The Changing Politics of Central Banking:

A Legal Perspective

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Abstract

Central banks around the world have emerged from the 2008 financial crisis in a curious situation. On the one hand, central banks were criticized because they had not been able to anticipate or prevent the crisis. They supposedly failed to impose any meaningful limitation to the abuses that had been happening in the financial sector. On the other hand, central banks were called on to lead the efforts towards the economic recovery. To rebuild price and financial stability, many central banks started using unconventional and even unprecedented measures.

Those two different stories encapsulate the wondrous life of central banks since the crisis. One is a gloomy story of failure and disappointment. The other is a bright story of redemption and empowerment – at least for now. How is that possible? How can two seemingly contradictory accounts be accurate?

This white paper reviews the legal literature in search of answers to those questions. It starts by revisiting the issue of central-bank independence and by looking at how the different branches of government interact with central banks. The tension between independence and accountability is not a new topic, but one still unresolved. The paper also explores the legal questions associated with central banks making use of unconventional tools. The limits of central banking have become more blurred now that central banks are at the center of the national and global stages. In fact, “whatever it takes” might well be the best description of modern central banking.

Keywords: central bank, financial crisis, legal mandate, independence, governance, accountability, regulatory capture, lender of last resort, quantitative easing, international financial regulation, soft law

Introduction

Central banks tend to appreciate predictability and quietude. Stability is their fundamental goal. A "boring" life would, in fact, be the aspiration of any central bank.[1] Until a financial crisis hits. The reality immediately changes, stability is lost, and panic spreads. Whenever central banks face a financial crisis, they reach a turning point. The fall from grace is inevitable; someone must be to blame. But redemption may come in unexpected ways.

Central banks emerged from the 2008 financial crisis in an ambiguous position.[2] On the one hand, they were unable to realize that a crisis was building up (e.g., Gadinis, 2013a, pp. 344-345). Central banks attracted fierce criticism because they, along with other regulatory agencies (Gadinis, 2013a, pp. 344-346; Garicano & Lastra, 2010, pp. 598-599), failed to perform their tasks properly, letting all kinds of abuses and excesses happen without imposing any meaningful limitation (Levitin, 2014, pp. 1993-1994, 2041-2044). The proximity of central banks to the financial industry also brought into question the real effectiveness of their enforcement power, with claims of regulatory capture (Gadinis, 2013a, pp. 348-349; Levitin, 2014, pp. 2041-2049).

In response to those apparent failures, new models of central-bank governance began to be explored. Independence lost its prominence and, now, the emphasis is on the necessity of oversight and control of central banks' activities to improve transparency and accountability (Levitin, 2014, pp. 2049-2052).[3]

On the other hand, central banks' following efforts were crucial for stemming the adverse effects of the crisis and, later, for helping toward the economic recovery (e.g., Judge, 2015).

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[1] See Haldane, 2014, p. 4, stating that the "[f]ormer BoE governor Mervyn King aspired to make monetary policy 'boring'."

[2] Looking closely at the American reality and at the situation of the Federal Reserve Board of Governors, see Bressman & Thompson, 2010, pp. 624-630; Levitin, 2014, pp. 2037-2049.

[3] For a harsh opinion on the flaws of central-bank independence and the need to overhaul it, see generally Canova, 2015.

Central banks have been increasingly active since the financial crisis. To rebuild price and financial stability, central banks started using unconventional and even unprecedented measures, such as extensive quantitative-easing programs and negative-interest-rate policies (Judge, 2015, pp. 65-66).

Such non-traditional policies implemented by many central banks redefined the scope of central banking after the crisis, raising questions about the limits of their legal authority. Are central banks allowed to do "whatever it takes" to fulfill their mandates? The answer is as complex as the new tools adopted by central banks.

The political reality of central banking has been, therefore, mixed since the financial crisis. Central banks tend to be under greater political pressure when performing the tasks related to the stability of the financial system. They have, however, emerged as powerful public actors in the global economic arena when it comes to restoring liquidity and monetary stability. Either way, central banking is a matter of growing interest and concern.

Two representative issues of the changing political situation of central banking are examined here from a legal and comparative perspective. First, the paper looks at the interactions of the different branches of government and central banks. Not only have central banks lost part of their independence from the central government, but their relations with legislators have also been reshaped. In the past few years, elected politicians have become much more interested in central banking.

Second, the paper explores the legal issues arising out of the use of unconventional tools by central banks. Since central banks have resorted to extreme measures in recent times, the definition and interpretation of their legal authority have become critical to the debate on the legitimacy of their acting. Finding the scope of their mandate is also relevant to understanding

the limits of the power and influence central banks exert at the domestic and transnational levels. Finally, because the debate has spilled over to the courts, the paper analyzes how, after the crisis, even the judiciary is getting more involved with central banking.

This paper, thus, offers a starting point for exploring the legal literature that has touched on the politics of central banking after the 2008 financial crisis, without trying to be exhaustive. It is an attempt to put together different parts of related conversations that are spread across the legal field. Moreover, its focus is on the countries that were at the center of the financial crisis, such as the United States, the United Kingdom, and, at a supranational level, the European Union (EU). Whenever valuable, the findings are contrasted with the reality of emerging markets, particularly Brazil and China, to grasp the significance and peculiarities of the different approaches.

Politics of Central Banking:

Financial Stability and the Place of Central Banks in the Government

Central-Bank Independence Redux

After the 2008 financial crisis, the first trend that can be observed is the increasing participation of governmental authorities in central banking (Gadinis, 2013a). The trend appears even in countries that have well-established independent central banks, such as the United States, the United Kingdom, Germany, and Japan.[4]

Examining the law of fifteen jurisdictions,[5] Stavros Gadinis (2013a, pp. 356-364) observes that the final decision on critical issues related to the stability of the financial system is now in the hands of high-ranking government officials, like treasury secretaries and, particularly,

[4] About the difficulties in defining and measuring the degree of central-bank independence, see, e.g., Crowe & Meade, 2008; Cukierman, Webb, & Neyapti, 1992; Duff, 2014; Laurens, Arnone, & Segalotto, 2009.

[5] Gadinis's analysis covered "fifteen key jurisdictions for international banking:" the United States, the United Kingdom, France, Germany, Japan, Spain, Switzerland, Belgium, Ireland, Italy, Denmark, Canada, Australia, Mexico, and South Korea.

finance ministers.[6] Gadinis (2013a) goes on to say that "there is a new player in global financial regulation, and it is the finance ministries" (p. 358).[7]

Much to his surprise, Gadinis (2013a, pp. 363-64) sees government officials becoming more involved in matters that go beyond sensitive and urgent stability issues, such as the resolution or bailout of financial institutions. Government officials are also taking part in matters related to the regular operation of the financial system, such as the supervision of financial institutions and the process of granting them authorization or license (Gadinis, 2013a, pp. 359-361).

Additionally, political involvement in banking and financial issues is now more active and direct, whereas politicians usually acted behind the scene before the crisis (Gadinis, 2013a, pp. 361-364). Post-crisis reforms in developed countries once at the center of the financial crisis created regulatory councils encompassing central banks and other independent agencies. In practice, those councils are part of an institutional arrangement that put politicians as the ultimate decision makers in relevant matters related to the financial system (Gadinis, 2013a, pp. 364-369).[8] As a result, financial regulators still are the leading experts and supervisors in the financial system, but final decisions in the field now have the significant participation of politicians (Gadinis, 2013a, p. 368).

The current pattern of an increased participation of government officials in central banking might come as a surprise to the industrialized countries, mainly to those that have gotten

[6] The notable exception here is Switzerland, which is the "only jurisdiction where reforms did not result in an increase of politicians' powers" (Gadinis, 2013a, p. 365).

[7] About the reality in the U.S., with the increasing participation of the Secretary of the Treasury in central banking matters, see also Bressman & Thompson, 2010, pp. 628-630.

[8] About the presence of regulatory councils in the decision-making process related to central-banking matters, see also Bank for International Settlements [BIS], 2011, pp. 21-23. About the Financial Stability Oversight Council established by the Dodd-Frank Act, and the political influence it brings to the American macroprudential policymaking, see Duff, 2014, pp. 213-214, 217.

used to independent central banks. This reality, however, is familiar to some emerging economies that do not have formally independent central banks.

The Central Bank of Brazil (BCB), e.g., is not statutorily independent. It has, though, some degree of autonomy to establish the best way to achieve the policy goals, under Lei No. 4.595, de 31 de Dezembro de 1964, which is the primary law organizing and regulating the financial system in Brazil.[9] The BCB has the legal authority to perform the supervision of the nation's banking and financial systems, not only to ensure their safety and soundness but also to tackle systemic risk.[10] The BCB has also the sole authority to make decisions about the resolution of financial institutions.[11] Under the flexible exchange rate system in place since 1999, the BCB can also intervene in the foreign exchange market to manage the excessive volatility of the national currency.[12] Last, under the inflation-targeting regime,[13] the BCB is authorized to set a short-term interest-rate benchmark and to use monetary tools, especially open market operations, to pursue that benchmark.

The inflation target, however, is set in advance not by the BCB itself, but by the National Monetary Council (CMN), which is presently composed of the Governor of the BCB, the

[9] A copy of Law No. 4.595, in English, can be found at *Law 4.595, dated 12/31/1964 - National Financial System*, BANCO CENTRAL DO BRASIL, http://www.bcb.gov.br/?LAW4595 (last visited Feb. 20, 2015).

[10] In accordance with Article 10 of Lei No. 4.595. The BCB, however, is not the direct supervisor of insurance companies and pension funds. Securities regulation and the related supervision also fall outside the responsibilities of the BCB, although the BCB shares some regulatory functions with the primary agency that supervises the Brazilian securities market, with respect to the supervision of certain financial institutions that operate in that market.

[11] Under Lei No. 6.024, de 13 de março de 1974 (available, only in Portuguese, at http://www.planalto.gov.br/CCIVIL_03/leis/L6024.htm).

[12] According to Comunicado No. 6.565, announced by the BCB on January 18, 1999, and available, only in Portuguese, at https://www3.bcb.gov.br/normativo/detalharNormativo.do?method=detalharNormativo&N=99009328. See Tabak & Lima (2009) for a brief overview of the BCB intervention in the FX market.

[13] Under Decreto [Decree] No. 3.088, enacted on June 21, 1999, and available, only in Portuguese, at http://www.planalto.gov.br/ccivil_03/decreto/D3088.htm.

Minister of Finance, and the Minister of Planning, Budget, and Management.[14] The CMN is responsible not only for policy-making and setting the BCB's organization and budget[15] but also for deciding the most sensitive matters related to the financial system, such as the bailout of financial institutions.[16] The CMN is a political council similar to the regulatory councils identified by Gadinis (2013a), in which the central bank has participation and can vote, although the final decision will result from a majority vote with the significant participation of two ministries, two senior members of the President's cabinet.

The People's Bank of China (PBOC), in turn, uses a variety of instruments to achieve multiple goals, particularly price, credit, and exchange-rate stability (Geiger, 2008; Sun, 2013). Following its mandate, the PBOC gives particular importance to promoting economic growth as a result of its actions (Geiger, 2008, p. 3; Sun, 2013, p. 5). The PBOC is not, however, the authority responsible for regulating and supervising the financial system, functions that are, since 2003, in the hands of the China Banking Regulatory Commission (Borst & Lardy, 2015). The PBOC does act to adjust the money supply and influence interest rates, to affect the structure and scope of bank lending, and to keep the Renminbi exchange rate "within its targeted floating bands" (Sun, 2013, p. 3).

Despite performing several different activities, all the targets to be pursued and the instruments to be used by the PBOC are dictated by the Chinese central government, especially through the State Council (Borst & Lardy, 2015, p. 4; Geiger, 2008, pp. 1-4; Sun, 2013, pp. 5-10). It is also hard for the PBOC to implement a clearly independent monetary policy because of

[14] According to Article 8 of the Lei No. 9.069, de 29 de junho de 1995 (available, only in Portuguese, at http://www.planalto.gov.br/ccivil_03/LEIS/L9069.htm#art8).
[15] According to Article 4 of Lei No. 4.595.
[16] *See, e.g.*, Medida Provisória [Provisional Measure] No. 1.179, enacted by the President of Brazil on November 3, 1995, and later on turned into Lei No. 9.710, de 19 de Novembro de 1998. A copy of the Law is available, only in Portuguese, at http://www.planalto.gov.br/ccivil_03/LEIS/L9710.htm.

the limited exchange-rate flexibility (Geiger, 2008, p. 11; Sun, 2013, pp. 5, 12-14). Finally, the PBOC's monetary and credit policies are also impaired by "high concentration of state-owned commercial banks (SOCBs) in the banking system," as the SOCBs tend to favor lending to state-owned enterprises (Sun, 2013, pp. 14-17).

Legislative Reactions to the Financial Crisis and Implications for Central Banking

Another trend that can be noticed following the 2008 financial crisis is the growing interest of the legislative branch in central banking, which is represented by two different movements.

First, legislators are back to financial regulation. Because deregulation had been seen as one of the causes of the crisis (e.g., Gadinis, 2013a, pp. 347-348; Levitin, 2014, pp. 2049-2050), post-crisis legislation related to the financial system tended to be extensive and detailed (Levitin, 2014, pp. 2040-2041), to the point of breeding overregulation (Prates, 2013, pp. 10-13). Enacted in 2010 in the United States, the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) is a case in point. The Act has 848 pages, and the resulting or related regulation sprawl over more than ten thousand pages (Levitin, 2016, pp. 23-24; Romano, 2014, pp. 25-26).

Legislators are back also because financial regulation has become a matter of general concern. As Gadinis (2013a) observes, "[v]oters paid far greater attention to financial regulation as a result of the crisis," which made "impossible for politicians seeking reelection not to think about finance" (p. 351). Roberta Romano (2014) adds that, facing a crisis like the 2008 financial crisis, legislators inevitably react to the media and popular clamor by "doing something" (p. 27). In the case, "doing something" meant passing copious legislation and demanding vast rulemakings in the shortest possible time (Romano, 2014, pp. 27-31). Legislators were, therefore,

able to offer a quick response to constituents and to get some positive reports on the media; even if the rules created were not the best or the right answer to the crisis (Romano, 2014, pp. 28-30).

Regulatory delegation and deference can be seen as a way of improving the quality of policy-making since the agencies tend to be the most technical and experienced public actors in the field (e.g., Romano, 2014). Romano (2014, pp. 31-32), however, argues that regulatory delegation can also be used by legislators to shift responsibility to the agencies for potential policy failures. The heavy amount of required rulemakings and the tight schedule for implementation transferred much of the pressure one level down. Central banks and the other regulatory agencies have been more exposed, thus, to direct lobbying, since the affected parties "have understandably sought to shape regulatory outcomes to their advantage" (Romano, 2014, p. 57). Financial regulation and its execution have become much more political for central banks. They are now subject not only to the political pressure that comes from legislators and all the rulemaking mandates but also to the pressure of interest group lobbying (Romano, 2014, pp. 67-69).

The second sign of change in the relation between central banks and legislators in recent years concerns the debate on the need for an external oversight to make central banks more transparent and accountable. The debate is particularly significant in presidential systems, in which the government is clearly separate from the legislative branch. As a consequence, any involvement of legislators with typical executive functions, like the ones performed by central banks, is controversial. In parliamentary systems, the fusion of executive and legislative powers in the government makes the debate less acute, yet still relevant.[17]

[17] About the "different dynamics governing administrative operations in parliamentary and presidential regimes," especially regarding the competitive interactions between the executive and the legislative branches in exercising control over the bureaucracy, see Ackerman, 2010, pp. 131-33.

In the United States, as Edward Rubin (2012, pp. 665-672) notes, the practice rather than explicit rules has led the Federal Reserve (Fed[18]), among all the government agencies, to be one of the most – if not the most – independent institutions. The Fed is insulated not only from direct presidential control but also from congressional oversight, in a situation that Rubin (2012) calls "hyperdepoliticization." The increased degree of independence is particularly noticeable in the control of the money supply, which is executed through open market operations decided solely by the Federal Open Market Committee (FOMC) (Rubin, 2012, pp. 667-668). The freedom from congressional budget control that allows the Fed to fund itself also reinforces its "hyperdepoliticization" (Rubin, 2012, pp. 668-669).

Although that unique form of independence is a long-standing tradition in the United States, it is not entirely safe from sustained legislative attacks aiming to reduce or eliminate the Fed's powers (Rubin, 2012, pp. 670-672). The most recent one appears in the preamble to the Dodd-Frank Act, which states that one of the primary purposes of the statute is "to protect the American taxpayer by ending bailouts." To accomplish that commitment, the Dodd-Frank Act greatly revised Section 13(3) of the Federal Reserve Act[19], aiming to limit the emergency powers that the Fed repeatedly invoked during the 2008 financial crisis (Baker, 2012, pp. 87-90; Mehra, 2010, pp. 234-260).

Under the Dodd-Frank Act, the Fed's Board of Governors needs prior approval of the Secretary of the Treasury to establish any program or facility related to emergency lending.[20] The Board also has to "provide Congress with immediate notice (within seven days of

[18] The term "Fed" can have different meanings. It can be used to refer to the Federal Reserve, as the central bank of the United States, specifically to its Board of Governors, which is technically the government agency, or even to the entire Federal Reserve System, including the twelve Federal Reserve Banks. Here, it will be used as a short reference to the central bank of the United States. For a brief overview of the different uses of "Fed," see Mehra, 2010, p. 224 n. 7.
[19] 12 U.S.C. § 343 (2012).
[20] 12 U.S.C. § 343(3)(B)(iv) (2012).

authorization) and periodic reports (every 30 days thereafter) regarding any Section 13(3) facility."[21] Moreover, the U.S. Government Accountability Office (GAO) is authorized "to conduct operational audits of all future credit facilities established under Section 13(3), and of discount window and open market transactions."[22]

Besides the monitoring of emergency-lending operations that are now in place, Congress is also pushing for a more comprehensive oversight of the Federal Reserve System. The goal it to bring about the possibility for the GAO to audit monetary policy decisions and operations (e.g., Wessel, 2015). Legislative initiatives of that kind, such as the "Audit the Fed" bill,[23] has stirred controversy, particularly because they would create a direct threat to central-bank independence (Wessel, 2015).

By contrast, as Colleen Baker (2012, pp. 97-98, 105-108, 117-118) emphasizes, Congress did not use the same rigor when authorizing and setting limits for the Fed to provide liquidity assistance to designated financial market utilities, such as payment, clearing, and settlement systems. In fact, Title VIII of the Dodd-Frank Act opens the possibility for the Fed to act as a market-maker of last resort, especially when dealing with central clearing parties facing "unusual or exigent circumstances" (Baker, 2012, pp. 97-98, 103-105, 114-118).[24] Baker (2012, pp. 114, 118-119) believes that Title VIII provisions can increase systemic risk and moral hazard instead of reducing them. The rules create a significant expansion of the federal safety net without demanding any significant contribution from the institutions likely to benefit from the government intervention (Baker, 2012, pp. 114, 118-119, 120-126). As a consequence, Title VIII

[21] BIS, 2011, p. 26, citing to 12 U.S.C. § 343(3)(C) (2012). See also Baker, 2012, pp. 88-89.
[22] BIS, 2011, p. 26, citing to 31 U.S.C. § 714(e)&(f) (2012). See also Baker, 2012, pp. 88-89.
[23] See *Audit the Fed: Dodd–Frank, QE3, and Federal Reserve Transparency: Hearing Before the Subcommittee on Domestic Monetary Policy and Technology of the House of Commons on Financial Services*, 112th Cong. 14 (2011).
[24] To emphasize the greater flexibility with which Congress treated the last resort role created in Title VIII of the Dodd-Frank Act, Baker (2012, pp. 109-112) notes that "when the words 'unusual' and 'exigent' are used together elsewhere in banking regulation, such as in the Federal Reserve's 13(3) emergency statutory authority discussed above, they are instead generally joined by the conjunctive 'and'," not by the disjunctive "or," as in Title VIII.

could contribute to lessening market discipline and also to furthering the mispricing of financial risk in the sector (Baker, 2012, pp. 93-94, 118-119). On a more surprising note, the Dodd-Frank Act did not require the degree of disclosure and accountability for Title VIII's last-resort lending authority as it did for the traditional Section 13(3) liquidity assistance (Baker, 2012, pp. 126-129).

In the United Kingdom, a broad external oversight of the central bank is already in place, at least when it comes to financial-stability actions. The Prudential Regulation Authority (PRA), which is an operationally-independent subsidiary of the Bank of England created after the 2008 financial crisis to perform the microprudential supervision of banks and insurers, is under a strict accountability regime (BIS, 2011, p. 14). The PRA is fully audited by the National Audit Office, with accountability to the Public Accounts Committee (BIS, 2011, p. 18). The PRA is also subject to independent inquiries ordered by the Treasury regarding its efficiency and effectiveness, and also potential regulatory failures, which, in the latter case, can lead to a report to the Treasury to be presented before Parliament (BIS, 2011, p. 18).

That reality can be observed also in the EU. As René Smits (2015, pp. 1172-1173) notes, the creation of a "banking union" in the Eurozone pushed much of the competence to perform microprudential supervision to the European Central Bank (ECB).[25] "Acknowledging that central bank independence for its monetary tasks differs from the independence and accountability befitting a prudential supervisor" (Smits, 2015, p. 1178), the ECB celebrated institutional agreements with the European Parliament and the Ecofin Council. The agreements

[25] Smits (2015, p. 1175) reports that "[a]s of end-2014, the ECB directly supervises 123 significant banks in the euro area, and is directly responsible for licensing all banks in the euro area and for the authorisation of shareholders in banks. The non-significant banks are primarily supervised by their national authorities. The ECB may decide to directly supervise NCA-supervised banks."

"give both branches of the legislative branch wide powers of oversight" over the ECB activities related to banking supervision (Smits, 2015, p. 1178).

The idea of an external oversight of the central bank does not come as a surprise in Brazil either. The Tribunal de Contas da União (TCU) [Federal Court of Accounts], which is the Brazilian equivalent to the GAO, helps the Congress to execute its constitutional mission of ensuring the accountability of the federal government.[26] The TCU has the authority to perform investigations, audit operations, and assess the effectiveness of government policies and programs, including the ones executed by the BCB when supervising financial institutions or implementing monetary policy.[27] As a consequence of its authority, the TCU can issue decisions similar to injunctions, compelling the BCB's officers to do or to refrain from doing specific activities.[28] The TCU can even impose financial penalties against the officers of the BCB in case of wrongdoing.[29]

Again the Tension between Independence and Accountability

An old problem… The overall impression is that the lines of central-bank independence are more blurred since the 2008 financial crisis. As Rosa Lastra and Geoffrey Miller (2001, pp. 33-36) emphasize, central-bank independence has never been an absolute; not even in theory. The protection of central banks against political pressure cannot and should not be complete, because of "concerns of social policy as well as the influence of politics or practicality" (Lastra & Miller, 2001, p. 35). Nonetheless, in developed countries and emerging economies alike, senior government officials and legislators have become more involved in central banking after

[26] Under Article 71 of the CONSTITUIÇÃO FEDERAL [C.F.]. A copy of the 1988 Federal Constitution, in English, can be found at *The Brazilian Constitution*, BANCO CENTRAL DO BRASIL, http://www.bcb.gov.br/?NORMS (last visited Jan. 4, 2016).
[27] Under Article 71 of the C.F. and Lei No. 8.443, de 16 de Julho de 1992, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.7.1992 (Braz.).
[28] Under Lei No. 8.443, de 1992.
[29] Under Lei No. 8.443, de 1992.

the crisis, particularly in issues related to the stability of the financial system.[30] What are the implications of this "global paradigm shift" (Gadinis, 2013a, p. 332)?

On the one hand, a greater involvement of central government officials and the extension of congressional control can increase the legitimacy and accountability of central banks' decisions (Gadinis, 2013a, pp. 380-382). As Gadinis (2013a, pp. 351-353) notes, regulators themselves widely welcomed politicians' actions during the 2008 financial crisis, especially when deciding about bailouts. The direct participation of central government and legislators in financial regulation is a blunt response to the view that central banks and the other regulators failed in their mission of assuring the stability of the financial system (Gadinis, 2013a, pp. 343-349).

On the other hand, the interference of elected authorities in central banks' affairs can result in the (over) politicization of central banking. Because of the harmful effect that the 2008 financial crisis had had in the life of ordinary persons, financial regulation became a topic of increasing interest to voters, which prompted politicians to get involved (Gadinis, 2013a, pp. 350-351). Reelection pressures, however, can affect politicians' decisions, making their judgments prone to short-term interests and considerations not directly related to financial stability (Duff, 2014, pp. 204-205; Gadinis, 2013a, pp. 383-388; Bressman & Thompson, 2010, pp. 635-637).

As a side effect, the fading of central-bank independence can represent a setback for the pervasiveness of independent agencies. It can even be taken as a step in returning to the more traditional tripartite formula of separation of powers. Independent central banks have been seen

[30] As Bressman & Thompson (2010) note "[m]onetary policy is one area which does not currently exhibit any changes that increase presidential involvement," although the future is uncertain (p. 647).

as a landmark in the process of insulating complex and technical matters from the political branches of government (e.g., Ackerman, 2010).[31]

Bruce Ackerman (2010) has used the example of independent central banks to substantiate his claim that the tripartite model of separation of powers is flawed since the traditional three boxes of government functions are inadequate to accommodate the independent institutions.[32] A new conceptual framework would, thus, be required to encompass functionally independent units that were part of the modern government, but could not be categorized in one of its typical branches (Ackerman, 2010, pp. 128-130).[33] Central banks, however, emerged from the 2008 financial crisis less shielded from direct political control and, as a consequence, they might not be the quintessential independent institution anymore. This might be the right time to welcome Montesquieu back.

The legal literature sees that shift in central banking also as a rearrangement of the all too often tortuous relation between administrative law and financial regulation. Both Michael Barr (2015) and Gillian Metzger (2015) emphasize how the tension between accountability – "administrative law's central obsession" (Metzger, 2015, p. 130) – and independence – "the defining structural precept" of financial regulation (Metzger, 2015, p. 130) – is abating after the financial crisis.

Metzger (2015) compares the Fed to the Environmental Protection Agency (EPA), showing how those two agencies can be archetypal of the differences between financial regulation and administrative law. Compared to the EPA, the Fed was seen, e.g., as less subject to presidential and congressional control, and to judicial review, and more integrated with

[31] About financial agencies in the U.S. being "among the most prominent independent agencies," see Bressman & Thompson, 2010, pp. 607-608, 654.
[32] About the defects of the of the tripartite model of separation of powers, see Ackerman, 2010, p. 131.
[33] Ackerman (2010) calls for a "new separation of powers" to grasp the distinctive features created by "the world-wide rise of new institutional forms that cannot be neatly categorized as legislative, judicial, or executive" (p. 129).

international peers than with national state regulators (Metzger, 2015, pp. 134-139). Moreover, financial regulatory agencies in the United States could often exercise a broader discretion in rulemaking and enforcement. Financial regulation used to be conducted with a kind of "administrative soft law" approach (Levitin, 2014, pp. 2047). A closer relation with the regulated institutions allowed the regulators to use informal ways to create the related regulation, to assess compliance with the applicable rules, and even to take enforcement actions (Levitin, 2014, pp. 2044, 2047; Metzger, 2015, pp. 130-131, 140-142).

Although some specific features still exist in each field, many of those differences have waned since the 2008 financial crisis.[34] Massive rulemaking responsibilities related to politically charged issues, requiring closer interagency coordination, and the increased participation of government authorities and legislators in matters relevant to the financial system make central banks more similar to other regulatory agencies (Metzger, 2015, pp. 144-150, 152-154).

Adam Levitin (2014), however, argues that, at least in the United States, the newly enacted legislation is not enough to close the gaps that allowed financial regulators to deviate from typical administrative law rules and procedures. Levitin (2014) advocates that there should be explicit proposals "to reform general administrative law governance provisions to encompass independent agencies and to cover not just formal rulemaking and adjudication, but also regulatory inaction in terms of lack of enforcement or refusal to undertake non-mandatory rulemakings" (p. 2049).

In the end, as Metzger (2015) notes, "the most important lesson administrative law holds for financial regulation is the inevitability of politics" (p. 155). The main challenge that arises

[34] As Metzger (2015) notes, although "the two fields are drawing closer together, their traditional features have not entirely dissipated" (p. 146). There are even cases of inversion. In rulemaking, e.g., "as financial regulation has moved more towards a heavy rulemaking focus, administrative law has headed in the opposite direction, towards more informal and contingent forms of regulation." (Metzger, 2015, p. 154).

from the current debate on the politics of central banking is, in fact, an old one in administrative law: how to find a better way to reconcile democratic accountability with independence from political influence when it comes to technocratic bureaucracies (Barr, 2015, pp. 119-123; Metzger, 2015, pp. 155-156).[35]

The question of balancing independence and accountability in central banking gets yet more complicated when all the different activities that can be performed by central banks are brought to the debate.[36] Some central banks have a narrow mandate, focused on monetary stability, the pervasive activity of central banking (Arner, Panton & Lejot, 2010, p. 13; Garicano & Lastra, 2010, p. 609). Others, however, act also to guarantee financial stability. Even if a central bank does not have any direct involvement with regulatory or supervisory responsibilities, it would still perform at least one task related to financial stability, which is the lender-of-last-resort role (Arner et al., 2010, pp. 14-15; Garicano & Lastra, 2010, p. 609).[37]

As Luis Garicano and Rosa Lastra (2010, p. 611), and Lisa Bressman and Robert Thompson (2010, pp. 648-650, 654-656) argue, the involvement of central banks with financial stability matters is positively correlated with political interest and control, posing a real threat to their independence. Since the most recent tendency is for central banks to become responsible at least for macroprudential regulation[38] besides monetary policy, it seems inevitable to have more political attention over central banking for the time being (Garicano & Lastra, 2010, pp. 612-

[35] The debate on the political legitimacy of central banks in the legal literature is not a new one either. About it, see, e.g., Lastra & Miller, 2001, pp. 38-42.
[36] About the variety of tasks that can be performed by central banks, see, e.g., Arner et al., 2010.
[37] Moreover, as Daniel Tarullo (2014) emphasizes, "[n]ot all central banks have microprudential regulatory authority, (…), [b]ut the shortcomings of pre-crisis regulatory regimes have been of concern to all central banks" (p. 3).
[38] For a definition of macroprudential regulation and an overview of the related instruments and tools, see, e.g., Duff, 2014, pp. 189-199.

613). And the tendency is only reinforced by the growing dissipation of the limits between monetary-policy and financial-stability actions.[39]

As Garicano and Lastra (2010) note, matters related to accountability and transparency of central banks' actions get even more complex when central banks perform different roles. Regarding accountability, it is much harder to assess compliance and performance of central banks' actions related to financial stability than to those related to monetary stability (BIS, 2011, pp. 50-53; Garicano & Lastra, 2010, pp. 616-617). Monetary stability has one clear goal – price stability – and one basic set of instruments – monetary policy tools.[40] Financial stability, in turn, moves around multiple goals and requires the use of a broad range of instruments to be effective (BIS, 2011, p. 50; Garicano & Lastra, 2010, pp. 610-611).

Concerning transparency, all the relevant information related to monetary policy is usually public or readily available (Garicano & Lastra, 2010, pp. 616-617). More than that, central banks have adopted the practice of "forward guidance". They disclose to the market how monetary policy will be conducted in the future depending on the evolution of some indicators, such as the inflation and the unemployment rates (Smits, 2015, p. 1170). The same degree of transparency cannot be generally granted in financial stability activities. Revealing too much information related to the stability of an institution or a sector can be counterproductive, "since the belief in a panic is self-fulfilling" (Garicano & Lastra, 2010, p. 617).

… with some new solutions. The recent legal literature has offered some proposals to deal with the problems associated with central-bank independence. Levitin (2014, pp. 2058-2067) believes that one possible solution would be trying to neutralize political influence

[39] About the interplay between monetary policy and financial stability, see Goldmann, 2014, pp. 269-272, 276-279; and Tarullo, 2014, pp. 7-8.
[40] Nevertheless, as Goldmann (2014, pp. 269-272) contends, even the concept of "price stability" is undefined and subject to controversy.

altogether, especially at the legislative level, by promoting rent-seeking behavior from competing interest groups. The idea would be to create industry divisions following the example of the Glass-Steagall Act, under which commercial banks, investment banks, and insurance companies were submitted to different regulatory regimes and had conflicting interests that helped to offset lobbying influences (Levitin, 2014, pp. 2060-2063). One way, therefore, to make both legislators and central banks less subject to unbalanced political pressure would be to foster "symmetrical policy contestations" (Levitin, 2014, p. 2058) – by, e.g., establishing different regulations and even regulators for megabanks and small banks. As a consequence, legislators and central banks could be more technocratic in their policy-making and could "advance more neutral regulatory agendas" (Levitin, 2014, p. 2067).

Kathryn Judge (2015) approaches the issue from a different perspective. Judge (2015, pp. 65-66) claims that there are forces that do not involve the traditional mechanisms of political control (congressional oversight, presidential control, and judicial review), but, even so, can impose meaningful limitation to central bank's actions. Those forces are named "soft constraints," especially because they are not legally binding, and their application might not always be clear (Judge, 2015, pp. 66, 68-69). Soft constraints can, nonetheless, contribute to increasing the central bank accountability while preserving its independence. As a consequence, soft constraints help to enhance the democratic legitimacy of an institution that is seen as holding too much power without being politically accountable (Judge, 2015, pp. 65-66, 95).

Judge (2015) illustrates the power of those forces by looking at two particular soft constraints in the Fed reality: principled norms, such as the real bills doctrine, the Taylor Rule, and Bagehot's dictum (Judge, 2015, pp. 68-82); and the Fed Chair's concern with her reputation (Judge, 2015, pp. 66-67, 82-87). Judge (2015) contends that, by adhering to established

principles for conducting monetary policy instead of breaking with tradition, the Fed enhances the justification for its decision-making and, at the same time, voluntarily limits the exercise of its authority. It is, then, easier for external observers to scrutinize the Fed's actions, as those observers can rely on a widely accepted norm that serve as a reference point for oversight and informed debate (Judge, 2015, pp. 72-73, 75-76).

Since the actions taken by the Fed directly affect the reputation of its Chair during her usually long tenure and afterward, reputational concern is another factor to guide the Chair's decisions (Judge, 2015, pp. 83-85). The Chair will, thus, make her decisions based also on the desire to have them approved, even if tacitly, by government authorities, peers, and the media, which can help to reduce the probability of arbitrary action. All in all, soft constraints can be an important yet imperfect resource for legitimizing not only the actions taken by the Fed but also the Chair's authority (Judge, 2015, pp. 74-75, 81-82, 87-90).

The flip side of soft constraints is automatic behavior. They tend to solidify the way central banks act, once it is easier and less risky to always follow the typical path, even if it no longer works or it is not the best solution anymore (Judge, 2015, pp. 72-74). As Judge (2015) points out, they "can retard learning and prevent experimentation, leading experts to fine-tune an established norm when it would be more productive to question its fundamental accuracy" (p. 73).

Timothy Canova (2015) goes one step further by arguing that more important than independence from politicians would be for central banks to be independent of private financial interests. For Canova (2015, pp. 675-677), the central issue to be discussed and solved in central bank governance is capture.

Peter Conti-Brown (2015), looking at the governance of the twelve Federal Reserve Banks, agrees that capture is a key issue (pp. 16-17). In fact, Conti-Brown (2015) argues that the "tension between their public functions and their private governance […] presents problems for both constitutional law and public policy" (p. 13). Conti-Brown (2015, pp. 19-22) focuses on the issues related to the nature of the appointment of the leaders of the Reserve Banks – exclusively private – and to the restrictions on their removal – excessively limited. Conti-Brown (2015), then, concludes that "the Federal Reserve System as currently organized is unconstitutional under a straightforward application of the recent U.S. Supreme Court precedent" (p. 13).[41] Despite some arguments against their ambiguous public-private existence, the Reserve Banks might not be abolished anytime soon. And, for Conti-Brown (2015, pp. 23-24), that is a consequence not of their functional utility, but of their political connections.

More broadly, Canova (2015) criticizes what he calls the "Jackson Hole Consensus," a set of "key rules of sound economic management, including central bank independence" (p. 677), shared by central bankers around the world. Canova (2015) claims that the consensus "is more related to ideology and faith than to scientific proof" and that it "reflect[s] the interests of private banking constituencies" (p. 677). Canova (2015, pp. 693-695), therefore, believes that the main problem to be confronted is the exclusion of a broad range of social groups and interests from the central-bank governance.

Realpolitik of Central Banking:

Unconventional Measures and Central-Bank Dominance

Since the 2008 financial crisis, central banks may be less independent. But that does not mean that they are less powerful. On the contrary, central banks have been deeply involved in the

[41] David Zaring (2015a, pp. 181-185) agrees that some constitutional challenges could be brought against the Federal Reserve System.

most pressing economic and political issues after the crisis: from leading the efforts towards the recovery of many economies to contributing to the stability and cohesion of the EU.[42]

Central banks, facing the most fundamental challenges in a generation – if not longer –, have resorted to extraordinary measures (e.g., Haldane, 2015). First, last-resort lending was taken to a new level (Haldane, 2014). To provide liquidity, especially right after the crisis, central banks around the world started lending also to non-banks and accepting a wider range of collaterals in those operations. In some cases, they went further to act as market-makers of last resort (Haldane, 2014). Second, to tackle a persistent low level of inflation and ultimately avoid deflation, central banks of developed countries lowered key interest rates to previously unseen – and sometimes negative – levels (Haldane, 2014). They also implemented quantitative and credit easing programs, purchasing large amounts of government securities and private sector assets (Haldane, 2014; Pacces & Repasi, 2015).

Central banking has changed a lot and at a fast pace. As Andrew Haldane (2014) puts it, "central banks are essentially unrecognisable from a quarter of a century ago" (p. 3). What are the legal implications of that transformation? How has the legal literature reacted to those new operational and political aspects of central banking?

The main reaction of legal scholars has been to discuss the legal authority of central banks to perform such unusual activities. A slow but steady literature has analyzed the legal framework associated with the new tools used by central banks. The literature is trying to determine whether the recent actions taken by central banks are in accord with the existing rules or whether those actions are shaping reality even before the corresponding legal framework can be adjusted.

[42] About the importance of the ECB's actions for the survival of the Eurozone and even for the future of European integration, *see, e.g.*, Wilkinson, 2014.

The legal literature is also looking at the increasing "judicialization" of central banking, represented by the judicial involvement in reviewing the measures related to the crisis response (e.g., Smits, 2015, pp. 1181-1190). The judicial review has been happening not only because of complaints filed directly against central banks and their decisions but also because of actions brought against the government by shareholders of bailed-out institutions on grounds of inadequate compensation.[43]

Beyond Lender of Last Resort: Liquidity Provision and Monetary Policy at a New Level

Regarding the limits of the legal mandate of central banks, Michael Wilkinson (2014) opens his paper with a question that reverberated around Europe: "Does the European Central Bank have a mandate to do 'whatever it takes' to save the Euro" (p. 2)?

The author explores the implications of the decision issued by the German Federal Constitutional Court in February 2014 casting doubt on the legality of the ECB's bond-buying initiative known as the Outright Monetary Transactions program (OMT). The OMT had been announced by the ECB in September 2012 and had had the purpose of allowing the ECB to act as the Eurozone's lender of last resort.[44] The ECB would make unlimited purchases of bonds, on the secondary markets, from selected Member States facing fiscal problems and financing hurdles, if those States committed to the stringent conditions of a European Financial Stability

[43] About the action brought by former shareholders of Northern Rock, an English bank that was nationalized in February 2008, see Walker, 2010, pp. 753-754; and Singh, 2011, pp. 898-900. As Singh (2011) emphasizes, the Northern Rock case "provides, for the first time, a judicial assessment of the Bank [of England]'s role within [Lender of Last Resort]" (p. 898). On the lawsuits filed by AIG shareholders against the nationalization of the American insurance company, see, e.g., Casey & Posner, 2015, pp. 6, 50-53.

[44] Two years before announcing the OMT, the ECB had introduced a Securities Market Program (SMP). "Under the SMP, the ECB bought both sovereign bonds of Member States whose interest rates had become markedly out-of-line with the euro area average, and debt instruments issued by private entities" (Smits, 2015, p. 1167). Besides the SMP, the ECB also introduced the Covered Bonds Purchasing Program (CBPP), which was a predecessor of the Quantitative Easing (QE) program launched in early 2015. Although the SMP has ended with the announcement of the OMT, the CBPP and other subsequent programs with similar characteristics were included in the QE (Smits, 2015, pp. 1167-1171). Moreover, the ECB and the 19 national central banks that are part of the Eurosystem also provide liquidity to troubled financial institutions through the Emergency Liquidity Assistance (ELA), which has been used to avoid the collapse of several Eurozone banks, particularly in Greece (Hofmann, 2013, pp. 538-539).

Facility/European Stability Mechanism (Dahan, Fuchs, & Layus, 2015, pp. 149-151; Mayer, 2014, pp. 112-114).

The German Court based its decision on two grounds related to the European legal order, although the Court also included in its reasoning an issue related to the German constitutional law (Wilkinson, 2014, p. 9).

First, the ECB's program, as an act of economic rather than monetary policy[45] because of its redistributive implications,[46] would have violated the distribution of power between the EU and its Member States (Dahan et al., 2015, pp. 138, 145-147; Wilkinson, 2014, p. 5). Second, since the OMT program would be used to provide financial assistance to the Member States, it would have violated the prohibition against the central bank financing of Member States (Dahan et al., 2015, pp. 147-148; Goldmann, 2014, pp. 276-279; Wilkinson, 2014, pp. 5-6).[47] Finally, the ECB action would have also conflicted with the German constitutional principle that secures Germany's democratic sovereignty in fiscal matters (Wilkinson, 2014, pp. 9-10). Here, the German Constitutional Court resorted to its "*ultra vires* doctrine". Under that doctrine, any act at the European level – as the ECB's OMT – that goes beyond the public powers transferred to the EU, modifying the plan of integration set by the Member States, would violate not only the EU law but also the German Constitution (Mayer, 2014, pp. 115-117, 124-128).[48]

Technically, the German Court did not declare the illegality of the ECB's program, as national courts can raise questions about the interpretation of EU laws but cannot directly invalidate acts based on those laws (Mayer, 2014, pp. 115-117). The Constitutional Court in

[45] The ECB monetary policy mandate is found in Article 127(1) of the Treaty of the Functioning of the European Union (TFEU).
[46] On the problems of the distinction adopted by the German Court between "direct" and "indirect" monetary policy goals, see Goldmann, 2014, pp. 274-276.
[47] The prohibition appears in Article 123(1) TFEU.
[48] For a detailed critique of the "legal context of the Constitutional Court's first-ever reference to the CJEU" and its use of the "*ultra vires* doctrine" in the case, see Bast, 2014. Highlighting some weaknesses of the "*ultra vires* doctrine," see Dahan et al., 2015, pp. 142-144.

Karlsruhe made a reference to the Court of Justice of the European Union (CJEU) so that the CJEU could analyze the issue before the German Court proceeded to its final decision (Wilkinson, 2014, pp. 3-4, 9-10).

Although the German Court's ruling could express some deference to the CJEU, it in fact left the CJEU in a challenging position (Mayer, 2014, pp. 118-120). Since the German Court mixed national and European constitutional questions in its decision, any ruling of the CJEU based only on EU law, which is the scope of its competence, would fall short of effectively deciding the controversy (Wilkinson, 2014, pp. 3-4, 9-10). The German Court would still have room to make a different decision based on the national constitutional framework (Dahan et al., 2015, pp. 139, 143-144; Mayer, 2014, pp. 122-124).

Matthias Goldmann (2014) believes that the German Court, when analyzing the OMT program, applied an inappropriate standard of judicial review. Instead of following its tradition and reviewing only the rationality of the ECB's policy measures, which would suffice to go beyond mere procedural control, the Court moved toward a non-deferential full review (Goldmann, 2014, pp. 266-274). In doing so, the Court got entangled in highly controversial economic debates, like the definition of "price stability" and the differences and relations among monetary policy, financial stability, and fiscal policy (Goldmann, 2014, pp. 269-272, 276-279). The German Court, therefore, had to second-guess technical decisions that involved forward-looking estimates about economic factors and risks, threatening not only its legitimacy and reputation but also the ECB's independence (Goldmann, 2014, pp. 266-268).

The whatever-it-takes debate in Europe illustrates how the extraordinary measures adopted by central banks can raise more than just concerns regarding their legal authority. Those measures can also raise questions that are deeply political: from circumventing democratic

authority to affecting the complex dynamic between *power* and *authority* (Wilkinson, 2014, pp. 12-14, 20-26, 30-31).[49]

As Wilkinson (2014) emphasizes, the "argument that resonated with the German Court is clear: 'the ECB does not have a mandate to defend the Euro by any means'" (p. 24). The German Court dismissed any implicit claim of sovereignty by the ECB through the use of its whatever-it-takes doctrine to protect the stability of the Eurozone and of the European integration (Goldmann, 2014, p. 277; Wilkinson, 2014, pp. 21-24). The issue is particularly interesting in the EU because the Euro is a "currency without a state," and the ECB does not serve a single jurisdiction (Wilkinson, 2014, pp. 21-26). Bringing the issue under national scrutiny, the Court reasoned that the ECB initiative to act like an absent European sovereign was not compatible with German's "constitutional identity," mainly with its "principle of democracy" (Wilkinson, 2014, p. 24).[50] To be fair, as Wilkinson (2014, pp. 25-26) notes, the debate on the viability of the Euro and of the European project turned into a clash between counter-majoritarian institutions: the ECB and the German Constitutional Court – with the anticipated involvement of the CJEU.[51]

In fact, the CJEU, on 16 June 2015, ruled that the OMT program "does not exceed the powers of the ECB in relation to monetary policy and does not contravene the prohibition of monetary financing of Member States" (Court of Justice of the European Union [CJEU], 2015). The German Constitutional Court can still have a final word on the OMT matter, because of the national constitutional issues also at stake in that case. The ECB, nonetheless, has gained so far strong judicial support in favor of its legal authority to exercise broad discretion in implementing

[49] About the "confusion of law and politics" that appears in the German Constitutional Court ruling on the OMT program, see also Mayer, 2014, pp. 134-136.
[50] For a discussion about the definition of "constitutional identity" and of the democratic principle by the German Constitutional Court and its implications, see Dahan et al., 2015, pp. 140-141; and Mayer, 2014, pp. 128-133.
[51] About the "democracy paradox" of having a confrontation among counter-majoritarian institutions in the name of democracy, see Mayer, 2014, pp. 139-142.

monetary policy.[52] As long as a connection with "price stability" can be demonstrated, the ECB is allowed to use a wide range of tools, conventional or not (CJEU, 2015).

Alessio Pacces and René Repasi (2015), also analyzing an unconventional monetary tool, look at the legal mandate of the ECB to make use of quantitative easing (QE). The authors start by explaining how QE is different from OMT. Although the OMT program is also executed through bond buying, it does not aim to increase the quantity of money, as QE does. "OMT only aim to secure the transmission of ECB policy rates throughout the Eurozone countries by ruling out speculations that one of them will exit the Euro to restructure its debt" (Pacces & Repasi, 2015, p. 1). So OMT can be effective without ever being implemented – as it is the case – because its most important effect is to affect expectations based on its credibility. QE, on the other hand, has to be implemented and has to create an increase on the quantity of money for QE to be credible and, as a consequence, effective (Pacces & Repasi, 2015, p. 1).

Despite those differences, QE,[53] as Pacces and Repasi (2015) show, raises all but the same set of legal questions associated with OMT.[54] First, the authors advocate that QE lies within the ECB's monetary policy mandate,[55] since QE is an open market operation; and open market operations are typical monetary policy instruments (Pacces & Repasi, 2015, p. 3). Moreover, as the QE primary goal is to attain price stability (modifying inflation expectations), the ECB does not exceed its monetary-policy mandate because QE can also include economic policy aspects (stimulating the economy). That line of reasoning appeared also in the Opinion of

[52] For a recollection of other cases against the ECB brought before the CJEU, all of them unsuccessful thus far, see Pacces & Repasi, 2015, p. 3; and Smits, 2015, pp. 1183-1188.
[53] The QE program was launched by the ECB on 22 January 2015, and the purchases started on 9 March 2015. For a detailed and useful overview of the ECB's QE, see Claeys, Leandro, & Mandra, 2015.
[54] For another summary of the arguments and counterarguments regarding the legality of OMT, see Hofmann, 2013, pp. 542-546.
[55] Article 127(1) TFEU.

the Advocate General at the CJEU Pedro Cruz Villalón in the OMT case (Pacces & Repasi, 2015, p. 3).

Second, Pacces and Repasi (2015) argue that QE does not violate the prohibition of monetary financing of Member States[56] either. QE involves the purchase of government bonds and private assets alike, as long as they are rated "investment grade". That limitation would exclude bonds of the most troubled countries (like, e.g., Greece) unless they committed to certain fiscal and economic conditions (Pacces & Repasi, 2015, p. 3). The ECB, moreover, makes the purchases only on the secondary market, not directly from the issuers on the primary market. There are also explicit limits on the total amount of purchases and on the relative amount of purchases from the same issuer or from a single issue. Those safeguards are considered sufficient to avoid even an indirect financing of a Member State, thus allowing "an unbiased formation of prices for government bonds on the primary market" (Pacces & Repasi, 2015, p. 4).

Also, Pacces and Repasi (2015, p. 4) rebut another argument related to the supposed illegal monetary financing of a Member State, or to the violation of the "no bail-out" clause[57] for that matter. First, only government bonds rated "investment grade" are eligible, and they are bought "in proportion to the share of national central banks in the ECB's capital" (Pacces & Repasi, 2015, p. 3). Government bonds are purchased and held directly by national central banks, and risk – and loss – sharing across the Eurozone is limited to 20% of the total asset purchases (Pacces & Repasi, 2015, p. 5).

The authors also claim that potential losses in the government bonds held by the ECB, because of a waiver of rights ("haircuts") or the default of a sovereign, would not lead to an automatic recapitalization of the ECB. As they explain (Pacces & Repasi, 2015, p. 4), reaching

[56] Article 123 TFEU.
[57] Article 125(1) TFEU.

out again to the Opinion of the Advocate General Cruz Villalón in the OMT case, taxpayers' money would be at risk only if the ECB faced insolvency and were liquidated. But that situation would not occur unless the Eurozone and the Euro were to be broken up. As long as the ECB can operate with a negative equity and gradually eliminate that imbalance by reducing the distribution of profits (from, e.g., seigniorage) to the Member States, the illegal financing or a bail-out would be nothing but a remote possibility (Pacces & Repasi, 2015, p. 4).

In the United Kingdom, George Walker (2010, pp. 767-771) shows that the legal framework related to management and resolution of failing banking institutions was modified and adjusted at the same time that the authorities were taking the measures needed to control the crisis. The nationalization of the Northern Rock Bank on February 17, 2008, for instance, was facilitated by the transitional provisions introduced four days later, on February 21, under the Banking (Special Provisions) Act. Those provisions allowed the Treasury to transfer the assets and liabilities of a bank, and even to make retroactive legal amendments, if those actions were necessary "to maintain financial stability or protect the public interest" (Walker, 2010, p. 767).[58] A year later, a more comprehensive and permanent Special Resolution Regime for failing banks was created under the Banking Act of 2009 (Walker, 2010, pp. 753-754, 767, 780).

The British parliamentary system helped to bring legislators, government authorities, and government agencies together to solve the problems of the financial system on a rolling basis. The coordinated move created some points of doubt and contributed to slowing reactions at first, especially when it was not possible to reach cross-party consensus (Singh, 2011, p. 919), but it ultimately provided the authorities with legal powers to act with confidence and determination (Walker, 2010, pp. 778-780). The coordination also helped to reduce claims based on the lack of legal authority against the actions taken by the Treasury, the Bank of England, and the then

[58] About the "UK casualties," see also Singh, 2011, pp. 876-879.

operating Financial Services Authority (the FSA) in response to the crisis. Even so, former shareholders of the nationalized Northern Rock Bank brought action against the government for inadequate compensation. In the end, the courts dismissed the lawsuit (Walker, 2010, pp. 753-754; Singh, 2011, pp. 898-900).

Timothy Canova (2015), focusing on the United States, raises doubts about the legitimacy of the lending and QE programs adopted by the Fed in the aftermath of the financial crisis (pp. 687-695). His concerns are similar to those that appeared in the European debate. Canova (2015) contends that the Fed acted well beyond its traditional powers when providing liquidity through exceptional loans to banks, non-banks, and even foreign central banks, in the latter case through the currency swap lines.

Chad Emerson (2010, pp. 125-129) also believes that the Fed exceeded its authority in the first responses to the financial crisis. When dealing with the investment bank Bear Stearns and the insurance corporation American International Group (AIG), the Fed acted outside the scope of its traditional and even emergency powers. Instead of providing liquidity to the troubled financial institutions through loans backed by collateral, the Fed made outright purchases of private assets held by the institutions in need. To avoid the statutory restrictions, the Fed created wholly-controlled limited liability companies (the Maiden Lane LLCs) that served as intermediaries in the liquidity injections (Emerson, 2010, pp. 128-129).

Alexander Mehra (2010) agrees with that criticism, claiming that "many of the Fed's actions during the financial crisis exceeded the bounds of its statutory authority" (p. 222). Mehra (2010, p. 235) is particularly critical of the Fed using Section 13(3) of the Federal Reserve Act to buy assets[59] from troubled financial institutions.

[59] The assets were all private, such as asset-backed securities (ABS) – particularly mortgage-backed securities (MBS), unsecured commercial papers, and money market instruments (Mehra, 2010, pp. 235-238, 242).

Mehra (2010) concurs with Emerson (2010) and argues that those operations were structured as loan transactions[60] to observe the legal requirements, but they were asset purchases, allowing the Fed "to move assets off the balance sheets of these institutions and onto its own" (p. 235). To that end, the Fed used special purpose vehicles (SPVs) as intermediaries in those transactions, the Maiden Lane LLCs. The SPVs were responsible for purchasing the assets from the troubled institutions, and the Fed for making the loans to the SPVs, which, in turn, used the purchased assets as collateral for the loans (Mehra, 2010, pp. 235-249). The relation between the Fed and the SPVs was so intertwined that the balance sheets of the SPVs were reflected on the Fed's balance sheet (Baxter, 2009). As a result, "[t]he composition of the Fed's balance sheet has been altered significantly by the actions that the Fed took during the crisis" (Mehra, 2010, p. 235, n. 62).

Mehra (2010, pp. 236, 239-40) identifies an additional problem with those transactions: the Fed was providing liquidity through loans to a party – the SPVs – other than the one who needed assistance – the troubled financial institutions. The ultimate beneficiary of the transaction was not the immediate borrower, which seems to go against the language of the statutory requirements for the operation.[61] Mehra (2010, pp. 236, 241), furthermore, contends that the operations implemented through the SPVs involved not a *discount*, as required by law, but an *advance* instead. In fact, it was a backward operation. First, the Federal Reserve Board authorized one of the Federal Reserve Banks to lend a certain amount to an SPV; only then the SPV purchased the assets that would be used as collateral to the already formalized loan (Mehra, 2010, pp. 237-238, 241). Mehra (2010), in the end, also raises the concern "whether the loans

[60] Mehra (2010, p. 243) also argues that some of those loan transactions were not even sufficiently secured.
[61] The statutory requirements appear in Section 13(3) of the Federal Reserve Act (Mehra, 2010, p. 240).

were in fact secured to the satisfaction of the Fed at the time it made them" (p. 236), since adequately valuing the assets offered as collateral at that time of crisis was extremely tough.

Regarding the QE programs in the United States, Canova (2015, pp. 691-693) argues that the Fed has stretched its statutory authority in the asset purchase operations. By making allocation decisions and focusing on particular sections of the market, the Fed picked winners and losers and ultimately engaged in fiscal policy matters (Canova, 2015, pp. 667, 689-690, 693-695). Adam Levitin (2014) buttresses the argument, underlining that monetary policy can be a "deeply political enterprise" (p. 2000), since it inevitably has distributional consequences. Levitin (2014) notes, for instance, that "[l]ow — near zero — interest rates were great for creditors, but devastating for debtors and savers" (p. 2000). As Canova (2015) puts it, the expansive actions that were taken throughout the QE programs "raised questions about the Fed's purported social neutrality and the justifications for its political independence from the representative branches of government" (p. 667).

Beyond International Financial Regulation: the "Central Banking Network"

Colleen Baker (2013) also speaks about the Fed as a liquidity provider, but she focuses on the international level. Baker (2013) turns her attention to a tool that was reactivated during the 2008 financial crisis: the central-bank liquidity swaps, also termed the "swap lines." The swap lines are contracts setting a bilateral currency agreement between the Fed and certain foreign central banks to exchange U.S. dollars for the foreign central bank's national currency. Through the swap lines, the Fed provides foreign central banks with liquidity of U.S. dollars so that they can meet, especially in times of crisis, the internal demand for the currency (Baker, 2013, pp. 622-624, 626). The swap lines, thus, aim to "relieve global shortages in short-term

funding markets for U.S. dollars" and "to promote international financial market stability" (Baker, 2013, p. 622).

As Baker (2013) argues, and Camila Duran (2015a) agrees, the swap lines have put the Fed as the "de facto international lender of last resort" (p. 619). After all, the Fed is offering liquidity to foreign financial institutions, although indirectly and without knowing the identity of the recipient institutions (Baker, 2013, p. 623). Duran (2015a) adds that the widespread use of currency swaps is also a consequence of the increasing political and economic power of central banks around the world and of the higher degree of central bank cooperation. The growing complexity of monetary policy after the 2008 crisis also helped to empower central banks as the leading actors in setting and implementing policy responses around the globe (Duran, 2015a, pp. 13-14).

On the one hand, the swap lines can be seen as a necessary tool to tackle instabilities in the global financial markets, particularly because the U.S. dollar is "the international currency and the main international reserve currency" (Baker, 2013, p. 612). The Fed, therefore, plays a preeminent role in the international monetary system and in the increasingly cooperative world of central banking – even more so after domestic-oriented responses to the crisis alone proved ineffective.[62] On the other hand, the swap lines can also be viewed as a controversial measure aimed to bail out foreign financial systems with U.S. taxpayers' money (Baker, 2013, pp. 606-608, 612-618).

In any case, as Baker (2013, pp. 636-653) contends, the legal framework related to the swap lines should be improved. Baker (2013, pp. 607-608, 626) emphasizes that, during the 2008 financial crisis, the Fed entered into swap-line arrangements with 14 foreign central banks for a

[62] About the influential role played by the Fed at the international level and the coordination among central banks, see, e.g., Arner et al., 2010, pp. 9-10, 28.

total amount of $583 billion, or about one-fourth of the Fed's assets at the time. In February 2012, this amount stood at $109 billion, and, in December 2012, the Fed extended the duration of its swap line facility. Despite the significant amount at stake and the risks involved in the operation,[63] the Fed neither relied on a solid legal authority nor sought congressional approval to engage in the swap lines (Baker, 2013, pp. 608-609, 626-628). As Duran (2015a, pp. 11-13) notes, the power of central banks and their international aspirations influenced even the design of the agreements used to enhance liquidity at the global level: from bilateral loans between governments and treasuries, which were common during the 1990's crises, to bilateral currency swaps between monetary authorities, after the 2008 crisis.

Baker (2013) also identifies "several potential public policy problems" associated with the swap lines as they stood (p. 629). The assurance of U.S. dollar liquidity can not only increase moral hazard at the international level, leading to excessive risk-taking and instability; it can also influence the price of exchange rates and, as a consequence, distort pricing mechanisms on a global scale (Baker, 2013, pp. 629-632). By engaging so actively in the international financial arena to perform such an unconventional role, the Fed might face reputational damages that can threaten its independence. The international presence of the Fed might also make it subject to additional interest-group pressures and to an increased risk of capture (Baker, 2013, pp. 632-633). Finally, by acting internationally as a liquidity provider without having the corresponding regulatory and supervisory tools, the Fed cannot exert any control over the institutions that ultimately benefit from its actions, leaving even more room to misaligned incentives and moral hazard (Baker, 2013, pp. 633-635).

[63] As Baker (2013) contends, "[a]lthough the default risk of a major central bank is generally viewed as minimal," the exposure to counterparty credit risk still exists (p. 624).

Duran (2015a) joins Baker (2013) in criticizing the currency swaps between central banks. Unlike Baker (2013), Duran (2015a) does not focus her analysis on the American perspective or on the problems that the Fed may face because of the swap lines. Duran (2015a, pp. 4-6) is more concerned about the international repercussions that the bilateral swap lines might generate, especially for emerging markets. She highlights three main negative consequences of the currency swaps.

First, currency swaps promote the fragmentation of the international monetary system. As many countries in Latin America, Europe, and Asia have tried to solve liquidity problems by letting their central banks sign bilateral agreements with the Fed, multilateral institutions like the International Monetary Fund (IMF) have been sidelined on the matter (Duran, 2015a, pp. 6-7, 12-13, 15-16). Duran (2015a, pp. 11-13, 16) argues that one of the possible causes for bypassing the IMF is political stigma. Since some countries, particularly emerging economies, had bad experiences with IMF programs during the 1990's and early 2000's crises, they now express a preference for bilateral arrangements. But Duran (2015a, pp. 13-14, 16) concedes that the increasing importance and autonomy of central banks also contributed to the spread of bilateral arrangements. The presence of an international organization, though, would be useful to better coordinate the efforts and allocate the resources based on the economic and financial situation of each country (Duran, 2015b, p. 2).

Second, currency swaps can raise concerns about reliability and stability. Since no resources are exchanged until the swap is activated, the counterparties face some "uncertainty about the access to international money in times of crisis" (Duran, 2015b, p. 2). That uncertainty could be avoided if the funds were transferred to an international organization that would collect them and, later on, allocate them as needed (Duran, 2015b, pp. 2-4).

Finally, currency swaps are “hierarchical not horizontal” (Duran, 2015b, p. 2), allowing room for central banks to unilaterally decide to whom they will extend their swap lines (Duran, 2015a, pp. 7, 15). The Fed, e.g., ultimately decided to have standing swap lines only with “the elite of the central banks in the developed world” (Duran, 2015a, p. 15). The PBOC, in contrast, “has almost 30 swaps in Renminbi with different central banks” (Duran, 2015a, p. 16). Again, the intermediation of an international organization would help to make the currency swaps less capricious and more accessible to a broader range of countries (Duran, 2015b, pp. 2-4).

Also looking at the international level, Douglas Arner, Michael Panton, and Paul Lejot (2010) stress the high degree of coordination developed by central banks during the 2008 financial crisis. Although cooperation among central banks had hardly been a novelty, and despite some frictions in the beginning and splits in the end, central banks were able to act fast and in an organized way to solve complex issues that went beyond domestic boundaries (Arner et al., 2010, pp. 30-34, 36-38). Through international meetings, formal and informal agreements, joint announcements, and collaborative efforts, central banks shared experiences, practices, and tools to deal with cross-boarder institutions and transnational problems (Arner et al., 2010, pp. 34-38). The swiftly coordinated response was facilitated by the high degree of independence – de jure and de facto – that many central banks held at the time (Arner et al., 2010, pp. 28-31).

As a result, the coordination helped to avoid the political hurdles that would have been encountered by governments acting in a similar situation (Arner et al., 2010, pp. 28-31). And the response was relevant not only because of the concrete measures jointly adopted by central banks but also because it delivered a message of cohesion. The international coordination, Arner et al. (2010, pp. 37-40) argue, was also important to set a transnational regulatory agenda aimed at preventing or, at least, at better managing future crises. In the end, the coordinated actions

contributed even to reviving the importance of the IMF as a global actor and liquidity provider (Arner et al., 2010, pp. 37-38) – albeit Baker (2013) and Duran (2015a) differ on that point.

Before the financial crisis, central-bank coordination would be found primarily in regulatory initiatives designed to deal with financial stability matters. For the past forty years, in fact, the "soft law" approach used in international financial regulation (IFR) has been testing the limits of public international law (e.g., Zaring, 2015b). The prevailing view is that a system organized by informal networks and based on flexibility, agility, and expertise is more effective for IFR than one structured around formal international organizations and based on treaties (e.g., Brummer, 2011).

Pierre-Hugues Verdier (2013) offers a different perspective, claiming that the conventional accounts neglect IFR historical and political dimensions. For Verdier (2013, pp. 1424-1436), the success of "soft law" in IFR results from a combination of historical path dependence with the dynamic political interaction among three crucial actors: national regulators, the financial industry, and the government of influential countries. Each of those actors tends to be reluctant to fully submit to international standards and oversight, and, as a result, to lose a significant part of their power and influence. They, therefore, favor fragmented and informal international arrangements that can be more easily adjusted, diluted, or even tailored to their views and needs (Verdier, 2013, pp. 1428-1436, 1439-1456). So, Verdier (2013) argues, for IFR proposals to succeed they "must have strong support from one or more of the three major actors, and at least passive acquiescence from the others" (p. 1436). Otherwise, the most common outcome in IFR tends to be inertia and purposely incremental development of goals and standards, leading to slow progress (Verdier, 2013, pp. 1436-1437).

In a similar manner, Annelise Riles (2013) notes that IFR might show positive signs in theory, but it can lead to uneven results in practice. First, because national actors tend to engage in IFR "with quite a nationalist view" (Riles, 2013, p. 73): they favor international harmonization as long as it helps to avoid that countries with less stringent regulation gain unfair advantage due to regulatory arbitrage.[64]

Second, because the development of standards and rules at the international arena means little without adequate supervision and enforcement at the national level (Riles, 2013, pp. 74-75). Without a strong "domestic support for implementation" (Riles, 2013, p. 74), IFR is nothing but good intentions. Or, as Lawrence Baxter (2016) puts it, "it might well be that global banking *regulation* (. . .) *optimizes locally*" (p. 15). The complex interaction of IFR and national powers can even degenerate into "Balkanization," an increased fragmentation of financial regulation that appears because actions taken toward global harmonization are offset by reactions at the national level (Baxter, 2016).

Rosa Lastra (2014), in fact, sees effective enforcement as the "greatest challenge at the international level" (p. 793). To deal with that issue, Lastra (2014, pp. 797-804) believes that it would be vital not only to harden some soft-law rules but also to create a World Financial Organization (WFO).[65] And, for her, the international institution that is best positioned to perform the role of a WFO is the IMF. Only the IMF currently has the international legitimacy, the appropriate tools and expertise, the needed financial resources, and the required staff to formally assume the role of a WFO (Lastra, 2014, pp. 800-804).

[64] Developing a similar argument regarding the importance of regulatory arbitrage to the support of international harmonization, see Posner & Sykes, 2013, pp. 1037-1039.

[65] Arguing against the creation of a WFO, especially because of the potential limitations of its enforcement power, see Turk, 2014, pp. 110-14.

The third reason why IFR might be more appealing in theory than in practice is the difficulty in creating simple and precise rules at the international level that can be used and applied straightforwardly by different countries. And, as Eric Posner and Alan Sykes (2013, pp. 1029, 1074-1077) stress, the vaguer and more complex the rules created at the international level are, the harder it is to assess compliance and to control deceitful behavior at the national level. Even the Basel accords, which have been mostly based on rules that could be considered precise and clear at first glance, have failed to meet their goals largely because of the swiftness and complexity of financial systems. Some degree of regulatory capture and national politics, promoting narrow interests, might also have contributed to the failure (Posner & Sykes, 2013, pp. 1039-1042, 1074-1075).

Politics, after all, might have been more important to the formation and longevity of IFR than "rational calculations of cost and benefits by states" about international cooperation (Verdier, 2013, p. 1439).[66] Politics also brought the most fundamental change in the architecture of IFR after the financial crisis (Gadinis, 2013b). The G20 is now the "principal forum for international economic cooperation" (Verdier, 2013, p. 1461), since the Financial Stability Board (FSB), established by the G20 in April 2009, has been playing a leading role in IFR.[67]

The G20, however, is neither a "transnational regulatory network" (TRN) nor a formal international organization. The G20 is a political body in which countries that account for about 85% of the world's GDP get together, represented either by their national leaders or by their finance ministers and central bank governors (Verdier, 2013, p. 1462). Since the relationship between the G20 and the FSB is strong, political leaders – finance ministers in particular – now

[66] For a different view, emphasizing the economic reasons that lead to international legal cooperation, see Posner & Sykes, 2013, pp. 1027-1030.
[67] Riles (2013) states that the FSB arguably represents "the state of the art in international financial governance" (p. 67).

have a direct participation in IFR, mirroring what happened at the national level (Gadinis, 2013b, pp. 159-161, 163-170). As Stavros Gadinis (2013b) emphasizes, through the FSB, elected politicians can shape financial regulation around the globe "in ways not available to them in the past" (p. 159).

The more political structure of the FSB does not necessarily imply that its democratic legitimacy is enhanced. Riles (2013, pp. 91-93, 98-100) underlines that the most important economies still hold the greater power to influence the outcome of the FSB initiatives. Furthermore, private actors and national legislators do not have significant direct participation in the FSB debates and decisions.

The "central banking network" (Baker, 2013, p. 637) that has emerged after the financial crisis, though, is somewhat different from previous and even recent experiences in IFR.[68] The network, as Baker (2013, pp. 608-609, 626-628, 637-638) highlights, has operated internationally in unusual ways. The chief distinction here, also noted by Duran (2015a, pp. 6-7, 11-16), is that central banks have, in many cases, acted directly among themselves. They completely sidelined not only national authorities but also international organizations and forums. Central banks have operated together without an overarching legal framework and outside of a formal institutional setting (Baker, 2013, pp. 632-35; Duran, 2015a, pp. 7, 15). Moreover, their primary goal has not been to create or organize standards and rules to be used in the future, but to directly solve problems and share practices in real time (Arner et al., 2010, pp. 34-38; Duran, 2015a, pp. 7, 9, 13-16).

Posner and Sykes (2013) share a similar view, although they express it in a more negative fashion: "about the most one can expect is occasional ad hoc cooperation among a subset of

[68] For a summary of past and recent central-bank cooperation and its limitations, see Posner & Sykes, 2013, pp. 1071-1073.

central banks confronting an immediate short-term problem" (p. 1071). Posner and Sykes (2013) look at the episodes of central-bank cooperation as exceptions proving the rule that central banks usually fail "to coordinate efforts to stimulate economies during downturns" (p. 1073).

Even when an effort to attain international coordination does exist, some disagreements may appear. Xin Chen (2014) claims that the radical QE policy adopted by the Bank of Japan (BoJ) since January 2013 has increased trade imbalances between Japan and its Asian counterparties. Under the ambitious economic program launched by Prime Minister Shinzo Abe ("Abenomics"), the BoJ has committed itself to engaging in an open-ended asset buying program and to raising its inflation target.

Chen (2014) argues that those actions resulted in the depreciation of the yen, helping Japanese exports "at the expense of Japan's trading partners" (p. 162).[69] As a consequence, Chen (2014) goes further, Japan's measures could be viewed as violating not only exchange-rate policies designed to promote currency stability among countries, but also international-trade rules. Those violations would allow challenges of the Japanese strategies under the IMF Articles of Agreement and also under World Trade Organization (WTO) and the General Agreement on Tariffs and Trade (GATT) rules (Chen, 2014, pp. 168-178). The line between economic stimulation at the domestic level and competitive depreciation at the international level is not always clear when it comes to the effects of monetary easing, particularly in long-lasting programs (Chen, 2014, pp. 165-168).[70]

[69] The evidence about the correlation between devaluation of the currency and boost in exports is not clear anymore. As "Big Mac Index" (2016) shows, Japanese export volume remained all but stable since January 2012, although the yen devaluated more than 35% in the same period.

[70] Nevertheless, as Posner and Sykes (2013) underline, because of the "long-run neutrality of money," in the long term "exchange rate devaluations will have no 'real' effect on economic activity because other prices will adjust to offset" (p. 1065).

John Riley (2014) dissents with Chen on the subject, arguing that Japan's monetary-easing policy complies with international law. Riley (2014) concedes that the dramatic depreciation of the yen has been a side effect of the monetary easing implemented by the BoJ. Riley (2014, pp. 185-188) states, however, that Japan's expansive monetary policy should be taken, in the first place, as a much-needed action to fight a persistent deflationary cycle and a stagnant economy; an action that would eventually come as a benefit for the region. It would be, then, difficult to prove that the ultimate intent of Japan was to manipulate its currency. As Riley (2014) puts it, claiming violations of international rules against Japan "would be tantamount to accusing the US, EU, England, as well as others, of similar violations" (p. 191), since all those countries have resorted to unconventional measures to squash the adverse effects of the 2008 financial crisis.[71]

Despite some points of conflict, the results of the coordinated actions taken by central banks during and after the crisis can be seen as fundamentally positive. There are, though, some questions that remain open: Is extremely loose monetary policy coming to an end, either because of strategy or because of exhaustion? What and how effective will be central banks' exit strategies from unconventional liquidity and monetary-policy actions? Will central banks be able to consistently reduce their balance sheets and bring them back to "normal" levels (e.g., Arner et al., 2010, pp. 39-40)? Or, more broadly, how to create and explore synergies between monetary and financial stability policies at the national and international levels?[72] The recent troubles the Fed had when trying to raise the benchmark interest rate, because of domestic and even foreign

[71] Posner and Sykes (2013, pp. 1065-1068) develop a similar reasoning to reach almost the same conclusion.
[72] About the difficulties in attaining a balanced and effective interaction between monetary and macroprudential policies, nationally and internationally, see generally Heath (2014). See also BIS (2011, pp. 43-45, 55-67), highlighting the synergies and conflicts between monetary policy and financial stability policy instruments and objectives.

factors (e.g., Forsyth, 2015), illustrates why the challenging life of central banks may not change anytime soon.

Conclusion

What is in a mandate? From a legal perspective, that is the question that summarizes the current state of affairs of central banks. Since the 2008 financial crisis, central banking has changed a lot and at a fast pace. Many central banks have been exploring uncharted territory. The core of their legal mandate, however, remains the same: to maintain monetary and, in many cases, financial stability.[73] The tools central banks have been using, though, to implement their mandate are completely different, some of them unprecedented. Do central banks have the legal authority to use those tools?

Each branch of government has different answers to that question. At first the executive branch will answer, "maybe." Central governments have not removed central banks from financial-stability matters, but they have adopted measures to mitigate central-bank independence on that front. The fear of financial failures, bailouts, and their repercussions have prompted central governments to get more directly involved with financial stability. Central banks are still in the field, but they are not fighting alone anymore.

When it comes to price stability and economic growth, though, the answer offered by central governments may turn into a more assertive "yes." The limitations, even political,[74] of fiscal policy have given central governments good reasons to let central banks take the lead in reorganizing the economy and resetting the path for growth through interest-rate tuning and balance-sheet boosting. The expansion of central banking can, however, complicate even further

[73] Although not all central banks will have a specific mandate on financial stability, most of them will act at least as lenders of last resort and, more recently, as macroprudential regulators. See supra note 37.
[74] Think, e.g., about the unpopular process of raising taxes to increase revenue and boost public spending and investments.

the practice of central-bank independence, as it might push central banking towards fiscal territory.

The Judiciary will timidly agree with the Executive and say, "yes," central banks can use any means to save the financial system and the economy – perhaps also the European Union. Faced with issues that are not typically brought to courts, judges do not appear to be ready to dig deeper into the work of central bankers and to run the risk of becoming trapped in complex economic debates.[75] They might be wary of striking down technical and sensitive central-bank decisions on formal grounds – like the lack of legal authority – and, thus, of contributing to aggravating the instability and uncertainty already present in the real economy. Reputational and legitimacy concerns can pose a serious challenge to judicial review of central-bank measures.

Legislators, in turn, will tend to say, "no." For many of them, independent central banks went too far during the crisis, by unilaterally picking winners and losers, and are still unreasonably stretching their mandate with massive asset purchases. Legislators are the ones who seem to be more willing to exert broad control over central banks. Not only do they want to create more statutory constraints on central-bank actions, but they also want to make central banks more transparent and accountable.

Legislators, however, have realized that building a legal framework to deal with financial and monetary stability issues is easier said than done. A strict rules-based approach, trying to curb central-bank discretionary powers, may not work well across all the tasks a central bank can perform (e.g., Ip, 2015). Some degree of flexibility, particularly in monetary policy and extreme stability measures, may be crucial for central banks to act promptly and effectively when faced with hard choices. Legislators may also have difficulties in targeting specific central-bank

[75] Focusing on the U.S. reality, Zaring (2015a, pp. 175-76) argues that the Fed and the FOMC have an excellent record in courts, and that the judiciary does not seem to be prepared or willing to thoroughly review and control their actions.

actions – like, e.g., emergency lending and bailouts – and imposing meaningful constraints on them since the differences between monetary-policy and financial-stability actions are wearing down – QE is a case in point. It is not easy to control an institution that deals with so many sensitive, complex, and controversial issues. But it is certainly not desirable to allow such a powerful institution to go unchecked. Striking a balance is the enduring challenge.

One movement is, therefore, clear since the 2008 financial crisis: all the three branches of government have become much more involved with central banking, creating a complex interaction of powers. And the interest in central banks goes well beyond the public sphere. Central banks are now at the center of the economic and political arenas. They had to abandon their boring "good life" (Haldane, 2014, p. 4) to lead the efforts to tackle the economic downturn. Central banks have been acting on more fronts, facing more risks, and, as a consequence, attracting more attention. Every central-bank move and word are now scrutinized on a daily basis not only by government officials and legislators, but also by market actors, the media, and ordinary citizens. That reality gives a different dimension to the debate over central-bank independence and governance, making it harder to determine from whom and to what extent central banks are, or should be, independent.

At the international level as well, central banks are protagonists. Central banks around the world have been working in coordination, based mostly on informal agreements, on setting and emulating examples, and even on financial instruments (like the swap lines). National governments and international bodies were sidelined in many situations, as central banks have been making full use of their autonomy to move fast and freely together. The "central banking network" is, in fact, helping to reshape international financial and monetary law, as central banks often appear as quasi-sovereign international legal actors. In the "central banking network," the

urge to act seems to eclipse the need to craft a framework for acting. The network is, therefore, a dynamic yet fleeting process, since ad hoc arrangements can be easily set but can also be quickly abandoned (Posner & Sykes, 2013, pp. 1026, 1062, 1071-1073).

Regarding monetary policy, in particular, it might be too early to declare the victory of cooperation and harmony. Divergence among central banks is looming, as the United States, the United Kingdom, the European Union, and emerging economies are entering different phases in their responses to the lingering crisis (e.g., Wolf, 2015). Parting ways might reinvigorate expressions of regionalism and nationalism, especially on exchange-rate policies.

In the end, all those issues culminate in the debate over the real scope of the central-bank legal mandate. So, again, what is in the legal mandate of central banks? “Whatever it takes” might well be the best answer.

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