the perspective of democratic accountability, it should be noted that, as envisaged in the SSM Regulation with respect to the ECB Governing Council's rejection of a decision coming from the ECB's Supervisory Board, the SRM Regulation does not provide for specific parliamentary scrutiny over the reasons that lead the ECB Governing Council to object the proposed resolution scheme presented by the SRB and approved by the Commission, nor of the reasons that make the Commission reject or amend the SRB's proposal.

However, while the Interinstitutional Agreement between the ECB and the European Parliament remedies this omission by compelling the former to transmit to the latter (at least to the President of the competent Committee of the European Parliament) the reasons for its

objection, a similar provision is lacking in the Interinstitutional Agreement signed between the SRB and the European Parliament[15]. Such omission or gap is a clear shortcoming in terms of democratic legitimacy as regards the relevant decisions of the Commission and/or the Council within the SRM.

Paradoxically, the various forms of democratic accountability which, in faithful transposition of those established by the SSM Regulation for the ECB's Supervisory Board (although the latter, unlike the SRB, is not subject to the double binding decision-making filter of the Commission and the Council, as it is the SRB), Articles 20 and 21 of the SRM Regulation only apply to the SRM and do not encompass the content and reasoning of the Commission's and the Council's resolutions which the SRM's proposals of decisions and resolution tools are dependent upon.

Above all, that happens when the criterion of either the Commission or the Council is totally or partially adverse to that expressed by the SRB in its proposed resolution scheme, but also does when they coincide, since in the latter case, only the SRB can be subject to parliamentary oversight, but not the Commission and the Council. Conversely, when the Commission or the Council's refusal is to be scrutinized, the SRM Regulation does not extend to either institution the specific democratic accountability mechanisms that it foresees with respect to the SRB.

This clear anomaly from the standpoint of the democratic legitimacy in the legal framework of the SRM (SRM Regulation and Interinstitutional Agreement between the SRB and the European Parliament) does not prevent to apply the general mechanisms of control by the European Parliament over both institutions (questions, Committees of Inquiry, hearings, debates, etc.) when appropriate, nor even the exigence of political accountability through a motion of censure, although only against the Commission, as results from Articles 17(8) TEU and 234 TFEU.

4 CONCLUSIONS: DEMOCRATIC WEAKNESSES IN THE SSM AND THE SRM WITHIN THE MORE GENERAL CONTEXT OF A GROWING EUROPEAN DEMOCRATIC DEFICIT IN EMU

The landscape described throughout this paper leads to a clear conclusion: a democratic deficit prevails in the SSM and the SRM. But it is not the democratic deficit generally attributed to Community decision-making procedures (the absence of initiative and full legislative capacity of the European Parliament, the legislative nature of the EU Council, despite its governmental composition, that relegates the Eurochamber to the mere role of an essentially negative co-legislator through the veto in the ordinary legislative procedure, the still relative abundance of cases of merely consultative intervention by the European Parliament through the also now called special legislative procedures...).

The SSM and the SRM suffer from an increased democratic deficit. The mechanisms of accountability are merely informative, and the binding powers of the European Parliament are scarce and weak (approval or rejection of the Commission's proposal for the appointment of members of the ECB's Supervisory Board, or of the SRB's, and moreover, only for the appointment of some, and not of all, such members). Other institutional characteristics and law sources go hand in hand within the SSM and the SRM (Olesti Rayo, 2018: pp. 95-97).

The responses to COVID have meant a change of direction in the EMU in general (from austerity as a reaction to the 2008 crisis to expansionary policies in the aftermath of

15 Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight of the exercise of the tasks conferred to the Single Resolution Board within the framework of the Single Resolution Mechanism of 16 December 2015, OJ L 339, 24.12.205, p. 58-65.

the pandemics: activation of the safeguard clause of the Stability and Growth Pact, SURE or *Next Generation EU* programs, etc.). And also, specifically in the area of banking supervision, with its possible impact on bank resolution, due to the change in prudential parameters as well as the link existing between both functions (Olesti Rayo, 2018 & 2021).

But these are short-term responses and have been configured as measures implementing the existing legal framework, without changing the structural deficiencies from the perspective of democratic legitimacy and the consequent parliamentary control, probably due to the urgency of dealing quickly with the consequences of all kinds, including, as far as it is concerned, the economic and financial consequences of the crisis (initially only of public health) of the COVID-19 (Sebastião 2021; Ladi & Tsarouhas, 2020: p. 1053).

In a nutshell, the increased democratic deficit (compared to the EU as a whole) existing within the SSM and the SRM is the result of a motley *cocktail* of complex regulatory instruments, institutional and procedural aspects, and the limited binding powers of supranational (European Parliament) or national (Member States' parliaments) direct representatives of citizens. As regards regulatory complexity, this is particularly evident in the case of the SRM, given the bifurcation of its legal framework between an EU Regulation and an intergovernmental agreement. Generally speaking, there is a quantitative dispersion in a constellation of different legal instruments: Regulations, Directives, intergovernmental Agreements, EBA prudential standards, etc.

In addition to such regulatory complexity, we have the organic-institutional proliferation within the SSM and the SRM, which results in an 'alphabet soup' or a 'soup of acronyms', corresponding to each of the many institutions, bodies, and agencies that overlap, sometimes with little clarity as to their respective tasks. There is also the reciprocal functional interaction between the former (agencies, institutions, bodies) and the latter (their respective tasks and roles).

We have the EBA, the ECB (in its various formations: Supervisory Board, Executive Board, Governing Council), the SRM, in addition, of course, to the Commission, the EU Council, the European Parliament, the Court of Auditors, and, in the cases of litigation, the Chambers of Appeal, the General Court, the Court of Justice, as well as, finally, the Eurogroup, which is not an EU institution according to the Court of Justice's case-law, although the concrete and detailed legal framework of the SSM seems to refute such judicial characterization, as seen above.

For proper democratic oversight and, where possible, political accountability, it is necessary to know precisely who is doing what, and that is not easy within the respective fields of the SRM and the SSM. The almost complete de-parliamentarisation of decision-making, at least as far as the European Parliament is concerned, isn't an ingredient in favor of democratic legitimacy.

It is precisely this 'supranational or European deparliamentarisation' seems to have been the main trigger, and not just a legal one, for the recourse to an intergovernmental agreement to fund and mutualize the SRF. Such prevailing technical-legal complexity, in turn, gives rise to a lack of transparency within the EU's legal framework of bank supervision and resolution. It is not sufficient justification the consideration that, unlike monetary policy, where transparency increases the effectiveness of the measures adopted or even the ECB's probity, in the field of supervision, it can produce adverse effects on the supervised banks, their customers, and users, and even on the ECB's own performance (Türk, 2019: p. 51).

All this landscape, in short, lies at the antipodes of what should be the public knowledge of the works conducted by the SRB and the rest of the relevant public actors. As a general rule, such publicity is essential for citizens' control and monitoring (directly at the

ballot box or indirectly through their parliamentary representatives) of the task carried out by their governing bodies, national or European.

Finally, the legal framework of SSM and SRM within the European Banking Union gives a clear predominance to experts at the expense of the sovereign citizenry, thus ultimately prioritizing technocracy over democracy. This imbalance in favor of the former to the detriment of the latter contrasts glaringly with the fact that it is not technocracy but democracy that constitutes one of the essential values on which the Union is founded, as provided for in Article 2 TEU.

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