

Contribution to the discussion at the 3rd ACELG Conference on *Postnational Democracy: Beyond Representation in the EU*, Amsterdam Centre for Law & Governance, University of Amsterdam, Amsterdam, 22 November 2013

It is a pleasure to be a discussant today at this conference on democratic embedment and post-democratic responsiveness of the institutions, in my case notably concerning the ECB. It is always a pleasure to work with Chiara Zilioli so I am glad I have been asked to be a discussant after her presentation. Good, to see you again, Chiara, on a historic day like this!

On this historic day, fifty years after the assassination of US President John F. Kennedy. A lot has been said already on this, which I will not do as I intend to focus on the subject of this event. Yet, culturally, it is always amazing to see how certain moments in time seem to define an epoch. The 1960s were times of change and hope, and of democratisation and participation of ever more politically conscious citizens. The 1960s were epitomised by the Kennedys and Martin Luther King. Being a child of the 1950s, this hope has never completely left me and has imbued my vision of the world and of our place in it. As difficult as it may be after other such defining moments like Chernobyl and Fukushima, Srebrenica and the fall of Lehman Brothers, not forgetting 09/11 or 07/07, to mention very different historic moments, I would like to recall the hope of those years today. As Bob Dylan sang: *The times they are a'changing*. So, let's keep hope in dark moments.

Dark these moments are for many in crisis-stricken Europe. The Great Recession and the euro area debt crisis have left deep marks in the economies of most Member States and in the lives of millions of Greek, Portuguese, Irish, Spanish and other EU citizens. Responsiveness to these citizens is ever more necessary today. As is a staunch stance against petty nationalism. As ECB President Mario Draghi reminded his audience in Berlin yesterday: "We are not German, neither French nor Spaniards nor Italian: we [at the ECB] are Europeans and we are acting for the eurozone as a whole"¹. Working for Europe and mandated by Europe. (Chiara Zilioli already referred to this speech by the ECB President. She also mentioned Mario Draghi's appearance a year ago before the *Bundestag* in Berlin². By the way, the multinational make-up of the Governing Council is a reason behind its confidentiality of the proceedings.) The mandate of the ECB has been broadened to include – far more than has originally been the case – *financial stability*, next to *monetary stability*. This implies less clarity with respect to output accountability as it is easier to measure whether inflation is below but close to 2% for the euro area as whole (monetary stability) than whether the ECB has contributed effectively to

¹ Quoted by the Financial Times, 22 November 2013; see: <http://www.ft.com/intl/cms/s/0/1891c476-52b6-11e3-8586-00144feabdc0.html#axzz21YN18OXs>. Mario Draghi's keynote address at the *Süddeutsche Zeitung Führungstreffen Wirtschaft* 2013 in Berlin on 21 November 2013 can be found at the ECB's website: <http://www.ecb.europa.eu/press/key/date/2013/html/sp131121.en.html>.

² See: <https://www.ecb.europa.eu/press/key/date/2012/html/sp121024.en.html>.

financial stability. The ECB's prominent role in the European Systemic Risk Board was the first such broadening post Lehman. The assumption by the ECB of a direct supervisory role on about 130 systemically significant banks and an indirect but direction giving role in the supervision of all other about 6,000 European banks (SSM) is the following major step.

On representation and participation many insightful contributions have been made in the papers. I have to admit that I have not been able to read them all. I did read Kenneth Armstrong's paper which I considered very insightful especially as he relates to the narrative on Europe and the nation state and the artificial and outdated boundaries between the two. This socio-cultural element of the crisis management system comes close to the element that Chiara Zilioli mentioned: the belief in a currency, as all currencies these days rely on confidence in their functions as unit of account, medium of exchange and store of value, and the credibility of its guardian. The European Council's functioning that Kenneth Armstrong describes recalls the title of a blog I saw today: *Pourquoi les leaders nationaux ne sont pas de bons leaders européens?*³ When it comes to concepts and boundaries between them, allow me to say that I see far too often (but not at this conference!) references to undefined or ill-defined terms dominate the debate: the term 'political union' is a case in point. Often, the debate runs as follows: monetary union requires a stronger economic union and that requires 'political union', an undefined but unattainable concept according to this line of thought. As if a community of nations and people with its own representation and direct elections to at least one of its institutions is not, to a degree, already a 'political union'. We need to go beyond old concepts, like 'nation states' and 'federations', and move away from interpreting the world, and law, on the basis of 19th century ideas and concepts. This bars our understanding. And our ability to work towards solutions in today's interconnected world.

³ *Pourquoi les leaders nationaux ne sont pas de bons leaders européens*, Ewoud LAUWERIER, *Sauvons l'Europe*, 22 November 2013 ; available at : http://www.sauvonsleurope.eu/pourquoi-les-leaders-nationaux-ne-sont-pas-de-bons-leaders-europeens/?utm_source=rss&utm_medium=rss&utm_campaign=pourquoi-les-leaders-nationaux-ne-sont-pas-de-bons-leaders-europeens.

Let me briefly mention four elements of representation and responsiveness on the part of the ECB in the newly emerging context, elements that are relevant in the context of Article 11 TEU⁴:

1. The ECB's role in advising governments during the crisis and post-crisis through opinions on draft legislation in the ECB's fields of competence, often in tandem with the Commission, in the areas of state aid and bank restructuring. I have referred to this before in my presentations and in legal writing⁵. This action helped keep the internal market and the single monetary policy as much intact as possible during the crisis. Here, the ECB played its expert role and within its mandate to act in the common European interest.
2. The ECB's role in the troika and in influencing economic policy in the Member States beyond the confines of mere central bankers' policy advice, the advisory role that central banks have traditionally undertaken and are considered competent to undertake in the informal interplay between monetary and economic policies. (The changed functioning of the ECB in this area have led Thomas Beukers to call it "New ECB" in his excellent contribution to the *Common Market Law Review*.⁶) There are many good reasons for conditionality and structural reform in the Member States but the role the ECB plays cannot be called responsiveness to the citizens.
3. The planned consultations on draft legal acts in the area of banking supervision, which are necessary for the ECB to get feedback from the credit institutions it will supervise and to get to know the markets, as supervisors should, but which also carry the risk of agency capture.
4. The very detailed rules on accountability in the Interinstitutional Agreement between the European Parliament and the ECB in its role in the Single Supervisory Mechanism⁷, the joint system of banking supervision as of 1 November 2014. I advise everyone interested in ex post accountability to study this text, and also the newly signed or at least agreed Memorandum of

⁴ Article 11 Treaty on European Union reads as follows:

Article 11 TEU

1. *The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.*

2. *The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.*

3. *The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.*

4. *Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.*

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

⁵ Notably, René Smits, European supervisors in the credit crisis: issues of competence and competition, Chapter 15 in Mario Giovanoli and Diego Devos (eds.), *International Monetary and Financial Law in the light of the Global Crisis*, 2010, pp. 305-327.

⁶ Thomas Beukers, The new ECB and its relationship with the eurozone Member states: between central bank independence and central bank intervention, *Common Market Law Review* 50: 1-42, 2013.

⁷ Inter-Institutional Agreement (IIA) between European Parliament and ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, available at:

<http://www.europarl.europa.eu/document/activities/cont/201311/20131107ATT74064/20131107ATT74064EN.pdf>

Understanding between the ECB and the Ecofin Council⁸. The Interinstitutional Agreement (IIA) embodies the responsiveness of the ECB as an autonomous agency for banking supervision. (Central bank independence and supervisory authority autonomy are two distinct concepts, a distinction that I cannot go into here.) The IIA contains:

- Confidentiality restraints
- Far-reaching reporting requirements
- Three types of hearing: ordinary public, ad hoc and confidential
- Access to information and dedicated webpages on banking supervision.

Let me end with a question on responsiveness which relates to the ECB's communication policy that was mentioned earlier. I consider the question that I have been asked by my Portuguese friends a challenging one: why do banks pay (almost) zero interest and do our governments pay so much more to borrow in order to finance their budgets? There are valid reasons for this state of affairs but is a major challenge to explain it in terms understandable to our citizens.

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⁸ Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), available at: <http://register.consilium.europa.eu/pdf/en/13/st15/st15963.en13.pdf>.