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***“Soft-law mechanisms, hard institutional impacts: how the European Ombudsman is enhancing the European Central Bank’s transparency framework”***

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**Abstract**

In the post-crisis scenario, the European Central Bank (ECB) has gained more financial powers and mandates at the European level. Therefore, there is more demand for transparency and accountability of this institution. This paper presents an ongoing research and an initial account on how the European Ombudsman has been contributing to improve the ECB framework for transparency. By means of nine inquiries involving the central bank, the Ombudsman expanded the transparency of the European monetary policy and produced considerable impacts on the ECB. For instance, as a result of one case, the central bank promoted a public consultation for specific regulation on financial matters. Despite its soft-law powers, the Ombudsman is promoting hard effects on the ECB accountability. However, there is room to improve it further.

**Keywords:** ECB, European Ombudsman, transparency, accountability, public evaluation.

## 1) Introduction

Looking back to central bank history, one may notice that conventionally these institutions were not supposed to be accountable to general public, but mainly to political powers of their countries.<sup>1</sup> Yet, in the last three decades, the most important institutional change for central banks was the attribution of political autonomy over monetary policy as well as the establishment of mechanisms for “operational transparency”. The main goal of monetary stability was another feature of this political movement. Having an exclusive aim, or a well-defined hierarchy of goals, was supposed to make the performance assessment straightforward. Therefore, accountability and transparency mechanisms<sup>2</sup> were designed by law to assure that currency management could be evaluated by parliaments and heads of government.

Nonetheless, since the 1990s, central bank regulations or statements related to operational transparency were also set up, though focused on market communication and economic efficiency of monetary actions. For instance, central bank, by their own initiatives, defined specific inflation targets for interest rate policy (the case for the ECB and after 2012 the United States' Federal Reserve) or decided to publish minutes (the ECB after 2015).<sup>3</sup> This precise type of accountability mechanism has emerged as *soft law*, i.e. outside of the battles of the political arena.

In my opinion, it has gone unnoticed in the economic literature, which refers to them only as mechanisms of “operational transparency” (Duran, 2012). Nonetheless, these central bank regulations established an institutional framework for *potential* greater social accountability (Duran, 2015). These “soft”

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<sup>1</sup> For an account on the history of accountability mechanisms of the European Central Bank, the United States' Federal Reserve and the Brazilian Central Bank, see Duran (2012). For the foundational book on this subject, see Amttenbrink (1999).

<sup>2</sup> In Duran (2012; 2015), I distinguished accountability from mechanisms of transparency: “[f]rom the point of a political and legal view, transparency is a precondition (i) to legitimate monetary policy implemented by [...] independent CBs [central banks] and (ii) for the accountability of these institutions – it enables social forums and political institutions to monitor and evaluate their operation” (Duran, 2015: 121).

<sup>3</sup> In February 2015, the ECB decided to publish its minutes. The *Financial Times* attributed this decision to “public pressure for more accountability after the global financial crisis [which] has forced traditionally secretive rate setters to open up” (European Central Bank opens up with release of minutes' - 19 February 2015).

instruments complemented the legal structure for monetary policy transparency construed by hard law and parliamentary initiatives.

The 2008 financial crisis, however, challenged this institutional framework for transparency in currency management. Firstly, the quantitative easing policies (QEs) became the “new normal” for central banks, since interest rate decisions exhausted its effects. Moreover, the intellectual consensus on the neutrality of money was contested and central banks gained more power and complex responsibilities related to financial stability (Goodhart, 2010; Aglietta, 2011; Borio, 2011). For instance, the ECB is in charge of banking supervision in the framework of the Single Supervisory Mechanism (SSM). This mandate creates new legal realities and challenges in relation to the independence of the institution. It also raises questions on how to keep ECB (new and old) powers in check.<sup>4</sup>

It was already complex for citizens and political actors to assess central bank decisions through legal instruments related to operational transparency in traditional monetary policy (soft or hard law in nature). What could be said about the quantitative easing policies and new regulatory functions acquired after the 2008 crisis? In democratic and global integrated societies, how to assure supervision and evaluation of complex public actions taken by monetary authorities?

I argued (Duran, 2012; Duran, 2015) that the role of law in policy-making, notably in monetary policy, is changing: from (i) *ex ante* framework to control the implementation of public policies (precise definition of instruments and legal quantitative limits to central bank actions)<sup>5</sup> towards (ii) an *ex post* form of supervision, i.e. through the establishment of accountability and transparency

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<sup>4</sup> It is important to note that new obligations related to confidentiality and professional secrecy are also required. For instance, the ECB has to combine the growing demand for transparency with specific procedures of professional secrecy established particularly by two Directives of the European Union – e.g. Directive 2014/59/EU (articles 84(5) and 98) and Directive 2013/36/EU (articles 59(2)). The ECB has been working with sensible information related to public debt and budgetary deficits of countries in the eurozone. It must also deal with confidential information in relation to the exercise of new powers in financial regulation.

<sup>5</sup> Historically, a legislative rule, which defined a ceiling for reserve requirements, or precise limits for issuance of paper money by central banks.

procedures (by means of targets and goals combined with instruments for *ex post* evaluation and possibly application of judicial or other types of sanctions).<sup>6</sup>

This movement was already noticed in modern monetary policy, but this trend tends to be reinforced in the 2008 aftermath in a more complex financial environment and with new mandates for central banks. These challenges call for the re-imagination of transparency mechanisms in monetary policy and banking supervision.<sup>7</sup> This is also a way to re-legitimate central bank actions in a post-crisis world. Thus how to improve the role of law in central bank transparency, notably at the ECB? How to deal with the trade-offs between transparency and confidentiality in financial and monetary matters?

This research proposes to assess how a non-judicial body in Europe, the Ombudsman, is contributing to enhance the legal framework for the ECB transparency and broadening citizens' oversight of central bank actions. This is particular important in the actual context of a growing complexity of ECB's mandates and responsibilities.

The Ombudsman has a very interesting hybrid nature: it is formally a parliamentary body, but operates as a *quasi*-judicial forum through individual complaints. It also has the power to initiate its own inquiries. It is designed to assure the respect of the rule of law by European institutions by investigating denunciations of "acts of maladministration". The Ombudsman "illustrates a classic logic of parliamentary accountability" (Magnette, 2003: 678).

This research aims, at first, to map the Ombudsman's cases involving the ECB since its creation, and then to analyze how they are contributing to broaden the general public's oversight of monetary regulation beyond markets and politicians. This paper presents the initial assessment of these cases and tries to contribute to the legal literature on how law can assure social accountability of central banks.

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<sup>6</sup> In the case of currency management, this legal metamorphosis is due to a change on how central banks regulate money in the economy. In stages of low development of financial markets, monetary authorities predominantly employed rules-based instruments, i.e. monetary mechanisms based on regulatory power, such as reserve requirements and liquidity asset ratios. With growing development of financial markets, central banks move towards more market-based mechanisms, i.e. policy tools destined to influence underlying conditions for demand and supply of central bank money, such as open-market operations (Laurens, 2005).

<sup>7</sup> A recent article on the perspective of the ECB democratic accountability in the framework of the SSM is Grandrud and Hallerberg (2015).

In the next section, I present the literature gap on central bank transparency and accountability. I also propose one legal perspective, which might bridge this gap. In the third section, I present my first assessment of the Ombudsman's cases involving the ECB and its monetary regulation. Even though Ombudsman's pronouncements are non-binding (a very different feature if one compares to Courts), this European institution has been promoting identifiable impacts on ECB transparency. Its soft-law nature is contrasted with hard effects generated by few cases involving the central bank since 1999, as I will explore below. A brief conclusion follows.

## **2) The research gap on ECB transparency and accountability: more legal literature required**

Since the 1990s, the literature on transparency and accountability of central banks is very proficient (de Haan et al., 1998; Amténbrink, 1999; Bini-Smaghi and Gros, 2001; Van den Berg, 2005; Blinder, 2004; Lybek, 2005; De Haan and Osterloo, 2006; Dincer and Eichengreen, 2007; Goodfriend, 2007; BIS, 2009; Laurens et al., 2009; Van der Crujisen et al., 2010a; 2010b).<sup>8</sup> Yet, I argued elsewhere (Duran, 2012; Duran, 2015) this literature (1) had essentially an economic perspective (i.e. focus on efficiency of monetary policy and central bank communication towards market agents), (2) accountability instruments were fused with transparency tools and the main literature did not sufficiently pay attention to the differentiation between *ex ante* and *ex post* institutional mechanisms to keep monetary power in check; and (3) the growing relevance of soft law was not identified by this intellectual field, as the main institutional innovation of central banks in the last decades.

Another literature gap is related to the analysis of checks and balances, notably for the ECB, from the perspective of judicial and non-judicial bodies, i.e. the Court of Justice of the European Union (CJEU) and the European Ombudsman. Few studies have been focused on judicial review. For instance, I may mention the collection of articles on the CJEU's decision related to the implementation of the Outright Monetary Transactions (OMT) by the central

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<sup>8</sup> The literature not focused on central banks, but especially relevant for the concept of accountability in European and international contexts is: Bovens (2007a; 2007b; 2010), Grant and Keohane (2005), Scott (2006) and Dowdle (2006).

bank (the “Gauweiler case”) published as special section at the German Law Journal (2015). However, these articles focus rather on the implications for the constitutional design of monetary policy instead of how the CJEU is contributing (or not) to enhance general public’s oversight of monetary decisions.<sup>9</sup>

It has not come to my notice a study focused specifically on the relationship between the European Ombudsman and the ECB. Magnette (2003) and Cadeddu (2004) analyzed the political role and the institutional functions of the European Ombudsman. At some point, they both mentioned cases related to the ECB (Magnette, 2003: 688-689; Cadeddu, 2004: 166, note 19). However, they did not focus on the effects produced by the Ombudsman’s decisions on the ECB framework.

The European central bank was designed as a very independent institution. However, monetary decisions have wide social impacts. The ECB allocates resources among different social groups, i.e. creditors and debtors. Thus, despite the complexity of central bank decisions, “technical” issues on money are political in nature and define winners and losers in European society. Therefore, in democratic contexts, there is a demand for legal mechanisms that could maintain monetary power in check.

If the legal structure for monetary policy is becoming more and more *ex post* in nature, as I suggested above, the Ombudsman is an important institution for this system. By means of an *ex post* control of governance procedures, the European Ombudsman can *indirectly* reach the *content* of monetary decisions by giving voice to stakeholders outside parliaments and markets.

The key Ombudsman’s institutional attributes, which may impact the framework for monetary power’s oversight are: (i) its investigative power, (ii) its openness to complaints by any European citizens or residents without formalities, and (iii) its “contradictory” procedures, where complainant and administration dialogues and can reach an agreement. Its technical specialization on governance issues and good administrative practices reshapes citizen’s arguments and can put them in similar level of knowledge as European bureaucracies. In addition, it works through repressive measures that may

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<sup>9</sup> For a contribution related to the CJEU review of the European Council decisions, see Abazi and Hillebrandt (2015).

generate effects on European institution's reputation and prestige - a sort of sanction very feared by central banks.

The Ombudsman has the potential to exercise political pressure on institutions in Europe, being a relevant "source of diffuse power" (Magnette, 2003: 682). It is a type of "soft justice", which may suit the framework for the oversight of European monetary power. Therefore, it is a matter of empirical question: how and in which conditions the Ombudsman has been influencing the ECB transparency?

### **3) Guarding the money guardian: how the European Ombudsman's decisions are improving ECB accountability and transparency**

The ECB has the confidentiality of its monetary deliberations guaranteed by treaty. Article 132(2) of the Treaty on the Functioning of the EU (TFEU) delegates the disclosure of decisions up to the ECB itself. Protocol 4 of the TFEU states that the Governing Council's regular meetings are confidential and only the central bank decides to announce them. Politically, "the power to decide the degree of transparency and the level of social accountability concerning monetary decisions is granted to the ECB" (Duran, 2015: 114-115).

Therefore, the European Ombudsman can particularly contribute to broadening the oversight scope of the ECB. Up to present, it decided 9 (nine) cases concerning the central bank, which involved complaints related to the management of monetary policy as well as other institutional matters.<sup>10</sup> The majority of the cases (6/9) were initiated by European citizens or residents, which reveals a high degree of Ombudsman's openness and facilitated access (Table 1, below). Other cases comprised complaints by a member of the Parliament (1) and a non-governmental organization - NGO (1), as well as a procedure initiated by the Ombudsman's own initiative.

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<sup>10</sup> I am not including in my empirical research cases related to the ECB's legal regime for employees and other service contracts. These rules are not aimed at the general public concerns on the management of money, the focus of this paper.

**Table 1. European Ombudsman's cases concerning the ECB and the institutional design of monetary regulation**

Case denomination and official number		Opened on	Ombudsman	Complainant	Any improvement on the ECB transparency?
1. AnaCredit	1693	2015	Emily O'Reilly	Member of the European Parliament <sup>11</sup>	Yes [most relevant]
2. Eurozone convergence criteria	356	2014	Emily O'Reilly	European citizen or resident (German citizen)	No. It was a missed opportunity.
3. Group of Thirty	1339	2012	P. Nikiforos Diamandouros	NGO <sup>12</sup>	Yes
4. ECB communication with Spanish authorities	2016	2011	P. Nikiforos Diamandouros	European citizen or resident (Spanish lawyer)	Yes
5. Language for ECB communication - case II	1008	2006	P. Nikiforos Diamandouros	European citizen or resident (French)	No. Actually, it had a negative impact.
6. Exchange rate policy	3054	2004	P. Nikiforos Diamandouros	European citizen or resident	Yes
7. Euro banknotes	1939	2002	P. Nikiforos Diamandouros	European citizen or resident	Yes
8. Language for ECB communication - case I	281	1999	Jacob Söderman	European citizen or resident	No. Actually, it had a negative impact.
9. Rules governing public access to documents	OI/1	1999	Jacob Söderman	Ombudsman (own initiative)	Yes

Among all these cases, two thirds (6/9) had a clear and identifiable contribution to ECB transparency and accountability (Table 1, above). In my qualitative analysis, I am not concerned with the case's result, i.e. if the Ombudsman found any maladministration in relation to the complainant's

<sup>11</sup> The MEP is Sven Giegold, a German politician (Group of the Greens/European Free Alliance).

<sup>12</sup> This organization is the Corporate Europe Observatory (CEO), a NGO based in Brussels which works on exposing the power of lobby groups in Europe.



allegations. Anyway, in all of these cases, the Ombudsman declared there was *no maladministration* on the part of the ECB.

However, the Ombudsman's particular contribution was elsewhere: by manipulating its (independent and soft) powers and establishing an institutional channel between the complainant and the ECB on transparency matters. Also, the Ombudsman vocalized issues related to governance transparency.

In cases 1, 3, 4, 6, 7 and 9 (Table 1, above), the ECB seems to change its behavior to respond to the Ombudsman's demands on transparency, or the Ombudsman used the procedures to vocalize significant arguments on central bank transparency. All Ombudsmen contributed to this movement (Emily O'Reilly, P. Nikiforos Diamandouros and Jacob Söderman). In case 2, no relevant impact on ECB transparency policy was identifiable, but in cases 5 and 8 there was, in fact, a negative impact, as I will explain below.

### **3.a) Cases with relevant impact on ECB transparency**

The AnaCredit case (Case 1, Table 1, above) was the most remarkable one. By means of a complaint, a member of the European Parliament (MEP) manifested his concerns on the AnaCredit regulation to be issued by the ECB. The AnaCredit is "a project to set up a dataset containing detailed information on individual bank loans in the euro area, harmonized across all member states".<sup>13</sup> The central bank intention is to create a European analytical credit datasets. The MEP was concerned that this regulation may be a breach of higher-ranking EU law, particularly rules and principles concerning data protection. Furthermore, according to him, the ECB should carry out a public consultation before issuing this type of regulation, since it concerns millions of people in Europe.

In her decision, the Ombudsman O'Reilly noted that the ECB was (currently) examining the MEP substantive concerns and has consulted the Data Protection Supervisor in Europe. Her first assessment was that, as *prima facie*, the legal basis for the AnaCredit did not seem to be wrong. However, in relation to the public consultation, she provoked the ECB to take action. In her words,

"I note from material published by the ECB on 11 November 2015 that the Bank ran a 'merits and costs' procedure, in which '*representatives of the banking industry were*

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<sup>13</sup> ECB website.

*directly involved'*, mainly via the respective NCBs [national central banks]. It is further stated that the industry was informed on many occasions and extensively in writing. There is also mention of a **possible public consultation** should the ECB Governing Council consider an extension of the scope of the AnaCredit dataset **in the future**. Given that it has not been possible for my services to find a published report on the 'merits and costs' procedure, it is difficult **to gauge to what extent stakeholders and the wider public have been given an opportunity to provide structured input on this important initiative**. The regulation to be adopted will affect millions of individuals; adopting it without ensuring the most appropriate consultation of stakeholders and the wider public may undermine the public trust of AnaCredit, irrespective of its merits. **I understand there is no legal impediment to the ECB giving all stakeholders including the wider public an opportunity to voice their views.**" (Fragments of the Ombudsman's decision on the Case AnaCredit, 1693/2015/PD, European Ombudsman, my emphasis).

The Ombudsman's decision was issued on 20 November 2015. On 4 December, the ECB published a draft regulation for the AnaCredit project and opened a period of more than 50 days for public consultation. The ECB also clarified that it would "provide feedback on how the observations received were assessed and taken into account in the Regulation".<sup>14</sup> The central bank also explained the confidential rules of the project: "[d]ata will be treated according to strict confidentiality rules as set out under existing European law, and will only be accessible to the [aforementioned] users and for the foreseen uses."<sup>15</sup>

Therefore, the ECB reacted positively to the Ombudsman's decision promoting, almost immediately, a public consultation for the AnaCredit regulation (instead of considering only a "possible future consultation") and, by its website, tried to address the initial concerns on data protection. Also, it is important to remark the Ombudsman's sentences: she clearly vocalized the interests of other stakeholders, besides industry and national central banks.

Possibly, this case had another effect related to the announcement of a research fellowship on ECB transparency in 9 December 2016. The second edition of the "ECB Legal Research Programme" called for papers on a

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<sup>14</sup> See the ECB announcement at: <https://www.ecb.europa.eu/stats/money/aggregates/anacredit/html/index.en.html>

<sup>15</sup> See the ECB announcement at: <https://www.ecb.europa.eu/stats/money/aggregates/anacredit/html/index.en.html>

“comprehensive analysis of the principle of transparency, including in view of the case law of the relevant courts and the practice of non-judicial subjects (e.g. the European Ombudsman) [which] would be relevant to determine whether transparency demands prevail over other competing requirements (related to central bank activities), favoring a more limited scrutiny.”<sup>16</sup> It shows that the ECB is carefully considering the arguments presented by the Ombudsman and the MEP.

The second case, which had a relative impact on the ECB, was the contestation made by a NGO on the central bank president's membership of the Group of Thirty (Case 3, Table 1, above). The NGO stressed that this membership could jeopardize ECB independence, since private market agents were also members of this Group. In fact, this Group was considered, by the complainant, as a “lobbying vehicle”. In 2013, in his final decision, the Ombudsman P. Nikiforos Diamandouros analyzed in detail the Group of Thirty's membership and financial support. It found a great variety of interests inside the institution and did not characterize it as a private market's lobby group. In fact, he understood that this Group is a very diverse forum, in which ideas on monetary regulation could be exchanged in an open dialogue. He emphasizes that the ECB should dialogue in other forums as well, not only the Group of Thirty.<sup>17</sup>

Another particular contribution of this case was in the Ombudsman's “further remarks”. Diamandouros stressed that the European economic crisis increased the public visibility and expectations in relation to the ECB and its role. He noted “further responsibilities are likely to be entrusted to the ECB in the future, in particular as regards the supervision of banks. These developments mean that not only the ECB, but the EU as whole, has a vital interest in ensuring

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<sup>16</sup> See the announcement at: [https://www.ecb.europa.eu/pub/conferences/html/20151209\\_lrp.en.html](https://www.ecb.europa.eu/pub/conferences/html/20151209_lrp.en.html)

<sup>17</sup> In his words, “[...] the obligation to maintain an “open” dialogue with civil society also implies that the dialogue should be balanced, affording diverse interlocutors an appropriate opportunity to debate issues of relevance to the work of the ECB. This observation does not imply that members of the decision-making bodies of the ECB should seek only to engage with those civil society groups that encompass, internally, the entire diversity of views on issues of relevance to the work of the ECB. Indeed, it is unlikely that such all-encompassing groups exist. Rather, it means that efforts **should be made to discuss the work of the ECB in diverse fora**, in addition to discussing the work of the ECB in the context of entities such as the Group of Thirty.” (Fragments of the Ombudsman's decision on the Case 1339/2012/FOR, European Ombudsman, my emphasis).

that the ECB further raises the quality of its communication with the public".<sup>18</sup> He invited the ECB to include the information on the President's Group of Thirty membership in his CV at the central bank website and encouraged the bank "to take steps to further raise the quality of its communication with the public".<sup>19</sup> The ECB responded to the Ombudsman demand and included this information on its President's CV.

Three cases with significant impacts (Case 4, 6 and 7, Table 1, above) concerned European citizens' demands to access ECB documents or information. The most valuable one, in terms of the qualitative content of arguments brought forth by the Ombudsman, was the Case 4 ("ECB communication with Spanish authorities"). In this case, a Spanish lawyer asked for access to a document sent by the ECB to political authorities in Spain. The central bank refused the demand based on the exception concerning protection of economic and monetary policy interests (Article 4(1) (a), second indent of Decision ECB/2004/3). However, in the European citizen's view, the ECB decision was not issued with appropriate statement of reasons.

In this case, the Ombudsman mentioned cases-law at the CJEU to identify the European legal regime on the "statement of reasons". In his words, the Court of Justice

"has clearly held that, when processing an application for access to documents, the institutions must carry out a specific examination of each document concerned. The mere fact that a document concerns an interest protected by an exception is not, in itself, sufficient to justify the application of that exception. On the contrary, the institution in question must, in principle, explain **how disclosure of the document could specifically and effectively undermine the interest protected by the exception invoked**. In addition to that, the risk of protected interests being undermined must be reasonably foreseeable and **not purely hypothetical**."<sup>20</sup> (Fragments of Fragments of the

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<sup>18</sup> Fragments of the Ombudsman's decision on the Case 1339/2012/FOR, European Ombudsman, my emphasis.

<sup>19</sup> Fragments of the Ombudsman's decision on the Case 1339/2012/FOR, European Ombudsman, my emphasis.

<sup>20</sup> The cases-law were: Case C-506/08 P *Sweden v MyTravel and Commission*, judgment of 21 July 2011, not yet published in the ECR, paragraph 76; Case T-250/08 *Bachelor v Commission*, judgment of 24 May 2011, not yet published in the ECR, paragraph 78; Case T-166/05 *Borax Europe v Commission*, judgment of 11 March 2009, not yet published in the ECR, paragraph 88; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission*, judgment of 21 September 2010, not yet published in the ECR, paragraph 72; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-1429, paragraph 43; Case T-

Ombudsman's decision on the Case 2016/2011/ER, European Ombudsman, my emphasis).

*During this inquiry*, the ECB reviewed its position and send to the complainant a more appropriate statement of reasons, describing the content of the letter and explaining the sensitivity of the issue, as well as the central bank's reasons and intentions underlying the letter's issuance. In his further remarks, the Ombudsman asked for more transparency and more concern on the part of the ECB. In his words, "the European Central Bank [should] continue to regard the disclosure of documents to the public, and the reasoning of decisions refusing disclosure, not only as legal obligations, but also as an opportunity to demonstrate its commitment to the principle of transparency and thereby to enhance its legitimacy in the eyes of citizens."<sup>21</sup>

The Cases 6 and 7 ("Exchange rate policy" and "Euro banknotes") concerned the same matter: the ECB did not explain sufficiently its reasons for not providing information related to, respectively, its exchange rate policy and statistics on stock and flows of euro banknotes. In the latter case, Diamandouros warned the ECB he could not accept that the central bank "is entitled" to rely on an intellectual argument related to "irrational behavior" from public (such as the idea of run on banknotes in countries where there are less stock). The ECB did not offer "evidence to substantiate this argument which, moreover, does not appear to relate to any of the exceptions" contained in the central bank regulation (Article 4, Decision ECB/2004/3).<sup>22</sup> Therefore, the Ombudsman stressed that economic ideas are not accepted as reasons for reducing central bank transparency.

Case 9 ("Rules governing public access of documents") also produced a relevant impact and it was the first one involving the ECB. It was an inquiry on the Jacob Söderman's initiative concerning different European institutions and the issuance of their rules governing public access to documents. The first ECB regulation regarding this issue was the Decision 1998/12 and the Ombudsman

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2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; *Sison v Council*, cited in footnote 5, paragraph 75."

<sup>21</sup> Fragments of the Ombudsman's decision on the Case 2016/2011/ER, European Ombudsman.

<sup>22</sup> Fragments of Fragments of the Ombudsman's decision on the Case 1939/2002/IJH, European Ombudsman.

identified some problems in it. The most relevant problem identified was: the ECB only regulated the access of so-called “administrative documents” and did not mention the procedures to have access to the Governing Council decisions on monetary policy, such as the meetings’ minutes. The dialogue with the ECB, during the inquiry, seemed to be tension. The ECB remembered the Ombudsman that, according to the TFEU, it was not obliged to disclosure its decisions. The Ombudsman replied saying that the central bank can disclosure if it decides to, and the regulation should govern this procedure. He referred to different cases-law at the CJEU.

It is difficult to identify a casual relationship between this Ombudsman’s decision, issued on 24 September 1999, and the developments on the ECB transparency policy during the 2000s. However, it is important to note that this inquiry was the first to establish an institutional dialogue between these two European institutions and, after this first one, the ECB seems to be more cordial and attentive to the Ombudsman’s demands and remarks. Also, the Ombudsman clearly vocalized a particular concern with the Governing Council’s minutes, which contain the most relevant decisions for the European monetary policy.

The ECB decided to regularly publish minutes only in 2015,<sup>23</sup> but it issued a better regulation concerning access to documents in 2004 (ECB Decision 2004/3), in which there are no more distinctions between “administrative documents” and other decisional papers. The regulation applies for any document formalized by the ECB, which could have as a source the Ombudsman’s concern.<sup>24</sup>

## **b) Cases without contribution, or with negative impact on ECB transparency**

One case had no particular impact on ECB transparency (Case 2, “Eurozone convergence criteria”, Table 1, above). It was a missed opportunity for the Ombudsman to contribute to the central bank governance. However, in cases 5 and 8, concerning a common issue (i.e. the “language of ECB communication”),

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<sup>23</sup> However, since its creation, the ECB established an institutional practice of organizing press conferences after the Governing Council’s meetings.

<sup>24</sup> However, only interviews can confirm this hypothesis.

it seems that the Ombudsman contributed negatively with the transparency of European monetary decisions.

In case 2 (“Eurozone convergence criteria”), Ombudsman O’Reilly received a complaint by a European citizen, in which that he/she argues the ECB was not publishing statistics on convergence criteria in “user-friendly” form, like a check box. The ECB replied that it publishes the relevant data on annual reports and by other means. Moreover, it stressed that member states are called upon to steer their fiscal and other policies in compliance with other criteria in addition to the convergence one.

The Ombudsman did not identify a duty on the part of the ECB to publish the information in the way the complainant asked for and did not develop further remarks. However, in this case, I believe the Ombudsman could contribute more to ECB transparency encouraging the central bank to invest in a less complicated form to communicate with European community. The US Fed, for instance, has been investing in a website for financial education and it contains clear explanations about the Federal Reserve system and its functioning.<sup>25</sup> The Ombudsman could have used this kind of complaint to remember the ECB that there is more alternatives to create a friendly environment for the understanding of complex matters in European monetary and economic policy.

In cases 5 and 8, I believe the main negative contribution was the acceptance by the Ombudsman (Diamandouros and Söderman, respectively) of a precise ECB argument, i.e. that there are two different documents about monetary decisions: one to be addressed to experts and financial markets, concerning “technical issues” in monetary policy and published in English; others to be shared with the European community and written in all languages.

This “differentiated language regime” drew a line between monetary decisions (technical issues) and “general information”. Nevertheless, the so-called “technical” decisions have allocational effects on social groups. In both cases, the Ombudsman did not explore the monetary argument and allowed the ECB to be less transparent for the general public. Of course, there is a concern on cost-efficiency to publish ECB documents in all community languages, however

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<sup>25</sup> The website is: <https://www.federalreserveeducation.org>

an intermediate approach should have been explored by the central bank to assure its legitimacy.

#### **4) Conclusion**

This paper presents an ongoing research and an initial exam of the European Ombudsman's decisions involving the ECB. I believe that this institution has been contributing to expand the transparency in monetary policy. Despite its soft-law powers, the Ombudsman is promoting hard effects on the ECB accountability. However, there is more room to improve it. At least in three cases (3/9), the Ombudsman did not contribute or impacted negatively in central bank governance.

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