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THE INDEPENDENCE OF THE ECB: JUSTIFICATION, LIMITATIONS AND POSSIBLE THREATS

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ABSTRACT. The paper first takes a brief look at the economic and judicial justification for the independent status of central banks in general and will thereby also illustrate the different manifestations of independence that need to be distinguished. Recent developments will then form the initial point for a detailed analysis of the concrete range of the ECB's independence. This analysis will end with a positive conclusion. Until today its independent status has not been violated by any of the analysed measures. Possible threats, however, continue to exist. Safeguarding the independent status of the ECB thus remains an important mission not only for legal scholars.

JEL codes: E58; G21; G33

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1. Independence in Times of Crisis

"It shall be independent in the exercise of its powers and in the management of its finances." Though this rule[1] concerning the European Central Bank (ECB) did not enjoy the privilege of being quoted on one of Germany's most prominent tabloid papers ("Bild") as it was the case with the no-bail-out clause of Art. 125 of the Treaty on the Functioning of the European Union (TFEU), the ECB's independent status is something any regular newspaper reader is most surely aware of – at least since the Eurocrisis.[2] From a normative perspective recent developments, however, have once again raised the question of the exact content of central bank independence, a question this paper seeks to find an answer to.

To do so I will first take a brief look at the economic and judicial justification for the independent status of central banks in general (2) and will thereby also illustrate the different manifestations of independence that need to be distinguished (3). Recent developments will then form the initial point for a detailed analysis of the concrete range of the ECB's independence, highlighting normative limitations as well as possible threats (4). The paper, however, will be able to end with a positive conclusion: Until today the independent status has not been violated by any of the analyzed measures. Possible threats, however, continue to exist.

2. The Justification of Central Bank Independence

2.1 Economic background

Though this might come as a surprise to the general public, the independent status of a central bank is no matter of course. Due to the fact that central banks perform responsibilities of public administration, integrating these agencies into the general hierarchical organization of administration would appear a lot more convincing. And also from a historical perspective independence from governmental interference is by no means the somewhat natural status of a central bank.[3] Not least the Bank of England was in actual fact founded in 1694 especially to help Great Britain's government out of its financial misery that had occurred due to several (and not always successful) war affairs. Quite similarly Alexander Hamilton hoped for significant assistance, "in obtaining pecuniary aids, especially in sudden emergencies"[4] when founding the first Bank of the United States in 1791.

Only the gradual switch of central banks from such "Banks of the State" to "Banks of the Banks" that took place during the 19th and 20th century makes the whole "independence debate"[5] understandable. It is only since then that their main objective – with diverging focal points – lies in safeguarding price stability[6] which is also the normative "core purpose"[7] of the ECB[8] according to Art. 127 (1) TFEU.[9] Can a central bank – this is the opening question of the debate – perform this task effectively as long as it is integrated into and thus dependent from (or even controlled by) the government? Two possible problems might hinder such an effective performance: First of all several inflation favoring conflicts of interests might arise as regards the governmental fiscal, wage, and employment policy.[10] And second of all politicians might be apt to consider a price-enhancing expansion of money supply in order to profit from the possible short term economy-boosting effects[11] while neglecting the long-term inflationary impact of such measures – especially with general elections coming closer.[12]

As can be seen in an article by Milton Friedman published in 1962[13] the answer to this question was discussed more or less openly at first. However, in the middle of the 1980s the pendulum continuously began to swing more and more towards the supporters of independence.[14] Trend-setting thereby was a paper by Kenneth Rogoff, who proposed – in order to avoid the inflationary incentives of the "policymaker"[15] analyzed game-theoretically by Robert Barro and David Gordon[16] – to lay monetary policy in the hands of a conservative (and independent) agent.[17] This agent thereby should be known to place a greater weight on inflation stabilization relative to unemployment stabilization.[18] Though Rogoff saw the problem that his institutional setting might impair the stabilizing function of monetary policy[19] – a function that could be witnessed during the last financial- and following Eurocrisis – he believed such an effect unavoidable yet diminishable by choosing a conservative but not too conservative agent.[20] During the 1990s the necessity of an independent central bank – supported by several empirical studies[21] – finally became[22] a central if not the central pillar of modern central bank theory[23] finding its temporary endpoint in the creation of the "most independent central bank of all"[24]: The ECB.

However, this "intellectual revolution"[25] or "intellectual shift toward central bank independence"[26] did not remain undisputed within the (academic) economic field. In actual fact the last years have seen an increasing number of scholars believing that an independent central bank is either not necessary or even harmful for ensuring price stability – and the historical experience of the last financial crisis has added voices to this critical choir.[27] Not least John B. Taylor, referring to the above mentioned article by Milton Friedman, has consistently argued that it is less the institutional position of a central bank but rather the question whether its monetary policy is based on rules (and not on discretion) that is decisive for safeguarding price stability.[28] Taylor himself offers several empirical studies to prove his analysis. However, from a normative perspective Taylor's arguments hardly make a convincing point against central bank independence for two reasons. First of all any rule needs to be interpreted.[29] Though Taylor's rules might include clear legal consequences depending on certain economic circumstances it will be impossible to conclude whether such circumstances are given without some sort of discretion. Different interpretations of economic settings remain possible – otherwise monetary policy might as well be left to electronic devices, a conclusion even Taylor would probably not agree to. At least these remaining discretional considerations, however, should remain in the hands of an independent central bank. And second of all: Nobody has yet been able to formulate monetary rules that fit to any economic development without exception.[30] In actual fact Taylor himself did not believe his "Taylor-Rule" to be necessarily followed under all circumstances – exceptions should be possible. Monetary policy without any discretion of the relevant actors thus seems simply not possible.[31] American central bankers have therefore always emphasized that monetary policy is "a matter of judgement"[32] and thus "an art rather than a science."[33] Taylor's findings thus might give reason to demand a detailed explanation by the central bank when deviating from a well formulated monetary rule, his statement "Monetary Policy Rules Work and Discretion doesn't,"[34] however, appears way too simplistic. Putting these necessary at least partly discretionary decisions in the hands of independent central bankers thus is nothing Taylor's rules concept would stand against.

Taylor, however, indeed has a point where he argues that it is less the formal but rather the internal independence of central bankers that is decisive.[35] And indeed: A lot of central bankers might not be equipped with the necessary amount of such internal independence as a study by Roland Vaubel suggests even for the so exemplary German Bundesbank.[36] But is the potential danger of such a "political capture" an argument against the formal independence of central banks as such? Obviously not, as only formal independence offers at least the chance of independent and goal-focused decisions in the first place. Formal independence is thus a necessary yet not sufficient condition[37] where one wants to uphold this chance.[38]

The criticism formulated by Bernd Hayo and Carsten Hefeker therefore focuses on a different aspect. They first of all point out that the repeated negative correlation between independence and inflation rate was merely a statistical correlation not to be confused with causality.[39] Several empirical studies in fact pointed to the conclusion that reaching the price stability goal depended less on the institutional status of the central bank but mainly on the inflation culture of a society.[40] Thus, in countries where preventing inflation was regarded as a necessary requirement for the prosperity of a society even a dependent central bank would be able to safeguard price stability.[41] However, no independent central bank would stand a chance against a "culture of inflation" – especially as the independent status was mostly guaranteed only by ordinary statute.[42] Yet again, these findings alone still not deliver a decisive argument against independence as such: In the worst case this status would be merely ineffective and thus useless but still not harmful. Hayo and Hefeker, however, doubt such a "useless but not harmful" conclusion due to the fact that there is no proven negative correlation between independence and inflation. Under such circumstances, Hayo and Hefeker point out, it appeared hardly justifiable to put monetary policy in the hands of an independent and conservative agent whose decisions were not foreseeable yet, once taken, impossible to amend for the politicians in charge[43] – especially due to the existing lobbying structures[44] that might influence the decisions taken by such an agent. Nevertheless Hayo and Hefeker do not oppose an independent central bank under all circumstances. According to their findings there might be rational reasons for a society to stick to such a model where it was compatible with the general political and legal system as well as the organization of the labor market. What they wanted to make clear, however, was the fact that an independent status was neither generally the best status nor for itself sufficient for safeguarding price stability. It appears fair to say, therefore, that a lot of questions (still) remain open.

As a legal scholar one will obviously not be able to solve this economic dispute. However, it makes clear that a society deciding in favor of an independent central bank is at least not completely off track as regards its economic rationality.[45] Yet, from a legal perspective such a decision obviously needs to be compatible with all relevant normative, especially constitutional requirements. And here the democratic principle comes into play – an aspect not least the German literature has dealt with in abundance.

2.2 (German) Democratic Theory

Compliance with the democratic principle first of all does not follow automatically from the abovementioned (possible) economic rationality behind the independent status of a central bank.[46] If one considers the dual democratic concept of Ernst Wolfgang Böckenförde – a concept especially the German Constitutional Court has taken over[47] – such a central bank lacks the necessary material ("content") legitimation.[48] Due to the unavoidable discretion of any central bank as regards monetary policy this deficit of legitimacy can thereby be compensated only partly (if at all) by binding the central bank to a more detailed statutory framework.[49] The central question for German legal scholars therefore is whether the unavoidable deficit of legitimacy can be justified or not. The literature to this question appears endless,[50] yet the answer given is more or less undisputed today: Due to the at least defensible relation between an independent central bank and price stability the overwhelming majority of German scholars negates a violation of the democratic principle.[51] We thus find a "justification by task"[52] with the following argument: If there is indeed a relation between the two (independence and price stability) then it seems impossible to transfer the task of safeguarding price stability onto a central bank while at the same time denying it the mandatory status needed to perform successfully. Such a "justification by task" is thus only possible for the area of monetary policy[53] – a consequence that might explain the problems a lot of German scholars have with the current policy of the ECB as this also makes it necessary to interpret the monetary mandate restrictively.[54] Any other task transferred to an independent institution cannot be justified with this argument, making it necessary to either find a different one – which will be very difficult according to the German interpretation of the democratic principle –

or to refrain from transferring the task in the first place. An independent central bank officially equipped with economic competences therefore always triggers alarm signals for German scholars. It is thus hardly surprising that a lot of German scholars are very reluctant as regards the idea to transfer the responsibility for financial stability formally onto the central bank – an idea that is being vividly discussed amongst economists since the financial crisis.[55] The fact that Art. 127 (1) TFEU states that "the ESCB[56] shall support the general economic policies in the Union" appears acceptable only as long as this part of the mandate is interpreted in a narrow sense respecting its clear subordination under the ECB's primary task of safeguarding price stability. This special "German sensibility" forms the main background of the whole dispute that arose between the German Constitutional Court and the ECB during the Eurocrisis. Unsurprisingly the German Constitutional Court brought forward this argument also in its second preliminary ruling initiated in July 2017.[57]

It also seems noteworthy that the independent status of the central bank – from a German perspective – cannot be justified with the special expertise or competence of the relevant central bankers, automatically leading to "better" monetary decisions.[58] Such a justification "by expertise" would not be acceptable to the German Basic Law as it would undermine (at least in the long run) the general requirement of dual legitimation.[59] Such a concept – once again and just recently proposed by Jason Brennan[60] – would finally lead to a self-abolishment of democracy and indeed: Brennan himself prefers a "moderate epistocracy." However, such a concept not only neglects the basic idea of free equality of each individual but also (and more importantly) completely misses the fact that it is impossible to conclude which decision would actually have been "right" or "better." Even experts (or epistocrats) can be mistaken and with more than one expert asked we will usually find more than one opinion how to proceed. The problem can be witnessed in the current ECB-Debate: German experts are criticizing ECB-experts and each side obviously believes it is right and has the better arguments.

3. Manifestations of Independence

Independence does not necessarily equal independence as it can manifest itself in various forms.[61] When speaking of independence it is thus vital to define what is actually meant; there is no such thing as "the independence" that either prevails or not.

First of all we can find "Goal-Independence," giving the central bank the authority to define its monetary objective autonomously without interference by the government. However, this form of independence is not to be misinterpreted as giving the central bank complete freedom which monetary policy goal(s) to pursue. The general monetary policy goals are in fact assigned to the central bank normatively by statute. Goal-independence thus allows a central bank not to choose but to autonomously interpret these goals and especially formulate its understanding of price stability in a binding way. The answer to this question is economically less clear than one might think, yet obviously has tremendous consequences as regards the monetary steps required. Although practically all central banks therefore are assigned with safeguarding price stability the internal inflation target can differ significantly and also might change over time – the Bank of Japan, for instance, doubled its internal inflation target from 1% to 2% in January 2013. Next to the Fed the ECB also enjoys such goal-independence; from a normative perspective the ECB therefore not only has the possibility but the duty to autonomously set its internal inflation target.[62] Currently the ECB has set its inflation target at "under, but close to 2%."[63] Compatible with its mandate, however, would not only be a slightly lower (1%) but also a slightly higher inflation target of up to 3%.[64] The Bank of England enjoys no such goal-independence, as the concrete inflation target is decided upon by the government on a yearly basis;[65] its degree of independence thus differs significantly when compared to the one of the ECB.

Goal-choice independence as the second form of independence allows a central bank to choose autonomously from a certain catalogue of assigned goals and to decide which of these goals to pursue with priority; it thus reaches further than mere goal-independence. We find this form of functional independence in the United States, for example, where Section 2A of the Federal Reserve Act defines the general monetary goals and states that the Fed "shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." Section 2A, however, says nothing as regards a possible hierarchy of these individual goals, a question which is thus left to the Fed to decide. In contrast, the ECB has to pursue its core purpose – price stability – with priority and is only allowed to support the economic policy in the Union as long as this core purpose is not inflicted. From a German perspective such a normative priority appears mandatory due to the above mentioned assumptions regarding the democratic principle – any form of functional independence similar to the one of the Fed would simply not be acceptable.

Finally instrumental independence enables a central bank to autonomously decide on the instruments it deems most fitting to reach the general monetary policy goals. However, usually a central bank will again not be completely free, but bound to a certain instrumental mix laid down in the relevant statute. But this instrumental mix will generally be very broad and usually not exclusive, thus allowing the central bank to react to the countless possible economic surroundings that might occur.[66] Restrictions on the other hand will mainly be introduced by a catalogue of generally forbidden instruments. Art. 127 (1) TFEU for instance states that the ECB shall act in accordance with the principle of an open market economy with free competition,[67] binding the ECB to a wide range of market-compliant instruments, while explicitly prohibiting the direct purchase of state bonds in Art. 123 TFEU.[68] The statute then lists a few typical monetary instruments and in Art. 20 even introduces an "instrument-invention-right" according to which the ECB-Council "may, by a majority of two thirds of the votes cast, decide upon the use of such other operational methods of monetary control as it sees fit, respecting Article 2."[69] This instrumental-independence thereby also includes the right of a central bank to decide autonomously on the methods it uses to measure the current inflation rate and the general economic situation of the respective monetary area. Again we find no broadly accepted economic method all central banks would have to revert to in this field – and the existing models indeed vary significantly in the results they produce.

4. Limitations and Threats

What are the limitations of these forms of independence and what measures might pose a threat to the independent status of the ECB?

4.1. Limitations

Limitations here refer to boundaries of independence and thus to measures that might challenge the independent status without violating it. These measures are thus permissible from a normative perspective what doesn't mean they might not infringe other social behavioral customs or the idea of "approved political etiquette." As it is obviously not possible to discuss all measures that are compatible with the independent status of a central bank, I would like to focus on the following three: Public criticism of the central bank by the media and political or economic actors (1), certain duties to report to other European institutions (2) and finally duties to cooperate that might arise from the instance that the ECB became a formal institution with the Treaty of Lisbon (3).

4.1.1 Public criticism

The fact that monetary policy will hardly ever remain undisputed in public was recently and once again proven during the financial- and the following Eurocrisis. In most cases such criticism will thereby focus on the concrete measures taken by the ECB, thus touching its instrumental independence. The ECB's definition of price stability – as part of its goal-independence –

has indeed hardly ever been part of such a public debate and in actual fact seems broadly accepted.[70] The question interesting here, however, is: When does such open critique of the ECB appear problematic as regards its independence?

First of all critique, possibly even very harsh critique, expressed by the interested public (either by academic scholars or the relevant media) will generally not infringe the ECB's instrumental independence. Monetary policy of an independent central bank does not take place in a discourse-free area and it can and has to be expected that any central bank (respectively its governors) are able to withstand such open critique. At least in a democratic system no institution can expect to act without ever being criticized. In fact, especially in a highly disputed area such as monetary policy, open criticism can positively influence the performance of a central bank as it is constantly forced to reflect its own decisions and diligently examine the proposed alternatives – even where the critique should not be mirrored in an adjustment of its monetary actions. Such external input can thus rationalize the internal decision making process and finally lead to a "better" central bank. Any central bank is therefore well advised not to completely neglect such critique but to implement it at least into the public presentation of its measures taken by making clear why these might have fallen out differently. And it would by no means be condemnable if a central bank should react to such critique by modifying or even completely changing its decisions. Commentaries such as "the central bank capitulated" are thus simply mistaken. It would obviously not be very functional if a central bank should stick to decisions only in order to prevent the impression that it might have reacted to external critique. Independence does not manifest itself in a general resistance to criticism, even though it would be just as senseless if a central bank should generally arrange its actions according to the public opinion. Its own conclusion as regards the "correct" economic decision therefore always has to remain the only benchmark for its monetary policy, no matter who formulated it in the first place – something that indeed requires a certain amount of internal independence and sovereignty of the central bankers, especially in times of crisis.

Criticism by politicians on the other hand might have to be interpreted differently.[71] Though such criticism clearly is no formal instruction in the sense of Art. 130 TFEU, depending on how it is formulated it might come very close. Although again independent central bankers should generally not let themselves be influenced by such critique,[72] this internal independence might be on for a tough test, depending especially who expressed such critique. To avoid any impression of being influenced, at least certain central bankers might act "too independent" and decide to generally omit such political critique in order to prove their independence – even in cases where they might actually find the presented arguments convincing. This danger especially exits where the independent status of a central bank is not easily amended by the respective government,[73] as is indeed the case for the ECB.[74] Well-intentioned critique formulated by politicians thus might lead to worse central bank decisions – a result no one could have an interest in.

These possible negative effects, however, should not lead to the conclusion that politicians would have to refrain from any comments regarding the monetary policy of the ECB from a normative perspective. Again one needs to consider that independence does not uncouple the central bank from all political discourse – as Milton Friedman pointed out, "Money is too important to be left to the central bankers."[75] Or, in other words: Elected politicians have to be able to talk about monetary policy. Well-intentioned advice, presented in a factual manner is thus perfectly acceptable,[76] one can and must expect a certain amount of coolness on the side of the central bankers in this respect. Practical experience confirms this result, being appointed as a central banker generally seems to lead to an appropriate amount of independence-awareness on the side of the appointed[77] – a phenomenon also known as the Beckett-Effect.[78] Political statements, however, become problematic where they are formulated in a demanding manner and are more or less openly connected with certain expectations how the central bank should react in the near future. Yet, in most cases and as long as these statements are not linked to the threat of consequences or sanctions[79] such a behavior will be less a normative than a question of decent political style.[80] There is thus no clear cut between acceptable political statements on the one hand and inacceptable influencing on the other,[81] and it would be indeed utopian to link the independent status with the end of any form of political pressure.[82] In fact the independent status is the necessary (though not sufficient) requirement, for the central bankers to face up to such political pressure. One should thereby also consider that it might be a lot more threatening for the democratic process if politicians should generally refrain from any critical statement due to a false understanding of independence than if they should now and then go a little too far with their critique – especially as neither the public nor the media would appreciate such "over-the-line-criticism." So this also speaks for a reserved approach towards the normative limitations for political critique. As a general rule, therefore, critical statements formulated by politicians might challenge the internal independence of the central bankers but will not violate the instrumental independence of the ECB itself.

4.1.2 Duties to report to European institutions

Not only compatible with its independent status but necessary in any democratic system are certain duties to report to other institutions (and the public) that are thus foreseen in practically all central bank systems. For the ECB we find such rules in Art. 15 of its statute and Art. 284 (3) TFEU.[83] Additionally, the ECB is monitored by the Court of Auditors and is integrated into the European Anti-Fraud System (OLAF).[84] Only such duties to report secure the minimum standard of accountability necessary for any authority in a democracy.[85] By reporting and explaining the central bank thus takes the necessary responsibility for its actions and thereby also ensures that no other institution is held responsible in public. Above that reporting and openly discussing its policies ("monetary dialogue")[86] has at least partly the same effect as public criticism: The ECB is forced to reflect its actions and thereby might find better solutions how to react in future. In the long run a central bank will indeed only succeed if it is able to explain in a comprehensible manner why it acted in a certain way (and not in another), making arbitrary action more or less impossible.[87] Independent activity is no secret occupation, the ECB is no "Black-Box." Its actions need to be critically accompanied not only by the public but also by the European Parliament[88] and even the national parliaments.[89] And within this process critical statements are not only possible but welcomed as long as they are brought forward in an adequate manner. Central bankers do not have to be handled as if they were "raw eggs."

4.1.3 Duties to cooperate

With the treaty of Lisbon the ECB was assigned formal institutional status by being included in the list of institutions in Art. 13 of the Treaty on the European Union (TEU).[90] Formally this changed nothing as regards its independent status. Yet, the ECB articulated concerns that the "mutual sincere cooperation" with the other institutions it is now obliged to might interfere with its independent status.[91] These concerns, however, were unfounded. First of all such an obligation to cooperate with the other institutions might not have been laid down explicitly in the treaty before, it nonetheless existed. The ECB never acted completely autonomously outside the EU's formal institutional system, was in fact smoothly embedded in this complex structure, a point made quite clear by the European Court of Justice (ECJ) in its OLAF-Judgement.[92] And second of all, the degree of this imperative to cooperate is limited by the concrete institutional mandate of the respective institution as created by the treaties. A duty to cooperate therefore only comes into consideration as far as the mandate of the ECB is not threatened or infringed. It is only within this frame that the ECB is obliged to consider the interests of the other institutions and commence a cooperative dialogue;[93] an obligation, however, that never turns into an unconditional duty to coordinate in advance – a conclusion confirmed when looking at the other independent institutions.[94] And such a dialogue between the relevant institutions in any case appears more than sensible, especially when it comes to the overlapping areas of monetary and fiscal- and economic-policy.[95]

4.2 Threats to independent monetary policy

4.2.1 Fiscal and wage policy of the Member States

The fact that the fiscal and the wage policy of the Member States have a significant influence on monetary policy is first of all neither surprising nor specifically problematic. All these policies might pursue different objectives yet do not stand completely separately next to each other.[96] If a central bank thus reacts to fiscal or wage policy decisions by amending its monetary policy this is nothing objectionable – just as monetary policy decisions might have consequences for the fiscal policy of a Member State when the central bank adjusts the key interest rate for instance. Regularly consultations between central bank and Member States thus appear more than sensible in order to avoid unexpected decisions for the respective other side. As regards the independence it is crucial alone that the ECB finally decides on its monetary policy autonomously solely on the foundation of its monetary mandate. And within this decision making process it is not objectionable if the central bank should finally vote for an option of action that interferes least with (or even supports) financial policy. Well founded and independent monetary policy is not necessarily linked to hurting fiscal or other policies of the Member States. Actions of the central bank should only then have negative consequences where this seems unavoidable from a monetary policy perspective – then, however, the central bank has no other choice than to interfere and take such "hurtful" actions.

Independence is threatened, however, if fiscal and wage policy should provoke economic consequences that make it more or less impossible for the central bank to fulfill its mandate. As regards the financial policy this is the case especially in times of excessive public debt.[97] Due to the reduced political scope of action in such times, states have a huge interest to at least partly reduce their debt burden by monetarizing their debt with the help of an unanticipated inflationary monetary policy and additional seigniorage earnings.[98] In "normal" times one should obviously expect an independent central bank to resist such political pressure. In fact this kind of pressure was the actual reason to introduce independent central banks in the first place. It gets problematic, however, as soon as the public debt ratio reaches a level that raises doubt on the medium- and long-term sustainability of public debt. If in such an environment the real interest rate should be above the economic growth rate (r bigger g) – and this is no particular unrealistic scenario – this debt ratio will rise further even in the case of a balanced primary budget ("dept trap").[99] If one excludes a national bankruptcy that obviously can only be the absolute last resort from a political perspective there are only two ways to reduce the debt ratio under such circumstances: Either the state manages to produce significant primary surpluses, an option that will not only be very stressful but hardly possible overnight or monetary policy becomes more expansive. The amount of continuously rising pressure on a central bank to do the latter is easily imaginable and might for itself create inflationary tendencies no matter whether the central bank finally gives in or not. If instruments such as the fiscal compact[100] and others try to keep public debt at a sustainable level then this is therefore clearly to be welcomed by any independent central bank.[101] However, to avoid dramatic economic downfalls one will have to ensure that respective measures are not taken by all Member States at the same time – an aspect in my view currently not sufficiently respected[102] – especially as the debt ratios are by no means critical in all the Member States of the Eurozone. None the least in Germany the public debate completely negates the positive consequences of a modest public indebtedness.

The consequences of a failed national wage policy within a monetary union also became visible during the Eurocrisis. To prevent a reduction of competitiveness it is essential that wage rises within a monetary union do not exceed the rise in productivity as the alternative remedy of a currency depreciation is impossible. If this requirement is not respected huge trade deficits as well as rising unemployment rates might follow being an additional burden on the national finances that will yet again almost certainly augment the pressure on the central bank. However, also due to different wage calculation regimes[103] the Member States, especially Greece, did not stick to this necessity. The reforms initiated in the respective Member States in the last years therefore point in the right direction – even Greece was just recently able to refinance itself on the financial markets for the first time in years. Yet, all these measures should not lead to an "austerity policy at all costs" – granting sufficient time for these reforms and shaping them in a socially acceptable manner thus is vital for their success in the long run.[104]

4.2.2 Bond purchases

During the Eurocrisis the ECB purchased a significant amount of bonds of so called "crisis states" according to its "Securities Market Program" (SMP). The SMP was finally replaced by the "Outright Monetary Transactions" (OMT) program, that, however, leads to not a single bond purchase. In addition to this and in order to raise the inflation rate the ECB is currently buying bonds in a volume of around 60 billion Euros per month of all Member States of the Eurozone according to its quantitative easing "Public Sector Purchase Program" (PSPP). All these measures were thereby covered by its monetary mandate[105] – the doubts concerning the OMT program raised by the German Constitutional Court in 2014[106] were convincingly rejected by the ECJ in 2016.[107] And one can assume that the ECJ will give the same answer as regards the PSPP when it decides on the preliminary ruling initiated by the German Constitutional Court in July 2017.[108] However, during the hearings concerning the OMT-program the German Bundesbank brought forward that such bond purchases might also raise questions as regards their compatibility with the independent status of the ECB. Though possibly justified to ensure the monetary transitional process, the Bundesbank pointed to the fact that they would nonetheless open the ECB to blackmail due to its own growing interest to prevent any form of state bankruptcy with a significant amount of bonds failing.[109] Is it thus possible for the ECB to infringe its own independent status when reverting to certain monetary measures by creating a situation where (sometime in the future) it might refrain from necessary monetary actions and risk missing its own inflation target in order to prevent possible and in the end self-inflicted losses?

To answer this question it is first of all important to recall that loss risks occur any time a central bank purchases any security paper outright. They are thus no special feature of state bonds. However, potential losses will usually be a lot higher in these cases than with other security papers and it is only with state bonds that central banks have a significant indirect influence on their default risk when setting the relevant interest rates. The dilemma a central bank finds itself in is therefore hardly to be denied.[110] To separate from this possible dilemma, however, is the question whether it can be used to formulate clear normative limitations for state bond purchases by a central bank. If one does not want to generally forbid such purchases – a step hardly convincing due to the fact such purchases form a classical monetary instrument of practically all important central banks worldwide – one will have to set certain quantitative restrictions. But where? The relatively small amount of equity of the ECB (currently about 11 billion Euros) is obviously too low. So how much instead? Ten times the amount? Twenty times? And how to value each bond purchase respecting the clearly differing insolvency risks of the Member States within the Eurozone?[111] These problems show that any quantitative limitation would have to be arbitrary and speak out for a formalistic interpretation. From a normative perspective it is thus only relevant whether the ECB reached its purchase decisions uninfluenced by other European or national institutions. The central bank itself is responsible for assessing possible risks when purchasing bonds and thereby also has to consider possible political pressure that might occur in times of crisis. In the end it all depends on the central bankers themselves: “As long as there is no absolute (and absolute convincing) strict rule, the people and personalities in charge will matter.”[112]

4.2.3 Judicial control

Let me finally take a look at the relationship between independence and judicial control. While this had been more of an academic question in the past – hardly any central bank’s monetary actions worldwide were ever taken to court[113] – the problem became practical in the aftermath of the Eurocrisis with the German Constitutional Court putting the ECB's OMT-program to a normative test by initiating a preliminary procedure before the ECJ in 2014.[114] In July 2017 it then initiated a second preliminary ruling regarding the ECB's general bond purchase program (PSPP). From a rule of law-perspective such a judicial control not only seems possible but virtually mandatory. It would hardly be acceptable if an institution dealing with administrative affairs were exempted from any other than public control simply because of its independent status.[115] Additionally such judicial control is able to at least partly diminish the justified yet still unsatisfying legitimatory deficit of the ECB.[116] And finally even from the perspective of the central bank itself such a judicial control appears acceptable as it is not intended to direct its monetary policy in detail but simply seeks to monitor the compliance with the general normative requirements of the ECB's mandate. However, this last point already marks the potential area of conflict: If a central bank wants to pursue its monetary goals effectively it needs sufficient room for manoeuver – especially in a complex and inhomogeneous monetary area as the European Monetary Union (EMU). Economically it will usually be impossible to determine a single monetary measure that clearly strikes out all the possible others. The independent status itself in actual fact only makes sense if it enables the central bank also to choose autonomously when to act and how to act. Where such a choice is taken either by the normative frame itself or the interpreting court hardly any room for autonomous decisions of the ECB remains. As regards the independence of a central bank it is thus not judicial control generally[117] but rather the intensity of such control that might appear problematic.[118] Judicial control therefore has to step back where the court is functionally overstrained due to the economic complexity of the respective manner. The central bank needs to be equipped with a sufficient margin of appreciation that is extracted from judicial control.[119] The detailed content of undefined legal terms (such as "price stability") is thus to be determined not by the respective court but by the ECB itself. And the same is true for the evaluation of the current and future economic surroundings of the whole monetary area and the decision on the thus necessary monetary actions. Within its judicial control the court is thereby limited to verifying the general tenability of the central bank's conclusions. It would not be compatible with the independent status if a court were to replace such tenable conclusions with its own – even if these should be regarded as equally tenable.[120] In its first request for preliminary ruling, however, the German Constitutional Court did exactly that by simply resuming the opposing position of the German Bundesbank, without losing a single word regarding the tenability of the opinion of the ECB. Why though should the opinion of the Bundesbank be of any higher normative value than the one of the ECB, especially if one considers the fact that the Bundesbank is actually a dependent part of the ESCB with the ECB at the top?[121] And in its second request for preliminary ruling initiated in July 2017 the Constitutional Court explicitly pointed out that “the acceptance of the goals as defined by the relevant European institutions combined with the appreciation of a wide margin of discretion of these institutions and a limitation of judicial control is eligible to enable these institutions an independent disposition as regards the range of the competences transferred upon them. Such an understanding of the competences does not sufficiently respect the principle of conferral and the necessity to interpret the ECB’s mandate in a restrictive manner.”[122] The Constitutional Court then goes on to point out why it believes that the ECB’s bond purchase program therefore neither respects Art. 123 TFEU nor Art. 127 TFEU and thereby once again takes hardly any opposing statements by legal scholars[123] into account that might prove at least the tenability of the ECB’s actions. The independence of the ECB therefore might be on for a tough test.

5. Conclusion and Outlook

The independent status of a central bank remains economically disputed yet can be justified from a democratic perspective and continues to be the “normative reality” for the ECB. This status is neither threatened by harsh critique nor by duties to report or to cooperate that, in fact, actually might have a positive effect on its performance. However, a mistaken finance and wage policy of the Member States might have problematic consequences so that it seems more than sensible to try to ensure a sustainable level of debt with instruments such as the fiscal compact. On the other hand the positive effects of public indebtedness should not be neglected in this context. The biggest threat for independence in actual fact might arise from a too intense judicial control granting the central bank not the necessary margin of appreciation it takes to successfully pursue its monetary goals. As regards the first preliminary ruling of the German Constitutional Court the ECJ in the end found the right answer and rejected the deficient approach of the German judges. However, finding the right balance between necessary control and autonomy of a central bank will continue to remain an important task not only for legal scholars[124] – especially as the German Constitutional Court is apparently still struggling to accept any limitations at all.

NOTES AND REFERENCES

1. Art. 282 (3) TFEU.
2. For the causes of the Eurocrisis see A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 1 ff.

3. For the development of central banks see A. Thiele, *Finanzaufsicht*, 2014, p. 188 ff.

4. A. Hamilton, “Report on a National Bank,” in Kroos, *Documentary History of Banking and Currency in the United States*, 1985, p. 231 ff.

5. See for the changing relationship of central banks and the government C. Goodhart, F. Capie, and N. Schnadt, “The Development of Central Banking,” in Capie et al., *The Future of Central Banking*, 1994, p. 48 ff.

6. See D. Masciandaro and D. Romelli, “Ups and Downs of Central Bank Independence from the Great Inflation to the Great Recession: Theory, Institutions and Empirics,” *Financial History Review* 22 (2015), 259 (259); C. Goodhart, F. Capie, and N. Schnadt, “The Development of Central Banking,” in Capie et al., *The Future of Central Banking*, 1994, p. 81. See also H. James, *Making the European Monetary Union*, p. 15. According to C. Goodhart, *The Regulatory Response to the Financial Crisis*, p. 34 ff. the financial crisis has shown that central banks also have a responsibility for maintaining financial stability and should see this as their second core purpose.

7. C. Goodhart, *The Regulatory Response to the Financial Crisis*, p. 34.

8. For the definition of price stability within the EMU see A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 27 ff. as well as J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 63 ff.

9. The corresponding exclusive right to authorise the issue of bank notes is transferred upon the ECB by Art. 128 (1) TFEU.

10. See J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 185 ff.

11. See for instance R. J. Barro and D. Gordon, “Rules, Discretion, and Reputation in a Positive Model of Monetary Policy,” *Journal of Monetary Economics* 12 (1983), 101 ff.: “The benefits from this surprise inflation may include expansions of economic activity and reductions in the real value of the government’s national liabilities.” See also W. A. Allen, “Quantitative Easing and the Independence of the Bank of England,” *National Institute Economic Review*, 241 (2017), p. 65 (66) and N. H. Buchanan and M. C. Dorf, “Don’t End or Audit the FED: Central Bank Independence in an Age of Austerity,” *Cornell Law Review* 102 (2016), 1 (8).

12. See H. Jarchow, *Grundriss der Geldpolitik*, p. 3, as well as H. Siekmann, in Siekmann, *EWU*, 2013, Art. 130 AEUV, mn. 26 ff.

13. M. Friedman, “Should There Be an Independent Bank?,” in Yeager, *In Search of a Monetary Constitution*, 1962, S. 219 ff. Friedman spoke out against an independent central bank: “Money is too important to be left to the central bankers.” See also W. Heun, “Die Zentralbank in den USA – das Federal Reserve System,” *Staatswissenschaften und Staatspraxis*, 9 (1998), 241 (262).

14. See also B. Blancheton, “Central Bank Independence in a Historical Perspective. Myth, Lessons and a New Model,” *Economic Modelling* 52 (2016), 101 (103 f.).

15. Meaning a government, that is also responsible for monetary policy.

16. R. J. Barro and D. Gordon, “A Positive Theory of Monetary Policy in a Natural Rate Model,” *Journal of Political Economy* 91 (1983), 588 ff.; R. J. Barro and D. Gordon, “Rules, Discretion, and Reputation in a Positive Model of Monetary Policy,” *Journal of Monetary Economics* 12 (1983), S. 101 ff.

17. See also F. M. Martin, “Debt, Inflation and Central Bank Independence,” *European Economic Review* 79 (2015), 129 (131).

18. K. Rogoff, “The Optimal Degree of Commitment to an Immediate Monetary Target,” *Quarterly Journal of Economics* 100 (1985), 1169 (1177): “We demonstrate that society can make itself better off by selecting an agent to head the independent central bank who is known to place a greater weight on inflation stabilization (relative to unemployment stabilization) than is embodied in the social loss function A.” See also D. Masciandaro and D. Romelli, “Ups and Downs of Central Bank Independence from the Great Inflation to the Great Recession: Theory, Institutions and Empirics,” *Financial History Review* 22 (2015), 259 (263).

19. For instance as regards the unemployment rate.

20. K. Rogoff, “The Optimal Degree of Commitment to an Immediate Monetary Target,” *Quarterly Journal of Economics* 100 (1985), p. 1177: “[…] it is never optimal to choose an individual who is known to care ‘too little’ about unemployment […].”

21. See especially the detailed study by A. Cukierman, *Central Bank Strategy, Credibility, and Independence: Theory and Evidence*, 1992. See also J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 215 ff.

22. See H. James, *Making the European Monetary Union*, p. 270. However, the studies revealed significant differences between developed and non-developed countries, see C. E. Walsh, “Central Bank Independence,” prepared for *The New Palgrave Dictionary*, 2005, p. 6 f.

23. C. Bodea and M. Higashijima, “Central Bank Independence and Fiscal Policy: Can the Central Bank Restrain Deficit Spending?,” *British Journal of Political Science*, 47 (2015), 47 (47); B. Hayo and C. Hefeker, “Reconsidering Central Bank Independence,” *European Journal of Political Economy* 18 (2002), 653 (653 f.). See also H. James, *Making the European Monetary Union*, p. 265: “The 1990s saw the emergence of a new philosophy of central banking, in which the independence of central banks from the political process became a core component of the culture of monetary stability.”

24. B. Hayo and C. Hefeker, “Reconsidering Central Bank Independence,” *European Journal of Political Economy* 18 (2002), p. 654: “The culmination of this trend is the European Central Bank (ECB) that, according to its statutes, is the most independent central bank of all.” For the difficulties when trying to measure the individual degree of independence see H. James, *Making the European Monetary Union*, p. 271 f.

25. H. James, *Making the European Monetary Union*, p. 15.

26. Ibidem.

27. See H. James, *Making the European Monetary Union*, p. 15, who believes that this effect is at least partly rooted in the experiences of the financial crisis: “When that rule or principle became muddied, and discretion in policy-making returned in the aftermath of the financial crisis, the case for central bank independence began to look more problematic. Thus the historical pendulum is now swinging back, toward a politically controlled Bank of England or a more accountable Federal Reserve.”

28. J. B. Taylor, “Discretion versus Monetary Policy Rules in Practice,” *Carnegie Rochester Conference Series on Public Policy*, Vol. 39 (1993), 195 ff.; J. B. Taylor, “Monetary Policy Rules Work and Discretion Doesn’t: A Tale of Two Eras,” *Journal*

of Money, Credit and Banking, Vol. 44 (2012), 1017 ff.; J. B. Taylor, "The Effectiveness of Central Bank Independence versus Policy Rules," American Economic Association Annual Meeting, January 2013.

29. See H. Dreier, *Hierarchische Verwaltung im demokratischen Staat*, 1991, p. 169: "Selbst der handlungsfreudigste, optimal informierte, seiner selbst gewisse Gesetzgeber kann heute auf Dauer nicht verbindliche Normen mit einem Konkretisierungsgrad und einer Detailgenauigkeit produzieren, die den Handlungsspielraum der zur Normexekution befugten Instanzen auf das sprachphilosophisch und methodologisch begründbare unvermeidliche Mindestmaß beschränken."

30. W. Heun, "Die Zentralbank in den USA – das Federal Reserve System," *Staatswissenschaften und Staatspraxis*, 9 (1998), p. 262 f.

31. See C. Goodhart, F. Capie, and N. Schnadt, "The Development of Central Banking," in Capie et al, *The Future of Central Banking*, 1994, p. 85: "Given the continuing rapid pace of the evolution of such structures, central banks will rightly aim to retain their discretionary flexibility."

32. Board of Governors of the Federal Reserve System, *Tenth Annual Report*, 1923, p. 32.

33. W. McChesney Martin, "Statement before the Subcommittee on a National Security and International Operations of the Senate Committee on Government Operations," *FRB* 51 (1965), p. 1237 (1238). See also W. Heun, "Die Zentralbank in den USA – das Federal Reserve System," *Staatswissenschaften und Staatspraxis*, 9 (1998), p. 263.

34. J. B. Taylor, "Monetary Policy Rules Work and Discretion Doesn't: A Tale of Two Eras," *Journal of Money, Credit and Banking*, Vol. 44 (2012), p. 1017 ff.

35. J. B. Taylor, "The Effectiveness of Central Bank Independence versus Policy Rules," American Economic Association Annual Meeting, January 2013, p. 14. Similar also B. Hayo and C. Hefeker, "Reconsidering Central Bank Independence," *European Journal of Political Economy* 18 (2002), p. 657 f.

36. R. Vaubel, "The Bureaucratic and Partisan Behavior of Independent Central Banks: German and International Evidence," *European Journal of Political Economy* Vol. 13 (1997), 201 ff. – a problem known and debated also regarding the independent judicial branch by the way.

37. See also U. Reumann, *Die Europäische Zentralbank*, p. 26.

38. See W. Heun, "Die Zentralbank in den USA – das Federal Reserve System," *Staatswissenschaften und Staatspraxis*, 9 (1998), p. 263.

39. B. Hayo and C. Hefeker, "Reconsidering Central Bank Independence," *European Journal of Political Economy* 18 (2002), p. 654: "In other words, this correlation does not indicate causality."

40. B. Hayo and C. Hefeker, "Reconsidering Central Bank Independence," *European Journal of Political Economy* 18 (2002), p. 654, for the different inflation cultures p. 663 ff. According to them an independent central bank is mainly installed in countries where preventing inflation is deemed highly significant. See also J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 219 f. and D. Masciandaro and D. Romelli, "Ups and Downs of Central Bank Independence from the Great Inflation to the Great Recession: Theory, Institutions and Empirics," *Financial History Review* 22 (2015), 259 (265 f.).

41. See also H. James, *Making the European Monetary Union*, p. 272.

42. Specially regarding this aspect B. Hayo and C. Hefeker, “Reconsidering Central Bank Independence,” *European Journal of Political Economy* 18 (2002), p. 659 f. Respective threats to remove the independent status occurred in Germany, for instance, in 1956 when Konrad Adenauer was unhappy with the monetary policy of the Bundesbank. However, to change the independent status of the ECB the European Treaties would have to be amended, including a ratification of such an amendment in all the Member States (Art. 48 TEU). See also C. Bodea and M. Higashijima, “Central Bank Independence and Fiscal Policy: Can the Central Bank Restrain Deficit Spending?,” *British Journal of Political Science*, 47 (2015), 47 (48).

43. B. Hayo and C. Hefeker, “Reconsidering Central Bank Independence,” *European Journal of Political Economy* 18 (2002), p. 659: “If it is not possible to observe a central banker’s characteristics, then society (or its government) should have the means to overrule or correct actions taken by the central bank. However, this is not possible with a truly independent central bank.”

44. B. Hayo and C. Hefeker, “Reconsidering Central Bank Independence,” *European Journal of Political Economy* 18 (2002), p. 665 f.

45. Cf. H. Siekmann in H. Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 34 and U. Häde, in C. Calliess and M. Ruffert, *EUV/AEUV*, 4th ed. 2011, Art. 130 AEUV mn. 9: “[…] deutliche Hinweise auf einen Zusammenhang zwischen Unabhängigkeit und Preisstabilität.” Whether the ECB should receive such an independent status, however, was highly disputed when constructing the EMU, see H. James, *Making the European Monetary Union*, p. 270 ff.; 278 ff.

46. See also U. Häde, in C. Calliess and M. Ruffert, *EUV/AEUV*, 4th ed. 2011, Art. 130 AEUV mn. 37 ff.

47. See H. Dreier, in H. Dreier, *Grundgesetz* Band II, 2010, 2006, Art. 20 mn. 113 ff.

48. See for a detailed analysis K.-P. Sommermann, in: H. von Mangoldt, H. Klein and C. Starck, *Grundgesetz* Band 2, 6. Aufl. 2010, Art. 20 Abs. 2 mn. 168.

49. Which, by the way, marks a significant difference to the judiciary.

50. Instead of many see F. Brosius-Gersdorf, *Deutsche Bundesbank und Demokratieprinzip*, 1997, p. 127 ff.

51. See for instance B. Kempen, in R. Streinz, *EUV/AEUV*, 2. Aufl. 2010, Art. 130 AEUV, mn. 5; J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 272 ff. See also the remarks of the German Constitutional Court in its Mastricht-Decision: *BVerfGE* 89, 155 (208): “Die Verselbständigung der meisten Aufgaben der Währungspolitik bei einer unabhängigen Zentralbank löst staatliche Hoheitsgewalt aus unmittelbarer staatlicher oder supranationaler parlamentarischer Verantwortlichkeit, um das Währungswesen dem Zugriff von Interessengruppen und der an einer Wiederwahl interessierten politischen Mandatsträger zu entziehen […]. Diese Einschränkung der von den Wählern in den Mitgliedstaaten ausgehenden demokratischen Legitimation berührt das Demokratieprinzip, ist jedoch als eine in Art. 88 Satz 2 GG vorgesehene Modifikation dieses Prinzips mit Art. 79 Abs. 3 GG vereinbar.” See also H. Sodan, *Die funktionelle Unabhängigkeit der Zentralbanken*, *NJW* 1999, 1521 (1521 f.).

52. M. Höreth, *Die Europäische Union im Legitimationstrilemma*, 1999, p. 230.

53. H. Siekmann, in H. Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 69 f.; J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 272 f., 566 f.; E. Peuker, *Die Anwendung nationaler Rechtsvorschriften durch Unionsorgane – ein Konstruktionsfehler der europäischen Bankenaufsicht*, *JZ* 2014, 764 (768).

54. This was pointed out once again in *BVerfG*, 18.7.2017, 2 BvR 859/15 and others, mn. 102 f.

55. See O. Issing, "Central Banks – Are Their Reputations and Independence under Threat from Overburdening?," *International Finance* 20 (2017), 92 (93 f.). See also E. Balls, J. Howat and A. Stansbury, "Central Bank Independence Revisited," M-RCBG Associate Working Paper Series No. 67 (November 2016), p. 5.

56. European System of Central Banks.

57. See *BVerfG*, 18.7.2017, 2 BvR 859/15 and others, mn. 102 ff.

58. See N. H. Buchanan and M. C. Dorf, "Don't End or Audit the FED: Central Bank Independence in an Age of Austerity," *Cornell Law Review* 102 (2016), 1 (64): "Accordingly, the case for Fed independence in ordinary times must rest on something beyond superior substantive competence of Fed economists relative to the elected officials."

59. See also J. H. Klement, *Der Euro und seine Demokratie*, *ZG* 2014, 169 (191), A. Thiele, *Verlustdemokratie*, p. 244 ff. and A. Thiele, *Finanzaufsicht* (Fn. 4), p. 429 ff.

60. J. Brennan, *Against Democracy*, 2017.

61. See especially S. Fischer, "Central-Bank Independence Revisited," *American Economic Review* 85 (1995), 201 ff.; H. Siekmann, in H. Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 41. See also P. Conti-Brown, "The Institutions of Federal Reserve Independence," *Yale Journal on Regulation* 32 (2015), 257 (269).

62. C. E. Walsh, "Central Bank Independence," prepared for *The New Palgrave Dictionary*, 2005, p. 3 f.

63. See *ECB*, *Die Geldpolitik der EZB*, 2011, p. 71. For the economic background see A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 27 ff. Now also see *BVerfG*, 18.7.2017, 2 BvR 859/15 and others, mn. 117: "Das Ziel des PSPP, die Inflationsrate auf knapp 2% steigern zu wollen, stellt nach Auffassung des Senats eine grundsätzlich zulässige Konkretisierung der Aufgabe dar, die Preisstabilität zu sichern."

64. See also A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 31.

65. C. E. Walsh, "Central Bank Independence," prepared for *The New Palgrave Dictionary*, 2005, p. 3.

66. See also A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 41 ff.

67. See for details U. Reumann, *Die Europäische Zentralbank*, p. 91 ff.

68. In detail see A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 63 ff.

69. See J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 477 ff. and U. Reumann, *Die Europäische Zentralbank*, p. 96 ff.

70. This question, however, was highly disputed when constructing the EMU.

71. See also J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 413.

72. See also U. Häde, in: Calliess/Ruffert, *EUV/AEUV*, 5th. Ed. 2016, Art. 130 AEUV mn. 15.

73. Because the central bank then does not have to fear such an amendment and can thus present its independence more or less risk free. See also J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 248.

74. As the independence of the ECB is laid down in the treaties any modification would require a treaty amendment according to Art. 48 TEU including a ratification in all Member States. On the other hand the independence of the German Bundesbank was only guaranteed by a simple statute (and not the constitution)

75. M. Friedman, "Should There Be an Independent Bank?," in Yeager, *In Search of a Monetary Constitution*, 1962, 219 (219): Friedman, however, spoke out against the independent status generally.

76. J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 413.

77. True also for other independent positions, see for instance the actions taken by Christine Lagarde, the Executive Director of the IMF and former French finance minister.

78. Thomas Beckett was Lord Chancellor and Adviser to King Henry II and became Arch Bishop of Canterbury in 1162. In this new position he vividly fought for the interests of the church (and not those of the King) so that he was finally murdered by the King's cronies. See also J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 249 f.

79. Such threats might raise inflation expectations of the market participants no matter whether they were successful or not, see J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 413 f.

80. Different opinion H. Siekmann, in Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 19 and M. Potacs, in: J. Schwarze, *EU-Kommentar*, Art. 130 AEUV mn. 1, who explicitly states that pressure form the media is a violation of the treaties.

81. See also U. Häde, in: Calliess and Ruffert, *EUV/AEUV*, 5th ed. 2016, Art. 130 AEUV mn. 15.

82. Not convincing therefore the statement of the ECJ, No. C-11/00, mn. 134 (Commission/ECB) according to which the independent status "seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute."

83. See also U. Reumann, *Die Europäische Zentralbank*, p. 184ff. For the American central bank see W. Heun, "Die Zentralbank in den USA – das Federal Reserve System," *Staatswissenschaften und Staatspraxis*, 9 (1998), p. 260.

84. As regards the compatibility of the integration of the ECB into OLAF with its independent status see ECJ, No. C-11/00, mn. 135 (Commission/ECB). See also H. Siekmann, in Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 136 ff.

85. C. E. Walsh, "Central Bank Independence," prepared for *The New Palgrave Dictionary*, 2005, p. 9. See for the concept of "accountable independence" also D. Curtin, "'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency," *European Law Journal* 23 (2017), 28 ff.

86. D. Curtin, '"Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency," *European Law Journal* 23 (2017), 28 (31).

87. This is also the reason why the publication of the minutes of the ECB-Council meetings is to be welcomed.

88. See U. Reumann, *Die Europäische Zentralbank*, p. 184 ff.

89. There are no official duties for the ECB to report to the national parliaments. However, it is to be welcomed if the ECB-President discusses his monetary policy with the national parliaments, especially in countries where the public seems very critical towards certain actions.

90. For the institutional settings according to the Lisbon Treaty see A. Thiele, *Europarecht*, 14th ed. 2017, p. 64 ff.

91. See U. Häde, in Calliess and Ruffert, *EUV/AEUV*, 5th ed. 2016, Art. 282 AEUV mn. 49.

92. ECJ, No. C-11/00, mn. 92, 135 f. (Commission/ECB).

93. See C. Calliess, in Calliess and Ruffert, *EUV/AEUV*, 5th ed. 2016, Art. 13 EUV mn. 28.

94. In this sense also H. Siekmann, in H. Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 160.

95. More to this relationship below.

96. See also E. Görgens, K. Ruckriegel and F. Seitz, *Europäische Geldpolitik*, 5th ed. 2008, p. 370 ff.

97. See also C. Bodea and M. Higashijima, "Central Bank Independence and Fiscal Policy: Can the Central Bank Restrain Deficit Spending?," *British Journal of Political Science*, 47 (2015), 47 (48): "Independent central banks prefer budget discipline because of the long-run connection between deficits and inflation (…)."

98. J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 252.

99. See E. Görgens, K. Ruckriegel and F. Seitz, *Europäische Geldpolitik*, 5th ed. 2008, p. 384 ff.

100. For details on the fiscal compact see C. Calliess and C. Schoenfleisch, "Auf dem Weg in die europäische 'Fiskalunion'?", *JZ* 2012, 477 ff.; F. Schorkopf, "Europas politische Verfasstheit im Lichte des Fiskalvertrages," *Zeitschrift für Staats- und Europawissenschaften* 10 (2012), p. 1 ff. as well as A. Thiele, "The 'German Way' of Curbing Public Debt: The Constitutional Debt Brake and the Fiscal Compact – Why Germany has to Work on its Language Skills," *European Constitutional Law Review* 11 (2015), p. 30 ff.. For further instruments trying to ensure budgetary discipline see C. Calliess, "Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung," *VVDStRL* 71 (2012), 113 (166 ff.).

101. See also J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 254 f., 259 ff.

102. See A. Thiele, "The 'German Way' of Curbing Public Debt: The Constitutional Debt Brake and the Fiscal Compact – Why Germany has to Work on its Language Skills," *European Constitutional Law Review* 11 (2015), p. 30 ff.

103. See M. Höpner and M. Lutter, "One Currency and Many Modes of Wage Formation," MPIfG Discussion Paper 14/14 regarding the different wage calculation regimes in the Member States.

104. For a detailed critique as regards the austerity policy of the Member States see M. Blyth, *Austerity. The History of a Dangerous Idea*, 2013. This, by the way, now also seems to be the official position of the IMF, see S. Lütz, "Vom Washington Consensus zum Flexiblen Keynesianismus – der internationale Währungsfonds nach der Finanzkrise," *PVS* 55 (2014), 427 (436 f.).

105. The PSPP is currently being reviewed by the German Constitutional Court, see A. Thiele, “Die EZB vor Gericht,” *ZBB* 2015, 295 (304 f.).

106. W. Heun, “Eine verfassungswidrige Verfassungsgerichtsentscheidung,” *JZ* 2014, p. 331 ff.; A. Thiele, “Friendly or Unfriendly Act?,” *German Law Journal* 15 (2014), p. 241 ff. In detail A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 57 ff.

107. ECJ, No. 62/14 (Gauweiler).

108. See *BVerfG*, 18.7.2017, 2 BvR 859/15 and others.

109. See also O. Issing, “A New Paradigm for Monetary Policy?,” CFS Working Paper No. 2013/02, p. 5: “And huge stocks of government bond expose the central bank to economic risks and political pressure.”

110. See also W. A. Allen, “Quantitative Easing and the Independence of the Bank of England,” *National Institute Economic Review*, 241 (2017), p. 65 (66).

111. In detail A. Thiele, *Das Mandat der EZB und die Krise des Euro*, p. 78 ff.

112. O. Issing, “A New Paradigm for Monetary Policy?,” CFS Working Paper No. 2013/02, p. 14.

113. Not even the Bundesbank ever had to face such a court procedure regarding its monetary policy measures.

114. *BVerfG*, Beschluss vom 14.1.2014, 2BvR 2728/13.

115. U. Reumann, *Die Europäische Zentralbank*, p. 216.

116. See also H. Siekmann, in H. Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 91 (“Korrelat zur Autonomie”).

117. The fact that Art 35 of its statute explicitly allows such a judicial control is thus no threat to its independent status per se.

118. This is not seen by H. Siekmann, in H. Siekmann, *EWU*, 2013, Art. 130 AEUV mn. 81, who does not mention the problem of the control intensity.

119. Cf. also J. Endler, *Europäische Zentralbank und Preisstabilität*, p. 239, 518 ff. and U. Reumann, *Die Europäische Zentralbank*, p. 61.

120. U. Reumann, *Die Europäische Zentralbank*, p. 223.

121. In actual fact it was more than debatable whether it was acceptable that the German Constitutional Court heard the president of the German Bundesbank, Jens Weidmann, as an authorized expert during its proceedings as the Bundesbank is a dependent part of the ESCB lead by the ECB and represented only by its president Mario Draghi.

122. *BVerfG*, 18.7.2017, 2 BvR 859/15 and others, mn. 119.

123. The only exception being J. Langer, in H. Siekmann, *EWU*, Art. 32 ESZB-Satzung, mn. 41 in mn. 132 of the ruling.

124. This includes the question whether the principle of proportionality can function as an adequate principle for restricting monetary measures taken by a central bank. This seems at least questionable as this principle generally intends to avoid disproportional interferences with some other (subjective) rights. What, however, could such other rights be? Subjective rights do not come to mind so that only the economic competence of the Member States might form such a “right.” But how to discover whether a monetary measure interferes disproportionately with this economic competence, respecting the fact that even “normal” monetary measures such as adjusting the interest rates might have dramatic consequences in this sense?