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The genie of independence and the European bottle:
How independence became Europe' Most Contentious Legal and Political Category

Antoine Vauchez*

Over the past decades, the notion of "independence" has become an essential terrain of contention of EU politics in a variety of fields ranging from monetary policies to rule of law standards or regulatory agencies. Rather than a series of idiosyncratic accounts on courts', central banks' or regulators' independence, the paper takes a broader standpoint and questions the deep-seated and cross-sectoral entanglement between EU polity and the notion of "independence". Through a socio-genetic approach, it explains how the EU has been a laboratory for the reinvention of the notion itself from negative institutional device (independence from*) to a broad empowering technology of supranational government connected to notions of general interest, professional expertise and discretionary powers (independence* for*). The formation of this* European *way of independence is analyzed in connection to the jurisdictional claims and legitimizing efforts of the triptych made up by the European Court of Justice, the European Commission and the European Central Bank. The paper considers three major EU constitutional crises and traces how the notion of independence has been functionalized in these critical junctures: the 1960s period whereby independence becomes the core legitimacy for the* political *mission of the Court-Commission duet as spokesmen of the long-term interests of the "European project"; the 1990s-2000s with the heated doctrinal and judicial debates that have marked the creation of an über-independent European Central Bank and the conflictual process of* broadening *of Europe's "independent branch" to the field of monetary policy; last, the 2010s with the equally disputed deepening of the "independent branch" into national contexts as the Court, the Commission and the Central bank defend their national counterparts against the rise of populist constitutionalism in Hungary and Poland. Written in the spirit of "immanent critique", the article is not meant to downplay the political value of independence in contemporary democracies, particularly when it comes to courts and the defense of rights and of equality before the law. Rather, it is an invitation to scholars versed in the political and legal theory of democracy to account for Europe's "independence wars" and engage in framing a more robust yet democratically-open notion to which independent policy-makers (whether European or national) could be held accountable.*

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1. Introduction

Over the past decade, the concept of "independence" has become one of the most ubiquitous and controversial concepts of EU politics. From the backsliding of the rule of law in Poland and Hungary to the heated debates over the unconventional monetary policies of the "über-independent" European Central Bank, or the ever-expanding role of EU regulatory agencies, the word stands at the core of Europe's transnational contentious politics. All these political and legal conflicts that question the scope of EU jurisdiction have progressively transformed into a flurry of definitional battles over the meaning, reach and exceptions to independence as well as its counter-balancing principles (principle of democracy, forms of accountability, standards of transparency). Each one of the parties to the debate, from the German constitutional court to the Polish or Hungarian governments, the European Central Bank, the European Commission or the Court of Justice of the European Union, has indeed crafted competing theories of independence anchored either in national-constitutional traditions, EU "constitutional settlement", regulatory rationales or monetary theory, etc. Granted, the European Union is not the only context in which the notion of independence is currently debated: ongoing discussions over the crisis of central bank independence ever since the 2008 financial crisis[1], or the systemic threats to courts' independence in some key Council of Europe countries like Turkey or Russia, are other cases in point. What is, however, specific in the ways it moves across debates in the EU is the fact that the notion has become the privileged battleground and proxy for *constitutional* conflicts involving the (horizontal or vertical) distribution of power, not only within the EU but also between the EU and the Member States. It all occurs as if the concept of independence had captured the terms of the debate over the jurisdiction of the EU and the related issues of supranationality, sovereignty, and conferral of powers[2].

The political saliency of "independence" in the EU finds us somewhat unprepared. Not that the concept has been absent from the literature on the European Union -quite to the contrary. From the mid-1980s onwards, a robust body of scholarship has explored processes of delegation to EU judicial and administrative bodies: while these issues of independence and delegation had initially been framed in terms of legal scholarship, with critics pointing at the extensive interpretation of its mandate by the Court of Justice of the European Union[3], it rapidly moved to the realm of political science as Giandomenico Majone brought the rich American literature on the autonomy and accountability of regulatory agencies in close contact with the European Union context. As he imported the "principal-agent" analytical toolbox, Majone influentially theorized the EU as an "independent fourth branch" of government – thematizing EU independents as a functional solution to national governments' limitations and failures[4]. Ever since, many strands of scholarship have questioned the ways in which EU independents outstripped their initial realm of competence, with studies on the

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[1] See for example: https://adamtooze.com/2020/05/13/the-death-of-the-central-bank-myth/

[2] Cf. FRANK VIBERT, THE RISE OF THE UNELECTED (CAMBRIDGE UNIVERSITY PRESS, 2007), and PIERRE ROSANVALLON, DEMOCRATIC LEGITIMACY. IMPARTIALITY, REFLEXIVITY, PROXIMITY (PRINCETON UNIVERSITY PRESS, 2011).

[3] For an early history of the critique of the Court of justice of the European Union, see the account given by HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE. A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING (1987).

[4] GIANDOMENICO MAJONE, THE EUROPEAN COMMUNITY. AN INDEPENDENT FOURTH BRANCH OF GOVERNMENT (EUI WORKING PAPER, 1993).

integrationist dynamics at the European Court of Justice[5], the blossoming of EU regulatory agencies at the periphery of the Commission[6], or the fast-expanding powers of the European Central Bank[7]. While these works are rooted in remarkably diverse scholarly traditions, from neo-institutionalism to inter-governmentalism, law-in-context or political economy, they all converge in using the concept of "independence". And yet, for the most part, the literature provides a range of *sector-specific* explanations for the rise of non-majoritarian institutions, thereby failing to account for the ubiquity of the notion in all these battles over EU jurisdiction. With some exceptions [8], each discipline has studied "its" own parent "independent", with lawyers typically studying the role of the European Court of Justice, political scientists, the web of EU regulatory agencies (European Commission *en tête*), and economists, the European central bank. As a result of this cutting independence into slices, the literature fails to provide an explanation as to why the notion of independence has become so central politically in the context of the EU. My hypothesis here is that the current centrality of "independence" in the European public conversation is not just a *reaction* to an unprecedented wave of attacks on the courts or regulators' independence in countries like Hungary or Poland. It also connects to a longer historical pattern that has turned the notion of independence (and independent policy-making) into a critical lever for shaping, consolidating and staging Europe's political legitimacy. The enigma is therefore historical in nature: how did such an encompassing and politically-loaded conception of "independence" solidify in the context of the EU, to the extent of becoming tightly intertwined with the very jurisdiction of the EU in terms of competence and scope of intervention.

To fully capture what happens in the EU political laboratory, it is essential not to hold the concept of independence constant. Rather than a stable analytical category, it is a historically contingent, endowed with changing meaning and rationalities over time, countries and policy domains. It is an essential bone of contention of the very processes that it is trying to account for. Following Walter Bryce Gallie's recommendations concerning "essentially contested concepts"[9], for such notions, the clarification can hardly come from a conceptual work that would seek to define a *true* abstract meaning of "independence" -what is *really* means. Such an endeavor would risk to end (as has often been the case for the classic debate over *judicial* independence) in "misleadingly vague terms and fuzzy ideas about judicial interpretation and decision-making, about the relationship between the judicial and the

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[5] Alec Stone Sweet, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO*, 1(1) Journal of Law and Courts, 61-88 (2008) ; KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW. COURTS, POLITICS, RIGHTS (PRINCETON UNIVERSITY PRESS, 2014); ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION (OXFORD UNIVERSITY PRESS, 2014) ; and ANTOINE VAUCHEZ, BROKERING EUROPE. EURO-LAWYERS AND THE MAKING OF A TRANSNATIONAL POLITY (CAMBRIDGE UNIVERSITY PRESS, 2015).

[6] Mark Thatcher, *The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe*, 18(3), Governance, 347-373 (2005) ; GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION. THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH (OXFORD UNIVERSITY PRESS, 2005).

[7] CENTRAL BANKS IN THE AGE OF THE EURO. EUROPEANIZATION, CONVERGENCE AND POWER (KENNETH DYSON & MARTIN MARCUSSEN, OXFORD UNIVERSITY PRESS, 2009); THE EURO CRISIS AND THE STATE OF THE EUROPEAN DEMOCRACY (BRUNO DE WITTE & ALII, EBOOK, EUI, 2013).

[8] For two exceptions: see George Tridimas, *Comparison of Central Bank and Judicial Independence*, in CONSTITUTIONAL MYTHOLOGIES. NEW PERSPECTIVES ON CONTROLLING THE STATE (Alain Marciano, ed, Springer, 2011, at 155-170) ; and Dorothee Heisenberg, Amy Richmond, *Supranational Institution-Building in the European Union: a comparison of the European Court of Justice and the European Central Bank* 9(2) Journal of European Public Policy, 201-220 (2002).

[9] Walter Bryce Gallie, *Essentially Contested Concepts* in PHILOSOPHY AND HISTORICAL UNDERSTANDING (W. B. Gallie, ed, Chatto & Wintus, 1964, at 157-191).

political, about the separation of powers, and so on"[10]. Conceptual clarification of such politically debated notions can only come from the empirical study of their conflicting usages *in practice.* Methodologically speaking, this implies to consider independence's definitional instability, changing avatars as well as a web of related concepts across time periods and policy domains. Thereby, one can identify the extent to which the EU has indeed been a key "laboratory" for the re-working and re-defining of the notion of independence. The paper contends that a *European avatar* of independence has coalesced over time - one that substantially differs from the ways in which the notion had historically solidified either in the field of international organizations or in that of liberal democracies[11]. While in post-WWII Western democracies, the notion of independence was thought of (together with the separation of powers) as one essential lever to *contain* the realm of the political and protect individual rights, at the EU level, remarkably, the notion of "independence" has been progressively functionalized *towards the promotion* of the "European project"[12]. While in the first conception, independence is seen mostly as a technique that allows to *insulate* decision-making from the pressure of partisan politics ('independence *from*'), in this second European sense, independence is *also* erected as a broad legitimizing ground for governing functions, in the name of a particular public good, that of the advancement of Europe's general interest ('independence *for*'). Empirically speaking, there is no denying that both conceptions of independence (*from* and *for*) are "two sides of the same coin as it is hard to find a definition of the concept that would be argued exclusively "in negative" or "in positive". However, the balance between the two is not historically constant and changes over time and policy-domain, with one rationale prevailing over the other. To capture this moving balance, I take the alternative between "independence *from*" and "independence *for*" as a Weberian ideal-type providing a theoretical fiction that works like a compass and allows to make sense of the changing social and political coordinates of independence ever since the 1960s.

As I engage in the exploration of the EU laboratory and its transformative effects on the notion of independence, I certainly do not mean to write an overall history of European integration. In line with historical institutionalism, I use history as a method to single out "sequences in which contingent events set into motion institutional patterns"[13]. I identify critical junctures ("Europe's independence wars") in the formation and development of Europe's "constitutional settlement", that is the various constitutional crises that have put in question the horizontal (among EU institutions) and vertical (between the EU and the Member States) distribution of competences : the defining moment of the 1960s when the underlying *logic* of the Rome treaty was initially debated (supranational vs. inter-governmental) ; the creation of the European Monetary Union when the functioning of a whole new domain of supranational policies was at stake; and last, the current "rule of law" crisis when the "dualism" between the European and the Member-States' constitutional levels is been questioned by the rise of populist governments. These three critical junctures allow to cover different moments of defining, broadening and deepening of Europe's "constitutional settlement". For each one of these historical constellations, I follow the competing

[10] MITCH LASSER, JUDICIAL (DIS-)APPOINTMENTS. JUDICIAL APPOINTMENTS REFORM AND THE RISE OF EUROPEAN JUDICIAL INDEPENDENCE (OXFORD UNIVERSITY PRESS, 2020 AT 115).

[11] While I do agree with Peter Lindseth's politically and historically refined account that sees EU independence and delegation as a continuation of Member States' "postwar constitutional settlement of administrative governance" (whereby national governments engaged in continuous and intense delegation of policy tasks to domestic administrative bodies), I consider that the integrationist dynamics of the EU have provided a context for an entirely new notion of independence: see PETER LINDSETH, POWER AND LEGITIMACY (OXFORD UNIVERSITY PRESS, 2010).

[12] For further developments, see ANTOINE VAUCHEZ, DEMOCRATIZING EUROPE (PALGRAVE, 2016).

[13] James Mahoney, *Path dependence in historical sociology*, 29 (5) Theory and society, 507-548 (2000).

theorizations, scholarly avatars and definitional battles that have taken place in academic, legal, judicial or bureaucratic arenas, with a particular interest in the attempts to theorize the functions and limits of independence as a category of EU polity. With a view to trace as exhaustively as possible the "hermeneutic space"[14] of contention, I have drawn from extensive empirical material gathered over more than a decade or so of research experience in the field of EU law, enriching it with a rich corpus of Doctrinal pieces, Conference proceedings, Opinions of the European Central Bank, Memos from the European Commission's Legal Service, ECB Legal convergence Reports, European Commission's EU Law Compliance Annual Reports, Opinions of CJEU Advocate Generals, Judgments, etc[15].

Before moving further into the argument I should make a *caveat* given the intensity of Europe's ongoing "independence wars", particularly when it comes to the rule of law and courts. The aim of the paper is not to *criticize* independence and "independent" institutions, let alone to deny the political value that they may have in the context of contemporary democracies, particularly when it comes to the protection of rights and equality before the law. It is not either actually to assess whether any given institution (whether court, central bank or regulator) is or is not independent. Rather, the article is written in the spirit of "immanent critique" tracking how a central principle such as that "independence" has taken form historically and institutionally in the context of the European Union and how it has been "the ideational basis for aspirations, tensions and contradictions *within* European democracies"[16]. As it considers contending normative theories of independence across levels of government and across policy sectors, it offers a critical basis for a more robust yet democratically-open notion to which independent policy-makers (whether European or national) could be held accountable.

The paper develops as follows. It first considers the European Communities *statu nascendi* as the Court and the Commission engage in defining a constitutional paradigm of European treaties, and traces the new political functionalities given to independence as Europe's constitutional settlement coalesces. The second juncture analyzes the constitutional crisis open by the creation of an "über-independent" European Central Bank along the lines of monetarist theory, and follows the conflictual yet progressive coopting of the ECB in the framework of Europe's "independent branch"[17]. The third and last juncture explores the challenges raised by the attacks launched by populist governments in Central Europe against non-majoritarian institutions, and the joint mobilization led by the Commission, the Court and the Central Bank to formalize the "systemic" functions of independence. Each one of the three junctures delineate a different step in the transformation of independence from a mere institutional device into a broad empowering technology of government connected to notions of EU competences and general interest.

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[14] On the notion of "hermeneutic space": NATHALIE HEINICH, THE GLORY OF VAN GOGH. AN ANTHROPOLOGY OF ADMIRATION (PRINCETON UNIVERSITY PRESS, 1997).

[15] Parts of the material have been obtained through Regulation (EC) No 1049/2001 procedure regarding public access to European Parliament, Council and Commission documents.

[16] For a similar usage of the tradition of "immanent critique", see Kalypso Nicolaïdis, *European Demoicracy and Its Crisis*, 51(2) Journal of Common Market Studies, 351-369 (2013).

[17] The notion of "independent branch" was first introduced, although in a more restrictive meaning, by Giandomenico Majone as he tried to formalize the role of the Commission as a regulator drawing its authority on non-political, expert-based and efficiency-driven policies: GIANDOMENICO MAJONE, THE EUROPEAN COMMUNITY. AN 'INDEPENDENT BRANCH OF GOVERNMENT' (EUI WORKING PAPERS 9/1993). For claims to question the traditional conceptions of the separation of powers and theorize new branches of government, see Bruce Ackerman, *The New Separation of Powers*, 113(3) Harvard Law Review 642 (2000).

2. Defining EU "Constitutional Settlement". Independence and the General Interest of the European Project

In this section, I trace how the notion of independence first entered the field of the European Communities in the 1960s and how a transnational network of Euro-lawyers from (or close to) the Court and the Commission transformed the traditionally "negative" understanding, typical of the realm of international organizations ever since the 1920s (independence *from*), into an essentially "positive" and empowering one in the name of the European Communities' long-term interests and objectives (independence *for*). Such theoretical rewriting operated as a privileged channel through which both the Court and the Commission were able to advance and strengthen their own-specific jurisdictional claims as guardians of the "European project".

2.1 Denationalizing International Civil Servants and Judges : The League of Nations' Legacy

By many standards, the notion of independence that one finds in Europe's founding treaties derives directly from the inter-war period and the « great experiment » of the League of Nations (LoN). With the rise of multilateral institutions in the 1920s, the notion of independence was indeed critical to the founding of permanent multilateral institutions, from the LoN secretariat to the Permanent Court of International Justice. Back then, the notion was essentially understood as an instrument to secure the insulation of the new class of international statesmen *from* national bonds and political pressures[18]. Both the 1920 World Court Statute and the 1922 League of Nations' Staff regulation service bear the mark of this central concern [19] as a variety of institutional devices (oaths of independence, incompatibilities, legal protection through immunities and privileges, remuneration through international funds, etc.) were crafted with the objective of "denationalizing" international office holders and shaping a specifically international loyalty freed from national allegiances. At times, a more positive notion of "*intérêt commun*" did appear in connection to this primitive independence toolbox. As one can find in the academic book that long served as the main reference for the definition of the *fonctionnaire international*, that of Suzanne Bastid-Basdevant :" The civil servant has to act in the common interest of several states and independently from its allegeance ties with each one of them"[20]. However, the notion mostly indicated a guideline that international public servants had to *individually* follow in fulfulling their tasks, and certainly not a general legitimizing ground for the related *institution* -whether the World Court or the League of Nations.

To a large extent, the Paris and Rome treaties took up directly from this tradition[21]. Many historical accounts have established that treaty drafters heavily borrowed from the existing grammar of international government when they delineated the statute of the EC judges,

[18] On the drafting of the Statute of the first World Court, see ANTOINE VAUCHEZ, THE INTERNATIONAL WAY OF EXPERTISE. THE FIRST WORLD COURT AND THE GENESIS OF TRANSNATIONAL EXPERT FIELDS (EUI WORKING PAPERS, 2014/80).

[19] While the Balfour Report formulates the principle of independence of international civil servant leading to its recognition in the article 1 of the League of Nations' Staff regulation of 1922, the World Court statute indicates in its article 2 that "The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality".

[20] SUZANNE BASTID-BASDEVANT, LES FONCTIONNAIRES INTERNATIONAUX (SIREY, 1933). My translation.

[21] Antoine Vauchez, *Statesmen of Independence. The International Fabric of Europe's Way of Political Legitimacy*, 27(2), Contemporary European History 183-201 (2018).

commissioners and civil servants[22], from the founding Treaties to a variety of later documents such as the 1st July 1956 *Statut du personnel* of the High Authority, ECJ *Règlement intérieur* of 7th March 1953[23], or the April 1965 *Protocole sur les privileges et les immunités des Communautés européennes*[24]. This is reflected in the writings of Paul Reuter, a renowned public international law professor and legal drafter of the Paris treaty : "how can one build Europe if not by calling upon independent personalities"[25]: as a result, both EEC judges and commissioners had to be put in a position to act independently from their own member state. Article 9 of the ECSC treaty is particularly interesting in this regard as it indicates that "the members of the High Authority exercise their functions in full independence, in the general interest of the Community" -a formula that would be later copy-pasted in all reform treaties up until the Lisbon treaty. While many contemporary textbooks retrospectively read article 9 as connecting the independence of the Commission to its embodiment of Europe's general interest, they erase the fact that the article merely reproposed the narrow IOs' understanding of independence[26]. In fact, most of the interpreters of the time saw the reference to "general interest" as nothing more than "simple criteria of action"[27] for individual commissioners, and certainly not any sort of privileged (let alone exclusive) access of the Commission to Europe's general interest. In other words, independence came to Europe embedded in IOs' rationales whereby it meant protecting individual international civil servants and judges *from* national interferences, yet without providing their parent institutions (whether international courts or secretariate generals) with a specific legitimatory ground, let alone a political mandate.

2.2 Independence as the keystone of Europe's Constitutional Settlement

The context changed dramatically in the mid-1960s when the European Economic Communities faced their first "constitutional crisis" regarding the *horizontal* distribution of competences *within* the new polity and the prevalence of its inter-governmental or supranational pole[28]. As the European Commission and the European Court of Justice re-positioned themselves from mere international secretariat and court to guardians of a *constitutional* order and spearheads of the "European project"[29], the notion of independence proved theoretically and politically central. Erected as a distinct and common feature of the Court and the Commission's identity as well as a foundational ground for their discretionary powers, it was progressively re-invented into the key legitimatory ground for Europe's supranational pole.

[22] Cf. Anne Boerger-de Smedt, *Negotiating the Foundations of European Law (1950-57). The Legal History of the Treaties of Paris and Rome*, 21 (3), Contemporary European History, 339-356 (2012); and Pierre Pescatore, *Les travaux du 'groupe juridique' dans la négociation des traités de Rome*, Studia diplomatica, 159-178 (1981).
[23] CHRISTOPH KRENN, LEGITIMACY IN THE MAKING. THE PROCEDURAL AND ORGANIZATIONAL LAW OF THE EUROPEAN COURT OF JUSTICE (PH.D MAX PLANCK INSTITUTE IN HEIDELBERG, 2017).
[24] Myriam Benlolo Carabot, *Les immunités dans les Communautés européennes*, 54, Annuaire français de droit international, 549-588 (2006). Interestingly, in the texts on immunities, commissioners and judges were merged into one unique category of "fonctionnaires et agents" (art. 12-14, PPI) of the Communities, a fusion that would later be further confirmed in the Regulation of 27th March 1969.
[25] PAUL REUTER, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER (LGDJ, 1953 AT 51).
[26] It's only with the treaty of Lisbon that a new wording was eventually introduced that explicitly charged the Commission with the task of "(promoting) the general interest of the Union" (article 9D TEU).
[27] Angelo Panebianco, *La Commissione*, in TRATTATO ISTITUTIVO DELLA CEE. COMMENTARIO (Giuffré, 1965 at 1151).
[28] See among many accounts of this inaugural crisis: LUUK VAN MIDDELAAR, THE PASSAGE TO EUROPE. HOW A CONTINENT BECAME A UNION (YALE UNIVERSITY PRESS, 2013).
[29] ANTOINE VAUCHEZ, *supra* note 5.

Truly enough, the notion of independence was not up for grabs as it already had a long history in national constitutional doctrines – particularly in relation to defining courts' and judges' autonomy vis-à-vis the political. Far from being a free-floating signifier, it was tightly coupled with one of the most sacred notion of constitutionalism, that of "separation of powers"[30] which gave independence its underlying rationale as the *sina qua non* condition for the proper functioning of the checks and balances' mechanism[31], protecting the judiciary from interferences from the other two branches. In the post-WWII context, the notion of independence has become a critical keystone to the "embedded constitutionalism" that has emerged in Western European democracies with the rise of independent constitutional courts in charge of protecting individual rights from the tyranny of the majority rule. In a EU institutional system featured by the overlapping and shared competences of the different organs, this "separation-of-powers" model proved difficult to transfer to the European level. The 'executive branch' of the Commission shared the 'legislative function' with the Council of ministers – while the parliamentary body merely had a consultative function and the court had its members directly nominated by the governments, etc. Such challenge to the canons of the "separation of power" doctrine was identified early one as a central matter of concern by law faculties and national courts. As early as 1963 and 1965, a German tax court from Rhineland-Palatinate challenged the constitutionality of the ratification act of the Treaty of Rome precisely on the ground that "the transfer of sovereignty to an international institution must not become a means of upsetting, from outside, the balance of power carefully worked out and protected by the Constitution for setting up a free society" [32]. Other national constitutionalist traditions objected to the fact that the European Court of Justice was at risk of establishing a "government of judges" [33] and criticized vis-à-vis Europe's baroque institutional system for its lack of guarantees.

Faced with the skepticism of constitutional law professors and of national supreme courts, a first milieu of pan-European lawyers emerged at the periphery of the Court and the Commission, and engaged in a sustained criticism of the value of national constitutional traditions (in particular that of "separation of powers") when it came to make sense of EU institutional setup and its complex layout of functions (judicial, legislative, executive) and of organs (Commission, Council of ministers, Member States, Court of justice, etc.). Repeated calls were made by central figures of the Court, such as Advocate General Maurice Lagrange or its president Andreas Donner, to "leave behind the too-narrow framework of the sacro-sanct notions of traditional constitutional law". Their view would progressively be consolidated in ECJ caselaw which coined the much more modest, *ad hoc*, and flexible notion of "institutional balance" in lieu of the more constraining notion of "separation of power"[34]. Similar moves to uncouple the European Communities from national constitutional traditions were made, particularly in denying the existence of *Travaux préparatoires* to the Rome treaty

[30] See Clemence Janssen's excellent comparative legal history of the notion in independence in France, Germany and the United-Kingdom: CLÉMENCE JANSSENS-BENNYNCK, LES CONCEPTS D'INDÉPENDANCE DE LA JUSTICE. UNE ANALYSE HISTORIQUE ET COMPAREE (ANGLETERRE, ALLEMAGNE ET FRANCE) (DOCTORAT UNIV. LUXEMBOURG, 2015 AT 49-50.

[31] Anja Seibert-Fohr, *Judicial Independence in Germany*, in JUDICIAL INDEPENDENCE IN TRANSITION (ANJA SEIBERT-FOHR, SPRINGER, 2012).

[32] See KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (OXFORD UNIVERSITY PRESS, 2001 AT 74-75).

[33] JEAN-PIERRE COLIN, LE GOUVERNEMENT DES JUGES DANS LES COMMUNAUTES EUROPEENNES (LGDJ, 1966).

[34] First crafted in *Meroni* which mentions "l'équilibre des pouvoirs caractéristique de la structure institutionnelle de la Communauté" (CJCE, 13 June 1958, aff. 9/56), the notion of "équilibre institutionnel" (institutional balance) will explicitly emerged in the decision *Köster* (CJCE, 17 December 1970, Köster, C 25-/70). See Claude Blumann, *Equilibre institutionnel et séparation des pouvoirs en droit communautaire*, in CLES POUR LE SIECLE (Paris : Dalloz, 2000, at 1639). The notion will only be integrated in EU treaties in the Amsterdam treaty.

(such as the ratification debates in national parliaments), thereby freeing the Court and the Commission from national legal traditions : to put it in the words of Pierre Pescatore who was not yet judge at the Court at the time, the ECJ "faced only its own legal conscience"[35] which meant that it could freely craft its own interpretation of the treaty of Rome key words. The view would later be embraced by the Court itself in the *Reyners v. Belgian State* decision of 21 June 1974 (C 2-74) which "excluded recourse to the preparatory work" and added that "for the opinions expressed in national parliaments during the process of ratification, it would be necessary, at least, to find interpretations which were in harmony to be able to derive any conclusion". Thereby, the hermeneutic ground was cleared from the hurdles of constitutional traditions and allowed for the emergence of "autonomous notions" of the European level.

The re-working of the notion of independence proved particularly central as the Court and the Commission were progressively affirming in the mid-1960s their "objective" roles as guardians of Europe's *constitutional* order. It is not the place here for a full analysis of how such constitutional paradigm of EU law coalesced[36]. Suffice it to say here that, in this far-ranging reading of the Paris and Rome treaties, independence became a common umbrella for both the Court and the Commission in their claim to act as spokesmen of Europe's long-term general interest. As they were affirming the *constitutional* duties of the European Commission as guardians of the treaties, in-house lawyers such as Walter Münch, at the time influential member of the Commission's Legal service[37], or Erich Wirsing, head of cabinet of Hans von der Groeben at the European Commission from 1957 to 1963, insisted that it was the Commission's *raison d'être*, as an independent institution, to be searching for "der objektiven gemeinschaftsinteresse"[38]. To the extent that, as early as 1965, an Italian law professor would worry that the Commission's and the Community's general interests "were at risk to coalesce"[39]. In this context, independence was not anymore a mere institutional device but was the very condition for the Commission's capacity to identify the general interest of the Community with objectivity[40]. This conceptual shift connecting independence with notions of "objectivity" and "general interest" was met with great interest in Luxemburg where Pierre Pescatore, now a judge at the Court, was becoming the grand theoricist of EU law's "*oeuvre commune*"[41]. In his textbook *The Law of Integration* (Kluwer Academic Publishers, 1974), he endowed the Commission but also the Court with a "*supplément d'objectivité*"[42] over diplomats and national politicians -a position that he connected directly to their being "independent" institutions. He would later systematize this position in a renowned paper in which he attempted to give theoretical depth to the weakly defined notion of "institutional balance" in EU law[43]. Depicting the specific logic of EC institutional system as the balance between four main institutions representing four types of "interests" ("States", "popular

[35] Pierre Pescatore, *La Cour en tant que juridiction fédérale et constitutionnelle*, in ZEHN JAHRE RECHTSPRECHUNG DES GERICHITSHOF DER EUROPEAÏSCHEN GEMEINSCHAFTEN, (Institut für das Recht der Europaïschen Gemeinschaften, Carl Heymanns Verlag, 1965, at 520-58).
[36] ANTOINE VAUCHEZ, *supra* note 5.
[37] See Walter Münch, *Systematik der Organe der EG*, in FESTSCHRIFT FUR SCHÄTZEL (1960 AT 339).
[38] Cf. Erich Wirsing, *Aufgaben und Stellung der Kommission in der Erfassungsstruktur der EWG*, in FORMER DER WILLENSBILDUNG IN DEN EUROPAÏSCHEN ORGANISATIONEN (Athenäum, 1965, at 48-74).
[39] Angelo Panebianco, "La Commissione", *supra*, note 27.
[40] See classic textbooks of the time like: René Joliet, LE DROIT INSTITUTIONNEL DES COMMUNAUTES EUROPEENNES (PRESSES DE L'UNIV. DE LIEGE, 1983 AT 14-17) ; Vlad Constantinesco, *La Commission*, 230 *Juris-classeur Europe* (1991).
[41] Loïc Azoulai, *La révolution introduite par Pierre Pescatore dans l'étude du droit communautaire européen*, 55(4) Revue de la Faculté de droit de l'Université de Liège, 469-478 (2010).
[42] PIERRE PESCATORE, LE DROIT DE L'INTÉGRATION (SITJHOFF, 1972).
[43] Pierre Pescatore, L'exécutif communautaire : justification du quadripartisme institué par les traités de Paris et de Rome, 14(4) *Cahiers du droit européen*, 393 (1978).

forces", "Community interest" and "the treaties"), Pescatore turned the Commission-Court duet into the representatives of the European project, and suggested an ontological difference between the objective supra-national and supra-electoral mandate of "independent" institutions on the one hand, and the discontinuous mandate of both the "political" institutions (Council and Parliament) on the other. The caselaw of the Court actually embraced this emerging European theory of independence through the promotion of a powerful notion of "general interest" (*intérêt général, intérêt de la Communauté, intérêt communautaire, objectifs d'intérêt général poursuivis par la Communauté*)[44] -much more effective and transcendent than the traditional IL notion of "common interests" (of the Member States)[45]. Interestingly enough, the "intérêt general" was used in close connection to role of the European Commission, mostly to override the many counter-weighing national interests and affirm its discretionary powers[46]. The *Commission v. France* (4 April 1974) decision is a case in point, as the Court grants "discretionary power" to the Commission on the basis of its role as guardian of the treaties as well as of the law of the treaties[47]. It notes that "the Commission, in the exercise of the powers does not have to show the existence of a legal interest, *since in the general interest of the Community its function is to ensure that the provisions of the Treaty are applied by the Member States*" (C-167-73, April 4 1974, point 15).

As the Commission and the Court were redefining their mission in the framework of the European Economic Communities, a new conception of independence emerged that cut loose from the modest toolbox of international organizations as well as from the tight coupling with the "separation of powers" doctrines of national constitutional traditions. Under the lead of Euro-lawyers' doctrinal as well as judicial formalizations, the notion had become the common cognitive platform for the expansionary mandate of the Court and the Commission as guardians and spokesmen of the European project. Over the years, new rationalities would pile up for the centrality of Europe's « independent branch » : only institutions independent of States, or *super partes* could be in a position to exercise with impartiality the multiple powers of direction, oversight and sanction entrusted to the European Union. Only they could guarantee protection to the "little States" against the risk that the "big States" take over the European institutions. Only they were exempt from the "temporal inconsistency" of partisan politics, etc. Only they were equipped to govern Europe in keeping with the "Community spirit" of its founders[48], etc. Let us make no mistake: this story is certainly not a tale without resistance. Many opposition forces stood up against this transformation of "independence" as Europe's way of political legitimacy. Governments and parliaments have claimed and maintained over the years alternative conceptions as to where political legitimacy stands in the context of the EU[49]. However, as these governmental and parliamentary forces coalesced into EU institutions respectively as a European Council (1974) and as a directly-elected European Parliament (1979), they were led to accept "Europe's

[44] Cf. Denys Simon, *L'intérêt général national vu par les droits européens* in L'INTERET GENERAL, NORME CONSTITUTIONNELLE (Michel Verpeaux and Bertrand Mathieu, eds., Dalloz, 2007).
[45] RENÉ-JEAN DUPUY, LA COMMUNAUTÉ INTERNATIONALE, ENTRE LE MYTHE ET L'HISTOIRE (ECONOMICA, 1986).
[46] On EU general interest in CJEU caselaw, see FABIENNE GAZIN LA NOTION D'INTERET GENERAL EN DROIT COMMUNAUTAIRE (DOCTORAT UNIV. STRASBOURG, 2001) ; Etienne Honorat, *La notion d'intérêt général dans la jurisprudence de la Cour de justice des Communautés européennes*, 50, Rapport Conseil d'Etat, 387 (1999) ; THOMAS HAMONIAUX, L'INTERET GENERAL ET LE JUGE COMMUNAUTAIRE (LGDJ, 2001).
[47] For example, see C-292/04 *Wienand Meilicke v. Finanzamt Bonn-Innenstadt*, General Advocate's Opinion (Christine Stix-Hackl), 5th October 2006, point 51-54.
[48] On these fonctions, see Renaud Dehousse, *La méthode communautaire a-t-elle encore un avenir ?*, in nMELANGES JEAN-VICTOR LOUIS (Presses de l'Université libre de Bruxelles, 2003, at 95-107).
[49] LUUK VAN MIDDELAAR, *supra*, note 28.

constitutional settlement" as the common ground for inter-institutional negotiations and *rapports de force*[50]. While political actors have not equally 'embraced' and supported this independence-centered vision of the EU polity, all EU institutions have come to accept it when it comes push their interests and their causes under the umbrella of Europe's "constitutional settlement". This process of convergence can be traced in the rise of the customary "community method" which provided a reading of EU polity centered around a "general interest safeguarded by the independent European Commission" [51] and a Court of Justice erected as the legal guardian of an "ever closer union" – an interpretation which would be enshrined in the Single European Act in 1986 which reinforced the eminent position of the Commission-Court duet.

3. Broadening. The Economic and Monetary Union and the Rise of Europe's Third Independent

The Maastricht treaty brought a sudden challenge to the constitutional settlement that had consolidated around the Commission and the Court ever since the mid-1960s. The founding of a whole new domain of EU policies around the European and Monetary Union (EMU) opened a new period of uncertainty regarding Europe' institutional balance and distribution of power between national and European authorities. The EMU vastly expanded EU competence, granting exclusive supranational power in the field of monetary policy to an entirely new independent institution, the European Central Bank. Here again, the "constitutional crisis" triggered by the rapid expansion of EU jurisdiction soon narrowed into a legal and political battle over the scope and meaning of independence in this new context. While the concept was undoubtedly central in the ECB's institutional set-up, its underlying rationale came to be interpreted radically differently by the German constitutional court, the European Central Bank or the Court of justice of the European Union. The following section analyzes this new battleground and identifies a (conflictual) process of mutual recognition between the Commission, the Court and the Central Bank, further broadening and formalizing Europe's "independent branch".

3.1 The Challenge of the Uber-Independent ECB

As is widely known, independence has been a foundational concept of the ECB from the very beginning[52]. Contrarily to the European Court and Commission whose institutional design had not stirred great interest among the treaty drafters, the architecture of ECB was thought of with great care and detail. While the wording for central bankers' independence in article 108 EC was copy-pasted from that of the Commission[53], the attached Protocole n°4 "on the Statute of the European System of National Central Banks and of the European Central Bank" detailed its many institutional consequences. And yet, it was not entirely clear

[50] For a discussion, see ANTOINE VAUCHEZ, *supra* note 12. On the European Parliament and the constitutional paradigm of EU treaties, see Jean-Paul Jacqué, *Les Verts v. The European Parliament*, in THE PAST AND FUTURE OF EU LAW. THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY (Loïc Azoulai & Miguel Maduro, eds, Hart publishing, 2010, at 316-32).

[51] Y. Devuyst, *The Europe Union's Community Method. Foundations and Evolution*, Oxford Research Encyclopedia of Politics (2020).

[52] On the drafting of the ECB Statute, see HAROLD JAMES, MAKING THE EUROPEAN MONETARY UNION (HARVARD UNIVERSITY PRESS, 2012 AT 265).

[53] Just like the members of the Commission, central bankers "shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks" (article 108 EC).

how the notion needed to be understood. By many standards, the ECB remained an essentially un-identified political object as it was neither an "agency" (since its powers had not been "delegated"), nor an "institution" (since it was not listed among "EU institutions" in the Maastricht treaty). As the notion of independence questioned the relationship of the ECB with the European Union as a whole as well as the scope of the Central bank's mandate, it soon became a proxy for all inter-institutional battles[54].

The hermeneutic space had been pre-empted early on by the German constitutional court with its remarked 1993 Maastricht decision[55] that sought to re-anchor the interpretation of ECB independence in national-democratic constitutional traditions. The creation of an independent European central bank was critically viewed as a "*limitation* of democratic legitimation, which is derived from the voters in the Member States, (and) affects the principle of democracy" as well as a "modification of the principle of democracy in order to protect the confidence placed in the value of a currency" - only admissible by virtue of the constitutional amendment voted by the German Parliament in 1991 to allow for the ratification of the Maastricht treaty. As the EU remained a "derived fundamental order", independence could not be understood as a ground for institutional discretion (and self-determination of ECB's own mandate) but had to be strictly interpreted as a *derogation* and an exception to constitutional commandments.

The community of central bankers however held a profoundly different view of the underlying rationale of ECB independence - one which was not to be found in legal or constitutional theory but rather in the new currents of monetarist theory[56]. The Delors Committee which drafted a proposal for the EMU (1989) is testimony to the diffusion among central bankers of new conceptions that saw "independence", broadly defined, as the inescapable tool to produce credible and time-consistent policies of low inflation[57]. In other words, the ECB was coming to Europe with its own (monetary) theory of independence, one that showed very little interest for the objects of value and legal categories of the European project itself[58]. The Legal department of the newly-created European Central Bank engaged in a pro-active attempt to provide legal recognition for these broad claims of monetary theory. Together with Martin Selmayr, who was at the time an "external legal adviser for the ECB" completing a Ph.D on "The Law of the Economic and Monetary Union" (defended in 2001 at the University of Passau), the Head of the "Institutional law" division at the ECB's Legal service, Chiara Zilioli (herself a former member of the Legal service of the Council of the EU) crafted a daring legal theory of the ECB that gave to the notion of independence an unprecedented scope. Presented as a "specialized organization of Community law"[59], the ECB

[54] For an account of these debates, see STEFANIA BARONCELLI, LA BANCA CENTRALE EUROPEA. PROFILI GIURIDICI E ISTITUZIONALI. UN CONFRONTO CON IL MODELLO AMERICANO DELLA FEDERAL RESERVE (FUCECCHIO, 2000 AT 171).

[55] BVerfGE, Maastricht ruling, Judgment of 12 October 1993.

[56] On the centrality of the monetarist theory of independence among central bankers: McNamara, Where do rules come from. The creation of the ECB, in THE INSTITUTIONALIZATION OF EURROPE (Neil Fligstein, Wayne Sandholz, and Alec Stone, eds, Oxford University Press, 2001) ; See also : K. Dyson, K. Featherstone and G. Michapoulos, *Strapped to the Mast : EC Central Bankers between global financial markets and regional integration*, (2-3) Journal of European Public Policy, 465-487 (1995).

[57] Kathleen McNamara, Rational Fictions: Central Bank Independence and the Social Logic of Delegation 25(1) *West European Politics*, 47-76 (2002).

[58] This is still the core credo of the ECB as can be read on its website: "extensive empirical evidence and theoretical analysis have shown that independent central banks are better capable of maintaining low inflation rates": https://www.ecb.europa.eu/explainers/tell-me-more/html/ecb_independent.en.html

[59] CHIARA ZILIOLI, MARTIN SELMAYR, THE LAW OF THE EUROPEAN CENTRAL BANK (HART, 2001 AT 29).

was viewed as independent from, though associated with, the Community[60]. In this context, Europe's central bank resulted not only independent from political actors but also "from the European Community" itself[61]… When the ECB was eventually brought to Luxembourg, the daring doctrine turned into concrete EU law claims. In a legal suit raised by an ECB employee to annul a decision of the Executive Board that suspended him (*X v. ECB*, Case T-333/99), the ECB refused to recognize the competence of the Tribunal of first instance arguing that the ECB's relationship with its employees had a different legal basis than the one "between the Community and its employees"[62]. In a second case which was brought to court that same year (*Commission v. ECB*, Case C-11/00), the Commission quarreled the ECB for refusing to recognize the applicability of the EC Regulation on anti-fraud investigations as well as the jurisdiction of the European Commission's anti-corruption office (OLAF) over its own services. In its submission to the Court, the Legal service of the European Commission brought the discussion specifically on the issue of independence, devoting no less than 9 pages to refute the claim by the ECB to be "an autonomous organization vis-à-vis the EC" (…) "not committed to pursue the 'objectives of the Community'"[63]. In response, the Director of ECB Legal Service, Antonio Sainz de Vicuna, seconded by Chiara Zilioli and Alan Dashwood, a renowned lawyer and EU law professor who had formerly been a *référendaire* at the Court, presented a full-fledged definition of the scope of ECB independence : "Conformément à l'article 107, paragraphe 2 CE, la BCE est dotée d'une *personnalité juridique propre, distincte de celle de la Communauté* »[64]. Mostly enshrined in the new currents of monetary theory, ECB theory of independence was at odds with the *pan-European* and *legal* motives that had consolidated ever since the 1960s at the Court and the Commission.

Unsurprisingly, the CJEU resisted claims coming from both the GCC and ECB's Legal Service, re-placing the ECB squarely *within* Europe' constitutional settlement. In the first case brought to Luxembourg (Case T-333/99, *X v. ECB*, 2001, October 18 2001), the Court of first instance insisted on the ECB's legal obligations vis-à-vis EU "general system of legal remedies" as defined in the *Les Verts* decision as the very core of Europe's "constitutional charter". In the following one (C 11/00, *Commission v. ECB*, 10 July 2000), Advocate General Jacobs openly targeted the views of ECB's Legal service stating that "it would be inaccurate to characterize it (the ECB) as have some writers, as an organization which is 'independent of the European Community', a 'Community within the Community'" (Opinion delivered on 3rd October 2002, point 60). The Court followed its AG, also endorsing to a large extent the position of the European Commission : "the recognition that the ECB has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law" (C 11/00, *Commission v.*

[60] While this position may seem somewhat extreme today, it was essentially in line with the legal experts of the Committee of EU (central bank) governors who had insisted during the preparation of the Maastricht treaty that the new central bank would not be considered as an institution of the European Community: see HAROLD JAMES, *supra*, note 52.

[61] Martin Selmayr, Die EZB als Neue Gemeinschaft: ein Fall für den EuGH?, Europa-Blätter, 170 (1999). Chiara Zilioli, Martin Selmayr, *The ECB, an Independent Specialized Organization of Community Law*, Common Market Law Review, 591 (2000). For critical reactions, see Jean-Victor Louis, *A Legal and institutional approach for building a monetary union,* Common Market Law Review, 44 (1998); Ramon Torrent, *Whom is the European Central Bank the central bank of ? Reaction to Zilioli and Selmayr,* 36(6), Common Market Law Review, 1229 (1999).

[62] Rejoinder submitted by the Legal service of the ECB in the *X v ECB* case (Case T-333/99) before the Court of first instance, 20 June 2000 (on file with author).

[63] Memo in defense to the president and members of the Court of Justice of the European Communities, 86 pages, 27 April 2000, point 50 and Rejoinder C-11/00, 6 Sept. 2000 (on file with author).

[64] *Ibid.*

ECB, 10 July 2000, point 135). In other words, in the eye of the CJEU, the ECB independence could only be understood in the framework of Europe's "constitutional settlement".

3.2 Mutually Assured Independence

These early jurisdictional battles over the European and Monetary Union would find a first partial settlement in the Lisbon treaty which formally included the Central bank in the list of "EU institutions" (article 13), thereby fully subjecting the ECB to Europe's "constitutional settlement". However, the Eurozone crisis soon re-opened the conflict : as the Central bank fast expanded its mandate and prerogatives to do "whatever it takes" to address the financial emergency, the GCC further developed its restrictive reading of independence in a series of ruling from the *OMT* Ruling (BVerfGE, *OMT Ruling*, 14 January 2014) to the recent *PSPP* decision (BVerfGE, *PSPP Ruling*, Judgment of 5 May 2020)[65] : "it is imperative that the mandate of the ESCB be subject to strict limitations given that the ECB and the national central banks are independent institutions which means that they operate on the basis of a diminished level of democratic legitimation" [66]. Here is not the place for a detailed account of the national and European cases and procedures that reviewed the legality of ECB decisions during the financial crisis[67]. Rather, I analyze here how these heated constitutional debates which revealed the legal fragility of the ECB position, initiated a process of approximation and mutual recognition between CJEU and the Central bank as part of Europe' a "independent branch" with special relationship with Europe's general interest.

Faithful to its "integrationist" *penchant* when it comes to settle the distribution of power between the "national" and "European", the CJEU acted as a staunch protector of ECB broad discretionary powers – assenting to the move of Europe's Central bank into the uncharted field of unconventional monetary policy. Yet, it is important to note the grounds on which the CJEU justified the Bank's broad discretion : following its own standards of judicial review over the regulatory powers of EU agencies i.e. in fields defined as "requiring a high level of technical and economic expertise and information" (C-270/12, *UK v. Parliament and Council* (ESMA), point 35), the CJEU tightly connected independence and discretion to expertise[68]. In *Gauweiler*, the Court recognized ECB's broad analytical discretion in the choice of economic instruments and in the establishment of "facts" from diagnoses (the level of emergency) to assessment of risks (the possible "breaking apart of the Eurozone" invoked by the central bank). And added that it is precisely because the ECB "is required to make choices of a technical nature and to undertake forecasts and complex assessments" that "broad discretion must be allowed" to it[69], except for some procedural obligations (diligent and impartial examination, "an adequate statement of the reasons for the decisions"). The Opinion of Advocate general Villalon was even more explicit in its expert-based approach to the ECB's independence. He had called on the Court to refuse "the risk of supplanting the Bank

[65] Clément Fontan & Antoine de Cabanes, "La Cour de Justice face à Gauweiler. La mise en récit de l'indépendance de la BCE" in LES RECITS DE L'EUROPE. CONCEPTS ET TYPOLOGIE (Antoinez Bailleux, Elsa Bernarrd & Sophie Jacquot, Bruylant, 2019 AT 170-191).
[66] BVerfGE, *PSPP Ruling*, Judgment of 5 May 2020, point 232.
[67] On the very rich and intense legal debate, see special issues of the *German Law Journal* or the *Maastricht Journal of European and Comparative Law* (2016), in particular, Stefania Baroncelli, *The Gauweiler Judgment in View of the Case Law of the European Court of Justice on European Central Bank Independence: Between Substance and Form*, 23(1), Maastricht Journal of European and Comparative Law, 79–98 (2016).
[68] The decision of the CJEU insists on "expertise" (3 times), "broad discretion" (3 times), and "independence" (3 times): Matthias Goldmann, "Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review", 15 *German Law Journal* (2014).
[69] Case C-62/14, *Peter Gauweiler et al*., point 68.

by venturing into a highly technical terrain" in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB" (Opinion of 14 January 2015 of Advocate General Cruz Villalón in *Gauweiler*, point 111). When considering this full recognition of the Bank's broad autonomous expertise in the realm of economics, it is hard not to think that the Court engages in a mirroring exercise about the professional and social foundations of *its own* independence and discretionary powers in the realm of EU law. The "broad discretion" of the Governing body of the ECB in interpreting the stakes of the Eurozone is only paralleled by the one of the Court itself in interpreting the inner logic of EU law - thereby sealing independence and discretionary powers to professional expertise whether in the field of law or economics.

Interestingly, the ECB was progressively led into recognizing the jurisdiction of the Court as well as the broad framework of Europe's "constitutional settlement" it once rejected. As the ECB repeatedly experienced its legal fragility before the German constitutional court, it increasingly relied on the CJUE to protect its independence and legitimacy[70]. While the Board had traditionally given only very little attention to EU law[71], the "legal wars" over independence forced the ECB into recognizing not only the central importance of the Court. In September 2015, only three months after the *Gauweiler* case had been ruled in Luxemburg, the ECB organized its first "ECB annual Legal conference" as part of "a more wide-ranging effort by the ECB's Directorate General Legal Services to foster the development of a central banking *legal doctrine* and to encourage academic research on aspects of law of interest to the ECB" [72] . While Mario Draghi opened the conference by (half-?) jokingly quoting Shakespeare's Henry VI famous phrase : "The first thing we do, let's kill all the lawyers"[73]…, another Board member, Yves Mersch -himself a lawyer by training- expressed sharp criticism of the German constitutional court whose "sovereignism could further undermine European integration"[74] and strong support for the Opinion delivered only few weeks earlier by AG Villalón in its Opinion in the *Gauweiler* case. In what was its first formal recognition of Europe's constitutional settlement coming from the ECB, he praised the "historical judgements" of the Court (*Van Gend en Loos, Costa, Internationale Handelsgesellschaft*) and insisted on the fact that "the principle of supremacy of European law is perhaps the ECJ's single most important contribution to the European integration process". In other words, the Bank increasingly pooled with the Court to protect its independence and Europe's constitutional settlement. In a parallel move to manifest its full adherence to the EU canons of integration, the Central bank also increasingly adopted a pan-European (and not only pan-Euro) discourse -one that had been almost entirely absent up to then[75]. In the midst of the

[70] The strong link between the Court and the Central bank singles out the ECB vis-à-vis the German Bundesbank which "was considered to be very independent before the euro did not rely on the judiciary to protect their independence".: Marijn van der Sluis, *In Law We Trust. The Role of EU Constitutional Law in European Monetary Integration*, Ph.D EUI, 2017, p. 101.

[71] On the progressive and tumultuous discovery of EU law by EMU actors, see NICHOLAS HAAGENSEN, EUROPEAN LEGAL NETWORKS IN CRISIS. THE LEGAL CONSTRUCTION OF ECONOMIC POLICY (PH. D COPENHAGEN BUSINESS SCHOOL, 2020).

[72] *Acknowledgements*, in FROM MONETARY UNION TO BANKING UNION. ON THE WAY TO CAPITAL MARKETS' UNION 1-2 SEPT. 2015 (ECB, 2015).

[73] Mario Draghi, *Afterward. European Integration, more an opportunity than a necessity*, in FROM MONETARY UNION TO BANKING UNION. ON THE WAY TO CAPITAL MARKETS' UNION 1-2 SEPT. 2015 (ECB, 2015 at 389).

[74] Yves Mersch, *Foreword*, in FROM MONETARY UNION TO BANKING UNION. ON THE WAY TO CAPITAL MARKETS' UNION 1-2 SEPT. 2015 (ECB, 2015 at p. 7-11).

[75] When in 2003, the ECB had published its first "mission statement", there was no explicit reference to EU integration as such : ECB, "The ECB's Mission statement", *Annual Reports*, 2003, p. 153. As it called upon a consulting firm (McKinsey) to write down its "Value folder", the outcome listed 6 "organizational values" (competence, effectiveness & efficiency, integrity, team spirit, transparency & accountability), complemented by

Eurozone crisis, the ECB felt compelled to adopt a more openly pan-European perspective as exemplified in the speech of 22 November 2015 by vice-president Vítor Constâncio: "The ECB, *as one of the true pan-European supranational institutions* is attached to the core values of the European project."[76] Not that this sudden interest in EU Law and in the European project cancelled the monetary rationales of independence but, along the way, its subversive potential had progressively been domesticated to fit in Europe's broad "constitutional settlement".

After the initial clash of perspectives when the EMU was initially created, the Eurozone crisis has seen a process of mutual recognition and approximation of the Court, the Commission and the Bank. While the Court recognized the ECB's unquestionable expertise and broad discretion over its own mandate, the latter accepted to endorse Europe's "constitutional settlement" that both the Commission and the Court had contributed to define. As he was back in Frankfort fifteen years after his first visit, this time as head of cabinet of Jean-Claude Juncker and keynote speaker to the first ECB Legal conference, Martin Selmayr, he who had claimed that the ESCB constituted a *separate* Community of its own, could only recognized that "the Commission and the ECB (were) institutional cousins"[77]… All three institutions thereby aligned along an isomorphic pan-European and expert-based rationale that erected independence into a powerful governing technique and consolidated the contours of an "independent branch" at the EU level.

4. Deepening. Reaching out to National Independents in a Context of Populist Constitutionalism

The rise to power of right-wing populist parties in Hungary and Poland[78] and the related "democratic backsliding" of the years 2010s have opened a new constitutional crisis in Europe[79]. In strikingly parallel moves, Fidesz (from 2010) and the PiS (from 2015) have targeted the rights of minorities, of migrants, of women, of LGBT, as well as the freedom of the press, of NGOs, of academics, and the independence of courts and regulators[80]. While this "conservative revolution" undermined core European values stated in article 2 of the Treaty of the European Union, the capacity of EU institutions to interfere with Member States' own constitutional system has remained unclear. Yet, interestingly, the constitutional conflict over the boundaries of EU jurisdiction has soon narrowed into a conceptual battle over the notion of independence. From the Commission's 2014 "Rule of law framework" to the *White Paper*

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a vague reference to "working for Europe": See https://www.ecb.europa.eu/careers/working-at-the-ecb/about/html/index.en.html

[76] https://www.ecb.europa.eu/press/key/date/2015/html/ecb.sp151122.en.html

[77] Martin Selmayr, *How Political are the Institutions of Economic and Monetary Union. The cases of the European Central Bank and the European Commission*, in FROM MONETARY UNION TO BANKING UNION. ON THE WAY TO CAPITAL MARKETS' UNION 1-2 SEPT. 2015 (ECB, 2015).

[78] On the Polish case, WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (OXFORD UNIVERSITY PRESS, 2020). See also ARMIN VON BOGDANDY, PAL SONNEVEND, EDS. CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA. THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA (HART PUBLISHING, 2015).

[79] Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, European Law Journal, 141-160 (2015).

[80] On the large array of assaults to the liberal democratic state, see the report on Hungary prepared by the MEP Rui Tavares (July 2013) or the European Parliament's debate over Poland in January 2016.

on the Reform of the Polish Judiciary presented by the Polish government in 2018[81] or the *Information Sheet of the Hungarian Government* produced that same year in response to the European Parliament's Sargentini Report [82], it all occurs as if the rise of populist constitutionalism [83] had re-opened Europe's "independence wars". This time, the heated jurisdictional battle has mostly concentrated on the control of "national independents" (courts, central banks and regulatory agencies), and the definition of their primary loyalty (and duties), alternatively to national constitutional orders *or* to Europe's constitutional settlement.

Truly enough, this new constitutional crisis did not emerge by mere virtue of PiS or Fidesz accessing power. It started early on, back in the 1990s, when the prospect of the near doubling of the Member States triggered a movement to minimize the potential impact of the enlargement to countries of the former Eastern Bloc. In this context, the notion of independence played a critical role moving from a mere objective for the passage to the rule of law into a central governing technique for the European Commission in its monitoring of the accession process. It was progressively weaponized not only as a central instrument of EU conditionality policy vis-à-vis the candidate countries, but also as a new ground for intervention in Member States constitutional affairs through the Technical Assistance and Information Exchange (TAIEX) and the Twinning programs supporting the reform of national judiciaries and strengthening the rule of law[84]. In parallel, it also became a critical tool for a tighter supervision of governments' judicial nominees for the CJEU.[85]. While independence had turned into a core policy tool for the European Union from the late 1990s onwards, it's not until the 2010s and the rise of populist governments that the issue became politically controversial. Interestingly, both Fidesz and the PiS targeted not only courts but also all forms of independent institutions that somehow interfered with the margins of maneuvering of the executive. The unfolding of this reform agenda which followed strikingly similar steps in both Hungary and Poland opened a new chapter in Europe's "independence wars". In front of governments which claimed their sovereign right to freely organize their own constitutional system, the EU had very limited leeway beyond the restricted scope of EU law infringement procedure. As the Court, the Commission and the European Central Bank have pro-actively engaged in extending their jurisdictional claim to monitor their national counterparties, they have thematized the *interdependence* and necessary cross-protection of all independents to address the *systemic* threat of populist governments, thereby delineating a cognitive platform in defense of Europe's "independent branch". It is important to note that none of these moves were made in isolation from the Member-States but rather were supported, if not directly called for, by a majority of national governments urging EU independents to act as a shield against the corrosive effects of populism.

4.1 Weaponizing Independence

The move into monitoring "national independents" was certainly easier to make for the European Central Bank. While the Court of Justice and the European Commission could

[81] CHANCELLERY OF THE PRIME MINISTER OF POLAND, WHITE PAPER ON THE REFORM OF THE POLISH JUDICIARY (7 MARCH 2018). Interestingly, the word "independence" appears no less than 77 times in the 99 pages of the Report.
[82] See http://abouthungary.hu/media/DocumentsModell-file/1536582679-information-sheetsargentini-report.pdf
[83] On populist constitutionalism, see the special issue by the *German Law Journal*, in particular Paul Blokker, *Varieties of Populist Constitutionalism*, 20(3), German Law Journal, 332-350 (2019).
[84] RAMONA COMAN, REFORMER LA JUSTICE DANS UN PAYS POST-COMMUNISTE. LE CAS DE LA ROUMANIE (ÉD. DE L'UNIV DE BRUXELLES, 2009).
[85] On the story of the "article 255" committee in relation to the fears spurred by the big bang expansion of 2004 to Eastern and Central European countries, see MITCH LASSER, *supra*, note 10.

only count on looser forms of coordination with their national counterparts through a "judicial dialogue" or "regulatory networks" in which they would only appear as *primus inter pares*, the treaty of Maastricht had designed an integrated and hierarchical "Eurosystem" with a variety of tools and procedures allowing for the ECB to discipline national central banks. In fact, the populist assaults did not find the Central bank unprepared. As early as 1995, the Working Group of Legal Expert (WGLE) of the European Monetary Institute (ECB's predecessor) had suggested to engage in a continuous scrutiny national central banks' independence through Bi-annual Reports on their "Legal convergence"[86]. Of the 454 Opinions that the ECB (and its predecessor, the EMI) delivered between 1994 and 2009 on national draft legislations, the notion of independence comes out as the most central concept[87] with 118 Opinions devoted to its protection[88] and a rich casuistic regarding terms of mandate, financial independence, conflicts of interests, voting rights of third parties, terms of office, conditions of re-appointment, rules on the removal from office, etc. Unsurprisingly, the changes introduced in the statute of the Hungarian central bank by the Orban government which endowed the executive with more capacity to intervene on the board immediately was met with immediate reaction on the part of the Governing Council of the ECB which expressed its deep concerns for the independence of the Hungarian central bank in a series of Opinions (Dec. 14 and 22, 2011; 2013; January 31, 2014) - eventually leading the Hungarian government to a partial retreat.

The European Commission could certainly not be found missing in this new impulse for the defense of "national independents" as it had been a consistent "entrepreneur of independence" over the past decades, promoting independent institutional designs for statistical institutes, fiscal watchdogs[89], and regulatory agencies of all sorts, etc[90]. As a matter of fact, ever since the very beginning of the populist challenge, the defense of independence has been the Commission's preferred ground of action to counterbalance the democratic backsliding in Hungary and later Poland. Few months only after the return to power of Fidesz, the Commission chose to position itself as a defender of *all* national independents. As early as 2011, it alerted on the overall issue in its "infringement policy report" on Hungary and pointed at "serious concerns" regarding the "compatibility of laws implementing the new Hungarian constitution with EU law, especially as regards the independence of the central bank, the judiciary and the data protection supervisory authority"[91]. Few months later, on January 17, 2012, the European Commission launched its first infringement procedure on the independence of national central banks as the Orban government was planning a

[86] Stephanie Mudge, Antoine Vauchez, *Dependence on Independence: Legal Expertise and the (Un)Making of the European Economy*, forthcoming.

[87] See the account by another former WGLE member: Robert Sparve, *Central bank independence under the European Union*, In FROM LEGAL ASPECTS OF THE EUROPEAN SYSTEM OF CENTRAL BANKS. PAOLO ZAMBONI LIBER AMICORUM (ECB, 2005, AT 271-281).

[88] Data built from https://www.ecb.europa.eu/pub/pdf/other/ecbsadvisoryrole200905en.pdf. On the ECB "consultative experience", see the overview by the member of the executive board: Lorenzo Bini Smaghi, *Central Bank Independence in the EU: From Theory to Practice*, 14(4), European Law Journal (2008 at 446-460).

[89] Diane Fromage, *Creation and Reform of Independent Fiscal Institutions in EU Member States: Incomplete and Insufficient Work in Progress?* In LEGAL CONSTITUTIONAL CHANGE THROUGH EURO-CRISIS LAW (Thomas Beukers, Bruno de Witte, & Claire Kilpatrick, eds, CAMBRIDGE UNIVERSITY PRESS, 2017 AT 108-142).

[90] On EU Commission's active protection of national regulatory agencies' independence, see Gabriel Eckert, *L'indépendance des autorités de régulation à l'égard du pouvoir politique*, 142, Revue française d'administration publique 629-643 (2012) .

[91] European Commission, "Hungary", in COMMISSION STAFF WORKING DOCUMENT MONITORING THE APPLICATION OF EU LAW IN MEMBER STATES (2012, 13).

constitutional reform that politicized the nomination of central bankers[92]. And a couple of years later, in April 2014, the European Commission opened another infringement proceeding, this time in defense of the independence of a regulator, the Hungarian data protection officer[93]. However, it is certainly the threat against judicial independence that has so far triggered the most intense mobilization on the part of the Commission with a policy of "accelerated" infringement procedures inaugurated "with true ferocity" [94] in the case *Commission v. Hungary* (C-286/12, 6 Nov. 2012) over the sudden lowering of judges' retirement age, and pursued more recently against the Polish government (C-192/18, *Commission v. Poland*, 5 Nov. 2019).

The change was more sudden and spectacular at the CJEU which engaged in an impressive *aggiornamento* of its jurisdictional claims over national courts. In a context in which the EU has no direct competence on the organization of national judicial systems (in the name of the principle of "procedural autonomy" of Member States[95]), the CJEU has always been denied direct forms of hierarchical control over national courts. Nor did it have procedural tools akin to those endowed to the ECB to discipline them. While the CJEU had attempted to normalize what a "court" or a "jurisdiction" had to be for the stake of the preliminary ruling procedure, the criterium of independence was just one among the many used, "such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent"[96]. In less than 18 months however, from 2018 to 2019, just as the new Polish government was starting its reforms of the judicial system, the CJUE ruled a trilogy of cases which crafted an entirely new theory of national courts defining their independence as a pivot for the effective functioning of Europe's "constitutional settlement"[97]. The first stone was laid with the *Associação Sindical dos Juízes Portugueses contre Tribunal de Contas* decision whereby the Court provided a far-reaching interpretation of a paragraph of article 19 TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law") which had been introduced in the Lisbon treaty but had until then remained somewhat toothless[98]. Departing from the restrictive interpretation suggested by the Advocate general[99], the CJEU turned article 19 into a direct source of legal obligations for Member States to respect of "judicial independence" for all courts found to intervene in "fields covered by EU law"[100]. A second layer was brought

[92] The move was strong enough to act as a deterrent as the Hungarian government committed to introducing changes in the bill.
[93] Kim Scheppele, *Making Infringement Procedures More Effective. A Comment on Commission v Hungary case C-288/12*, Eutopia Law, April 2014 (accessible at https://eutopialaw.wordpress.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/)
[94] Dimitry Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, Yearbook of European Law, 1-23 (2005).
[95] Cecilia Rizcallah, Victor Davio, *L'article 19 du Traité sur l'Union européenne : sésame de l'Union de droit. Analyse de la jurisprudence récente de la Cour de justice de l'Union européenne relative à l'indépendance des juges nationaux*, Revue trimestrielle de droit européen, 155-185 (2020).
[96] See Opinion of Advocate General Stix-Hackl delivered on 11 May 2006, *Wilson* (C-506/04, para 44).
[97] Cécile Rizcallah, Victor Davio, *supra*, note 94.
[98] *Associação Sindical dos Juízes Portugueses contre Tribunal de Contas* (C-64/16, 27 Feb. 2018), *LM* (C-216/18 PPU, 25 July 2018), and *Commission v. Poland* (C-619/18, 24 June 2019).
[99] The AG had made a point of distinguishing the "effective legal remedy" of article 19 from the "principle of judicial independence" established at the article 47 of the Charter of fundamental rights through the "right to an effective remedy": Opinion *AG H. Saugmandsgaardoe* du 18 May 2017 (C-64/16).
[100] As aptly analyzed by Laurent Pech and Sébastien Platon, the article 47 of the Charter which limits its protection of independence to the cases where EU law is actually mobilized would have not allowed to grant

by *Commission v. Poland* (C-192/18, 4 November 2019) which turned independence into an essential pillar of the "rule of law" objective stated in article 2 TEU : "That requirement that courts be independent (…) is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded" (CJEU, 4 November 2019, *Commission v. Pologne*, para. 106). The third and last layer was added in a preliminary ruling requested by the Irish High Court on the European arrest warrant (EAW) in which the Court pointed at independence and impartiality as *qua non* conditions for the "high level of trust between MS on which the EAW mechanism is based" (CJUE, 25 July 2018, *LM*, C-216/18 PPU). As the CJEU elevated independence to the status of *constitutional* pillar of the EU legal order, it directly challenged Member States' discretion over the definition of what a "court" is by ruling that national courts would now need to comply with an EU standard of independence – resulting ever since in a long series of condemnations of Poland for its laws on the Supreme court (CJEU, *Commission v. Pologne*, 24 June 2019), on judges' retirement age (CJUE, *Commission v. Pologne*, 5 November 2019, C-192/18), etc.

4.2 Monitoring National Independent Ecologies

Confronted with the challenge of populist constitutionalism, each one of the three EU independents has thus engaged bold jurisdictional moves into Member States' constitutional settlements. In a long series of Opinions, Recommendations and Judicial decisions, they have crafted new theories of independence that all lead to claim responsibility over their national counterparts. Urged by many governments and the European Council itself to act as shields against the corrosive effects of right-wing populism, the three EU independents have increasingly come to acknowledge their mutual interdependence thematizing the *general systemic value* of independence and independent policy-making.

The promotion of the notion of "systemic threat" to the rule of law was crucial in this regard. As is well known, the European Commission led the institutionalization of a monitoring system able to prevent "serious breaches" to values listed in article 2 TUE[101]. In the years following the return to power of *Fidesz* in 2010, the Commission actively sought to fill "a void" between the infringement procedure and the "nuclear power" of article 7. In 2014, it created a brand new "Rule of law framework" which organizes a procedure of dialogue and assessment with Member States presenting a clear and persistent risk of "systemic threat to the Rule of law". Here is not the place for a detailed account of the institutional mechanism. Suffice it to point at the fact that the Commission's bold move was met with many criticisms coming from different quarters (the Legal service of the Council as well as various governments) that questioned the legitimacy of the European Commission in moving into the traditional constitutional competences of Member States. Their main argument pointed at the lack of legal basis for such monitoring role, especially as article 2, just like the EU Charter of fundamental rights, does not confer any direct EU competence but was viewed as providing objectives and values to be respected in EU public policies. As it was criticized for its vague definition of the "rule of law", the Commission undertook to clarify this standard that was indeed central to its newly affirmed prerogative. And it chose to do so by connecting it tightly to the notion of independence. Not only is the requirement for

such widespread protection: Laurent Pech & Sébastien Platon, *Judicial Independence under Threat: The Court of Justice to the rescue in the ASJP case*, 1827-1854 CMLRev (2018).

[101] THE ENFORCEMENT OF THE RULE OF LAW AND VALUES. ENSURING MEMBER STATES' COMPLIANCE (Andreas Jakab & Dimitri Kochenov, eds, OXFORD UNIVERSITY PRESS, 2017).

"Independent and impartial courts" listed among the 6 elements that are defined as constituting a "systemic threat" to the rule of law; but also the notion is given a pivotal role in defining the *systemic* nature of the threat : "The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress". Unsurprisingly, the very first case of "preliminary assessment" that was open against Poland on January 16, 2016 was linked to independence as the complaints related to the independence of the Constitutional Court, of the council for the judiciary, and to changes in the training of judges that could undermine the independence of the judiciary and the separation of powers.

Yet it is the "Stakeholder Consultation" on the "*Strengthening of the Rule of Law with the Union*" launched by the European Commission in 2019 which has allowed the assess how all three EU independents converge in pointing the broad *systemic* importance of independence for Europe. Even the ECB, probably the one institution less inclined to engage directly on the theme of the rule of law, has moved forward. In its contribution to the "Stakeholder Consultation", the ECB builds directly on the CJEU caselaw on independence and on the European Commission's overall diagnosis of a "rule of law crisis"; and it expresses concern for the current "*generalized* challenge to independent authorities" and "independent policy-making"[102]. Faced with the "populist, anti-establishment, and anti-expertise approaches (…) that challenge independent institutions"[103], EU independents have increasingly thematized the community of situation of courts, central banks and regulators (whether national or European) which must all "carry out the tasks conferred upon them by the Treaties independently"[104].

As these *systemic* definitions of threat have progressively developed and circulated, a sense of interdependence, if not solidarity, has emerged among EU independents, leading to the promotion of a broad understanding of independence as an "ecology" whereby the independence in one sector (say monetary) is both guaranteed and conditioned by the independence in the others (say judicial). For the Hungarian central bank to be independent, said the ECB, its auditing procedures should be performed on a "non-political, independent, and purely professional basis"[105]. Similarly, for the Latvia central bank to be independent, said the CJEU in the *Rimsevics* decision (C-202-18, 26 February 2019)[106], its governor should only be indicted and arrested by "an independent tribunal". Similarly, for the Polish courts to be truly independent, said the Commission in its October 2019 infringement procedure, disciplinary sanctions cannot be decided by a body "which is composed solely of judges selected by the National Council for the Judiciary, which is itself politically appointed by the Polish Parliament (Sejm)", etc [107]. In this new framework, independence *calls for* independence as auditing, prosecuting, or disciplinary powers over independents must be

[102] European Central Bank, "A central bank perspective", 31 July 2019. https://www.ecb.europa.eu/pub/pdf/other/ecb.other190731_commission_rule_of_law~7bb04806d3.en.pdf
[103] Ibid.
[104] Ibid.
[105] Opinion of the European Central Bank of 22 June 2011 on the Hungarian State Audit Office in relation to its audit of the Magyar Nemzeti Bank (CON/2011/53).
[106] In February 2018, *Rimšēvičs*, the Latvian Central Bank Governor, was arrested by the Latvian Anti-Corruption Office ("The KNAB") for allegedly accepting a bribe. As a consequence, Rimšēvičs was prohibited from exercising his powers as a member of the ECB's Governing Council.
[107] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6033

performed by equally *independent* institutions. Unsurprisingly, in this context, attacks on one independent institution increasingly tend to be perceived as an existential threat to the other ones and result in a series of action (Commission's infringement procedures, ECB Opinions, CJEU decisions, etc.) in defense of the general value of independence. Such defense is perceived as serious enough to justify unprecedented moves such as in the *Rimsevics* case in which the CJEU has taken the bold and unprecedented decision to directly *annul* a national act (that of an anti-corruption body) for the threats it was putting on the independence of a national central bank. Thereby, the notion of independence is increasingly conceived as an inter-locking system in which each one (whether court, regulator or central bank, whether national or European) is at turns protector of and protected of this independent ecology, thereby delineating the contours of an "independent branch".

5. Conclusion

Over the past half century, the EU has been a laboratory for the reinvention of the notion of "independence" from mere negative institutional device to a broad empowering technology of supranational government. As the examination of Europe's major constitutional crises has demonstrated, it is now deeply entangled with the notion of EU jurisdiction and competences itself. While each one of the EU independents has its own specific mandate, degree of discretion and mode of accountability, the lexicon of independence has increasingly allowed for a sense of commonality (in their situation as well as in their mission) to emerge *across* the Court, the Central bank and the Commission, thereby delineating the contours of a powerful "independent branch". All along these "independence wars", EU institutions may have acted as "rivals" controlling or counter-balancing each other, but they have also "discovered" each other as "*associated* rivals" acknowledging one another's importance against attempts to re-anchor the notion of "independence" outside of Europe's constitutional settlement, whether it is in public international law, monetary theory, populist constitutionalism or national-democratic traditions of separation of powers. As it traces the genesis and cross-time transformation of the notion at the EU level, the paper unearths the historically-rooted political formula of EU polity, one that points at the enduring entanglement between independence, political legitimacy and the European project.

It is not for us to criticize or justify here this deep-seated reality but rather to take it into account as we think about the ways in which the European Union navigates between the twin challenges of technocracy and populism[108]. The point here is not to further legitimize the profound transformation of democratic politics here at stake. After all, the costs related to the rise of independent institutions are well known : the diffusion of a grim image of democratic politics as intrinsically clientelistic and short-termist, an over-reliance of the "objectivity" of expertise whether legal, economic or other, the concealment of the politics and trade-offs that exist therein, the enduring opacity on the issue of redistributive effects in the name of rule-based decision-making, etc[109]. It is not either our intension to disregard the political value of independent institutions in contemporary democracies, particularly when it comes to courts and their capacity to defend rights and equality before the law. Rather, the article is an invitation for scholars, in particular lawyers or political theorists, to systematically document, compare and assess the changing definitions of independence provided by the different

[108] CHRIS BICKERTON, CARLO INVERNIZZI, THE NEW LOGIC OF DEMOCRATIC POLITICS (OXFORD UNIVERSITY PRESS, 2020).

[109] FRITZ SCHARPF, PROBLEM SOLVING EFFECTIVENESS AND DEMOCRATIC ACCOUNTABILITY IN THE EUROPEAN UNION, MPIFG WORKING PAER 03/1, FEBRUARY 2003.

contenders of Europe's "independence wars" with a view to frame a more robust notion to which independents (whether national or European) could be held accountable. As we recognize its deep-seated centrality and its politics, we may be in a better position to account for uncontrolled usages of this transversal notion, organizing new forms of accountability of independent policy-making, and theorizing more democratically-open conceptions of independence[110].

[110] For developments along these lines : ANTOINE VAUCHEZ, *supra*, note 12.