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greater transparency*

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Why ECB independence is impossible without greater transparency

Background to DiEM25's campaign, together with a broad alliance of politicians and academics, to throw light on the lawfulness and propriety of ECB decision-making – beginning with transparency *viz.* the case of Greece (February 4 and June 28, 2015)

Introduction

The European Central Bank (ECB) is the eurozone's primary institution. It sets monetary policy across Europe's monetary union, preserves the common currency's integrity, but also exercises inordinate power over member states – to the extent that it is within its remit to withdraw liquidity from a country's entire banking system, causing it to shut down (e.g. Greece on February 4 and June 28, 2015).

Mindful of the enormous power that they were vesting in the ECB, the eurozone's architects determined that the ECB should be *fully independent of the political process*. And yet the ECB, while in law and intent the most independent of central banks, is in practice possibly the *least* independent central bank in the developed world due to a paradox built into its design: *During a crisis*, when the central bank's role is to support the union's *financial system*, at the very moment a member state government becomes insolvent, *a truly independent ECB must shut down that member-state's banks.*¹

Since 2010, the ECB's independence has been informally shelved through the introduction of a new informal rule: The ECB can accept as collateral the bonds of insolvent governments² if the Eurogroup issues a communiqué stating that the said member state is in a troika-supervised 'programme' which can be 'assumed' to be proceeding towards a 'successful conclusion'. Put simply, if the Eurogroup gives the green light to the ECB, the ECB can decide *not* to shut down the banks of a crisis country.

The result has been that since 2010, the ECB's independence from the political process does not hold even in theory: whether or not it causes the banks of a European country to shut down depends on the wording of the finance ministers' Eurogroup communiqué – *the very opposite of central bank independence*. Consequently, the crucial decision to shut down whole banking systems is made outside the realm of clear rules and *is shrouded in perfect secrecy* given that both the Eurogroup and the ECB's Governing Council meetings happen behind hermetically sealed closed doors.

When a decision to close down a country's banks is made in secret and in the absence of clear rules, arbitrary discretionary power decides the outcome against any concept of democratic accountability and in a manner that de-legitimises totally the EU's decision-making in the eyes of Europe's citizens.

The case of Greece's banks

During the first half of 2015 the ECB's Governing Council made decisions that raised important questions about the ECB's independence as well as about the extent to which democratic principles are upheld within the EU. Three were the pivotal decisions, or moments, during that period:

The February 4, 2015 ECB Governing Council decision

The Greek government lost access to money markets in 2010 and its debt repayments have been hitherto met through a sequence of 'bailout' loans provided by the EU and the IMF. Without the aforementioned green light from the Eurogroup to the ECB to continue to accept Greek 'paper' as collateral, the ECB would have to shut down the Greek banks. This green light remained switched on as Greece's first loan agreement was rolled over into its second loan agreement in 2012.

The second loan agreement was due to expire on December 31, 2014. However, the then Greek government and the troika of lenders (European Commission, European Central Bank and the IMF) failed 'successfully to complete' the 2012-2014 'programme' – for the simple reason that the Greek state remained even more insolvent in 2014 than it had been in 2012 (or 2010).

As new elections were planned for January, the troika and the previous Greek government extended their loan agreement by a mere two months, the new expiry date being set for February 28, 2015.

On January 25, 2015 a new Greek government came to office with a mandate to re-negotiate the country's loan agreement with the EU and the IMF.

On February 1, Greece's finance minister travelled to London to address financiers and reverse a run on the Greek banks, and their shares in the stock exchange, caused by rumours that the ECB would shut them down.

On February 3, following the finance minister's London trip and his advocacy of a mutually advantageous EU-Greece agreement, the Greek stock exchange jumped by more than 11% and the shares of Greece's banks by 20%. One would have expected a central bank concerned with financial stability not to make a move that reverses unnecessarily such impressive gains. And yet...

The following day, February 4, the ECB's Governing Board cut off Greek banks from ECB liquidity³ and referred them to the more expensive liquidity (known as Emergency Liquidity Assistance, ELA) of its Greek branch - the Greek Central Bank. As a result, Greek bank shares lost all their previous gains and the bank run returned.

The excuse offered by the ECB's Board for its February 4 decision was that it was "based on the fact that it is currently not possible to assume a successful conclusion of the programme

review and is in line with existing Eurosystem rules.” Was this the independent decision of an apolitical ECB? There are good reasons for doubting it:

- The new Greek government was only one week old and still had three more weeks to extend further the already-extended (by the previous government) loan agreement with the creditors and their troika.
- The first chance Athens had to table its proposals for an extension of the loan agreement was the Eurogroup meeting of February 11 – seven days later and a good seventeen days before the loan agreement was due to expire or be extended.
- It is highly unlikely that the ECB would have made that decision if the January 25 January election had been won by the previously governing parties.

The March 4, 2015 ECB Governing Council’s decision not to restore Greek banks’ access to ECB liquidity

In the Eurogroup meeting of February 20, 2015 an agreement was reached for extending the Greek loan agreement by four months, until June 30, during which to strike a mutually advantageous agreement between Greece and its creditors based on a list of reforms that the Greek government would submit and which would be accepted, or rejected, as a basis of negotiations by the ECB, the Commission and the IMF on February 24.

On February 23, the Greek finance minister submitted his government’s list of proposed reforms to the EU, ECB and IMF.

On February 24, via teleconference, the Eurogroup approved the submitted list as the basis for completing the programme’s review and starting work on new arrangements. Thus the Greek loan agreement was extended formally to June 30.

Given this agreement, the reason the ECB had given for refusing liquidity to the Greek banks disappeared. Indeed, ECB President Mario Draghi had verbally reassured the Greek finance minister, after the February 20 Eurogroup meeting, that Greek banks’ access to ECB liquidity (the so-called ‘waiver’) would be restored once the agreement just struck, in that Eurogroup meeting, had been formalised.

On March 4, and after the agreement was formalised, despite the Greek government’s repeated requests that the ECB restore Greek banks’ access to ECB liquidity (the so-called ‘waiver’), the ECB’s Governing Council made no such decision.

The June 28 2015 ECB Governing Council decision that closed down the Greek banks

Months of negotiations followed, during which the Greek government’s proposals were dismissed by the troika. In the June 25 Eurogroup meeting, the troika presented the Greek finance minister with a proposal that included a provision that the forthcoming (in the following July and August) redemption of certain Greek government bonds owned by the ECB (i.e. payments by Athens to the ECB) would come out of a loan facility that had been previously earmarked for the purposes of recapitalising Greece’s banks.

The Greek finance minister, at that point, asked his German counterpart whether this would be acceptable to the German government. Schäuble answered in the negative. Clearly, the proposal to the Greek government by the three institutions, including the ECB, on how Athens should repay the ECB was a non-starter. In spite of this, the Eurogroup's President instructed the Greek finance minister to "take it or leave it"⁴, the clear implication being that if the Greek government did not accept the deal the ECB would close down the Greek banks.⁵

*The fact that the Greek government was threatened with bank closures by the Eurogroup President, **a threat that could only be carried out by the so-called independent ECB**, proves beyond reasonable doubt that the ECB is not independent of the political process and behaved in gross violation of both the spirit and the letter of its charter.*

On June 27 the Eurogroup reconvened. The Greek finance minister conveyed his government's decision: "We have no mandate from the Greek people to confront the rest of the Eurogroup by turning down its 'take it or leave it' offer and we have, at the same time, no mandate from the Greek people to sign an agreement that is impossible to implement legally and financially. Having been put in this 'take it or leave it' position, the government has decided to put the Eurogroup's final offer to the Greek people in a referendum a week on Sunday. Let the people decide whether Greece will 'take it or leave it'. To facilitate the democratic process, we request that the Eurogroup agrees to a further extension of the loan agreement from June 30 to July 30." The Eurogroup turned that request down.

On June 28 the ECB Governing Council refused Greece's central bank the right to increase its ELA facility, effectively closing Greece's banks down at enormous cost to Greek business, citizens and Greece's image. And thus the people of Greece were denied the right to deliberate in calm conditions before the referendum, with the closed banks a constant reminder of the power of the ECB to hold a nation to ransom.

Legal opinion on the legality of the ECB's conduct

From the facts above it is clear that the following decisions of the ECB were arbitrary and interpretable as politically motivated:

- (A) The February 4 decision of the ECB's Governing Board [to cut off Greek banks from ECB liquidity,⁶ and to refer them to the more expensive liquidity, known as Emergency Liquidity Assistance, ELA, of the Greek Central Bank one week after the new government was elected and three weeks before the loan agreement expired]
- (B) The March 4 decision of the ECB's Governing Board [to not restore the Greek banks' access to ECB liquidity]
- (C) The June 28 decision of the ECB's Governing Board to close down the Greek banks and make capital controls inescapable [by refusing to increase the ceiling of the Greek central bank's ELA]

Interestingly, it now seems that *the ECB's Executive Board also worried about the legality of its conduct*. This is demonstrable from the fact that the ECB commissioned external legal opinions to examine the lawfulness of its February 4 and June 28 decisions

In July 2015, Fabio De Masi MEP (GUE/NGL) submitted the following question demanding a written answer (Z-123/2015) to the European Central Bank pursuant to Rule 131 of the Rules of Procedure of the European Parliament.

1. Does the ECB intend to publish these legal opinions and, if so, within what time frame?
2. Regardless of the ECB's plans for publishing them, will it allow Members of the European Parliament to inspect the documents via Parliament's Classified Information Unit (CIU) or by similar means to maintain confidentiality, and if so, within what time frame?
3. If the ECB is not planning to publish the legal opinions or to allow Members of the EP to inspect them, what is its justification for this?

The ECB replied as follows in a letter dated September 17, 2015:

"I would like to inform you that the European Central Bank (ECB) does not plan to publish the legal opinions regarding the "separation of monetary and economic policy" that you refer to in your letter. Legal opinions provided by external lawyers and related legal advice are protected by legal professional privilege (the so-called "attorney-client privilege") in accordance with European Union case law. Those opinions were drafted in full independence, and on the condition that they can only be passed on by the addressee and only shared with people who need to know the content of the expert opinions in order to make informed decisions on the issues at stake. The disclosure of

such legal opinions would undermine the ECB's ability to obtain uncensored, objective and comprehensive legal advice, which is an essential starting point for the well-informed and comprehensive deliberations of its decision-making bodies. I would also like to point out that legal advice on matters relating to the ECB's monetary policy is of a particularly sensitive nature. Finally, it should be noted that those legal opinions deal with matters relating to the economic and monetary policies of the European Union. \[...]."

The ECB's refusal to release the legal opinions on the legality of its conduct may be interpreted by a fair and reasonable person as an indication that it was *not* supportive of its decisions, or at least that they contain views that the ECB does not want to publicise. The question is: Is the ECB's refusal to release these legal opinions legally justified? Or does it fall foul of the fundamental democratic rights of European citizens to know what these legal opinions were?

The eminent EU Law expert Andreas Fischer-Lescano was asked to deliver a legal opinion on this question.⁷ His answer was, in brief, that the ECB has no case for withholding from Members of European Parliament and the citizens of Europe the legal opinions the ECB secured (and paid for using European taxpayers' funds) regarding its own conduct. (See the Appendix for a summary of Professor Fischer-Lescano's legal opinion.)

Our ECB TRANSPARENCY CAMPAIGN

We, the undersigned, demand greater transparency of the ECB to give European democracy a chance, as well as to make the ECB less vulnerable to power politics

- We demand the immediate release of the legal opinions viz. the ECB's conduct in 2015 towards Greece – by means of petitions, press conferences and demonstrations
- We campaign for the European Parliament to debate the ECB's nominal independence in relation to its conduct in 2015 towards Greece, to similar violations of probity in the case of Ireland
- We are working towards a coalition of political, civil society and cultural movements/organisations to inform the people of Europe of the manner in which arbitrary discretionary power by unelected officials is undermining European democracy.

On behalf of the Democracy in Europe Movement – DiEM25,

Yanis Varoufakis

Co-signed by academics:

- Prof. Dr. Klaus Dörre, Jena
- Professor James K. Galbraith, University of Texas at Austin
- Dr. Rudolf Hickel, Bremen
- Prof. Dr. Gustav A. Horn, Hans-Böckler-Stiftung
- Dr Aidan Regan, University College Dublin
- Professor Jeffrey Sachs, University of Columbia
- Prof. Dr. Joseph Vogl, Humboldt
- Professor Arthur Gibson, Department of Pure Mathematics, University of Cambridge

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APPENDIX: Professor Fischer-Lescano's Legal Opinion – A Summary

The reference to 'administrative tasks' is so general that refusal of access to documents on that basis would further undermine the notably weak democratic legitimacy of the European Central Bank. For the weaker the democratic legitimacy of an institution, the more transparent its decisions must be.

The present case specifically concerns assessment of the lawfulness of the decisions of 4 February 2015 and 28 June 2015, i.e. a legal opinion on whether the decision of the ECB Governing Council to cease accepting government bonds as security for loans, and to freeze ELA loans at a certain level, is within the legal bounds of the TFEU.

A legal opinion does not constitute political advice on the use (or non-use) of the instruments that have been granted to the ECB for the purpose of monetary policy control and ensuring price stability in the Union. The framework in which the ECB makes its monetary policy decisions is not affected by legal decisions. If negatively defined in relation to such monetary policy activities, the legal opinions therefore come under the scope of administrative activities.

The ECB is obliged to provide access to the legal opinions. The exception set out in the second indent of Article 4 (1) (a) ECB/2004/3 is not applicable. The public interest, in the form of the monetary and economic policies of the Community or a Member State, is not specifically affected by publication of the legal opinions.

In the present case, access is requested to external legal opinions that deal with the decisions of the ECB Governing Council of 4 February 2015 and 28 June 2015. Access is refused by the ECB because 'those legal opinions deal with matters relating to the economic and monetary policies of the European Union'.

If the term 'monetary policy and economic policy measures' were to be interpreted so broadly as to include everything that is merely indirectly related to it, then all administrative matters of the ECB, for which transparency is required pursuant to the fourth subparagraph of Article 15 (3) TFEU, would come under the exception.

The institution must assess whether the protection of legal advice would actually be undermined by disclosure of the document. The ECJ applies a strict standard to that assessment – access may not be refused on the grounds of abstract and general risks alone.

According to the ECJ, it is rather a lack of information and debate that raises doubts in citizens concerning the legal act itself, as well as the decision-making process as a whole, since as long as the institution provides convincing reasoning as to why a certain legal position in a legal opinion is not followed, unfounded doubts cannot arise as to the lawfulness of a legal act adopted by the institution.

The ECJ has also decisively established that citing the difficulty of defending the lawfulness of a legal act in the event of later disclosure of a legal opinion that takes the opposite view is not sufficient for application of the exception for protection of legal advice.

A potential situation in which the legal experts have to justify themselves before other institutions and are therefore prevented from giving frank, objective or comprehensive advice cannot arise.

The mere fact that the legal opinion comes under the scope of monetary and economic policy (i.e. the exception set out in the second indent of Article 4 (1) (a) ECB/2004/3) is not sufficient for presumption of the exception set out in the second indent of Article 4 (2) ECB/2004/3 (protection of legal advice).

A legal opinion and legal advice about the lawfulness or unlawfulness of the actions of European institutions cannot undermine the protection of the public interest. On the contrary, the unlawful actions of European public bodies are never entitled to protection in the public interest for reasons of the rule of law alone. The European institution cannot have an interest in withholding such legal opinions, because the legal assessment – and consequently the establishment of a potentially unlawful decision of the ECB – is the very definition of public interest and is therefore necessarily in the public interest.

Citizens have a fundamental interest in assuring themselves of the lawful actions of European bodies, especially in the case of decisions that are made in a highly contentious environment and in the context of political battles.

The ECB must at least justify why the opinions (namely, the legal deliberations of relevance in this case) are not even partially disclosed.

NOTES

¹ Throughout the eurozone, commercial banks tend to use extensively their government's bonds as collateral posted at the ECB in exchange of liquidity. If the government is insolvent, its bonds downgraded to junk status, a truly independent ECB should refuse to accept these bonds from the commercial banks that are replete with them. Common knowledge of this impending liquidity squeeze will start a bank run in the said member state. Since the ECB is constrained not to provide liquidity to them, the only possible outcome is bank closures, capital controls and the monetary union's *de facto* fragmentation.

² The technical term used was to afford them a 'waiver' from exclusion of assets backed by the fiscally stressed member state.

³ In technical terms, on February 4 it pulled the 'waiver' that Greece's banks had been granted earlier – see previous note.

⁴ That is, "take or leave" a deal that even Germany's finance minister rejected!

⁵ By refusing to allow the Greek central bank to increase its ELA facility to accommodate the steady outflow of deposits (from Greece's banks) caused by the news that the ECB was about to... refuse to allow the Greek central bank to increase its ELA facility in order to accommodate the steady outflow of deposits (from Greece's banks)!

⁶ In technical terms, on February 4 it pulled the 'waiver' that Greece's banks had been granted earlier – see previous note.

⁷ He had already supervised a lawsuit against the European Commission on access to documents of the Code of Conduct group on business taxation after the LuxLeaks revelations. He also authored an influential study of the violations of the European Human Right Convention by EU-ECB-IMF 'troika'.