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GLOBALIZATION

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CONTENTS

The Capital Markets Union and the elusive goal of a ‘genuine’ Economic and Monetary Union.....	215
---	------------

Rainer Masera

Risk, regulation, supervision and crises in the European banking union.....	236
--	------------

Fabiano Colombini

Creative austerity.....	274
--------------------------------	------------

Giuseppe Di Taranto - Sabina Smailovic

Which democratic oversight on the Banking Union? The role of the Euro-national parliamentary system.....	289
---	------------

Nicola Lupo - Renato Ibrido

The Danish No to EU Justice and Home Affairs opt-in. The reasons behind.....	323
---	------------

Thomas E. Jorgensen - Alessandra Chirico

FOCUS ON GLOBAL PERSPECTIVES

Bridging spending review and change management in Italian public administrations.....	337
--	------------

Vincenza Esposito - Riccardo Mercurio - Marcello Martinez - Mario Pezzillo Iacono - Ernesto De Nito

Central Banks’ Monetary Policy Study.....	352
--	------------

Galina Gospodarchuk - Sergey Gospodarchuk

The fight against fraud: a critical review and comparative analysis of the Labour and Conservative government’s anti-fraud policies in the United Kingdom.....	369
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Umut Turksen - Nicholas Ryder

Which democratic oversight on the Banking Union?

The role of the Euro-national parliamentary system*

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ABSTRACT: *The essay aims at analysing the instruments of democratic and parliamentary oversight on the European Banking Union. It argues that the role of the European Parliaments and National Parliaments, as envisaged in Regulation (EU) No. 1024/2013 of the Council, in Regulation (EU) No. 806/2014 of the European Parliament and of the Council and in the interinstitutional agreements between the European Parliament, on the one side, and, on the other, the European Central Bank or the Single Resolution Board (published respectively on 30th November 2013 and 24th December 2015), could be fruitfully analysed using the concept of the “Euro-national parliamentary system”. It is developing traditional and innovative parliamentary instruments, at national as well at European level (especially the so called “banking dialogue”), that these new powers can be made accountable and that the new bodies of the “fragmented” Executive in the EU, set up within the Banking Union, will not increase the width of the “democratic disconnect”.*

SUMMARY: 1. Introduction. - 2. The Euro-national parliamentary system: an analytical tool to clarify (and enhance) the role of Parliaments in the EU. - 3. The place of central banks in the “fragmented” Executive in the EU. - 4. The Banking Union: steps and architecture. - 5. The European Parliament’s role within the Banking Union governance. - 5.1. Towards a “banking dialogue”. The European Parliament’s oversight powers in Regulations 1024/2013 and

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806/2014. - 5.2. The Interinstitutional Agreement between the European Parliament and the European Central Bank. - 6. The National Parliaments' participation in the Banking Union governance. - 6.1. An "anatomy" of the National Parliaments' oversight powers in the Banking Union framework. - 6.2. The implementation of the National Parliaments' internal rules: comparing procedural philosophies. - 7. Conclusions

1. The setting up of the European Banking Union has been a strategic step of the European integration process¹. By means of the Banking Union, further traditional functions exercised at national level, also by the central banks², have been pooled and will be mainly exercised at a European level.

As often happens, especially regarding crucial policies on the banking sector, the most relevant roles have been assigned to bodies and institutions neither elected by citizens nor directly deriving their legitimacy from Parliaments. Some powers are, indeed, reserved to the (National and European) Governments, but most of them are attributed to central banks of the ESBC, independent authorities and to other agencies that could be included in the "fragmented" Executive in the EU (as we will see in par. 3).

For this very reason the problem of democratic oversight on the European Banking Union is, at the same time, absolutely crucial and not easy to be solved. Democratic legitimacy and political accountability of the important decisions that can be taken by the institutions and bodies of the Banking Union and that might have clear and very relevant effects on European citizens, as savers, borrowers or taxpayers, depend on the capacity of Parliaments to exercise some form of oversight on these institutions.

¹For an historical antecedents of the Banking Union project, see MOURLON - DRUOL, *Banking Union in Historical Perspective: The Initiative of the European Commission in the 1960s–1970s*, in *Journal of Common Market Studies*, 2016, 1 ff. On the European policy framework in the financial sector and post-crisis bank regulatory reforms, see CAPRIGLIONE – TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, Torino, Utet, 2014; ANGELONI – BERETTI, *Harmonising banking rules in the Single Supervisory Mechanism*, in *Law and Economics Yearly Review*, 4, 2015, 124 ff.

² On the problem of the separation between monetary policy and banking supervision, see, inter alia, GOODHART – SCHOENMAKER, *Should the Functions of Monetary Policy and Banking Supervision Be Separated?*, in *Oxford Economic Papers*, 4, 1995, 539 ff.; SABBATELLI, *La supervisione delle banche. Profili evolutivi*, Padova, 2009, spec. 166 ff.

As always happens, the pooling of functions at European level determines a potential dispersion of responsibility, as well as the need to identify the Parliament where forms of accountability and sometimes of political direction could be experienced. It will be shown (respectively, in paras. 4 and 5) that both the European Parliament and National Parliaments are called upon to play a role in this regard. Indeed, after the Monetary Dialogue, the Political Dialogue and the Economic Dialogue a new framework of democratic oversight powers and parliamentary information rights was introduced within the Banking Union governance.

That is why, particularly in this case, the analytical tool of the Euro-national parliamentary system – a way of reading the role of the many Parliaments that exist and operate in the EU – could be useful in order to clarify the mechanisms and the procedures allowing Parliaments to exercise one of their fundamental roles i.e. to oblige the Executives to publicly give account of the reasons for the decisions that they have taken and to discuss with representatives elected by the citizens the main directions they are going to follow while they make use of their powers.

2. There are many ambiguities and debates on what is and what should be the place of the many Parliaments that exist and operate in the EU democracy, and particularly on the respective functions of the European Parliament and National Parliaments³. These debates and ambiguities are particularly heated when they refer to functions that have been pooled following the inter-governmental method instead of the community method, as in these cases the role of the European Parliament as co-legislator and its scrutiny powers of the Commission tend almost inevitably to be by-passed. At the same time, it is far from easy for National Parliaments to oversee the action exercised by the Ex-

³For an updated picture see HEFFTLER – NEUHOLD – ROZENBERG – SMITH (eds.), *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke, Palgrave Macmillan, 2015.

executives at European level: at best, each one of them can oversee and sometimes even direct the behavior of its own Government, with reference to how it was able to pursue the national interest, but obviously it is not in any position to do the same thing at European level, checking whether or not the policies envisaged or enacted have actually achieved the European interest.

The analytical tool that has recently been proposed in this regard, in order to better grasp these peculiar features of EU democracy, and eventually to stimulate their evolution, is the “Euro-national parliamentary system”⁴. It assumes that the EU democracy is founded and characterized not only on the directly elected European Parliament, but also on the confidence relationships that, with the only exception of Cyprus, link each National Government to its Parliament (or with at least one Chamber thereof). Consequently, it tends to underline the relevance for EU democracy of the relationship between each National Parliament and its respective Government, explicitly acknowledged by article 10 TEU, when it states, after recognizing that the EU is founded on representative democracy and after recalling the role of the European Parliament, that “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens”⁵.

In comparison to other widespread analytical tools, like the one of the “multilevel parliamentary field”⁶, which has become remarkably widespread in

⁴See MANZELLA – LUPO (eds.), *Il sistema parlamentare euro-nazionale. Lezioni*, Torino, Giappichelli, 2014; LUPO, *Parlamento europeo e Parlamenti nazionali nella Costituzione “composita” dell’UE: le diverse letture possibili*, in CIANCIO (ed.), *Nuove strategie per lo sviluppo democratico e l’integrazione politica in Europa*, Roma, Aracne, 2014, 365 ff.; MANZELLA, *Parlamento europeo e parlamenti nazionali come sistema*, in *Rivista AIC*, 1, 2015, www.rivistaaic.it/parlamento-europeo-e-parlamenti-nazionali-come-sistema.html.

⁵On this point GRIGLIO – LUPO, *Parliamentary Democracy and the Eurozone Crisis*, in *Law And Economics Yearly Review*, 2012, 314.

⁶See CRUM – FOSSUM, *The Multilevel Parliamentary Field: a framework for theorizing representative democracy in the EU*, in *European Political Science Review*, 1, 2009, 249.

recent years⁷, the “Euronational Parliamentary system” seems more useful and meaningful, as it adds a couple of new and relevant elements.

First, it includes in the picture not only all the Parliaments (European, National and even regional, if they exercise legislative powers), but also the Executives. In this way, it highlights the fact that, also thanks to the already mentioned confidence relationships existing in each Member State’s form of government, among the main functions of each Parliament is the oversight of its Executive, or, better, of the part of the “fragmented” Executive in the EU that is in some way linked to it.

Second, in talking about a “system” instead of a “field”, it shows that the relationships among Parliaments cannot be correctly defined as “having no clear relation of hierarchy, but linked to each other by a sense of common responsibility, shared norms, and a certain density of interaction”. On the contrary, the relationships among Parliaments, and even more so those between each Parliament and its Executive, are designed and ruled by legal provisions and characterized by Euro-national procedures and often by a number of common institutions.

In other words, the ‘system’ of relationships outlined above is constituted by procedures, ruled by a composite parliamentary law, made up of EU as well as national provisions, and is based on the idea that the functions of representation, political direction and oversight are now necessarily shared between parliaments of different levels of government⁸.

⁷Among others, LORD, *The European Union: Parliamentary Wasteland or Parliamentary Field?*, in CRUM – FOSSUM (eds.), *Practices of Inter-parliamentary Coordination in International Politics: The European Union and Beyond*, Colchester, ECPR Press, 2013, 235; ERIKSEN, *The Normativity of the European Union*, London, Palgrave MacMillan, 2014, 98 ff.; ABELS – EPPLER (eds.), *Subnational Parliaments in the EU Multi-Level Parliamentary System: Taking Stock of the Post-Lisbon Era*, Innsbruck, Studien Verlag, 2015.

⁸See MANZELLA, *Verso un governo parlamentare euro-nazionale?* in MANZELLA –LUPO (eds.), No. 4 *supra*, 1 ff.. See also, although talking of a multilevel parliamentary field, WINZEN – ROEDERER-RYNNING – SCHIMMELFENNIG, *Parliamentary Co-Evolution: National Parliamentary Reactions to the Empowerment of the European Parliament*, in *Journal of European Public Policy*, 22, 2015, 75.

One of the advantages of this approach is that it should encourage Parliaments to cooperate not just for the pleasure of doing so, but because any form of interparliamentary cooperation would strengthen the setting up and the efficacy of parliamentary oversight on the “fragmented” Executive in the EU (the European Council, the Council, the Commission, and also the European Central Bank).

3. As stated, there is no one single unitary institution in the EU which can be described as the “European government”. The executive power in the EU is indeed a “fragmented power”, that is composed of supranational institutions (the Commission, the ECB, the agencies), institutions made up of National Governments (European Council, Council) and a galaxy of committees and working groups at a sectorial level⁹.

However, far from weakening the EU Executive, its “fragmented” nature makes it “ultra-powerful”, as long as traditional forms of parliamentary oversight and political responsibility are difficult to apply¹⁰. In taking part in the European integration process, National Governments have obtained, at least in part, what was deemed impossible in contemporary democracy: the exercise of powers without (almost any) responsibility.

On the one side this is the outcome of the fact that for the Government to blame someone else for the decisions they have actively concurred in taking and, on the other side, of the difficulty for National Parliaments and for (still mainly national) public opinion to correctly reconstruct the chain of political re-

⁹For the thesis of the EU’s “fragmented executive”, see MAGNETTE, *L’Union européenne: un régime semi-parlementaire*, in DELWIT – DE WAELE – MAGNETTE (eds.), *A quoi sert le Parlement européen?*, Bruxelles, Editions Complexe, 1999, 25 ff.; CURTIN, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford University Press, Oxford, 2009, spec. p. 28 ff., Id. *Challenging Executive Dominance in European Democracy*, in *The Modern Law Review*, 1, 2014, 1 ff.

¹⁰See LUPPO, *Il controllo parlamentare dei Governi degli stati membri nell’Unione europea, tra trasparenza e privacy*, in *Federalismi*, 3, 2015, 7.

sponsibility and, should it be necessary, to sanction those who have exercised their powers in an ineffective or incorrect manner¹¹.

Even the Banking Union governance is not exempt from the interactions between the “fragmented executive” in the EU and its parliamentary interface. Rather, the analysis of the supervision and resolution policies confirms that the ECB is not – as affirmed in a recent book¹² – a *counter-majoritarian* institution that can be assimilated to a constitutional court. The ECB is instead a component of the “fragmented executive”, and indeed this “executive” role explains the competences of the European Parliament and the National Parliaments to oversee the decisions adopted by the ECB within the Banking Union governance.

The concept of “executive” shows at least two different meanings: in a negative sense, it could be defined as being in opposition with the other two powers which make up the traditional Montesquieu tripartite system; instead, in a positive sense it coincides with the bodies which carry out the function of execution¹³.

From this point of view, the central banks seem to correspond with both definitions of “executive”. Indeed, it is not a coincidence that the German Bundesbank is regulated by art. 88 GG., that is a provision included in the section of the Basic Law concerning “The Execution of Federal Laws and the Federal Administration”¹⁴.

¹¹See HOBOLT – J. TILLEY, *Blaming Europe? Responsibility Without Accountability in the European Union*, OUP, Oxford, 2014.

¹²See MOROSINI, *Banche centrali e questione democratica. Il caso della Banca centrale europea (BCE)*, Pisa, Edizioni ETS, 2014, especially 43.

¹³On the different meaning of “executive”, see BOGNETTI, *Governo*, in *Enciclopedia delle scienze sociali*, IV, 1994, 405 ff.; SCHÜTZE, *European Constitutional Law*², Cambridge, CUP, 2015, 302 ff.

¹⁴See BIFULCO, *Bundesbank e Banche centrali dei Länder come modello del sistema europeo delle banche centrali*, in GABRIELE (ed.), *Il governo dell’economia tra crisi dello Stato e crisi del mercato*, Bari, Cacucci, 2005, 41 ff.

Moreover, the recent ECB refinancing operations and purchase programmes¹⁵ highlight the “enlargement of functions” of the European Central Bank and could be considered as indirectly confirming the Alberto Predieri thesis: although the central banks are at the apex of a sectorial sub-system (the banking governance), they are actively involved in the political direction function, taking decisions with a general and intersectorial impact¹⁶.

4. In December 2012, at the peak of the sovereign debt crisis¹⁷, the EU decision-makers launched a “road map” to achieve a complete Economic and Monetary Union (EMU) through the setting up of a European Banking Union¹⁸.

The Banking Union architecture is built on three different pillars: the Single Supervisory Mechanism (SSM), the Single Resolution Mechanism (SRM), and the Deposit Guarantee Scheme (DGS)¹⁹.

¹⁵On the ECB refinancing operations and purchase programmes, see MOSTACCI, *Alla maniera di Asghar Farhadi. Le operazioni straordinarie della BCE nelle dinamiche delle separazione*, in *DPCE*, 1, 2015, 221 ff.; PISANESCHI, *Legittimo secondo la Corte di Giustizia il piano di allentamento monetario (OMT) della BCE. Una decisione importante anche in relazione alla crisi greca*, in *Federalismi*, 13, 2015; BASSAN, *Le operazioni non convenzionali della BCE al vaglio della Corte costituzionale tedesca*, in *Riv. dir. internaz.*, 2014, 361 ff.

¹⁶See PREDIERI, *Il potere della banca centrale: isola o modello?*, Firenze, Passigli, 1996.

¹⁷For a parallel between the recent financial crisis and the Great Depression of 1929, see CAPRIGLIONE, *Crisi a confronto (1929 e 2009)*, Padova, Cedam, 2009.

¹⁸With regard to the “constitutional impact” of the crisis, on the EU as well as on national legal orders, see CONTIADES (eds.), *Constitutions in the global financial crisis: a comparative analysis*, Farnham, Ashgate, 2013; DI GASPARE, *Diritto dell'economia e dinamiche istituzionali*, Padova, 2015, 257 ff.; TUORI – TUORI, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge, CUP, 2014; BALAGUER CALLEJÓN, *Crisis económica y crisis constitucional en Europa*, in *Revista española de derecho constitucional*, 98, 2013, 91 ff.; CERRINA FERONI – FRANCO FERRARI (cur), *Crisi economico-finanziaria e intervento dello Stato: modelli comparati e prospettive*, Torino, Giappichelli, 2012; GRASSO, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, Napoli, Editoriale scientifica, 2012. Specifically on the impact on EU Constitution, denying that the responses to Eurocrisis determined a “constitutional mutation” of the EU legal order, see (also for references to those who argued the opposite) DE WITTE, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?*, in *European Constitutional Law Review*, 3, 11, 2015, 434 ff. With regard to the role of the ECB during the crisis, see NAPOLITANO, *Il ruolo delle banche centrali nella gestione della crisi dell'Eurozona: osservazioni su alcuni aspetti istituzionali*, in ADINOLFI – VELLANO (eds.), *La crisi del debito sovrano degli stati dell'area Euro: profili giuridici*, Torino, 2013, 66 ff.; RAFFIOTTA, *Il volto ambiguo della Banca centrale europea*, in MORRONE (ed.), *La costituzione finanziaria. La decisione di bilancio dello Stato costituzionale europeo*, Torino, 2015, 215 ff.

Moving from the SSM, Regulation No. 1024/2013 established an integrated and multilevel structure, transferring the direct supervision competences on the most systemically important banks to the ECB. The National supervising authority, instead, continues to carry out the supervision of “less significant banks”²⁰, although under the ultimate responsibility of the ECB²¹.

The ECB’s supervisory tasks are carried out by a Supervisory Board, which is composed of a Chairman, a Vice-Chairman, 4 representatives of the ECB and one representative from each national supervisory authority in the participating Member States. However, the ECB’s Governing Council has the power to reject the Supervisory Board’s decisions.

¹⁹On the Banking Union project, see CAPRIGLIONE, *L’Unione bancaria europea: una sfida per un’Europa più unita*, Torino, Utet, 2013; BARUCCI – MESSORI (eds.), *Towards the European Banking Union: achievements and open problems*, Bagno a Ripoli, Passigli, 2014; CERRINA FERONI, *Verso il Meccanismo Unico di Vigilanza sulle Banche. Ruolo e prospettive dell’European Banking Authority*, in *Federalismi*, 17, 2014; PISANESCHI, *La regolazione comunitaria del credito tra European Banking Authority (EBA) e Banca centrale europea: prime osservazioni sul Single Supervisory Mechanism*, in MELICA – MEZZETTI – PIERGIGLI (eds.), *Studi in onore di G. De Vergottini*, III, Padova, Cedam, 2014, 2283 ff.; BOCCUZZI, *L’Unione bancaria europea. Nuove istituzioni e regole di vigilanza e di gestione delle crisi bancarie*, Roma, Bancaria, 2015; BUSCH – FERRARINI, *European Banking Union*, Oxford, OUP, 2015; CLARICH, *I poteri di vigilanza della Banca centrale europea*, in *Diritto pubblico*, 3, 2013, 975 ff.; ANTONIAZZI, *L’Unione bancaria europea: i nuovi compiti della BCE di vigilanza prudenziale degli enti creditizi e il meccanismo unico di risoluzione delle crisi bancarie*, in *Rivista italiana di diritto pubblico comunitario*, 3-4, 2014, 717 ff.; MANCINI, *Dalla vigilanza nazionale armonizzata alla Banking Union*, in *Quaderni di ricerca giuridica – Banca d’Italia*, 73, 2013, 10; CIRAULO, *Il Regolamento UE n. 1024/2013 sul Meccanismo unico di vigilanza e l’Unione bancaria europea. Prime riflessioni*, in *Amministrazioni in Cammino*, 2014; QUAGLIA – HOWARTH, *The New Intergovernmentalism in Financial Regulation and European Banking Union*, in BICKERTON – HODSON – PUETTER (eds.), *The New Intergovernmentalism States and Supranational Actors in the Post-Maastricht Era*, Oxford, OUP, 2015, 146 ff.; DI MARCO, *Il controllo delle banche nell’UEM: la (problematica) nascita di un sistema integrato di vigilanza prudenziale*, in *Dir. Un. eur.*, 3, 2013, 549 ff.; TORCHIA, *L’Unione bancaria europea: un approccio continentale?*, in *Giornale Dir. Amm.*, 2015, 1, 11 ff.; SCHIMMELFENNIG, *A differentiated leap forward: spillover, pathdependency, and graded membership in European banking regulation*, in *West European Politics*, 2016, 1 ff. For a comparison with the US experience, see KAISER, *Act of Congress: How America’s Essential Institution Works, and How It Doesn’t*, Vintage, 2014.

²⁰At present, the ECB directly supervises the 120 biggest banking groups, covering almost 85% of the total banking assets of the Euro area. In particular, banks subject to direct supervision are those which have assets of more than € 30 billion or which account for at least 20% of their home country’s GDP.

²¹Indeed, the ECB may decide to directly supervise the “less significant” banks if necessary to ensure consistent application of the supervisory standards.

With the introduction of the SSM, the role of the European Banking Authority (EBA) – within the European System of Financial Supervision (ESFS)²² – is undergoing some important changes. In any case, the EBA – an agency already established with Regulation No. 1093/2010 – maintains the responsibility for the implementation of the Single Rulebook in the banking sector²³, participating moreover in the preparation of “bank stress tests”.

Secondly, Regulation No. 806/2014 and Directive No. 59/2014 introduced the Single Resolution Mechanism, that is, an EU level system for the resolving of non-viable financial institutions.

On the one hand, the Single Resolution Mechanism is based on a distribution of tasks between an atypical European agency²⁴ – the Single Resolution Board – and the National authorities. The Board is directly responsible for the cross-border cases and for the significant banks, while the National authorities ensure the resolution of the other cases. However, the resolution scheme adopted by the Board enters into force only if, within 24 hours after its adoption by the Board, there are no objections from the Council (acting by simple majority) on a proposal by the Commission²⁵.

²²The ESFS is a system of micro (the European Supervisory Authorities, the European Banking Authority and the European Insurance and Occupational Pensions Authority) and macro-prudential authorities (the European Systemic Risk Board) created in 2010. On the relations between EBA and Banking Union (and their constitutional implication) see CERRINA FERONI, *Verso il Meccanismo Unico di Vigilanza sulle Banche. Ruolo e prospettive dell'European Banking Authority*, in *Federalismi*, 17, 2014; PISANESCHI, *Banca centrale europea, vigilanza bancaria e sovranità degli stati*, in *Federalismi*, 17, 2014.

²³ The Single Rulebook is a set of legal acts applied in all the EU which aims to harmonize the Member States' legislations, ensuring the same level of protection for consumers and an equal playing field for the banks in Europe. In particular, it includes the capital requirements directive IV (CRD IV), the capital requirements regulation (CRR), the amended directive on deposit guarantee schemes, the bank recovery and resolution directive (BRRD).

²⁴ The Single Resolution Board is formally an EU agency with a composition and independence which departs from the model of all other EU agencies, which are auxiliary bodies and are subordinate to the Commission. See MACCHIA, *The independence status of the Supervisory Board and of the Single Resolution Board: an expansive claim of autonomy?*, in BARUCCI – MESSORI (eds.), No. 19 *supra* 117 ff.

²⁵“Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission.

Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme in the cases not covered in the third subparagraph of this paragraph.

On the other hand, the SRM finds a fundamental component in the Single Resolution Fund (SRF). This common fund, which is financed with the contributions of the same banks of the Banking Union participant countries, will be used for resolving the failing credit institutions. At the same time, a precondition for accessing the fund is the application of the “bail-in” system. Indeed, in order to minimize the costs of the resolution of a failing entity borne by the taxpayers, Directive No. 59/2014 introduces some rules to avoid the application of the “bail-out” model. Precisely, the “bail-in” principles ensure that shareholders and creditors of the failing entity suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the entity. Only if necessary will it be possible to resort to the Single Resolution Fund.

The SRF will be built up over a period of 8 years. However, in December 2013, a Statement by the Eurogroup and ECOFIN Ministers undertook to develop a common “backstop” and ensure “bridge financing” for the transitional phase, also through the resources of the European Stability Mechanism (ESM).

It is important to emphasize the asymmetry between the European System of Financial Supervision – which is a decentralized, multi-layered system of

Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council:

- (a) to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfill the criterion of public interest referred to in paragraph 1(c);
- (b) to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.

The resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board. The Council or the Commission, as the case may be, shall provide reasons for the exercise of their power of objection.

Where, within 24 hours from the transmission of the resolution scheme by the Board, the Council has approved the proposal of the Commission for modification of the resolution scheme on the ground referred to in point (b) of the third subparagraph or the Commission has objected in accordance with the second subparagraph, the Board shall, within eight hours modify the resolution scheme in accordance with the reasons expressed.

Where the resolution scheme adopted by the Board provides for the exclusion of certain liabilities in the exceptional circumstances referred to in Article 27(5), and where such exclusion requires a contribution by the Fund or an alternative financing source, in order to protect the integrity of the internal market, the Commission may prohibit or require amendments to the proposed exclusion setting out adequate reasons based on an infringement of the requirements laid down in Article 27 and in the delegated act adopted by the Commission on the basis of Article 44(11) of Directive 2014/59/EU” (art. 18, par. 7 Regulation No. 806/2014).

micro- and macro-prudential authorities with a competence for the whole EU – and the SSM/SSR. Indeed, the SSM and SSR rules find application only in the Eurozone and in those non-Euro countries that opt to join the Banking Union mechanisms.

However, it is undoubtedly significant (although in no way surprising) that in the new Juncker Commission, the portfolio concerning the Banking Union was conferred to Lord Hill, that is, to a commissioner coming from a state, the United Kingdom, which does not participate in the Banking Union.

Finally, Directive No. 49/2014 lays the foundation for the Deposit Guarantee Scheme. According to the Directive, Member States have to create a Deposit Guarantee Scheme financed with the sector bank contributions. In this way, should deposits be unavailable, it will be possible to reimburse a limited amount of deposits to depositors whose bank has failed.

5:5.1. The Euro-national parliamentary system research hypothesis finds a fundamental test in the recent trend towards the “parliamentarization” of the Banking Union governance²⁶. Council Regulation (EU) No. 1024/2013 and Regulation (EU) No. 806/2014 of the European Parliament and the Council – despite some “pitch invasion” of the intergovernmental method – reserved several original oversight powers for the European Parliament (EP) and the National Parliaments (NPs) in the field of policies related to the prudential supervision of credit institutions and banking resolution. Although these powers are rarely configured as definitive and insuperable, they can nonetheless represent an an-

²⁶The definition of the concept of “parliamentarization” is controversial. In any case, in this article, we will use this concept in a very broad meaning, that is to indicate the trend to empowerment of the parliamentary institutions within the European decision-making process: therefore including not only the European Parliament but also National Parliaments, Regional Parliaments and the instruments of interparliamentary cooperation, consistently with the approach of the Euro-national parliamentary system.

swer, regarding the banking policies pursued in the EU and in the Eurozone, to accountability and “democratic disconnect” problems²⁷.

Undoubtedly, these new forms of accountability do not substitute the tools which the European Parliament can exploit within the Monetary Dialogue and the Economic Dialogue. Pursuant to the first tool, the ECB shall address some periodical reports to the EP, which may adopt recommendations on the monetary policy of the ECB²⁸. With regard to the Economic Dialogue, starting from the “Six-Pack” and “Two-Pack”, some continuous interaction procedures have been introduced between the EP, Council, Commission, European Council and national institutions within the European semester²⁹.

²⁷According to LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, OUP, 2010, the problem in Europe is not the “democratic deficit”, in the sense of needing increased input legitimacy, but rather a “democratic disconnect”. Indeed, the EU institutions are generally perceived as beyond the oversight of the national democratic and constitutional bodies, and this has a bearing on the scope of authority that Europeans believe supranational bodies can legitimately exercise. For the “*subsidiarity deficit*” thesis, see MACCORMICK, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford, OUP, 1999. For overview on the debate about the democratic deficit, see also RIDOLA, *The parliamentarisation of the institutional architecture of the European Union between representative democracy and participatory democracy*, in BLANKE – MANGIAMELI (eds.), *Governing Europe under a Constitution*, Berlin-Heidelberg, Springer, 2006, 415 ff.; CRAIG, *Integration, democracy and legitimacy*, in CRAIG – DE BURCA (eds.), *The evolution of EU Law*², Oxford, OUP, 2011, 13 ff.

²⁸On the Monetary Dialogue, see AMTENBRINK – VAN DUIN, *The European Central Bank before the European Parliament: theory and practice after 10 years of monetary dialogue*, in *European Law Review*, 2009, 561 ff.; EIJJFINGER – MUJAGIC, *An Assessment of the Effectiveness of the Monetary Dialogue on the ECB’s Accountability and Transparency: A Qualitative Approach*, in *Intereconomics*, 2004, 190 ff.; COLLIGNON, *Central Bank Accountability in Times of Crisis. The Monetary Dialogue: 2009-2014*, 2014, <http://www.europarl.europa.eu>. For the problem on the ECB democratic accountability, see AMTENBRINK, *On the Legitimacy and Democratic Accountability of the European Central Bank*, in ARNULL – WINCOTT (eds.), *Accountability and Legitimacy in the European Union: Legal Arrangements and practical experience*, Oxford, OUP, 2002, 147 ff.; AMTENBRINK, *The Democratic Accountability of Central Banks. A comparative study of the European Central Bank*, Portland, Hart Publishing, 1999; GORMLEY – DE HAAN, *The Democratic Deficit of the European Central Bank*, in *E.L. Review*, 1996, 95 ff.

²⁹On the ambiguity of the “Economic Dialogue” concept, FASONE, *European Economic Governance and Parliamentary Representation. What Place for the European Parliament?*, in *European Law Journal*, 2, 2014, 164 ff., highlighting that “it is not clear what happens if the Economic Dialogue fails or if one of the institution does not fulfill its obligations. In many regards, its execution seems to be left to the voluntary commitment of the European Parliament, the Commission, the Council, the President of the European Council and the governments of the Member States”. On the European Semester, see ARMSTRONG, *The New Governance of EU Fiscal Discipline*, in *European Law Review*, 5, 2013 601 ff.

To a certain extent, on the contrary, the parliamentary oversight powers established in the Banking Union framework seem to represent the partial reproduction and enhancement of the format already experimented with the Monetary Dialogue and the Economic Dialogue.

In spite of a trend of literature to highlight the critical points rather than the merits of the Monetary Dialogue³⁰, some eminent scholars, in a “qualitative” evaluation of the relationship between the European Parliament and the ECB, underlined how the Monetary Dialogue has increased the transparency and the accountability of the ECB over time³¹.

This element appears encouraging in view of the next steps of the BU. However, in this article any conclusion about the effectiveness of the oversight powers of the European Parliament and National Parliaments within the Banking Union governance will have only an open and provisional character. The period that has elapsed from the assumption of the prudential supervision competence by the ECB on 4 November 2014 is indeed too short. Moreover, as whole parts of the Banking Union project are incomplete or not fully implemented, in this phase the research can only take into consideration the fundamental data of the institutional practice in a minimum part.

As seen above, Regulations No. 1024/2013 and No. 806/2014 have transferred some relevant competences from national to EU level in the field of policies relating to the prudential supervision of credit institutions and banking resolutions.

³⁰According to the article 284, par. 3 TFEU “The European Central Bank shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament, the Council and the Commission, and also to the European Council. The President of the European Central Bank shall present this report to the Council and to the European Parliament, which may hold a general debate on that basis. The President of the European Central Bank and the other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent committees of the European Parliament”. Although the art. 284, par. 3 TFEU requires only one meeting a year, the Monetary Dialogue takes place quarterly in the form of a meeting between the President of the ECB and the ECON Committee.

³¹ See AMTENBRINK – VAN DUIN, No. 28 *supra*, which however highlighted some criticality of the Monetary Dialogue.

However, the EU has tried to balance this process of power transfer through the strength of the transparency and democratic accountability standards within the context of the supervision and resolution policies in the Eurozone.

In this framework, the ECB “shall be accountable to the European Parliament and to the Council for the implementation” of Regulation No. 1024/2013 (art. 20, par. 1), while the Single Resolution Board “shall be accountable to the European Parliament, the Council and the Commission” for the implementation of Regulation No. 806/2014 (art. 45, par. 1).

Therefore, the conferral of supervisory and resolution tasks from the Member States to the Union level in the field of the Banking Union is balanced by the promotion of the European Parliament oversight function, through the introduction of specific transparency and accountability standards. On the other hand, these new forms of accountability are not exempt from an “original intergovernmental flaw”³².

First of all, the Regulation which transferred the prudential supervisory tasks to the ECB was adopted, in accordance with art. 127, par. 6 TFEU, following a special legislative procedure, within which the European Parliament was only consulted. This means that, without a more solid legal “umbrella”, the Council could at any time make a clean sweep of the European Parliament and National Parliaments oversight powers within SSM governance (or, however, reshape these powers in a unilateral way). The fact that, in the current European political framework, this scenario appears unlikely does not change how things really stand, at least from a legal perspective.

Another sign of the “intergovernmental original flaw” can be traced back to the status of the “Agreement on the transfer and mutualisation of contribu-

³²On the “*vizio d’origine “intergovernativo”* (“original intergovernmental flaw”) of the new forms of accountability within the Banking Union, see IBRIDO – PECORARIO, *Unione bancaria e sistema parlamentare euro-nazionale*, in *DPCE*, 1, 2016, forthcoming.

tions to the SRF". Despite an initial outcry from the European Parliament³³, Regulation No. 806/2014, adopted in accordance with an ordinary legislative procedure *ex art. 114 TFEU*, transferred an essential part of the matter to an intergovernmental agreement (and therefore an international legal source), causing many protests by the European Parliament given that art. 114 TFEU, for the unanimous admission of the legal services of the three main institutions, constituted the most appropriate legal basis.

5.2 In any case, the European Parliament's oversight powers within the Single Supervision Mechanism are only partially defined by Regulation (EU) No. 1024/2013. Indeed, art. 20, par. 9 refers to an Interinstitutional Agreement between the European Parliament and the ECB for the concrete definition of the "practical modalities of the exercise of democratic accountability and scrutiny over the exercise of the tasks conferred on the ECB by this Regulation"³⁴.

In a similar manner, art. 45, par. 7 and 8 of Regulation No. 806/2014 established that the European Parliament and Single Resolution Board would set out an Agreement to define the European Parliament oversight powers of the activity of the Board.

The Interinstitutional Agreement between the European Parliament and ECB was published on 30 November 2013 in the Official Journal of the European Union. Instead, the European Parliament and Single Resolution Board concluded the second Agreement on 16 December 2015.

³³ See the letter of 20 January 2014 from the European Parliament President to the President of the Commission on the Single Resolution Fund, in which Martin Schulz stood against the decision of the Council to take certain aspects out of Regulation No. 806/2014 and dealt with them through an intergovernmental procedure. With regard to the problem of the legal basis of the Single Supervision Mechanism, see TOSATO, *The legal basis of the Banking Union*, in BARUCCI – MESSORI (eds.), *Towards the European Banking Union: achievements and open problems*, No. 19 *supra*, 43 ff.

³⁴ Moreover, in December 2013 the Council of the European Union and the European Central bank signed a Memorandum of Understanding on the cooperation related to the Single Supervisory Mechanism. The Memorandum implemented the accountability and reporting obligation of the ECB to the Council and the Euro Group under Regulation (EU) No. 1024/2013.

The Interinstitutional Agreement between the European Parliament and ECB can be divided into 4 parts.

First of all, the Agreement defined some specific oversight procedures: a) the presentation of an Annual Report of the ECB at a public hearing of Parliament. The Report concerns the execution of supervisory tasks within the SSM³⁵; b) the power of the ECON Committee of the European Parliament to convene the Chairman of the Supervisory Board for ordinary hearings, ad hoc exchanges of views and confidential meetings³⁶; c) the duty of the ECB to reply in writing to

³⁵“The ECB shall submit every year a report to Parliament (“Annual Report”) on the execution of the tasks conferred on it by Regulation (EU) No 1024/2013. The Chair of the Supervisory Board shall present the Annual Report to Parliament at a public hearing. The draft Annual Report shall be made available to Parliament on a confidential basis in one of the Union official languages four working days in advance of the hearing (...) During the start-up phase referred to in Article 33(2) of Regulation (EU) No 1024/2013, the ECB shall transmit to Parliament quarterly reports on progress in the operational implementation of the Regulation (...) The ECB shall publish the Annual Report on the SSM website. The ECB’s “information e-mail hotline” will be extended to deal specifically with SSM-related questions, and the ECB shall convert the feedback received via e-mails into a FAQ section on the SSM website” (art. I.1 of the Interinstitutional Agreement between the European Parliament and the ECB).

³⁶“The Chair of the Supervisory Board shall participate in ordinary public hearings on the execution of the supervisory tasks on request of Parliament’s competent committee. Parliament’s competent committee and the ECB shall agree on a calendar for two such hearings to be held in the course of the following year. Requests for changes to the agreed calendar shall be made in writing.

–In addition, the Chair of the Supervisory Board may be invited to additional ad hoc exchanges of views on supervisory issues with Parliament’s competent committee.

– Where necessary for the exercise of Parliament’s powers under the TFEU and Union law, the Chair of its competent committee may request special confidential meetings with the Chair of the Supervisory Board in writing, giving reasons. Such meetings shall be held on a mutually agreed date.

–All participants in the special confidential meetings shall be subject to confidentiality requirements equivalent to those applying to the members of the Supervisory Board and to the ECB’s supervisory staff.

– On a reasoned request by the Chair of the Supervisory Board or the Chair of Parliament’s competent committee, and with mutual agreement, the ordinary hearings, the ad hoc exchanges of views and the confidential meetings can be attended by the ECB representatives in the Supervisory Board or senior members of the supervisory staff (Director Generals or their Deputies).

–The principle of openness of Union institutions in accordance with the TFEU shall apply to the SSM. The discussion in special confidential meetings shall follow the principle of openness and elaboration around the relevant circumstances. It involves the exchange of confidential information regarding the execution of the supervisory tasks, within the limit set by Union law. The disclosure might be restricted by confidentiality limits legally foreseen.

–Persons employed by Parliament and by the ECB may not disclose information acquired in the course of their activities related to the tasks conferred on the ECB under Regulation (EU) No 1024/2013, even after such activities have ended or they have left such employment.

written questions put to it by the European Parliament as promptly as possible, and in any event within five weeks of their transmission to the ECB³⁷; d) the possibility for the European Parliament to access some categories of information in possession of the ECB³⁸.

Secondly, in the attempt to strengthen the standard of transparency in the selection process of the Chairman and Vice-Chairman of the Supervisory Board, the interinstitutional agreement of 30 November 2013 submitted their appointment to Parliament's approval, which is held at a public hearing of the candidates proposed by the ECB. If the proposal for the Chair is not approved, the ECB may decide either to draw on the pool of candidates that originally applied for the position or to re-initiate the selection process. From this point of

–The ordinary hearings, ad hoc exchanges of views and the confidential meetings can cover all aspects of the activity and functioning of the SSM covered by Regulation (EU) No 1024/2013.

–No minutes or any other recording of the confidential meetings shall be taken. No statement shall be made for the press or any other media. Each participant to the confidential discussions shall sign every time a solemn declaration not to divulge the content of those discussions to any third person.

– Only the Chair of the Supervisory Board and the Chair and the Vice-Chairs of Parliament's competent committee may attend the confidential meetings. Both the Chair of the Supervisory Board and the Chair and the Vice-Chairs of Parliament's competent committee may be accompanied by two members of respectively ECB staff and of Parliament's Secretariat" (art. I.2 of the Interinstitutional Agreement between the European Parliament and the ECB).

³⁷“The ECB shall reply in writing to written questions put to it by Parliament. Those questions shall be channeled to the Chair of the Supervisory Board via the Chair of Parliament's competent committee. Questions shall be replied as promptly as possible, and in any event within five weeks of their transmission to the ECB.

– Both the ECB and Parliament shall dedicate a specific section of the websites for the questions and answers referred to above" (art. I.3 of the Interinstitutional Agreement between the European Parliament and the ECB).

³⁸“– The ECB shall provide Parliament's competent committee at least with a comprehensive and meaningful record of the proceedings of the Supervisory Board that enables an understanding of the discussions, including an annotated list of decisions. In the case of an objection of the Governing Council against a draft decision of the Supervisory Board in accordance with Article 26(8) of Regulation (EU) No 1024/2013, the President of the ECB shall inform the Chair of Parliament's competent committee of the reasons for such an objection, in line with the confidentiality requirements referred to in this Agreement.

– In the event of the winding-up of a credit institution, non-confidential information relating to that credit institution shall be disclosed ex post, once any restrictions on the provision of relevant information resulting from confidentiality requirements have ceased to apply.

– The supervisory fees and an explanation of how they are calculated shall be published on ECB website.

– The ECB shall publish on its website a guide to its supervisory practices" (art. I.4 of the Interinstitutional Agreement between the European Parliament and the ECB).

view, these provisions present some analogies with the appointment procedure of the European Banking Authority Chairperson³⁹.

The European Parliament can use this sort of veto power also in relation to the ECB's proposal to remove the Chairman and the Vice-Chairman of the Supervisory Board from their office⁴⁰.

Moreover, in the case that the European Parliament sets up a Committee of Inquiry⁴¹, the ECB, in accordance with Union law, shall assist a Committee of Inquiry in carrying out its tasks in accordance with the principle of sincere cooperation. Against this support, the European Parliament shall respect some confidentiality obligations⁴².

³⁹According to the art. 48 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council, the European Banking Authority Chairperson shall be appointed by the EBA Board of Supervisors, following an open selection procedure. However, before taking up his duties, and up to 1 month after the selection, the European Parliament may, after having heard the candidate selected by the Board of Supervisors, object to the designation of the selected person.

^{40cc}– The approval process shall comprise the following steps:

– The ECB shall convey its proposals for the Chair and the Vice-Chair to Parliament together with written explanations of the underlying reasons.

– A public hearing of the proposed Chair and Vice-Chair of the Supervisory Board shall be held in Parliament's competent committee.

– Parliament shall decide on the approval of the candidate proposed by the ECB for Chair and Vice-Chair through a vote in the competent committee and in plenary. Parliament will normally, taking into account its calendar, aim at taking that decision within six weeks of the proposal.

– If the proposal for the Chair is not approved, the ECB may decide either to draw on the pool of candidates that applied originally for the position or to re-initiate the selection process, including elaborating and publishing a new vacancy notice.

– The ECB shall submit any proposal to remove the Chair or the Vice-Chair from office to Parliament and provide explanations.

– The approval process shall comprise:

– a vote in Parliament's competent committee on a draft resolution; and

– a vote in plenary, for approval or objection, on that resolution". (art. II of the Interinstitutional Agreement between the European Parliament and the ECB).

⁴¹The main legal basis of the Committee of Inquiry is the art. 226 TFEU. According to this provision, the European Parliament may – at the request of a quarter of its members – set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of Union law. More detailed provisions about the European Parliament's right of inquiry are contained in the Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission of 19 April 1995.

⁴² All recipients of information provided to European Parliament in the context of investigations shall be subject to confidentiality requirements equivalent to those applying to the members of the Supervisory Board and to the ECB supervisory staff and Parliament and the ECB shall agree on the measures to be applied to ensure the protection of such information. Moreover, where the protection of a public or private interest recognised in Decision 2004/258/EC requires that confidentiality is maintained, European Parliament shall ensure that this protection is maintained and shall not divulge the content of any such information

Finally, according to the interinstitutional agreement, the ECB shall pre-emptively inform the ECON Committee with regard to the main contents of some categories of acts which the ECB drafts to adopt within the SSM⁴³. This obligation is established also with reference to the Code of Conduct referred to in art. 19 of Regulation No. 1024/2013⁴⁴.

The European Parliament oversight powers defined by Regulation No. 806/2014 mirror, in great part, the powers established by Regulation No. 1024/2013 and by the Interinstitutional agreement of November 2013. Indeed, the Chairman of the Single Resolution Board shall submit an Annual report to the European Parliament, to participate at the public hearing of the ECON Committee (at least once a year), to hold confidential discussions behind closed doors with the Chairman and Vice- Chairman of the ECON Committee.

Moreover, the Single Resolution Board shall reply orally or in writing to questions addressed to it by the European Parliament within five weeks and shall support the European Parliament investigation⁴⁵.

Finally, the European Parliament confirms the appointment⁴⁶ and the removal⁴⁷ of the Chair, Vice-Chair and four other full-time members of the Single Resolution Board.

^{43cc}– The ECB shall duly inform Parliament’s competent committee of the procedures (including timing) it has set up for adoption of ECB regulations, decisions, guidelines and recommendations (“acts”), which are subject to public consultation in accordance with Regulation (EU) No 1024/2013.

–The ECB shall, in particular, inform Parliament’s competent committee of the principles and kinds of indicators or information it is generally using in developing acts and policy recommendations, with a view to enhancing transparency and policy consistency.

–The ECB shall transmit to Parliament’s competent committee the draft acts before the beginning of the public consultation procedure. Where Parliament submits comments on the acts, there may be informal exchanges of views with the ECB on such comments. Such informal exchanges of views shall take place in parallel with the open public consultations which the ECB shall conduct in accordance with Article 4(3) of Regulation (EU) No 1024/2013.

– Once the ECB has adopted an act, it shall send it to Parliament’s competent committee. The ECB shall also regularly inform Parliament in writing about the need to update adopted acts”. (art. V of the Interinstitutional Agreement between the European Parliament and the ECB).

⁴⁴The Code of Conduct is a set of rules which establish proper practices for the ECB staff and management involved in banking supervision concerning in particular conflicts of interest.

⁴⁵According to the art. 128 of the European Parliament Rules of Procedure, questions for oral answer with debate may be put to the Council or the Commission by a committee, a political group or at least 40 Members.

As seen in this overview, the European Parliament’s oversight powers within the Banking Union appear variegated and heterogeneous: some of these can in fact be attributed to a passive function, like for instance, the right of the ECON Committee to receive a report of the Supervisory Board’s meetings. In other cases, these powers have a more active nature, in which the European Parliament is called upon to give its own views. Sometimes, this active role can include powers of a positive type, such as, in particular, the comments that the European Parliament can transmit to the ECB regarding the drafting of acts. Otherwise, the European Parliament’s active oversight function can include powers of a negative type. This is the case of the opposition power to the appointment of the Chairman of the Supervisory Committee.

The “*fil rouge*” of this cluster of powers can instead be traced back to the tension between the demands of publicity – which represents the traditional reason for the oversight function – and the necessity to preserve the confidentiality of the work of the ECB and the Single Resolution Board. This is a very important point, given that a surplus of publicity can compromise the efficacy of the supervisory and resolution action, proper market behavior and the very capacity of the European Parliament to obtain information⁴⁸.

From this point of view, the special regime of publicity established by the “confidential meetings” (art. 1.2) is emblematic. These meetings may be at-

⁴⁶The Single Resolution Board shall be composed of the Chair, four other full-time members and a member appointed by each participating Member State (representing their national resolution authorities). The Chair, the Vice-Chair and the four full-time members shall be chosen on the basis of an open selection procedure. In particular, the Commission shall submit a proposal for the appointment of the Chair, the Vice-Chair and the full-time to the European Parliament for approval. Following the approval of that proposal, the Council, acting by qualified majority, shall adopt an implementing decision to appoint these members.

⁴⁷If the Chair or the Vice-Chair or a full-time member no longer fulfills the conditions required for the performance of his or her duties or has been guilty of serious misconduct, the Council, acting by qualified majority, and on a proposal from the Commission which has been approved by the European Parliament, may adopt an implementing decision to remove him or her from office.

⁴⁸On the need to control the publicity of parliamentary committees’ activity, especially after the transformations due to the internet, see FASONE - LUPO, *Transparency vs. Informality in Legislative Committees. Comparing the US House of Representatives, the Italian Chamber of Deputies and the European Parliament*, in *The Journal of Legislative Studies*, 3, 2015, 342 ff.

tended only by the President of the Supervisory Board, the Chairman and Vice-Chairman of the ECON Committee and two senior members of the ECB staff and the Parliament's Secretariat. No minutes of the proceedings or any other recording of the confidential meetings shall be taken. No statement shall be made to the press or any other media. Moreover, each participant at the confidential discussions shall sign a solemn declaration every time not to divulge the content of those discussions to any third person.

The binding nature and the “enforcement” of the interinstitutional agreement (and, even more so, of other typologies of agreements) in the framework of EU source of law are debatable⁴⁹. In principle, the interinstitutional agreements are a species of the wider typology of atypical acts (that is, acts not provided for by art. 288 TFEU). However, the difficulties to define the position of these acts are increased by the fact that some of these agreements find a legal basis in the Treaties, while others may be deemed at the most only the expression of the principle of “mutual sincere cooperation” (art. 13, par. 2 TEU).

The two agreements that the European Parliament had to conclude within the Banking Union do not find the “umbrella” of art. 295 TFEU, which allows Council, Commission and European Parliament to adopt binding interinstitutional agreements. Therefore the legal basis of these agreements can be traced back only to the Regulations concerning the SSM and SRM (nevertheless with the additional “umbrella” of the already mentioned art. 13, par. 2 TEU).

6:6.1. Although less incisive in comparison with the tools of the European Parliament, the oversight powers that art. 21 of Regulation No. 1024/2013 and

⁴⁹See HUMMER, *From “Interinstitutional Agreements” to Interinstitutional Agencies/Offices?* in *European Law Journal*, 1, 2007, 47 ff.; TOURNEPICHE, *Les accords interinstitutionnels dans l’Union européenne*, Bruxelles, Bruylant, 2011; SBOLCI, *Conflitti tra istituzioni dell’Unione europea e accordi interistituzionali*, in *Riv. dir. internaz.*, 2, 2007, 344 ff.; STACEY, *Integrating Europe. Informal politics & institutional Change*, Oxford, 2010; FIENGO, *Brevi riflessioni in tema di natura giuridica ed efficacia degli accordi interistituzionali alla luce del Trattato di Nizza*, in *DPCE*, 1, 2002, 13 ff.

art. 46 of Regulation No. 806/2014 reserved for the National Parliaments also appear relevant. Rather, according to some scholars the National Parliaments' participation in the Banking Union governance exceeds the oversight function usually played by these bodies towards the National Central Banks⁵⁰.

First of all, like the European Parliament, the National Parliaments also receive the annual reports from the ECB and the Single Resolution Board. In turn, the National Parliaments can “react” to them, addressing their reasoned observations on the reports to the ECB and Single Resolution Board.

Secondly, through their own procedures the National Parliaments may request the ECB and Resolution Board to reply in writing to any observations or questions submitted by them.

Finally, the National Parliaments may invite the Chairman or a member of the Supervisory Board and the Chairman of Resolution Board to participate in an exchange of views together with a representative of the competent national authority. However, the terminology used by the Regulations is ambiguous: the reference to “exchange of views” rather than “hearings” – a tool which instead could be activated by the European Parliament and Euro Group – could be interpreted as the exclusion from the possibility to organize meetings with the same level of formality and publicity typical of the hearings in the National Parliaments' Rules of Procedure.

It is important to emphasize that the involvement of the National Parliaments is also the result of the contribution of these institutions within the political dialogue procedure. Some National Parliaments – this is the case, for example, of the Czech Republic and Denmark⁵¹ – asked for an empowerment of

⁵⁰See MANZELLA, *Parlamento europeo e Parlamenti nazionali come sistema*, No. 4 *supra*, at 10.

⁵¹On 13 March 2013, a Resolution of the Senate of the Parliament of the Czech Republic observed that the “new tasks on the European Central Bank concerning policies relating to the supervision of banks leads to a significant concentration of power in the hands of one institution (...). It is, therefore, necessary to ensure that the ECB is, in the exercise of this function, subject to democratic control, not only by the European Parliament, but also, in particular (...) National Parliaments, because the responsibility for the stability of the financial system (including financial guarantees to depositors) will continue to lie with the Member States”. Instead, on 10

the role of the National Parliaments within the Banking Union governance in the comments transmitted to the Commission⁵².

Obviously, the catalogue of National Parliaments powers within the Banking Union should be interpreted also in the light of the oversight tools that each Chamber can activate on its own Government by virtue of the domestic constitutional law. As has been seen, indeed, the ECB and the SRB are accountable also to the Council. Consequently, according to the “Europeanization clause” of the national institutional framework contained in art. 10, par. 2 TEU, Member States are represented in the Council by their governments, themselves democratically accountable either to their National Parliaments, or to their citizens.

As clarified by the preamble of the two above mentioned Regulations, the involvement of the National Parliaments is aimed to counterbalance the potential impact that Banking Union measures may have on public finances, credit institutions, their customers and employees, and the markets in the participating Member States.

However, this catalogue did not confer oversight powers to all National Parliaments, but only to the Chambers of the Eurozone and also the Parliaments of the countries, not included in the Eurozone but which have established a close cooperation in the Banking Union field (the so-called, “participating Member States”). This element introduces a relevant component of differentiation in comparison with the European Parliament: while the involvement of the National Parliaments in this field reflects the “variable geometries” of the “asymmetric Union”, the European Parliament composition instead expresses

July 2013 the European Affairs Committee of the Danish Parliament presented an Opinion concerning the EU Commission proposal for a Regulation on the Single Resolution Mechanism. The majority was pleased that the proposal ensured that the Single Resolution Board must inform National Parliaments of its activities and answer questions submitted by the Parliaments. In this framework, the majority support the view that National Parliaments should be able to invite the Executive Director of the Single Resolution Board to participate in an exchange of views.

⁵²On the “political dialogue”, see, *ex multis*, D. JANCIC, *The Barroso Initiative: Window Dressing or Democracy Boost?*, in *Utrecht Law Review*, 2012, 78 ff.

the traditional indifference of this institution to the “differentiated integration” models⁵³.

According to one of the possible classification criteria⁵⁴ we can distinguish among four kinds of National Parliaments “European powers”: a) powers individually attributed to each Chamber; b) powers attributed to each National Parliament, thus requiring a double approval in the case of bicameral systems; c) powers attributed to a “group of chambers”, which require the achievement of some threshold; d) powers exercised in collective form, in the case with the involvement of the European Parliament.

Therefore, the National Parliaments’ powers within Banking Union governance can be classified in the first category. At the most, in some countries like Spain, where a bicameral Committee for the EU is provided, the National Parliaments can consider the possibility to exercise powers of the second type.

The question of the “individual” or “collective” nature of the National Parliaments’ oversight powers makes it possible to deal with a fundamental point. According to some scholars, the National Parliaments’ individual action integrates an indirect source of democratic legitimacy (affecting the domestic level in a way not so dissimilar to the “pluralist paradigm” identified by the *Maastricht-Urteil*). On the contrary, the National Parliaments’ collective action would ensure a *quantum* of legitimacy which is not mediated by the democratic resources of the Member States⁵⁵.

This interpretation, which may be too schematic, needs to be problematized. The border line between the “individual action” and “collective action” of the National Parliaments is indeed much more uncertain than may appear at

⁵³See FASONE, *Il Parlamento europeo nell’Unione asimmetrica*, in MANZELLA – LUPO (eds.), No. 4 *supra* at 51 ff.

⁵⁴See LUPO, *National parliaments in the European integration process: re-aligning politics and policies*, in CARTABIA – LUPO – SIMONCINI (ed.), *Democracy and subsidiarity in the EU National Parliaments, regional and civil society in the decision-making process*, Bologna, il Mulino, 2013, 107 ff.

⁵⁵See KNUTELSKÁ, *Cooperation among National Parliaments: An Effective Contribution to EU Legitimation?* in CRUM – FOSSUM (ed.), *Practices of Inter-parliamentary Coordination in International Politics: The European Union and Beyond*, Essex, ECPR Press, 2013, 35 ff.

first sight. For example, how to frame these interparliamentary cooperation forms which aim to put the Parliaments in the best conditions for the activation of the European procedures on an individual basis⁵⁶?

In fact, the chances of success of the new democratic accountability mechanisms largely depends on the predisposition of adequate interparliamentary cooperation forms – not expressly provided for by Regulations No. 1024/2013 and 806/2014. Without a doubt, the point is not to add a new and further body specialized on the Banking Union affairs to the already overcrowded family of interparliamentary cooperation bodies. The point is instead to exploit the already existing cooperation structures or however to activate fast informal cooperation channels among Parliaments. It suffices to imagine, for example, the opportunity to organize ad hoc meetings between the European Parliament ECON Committee and the National Parliaments' specialized Committees. From this point of view, the interparliamentary cooperation in the Banking Union field has at least three important advantages.

First of all, the exchange of information and good practice would make it possible to take care of the problem of the “informational asymmetry” which has been identified by eminent scholars as one of the main factors at the basis of the “executive dominance issue”⁵⁷.

Secondly, the cooperation in the Banking Union field could help to strengthen the connection and the complementarity among the European Par-

⁵⁶ On interparliamentary cooperation, see CRUM – FOSSUM (eds.), *Practices of Interparliamentary Coordination in International Politics. The European Union and Beyond*, Essex, ECPR Press, 2013; COOPER, *Parliamentary oversight of the EU after the crisis: on the creation of the “article 13” interparliamentary conference*, SOG Working Paper Series, 2014; DECARO – LUPO (eds.), *Il “dialogo” tra Parlamenti: obiettivi e risultati*, Roma, Luiss University Press, 2009; ESPOSITO, *La cooperazione interparlamentare: principi, strumenti e prospettive*, in MANZELLA – LUPO (eds.), *Il sistema parlamentare euro-nazionale. Lezioni*, No. 4 *supra*, 133 ff.; DICOSOLA, *I Presidenti di Assemblea nella cooperazione interparlamentare in Europa*, in GIANFRANCESCO – LUPO – RIVOSECCHI (eds.), *I Presidenti di Assemblea parlamentare. Riflessioni su un ruolo in trasformazione*, Bologna, il Mulino, 2014, 331 ff.

⁵⁷ See CURTIN, *Challenging Executive Dominance in European Democracy*, in *The Modern Law Review*, 1, 2014, 1 ff. and notably 15.

liament and National Parliaments, reversing the trend of these institutions to interpret their relationships in competitive terms⁵⁸.

Finally, a third advantage consists in the contribution which the interparliamentary cooperation can offer the National Parliaments' "Europeanization"⁵⁹. In this framework, the cooperation appears able to increase the National Parliaments' awareness to work, also in this sector, within a systemic and interconnected European dimension, fostering a fruitful process of global interaction among National Parliaments' Rules of Procedures. In this way, the parliamentary oversight procedures in the Banking Union field can be "exchanged", developed, improved and integrated in their own national context.

6.2 As mentioned above, the setting up of new oversight powers needs an implementation of the National Parliaments' internal procedures. Regarding the power to address the observations to the ECB and the Board, the same Regulations No. 1024/2013 and 806/2014 require an upgrade of the National Parliaments' Rules of Procedure.

The main choice that National Parliaments are called upon to make will be that of defining the relations between the competent Committee for the banking sector and the Committee on European affairs. From this point of view, the German Bundestag experience and that of the French National Assembly seem to point to the existence of two opposing philosophies⁶⁰.

The German Bundestag – which significantly was the first Parliament to set up new oversight mechanisms introduced with Regulation No. 1024 of 2013

⁵⁸See FASONE – LUPO, *Conclusion. Interparliamentary Cooperation in the Framework of a Euro-National Parliamentary System*, in FASONE – LUPO (eds.), *Interparliamentary cooperation in the composite European Constitution*, Hart, Forthcoming.

⁵⁹On the concept of "Europeanization" see RADAELLI – EXADAKTYLOS, *New Directions in the Europeanization Research*, in EGAN – NUGENT – PATTERSON (eds.), *Research Agendas in EU Studies. Stalking the Elephant*, Houndmills, Palgrave Macmillan, 2010, 189 ff.; FABBRINI (ed.), *L'europeizzazione dell'Italia*, Roma-Bari, Laterza, 2003, 3 ff.

⁶⁰On the relations between the European affairs committees and the sectorial standing committees, see FROMAGE, *Standing Committees in Interparliamentary Cooperation in the Post-Lisbon Era: Towards the End of the European Affairs Committees' Predominance?*, in FASONE – LUPO (eds.), *Interparliamentary cooperation in the composite European Constitution*, Hart, Forthcoming.

– gave precedence to the role of the Committee competent in such matters, namely the Budget Committee. On 8 September 2014, the President of the Supervisory Board, accompanied by the President of the German Financial Supervisory Authority was heard before the Committee in a ‘closed-doors exchange of views’.

Unlike the German Parliament, in France the Committee specialized in EU affairs has maintained its role of “*dominus*” of European procedures, and in that capacity on 16 December 2014 it proceeded to the public hearing of the President of the Supervisory Committee and the Secretary General of the National Prudential Supervision and Resolution Authority. It is true that the Rules of Procedure of the French National Assembly do foresee a double membership (of sector Committee and European Affairs Committee). Nevertheless, this latter body did not even consider coordinating with the Budget Committee, for example, by means of the calling of a joint hearing.

The political implications at the basis of these different procedural choices cannot escape notice: in the Bundestag the interlocutors of the Supervisory Board were deputies specialized in finance, banking and insurance matters and the very choice to proceed “with closed doors” constitutes further proof of the will of the German MPs to obtain non generic information perhaps unsuitable to being made public to the markets. On the other hand, in the French National Assembly, the representatives of the Supervisory Committee were able to exchange views with a body with “transversal” competence and in fact the minutes of the meeting mirror the reality of an undoubtedly interesting debate but which is still focused on the “broad outlines” of the issues of banking supervision.

The German Bundestag was furthermore the first – and until now the only – Parliament to have organized a hearing of the President of the Single Resolution Board setting in motion the powers foreseen by Regulation No. 806 of 2014. Moreover, it is significant that this faculty was exercised not so much in

the perspective of oversight of the activity of the SRB – a body that was only established a few months ago – as rather to ask the Board for an opinion with regard to the national legislative measures for the implementation of Regulation No. 806 of 2014 being examined by the Bundestag.

A further point concerns the role of the upper Chambers. At the moment, the only Upper Chamber to have exploited oversight powers in the context of the Banking Union is the Italian Senate. This is perhaps not fortuitous considering that the perfect Italian bicameralism does not penalize the competences of the Senate in policies regarding banking⁶¹. Nevertheless, on 23 June 2015, the Italian representative of the Supervisory Board, Ignazio Angeloni, intervened in the Finance and Treasury Committee during a fact-finding investigation already started by the Senate. Furthermore, the different formal framework that the Senate and the ECB gave to this meeting must be noted: while the President of the Finance Committee identified the juridical legal basis of the meeting in art. 48 of the Rules of the Senate (hearings of experts during fact-finding investigations), in its website the Supervisory Board referred to an “exchange of opinions” according to art. 21 of Regulation No. 1024 of 2013.

Following the coming into force of the Treaty of Lisbon, some National Parliaments – and in particular those of Spain, Ireland and Belgium – attributed the competence for establishing the new “European powers” appertaining to National Parliaments to a bicameral Committee. It is foreseeable that great part of these systems will choose to extend also the competences regarding the banking Union to such bicameral Committees. This is furthermore a solution that in our opinion presents a number of drawbacks: there is no doubt that the setting up of a bicameral Committee within the differentiated bicameral systems has the advantage of contributing to a rebalancing of the positions between the two Houses. And however, also in this case the sectorial Committee

⁶¹On the Europeanization of the upper Chambers, see KIIVER, *The Early Warning System for the Principle of Subsidiarity. Constitutional theory and empirical reality*, London – New York, Routledge, 2012, 62 ff.; ROMANIELLO, *Second Chambers in EU Affairs*, Roma, Pioda, 2015.

specialized in banking issues would end up being excluded from the dialogue circuit with the European institutions, thus accentuating competitive attitudes among National Parliaments and European decision-makers. The prudential supervision and resolution policies – it must be stated once again – represent matters that are far too technical to be assigned to bodies having “transversal” competence.

With specific reference to the implementation of internal Italian Parliament procedures, it is possible to anticipate four different scenarios.

A first path could consist of a Rules of Procedure reform which aims to introduce “ad hoc” tools for the implementation of art. 21 of Regulation No. 1024/2013 and art. 46 of Regulation No. 806/2014. Nevertheless, this is the most stringent solution from a formal point of view, and at the same time it is the most difficult to accomplish. In the light of the current obstacles met by the reform projects of both the Chamber and the Senate, a formal modification of the Rules of Procedure is indeed improbable, at least in the short term. After all, the idea of a maintenance and upgrade of parliamentary law rules through typical procedures seems to have gone out of fashion within the Italian Parliament⁶².

A second solution, which basically retraces the path followed by the Chamber on the occasion of the implementation of the National Parliaments’ European powers established by the Lisbon Treaty could consist in an opinion by the Committee on the Rules of Procedure (*Giunta per il Regolamento*). In this case, the Committees on the Rules of Procedure, with the exception of some adjustments, could limit themselves to applying the already existent procedures with an analogical interpretation (for example, equalizing the BCE and Single Resolution Board reports to the documents transmitted to the National Parliaments within the political dialogue). Otherwise, they could adopt an opinion

⁶²See LUPO, “Codificazione” dei precedenti o valorizzazione della Camera? I presupposti dell’ipotesi di riforma del regolamento della Camera e alcune possibili integrazioni, in *Oss. fon.*, 1, 2014; POLI, *Dinamiche del sistema politico e formazione delle regole di diritto parlamentare: una tassonomia dei pareri delle Giunte per il Regolamento*, in *Oss. fon.*, 4, 2014.

with a more innovative character. However, the flippant recourse to “experimental procedures” through recommendations by the Committee on the Rules of Procedure was subject to severe criticism by scholars (especially with regard to the adoption of “experimental procedures” in violation of the “*nemine contradicente*” constitutional custom)⁶³.

The compliance of the internal procedures with the new National Parliaments’ powers established in the Banking Union sector could also occur – this is the third scenario – on the basis of a Presiding Officer’s decision, possibly together with the Presiding Officers of the Finance and EU affairs Committees. This model is quite similar to the one followed after the Lisbon Treaty, when the experimental procedure concerning the subsidiarity scrutiny was defined through a letter of the Presiding Officer to the Committee’s Presiding Officer⁶⁴.

Finally, in the light of the “culture” of the Italian Parliament, it is not possible to exclude that, after having experimented the “zero option”⁶⁵ on the occasion of the implementation of the Lisbon Treaty innovations, the Houses would decide to pass to the “below zero option”: keeping the current procedural framework intact, abstaining from the use of the new powers established in the Banking Union field and at the most sending the European authority informal letters of the Finance Committees (should it be necessary in agreement within their own Committee Board).

There is no point in adding that it would be a pity: this minimalist approach would not help either to increase the transparency and democratic accountability level within Banking Union governance or least of all to modernize

⁶³Indeed, the experimental procedure introduced through a Committee on the Rules of Procedure recommendation represents a waive of the Rules of Procedure. See POLI, No. 62 *supra*, above all 16 ff.; FASONE, *Quale è la fonte più idonea a recepire le novità del Trattato di Lisbona sui Parlamenti nazionali?*, in *Oss. fon.*, 3, 2010, notably p. 6 ff.; IBRIDO, “*In direzione ostinata e contraria*”. *La risposta della Corte costituzionale alla dottrina della sindacabilità dei Regolamenti parlamentari*, in *Rivista AIC*, 3, 2014, above all 13.

⁶⁴See the letter of 6 October 2006 from the Senate President to the Presidents of the permanent Committee.

⁶⁵According to the expression proposed by FASONE – GRIGLIO – PICCIRILLI, *The implementation of the Lisbon Treaty in the parliamentary rules of procedure. The Italian “zero-option” in comparative perspective*, paper – XIX Annual Conference del Council for European Studies, Boston, USA, Columbia University, 2012.

the Houses, which are nowadays called upon to Europeanize their organization and working modalities.

7. The evaluation of the National Parliaments' powers in the Banking Union governance is controversial: as seen, while some constitutional law scholars underline that these powers exceed the oversight function usually played by the National Parliaments towards the National Central Banks⁶⁶, other scholars consider the role of the National Parliaments in the Banking Union governance as insignificant⁶⁷.

Maybe, the truth is somewhere in-between: as the Monetary Dialogue experience has shown, the *ex post* parliamentary oversight powers can potentially activate fruitful discourse dynamics with the purpose of making the Banking Union governance more transparent, more participant and consequently, more legitimate. This dialogue does not exclude but, on the contrary, implies that the ECB and the Single Resolution Board have the last word with regard to competences which, already before their transfer at European level, were in many Member States taken away from the entitlement of democratically elected organs⁶⁸.

Nor is it possible to underestimate the potential importance of the new information rights conferred to the European Parliament and National Parliaments. As stated, also the enlargement of this category of parliamentary powers can represent a first answer to the problem of the "*informational asymmetry*". This is a problem which has been identified by scholars as one of the main factors at the bottom of "*Executive dominance issue*"⁶⁹.

⁶⁶See, for example, MANZELLA, *Parlamento europei e Parlamenti nazionali come sistema*, No. 4 *supra*, at 10.

⁶⁷This is the position, for example, of CONTALDI, *Politica economica e monetaria (diritto dell'Unione europea)*, in *Enc. Dir. (annali)*, VII, Milano, Giuffrè, 2014, 811 ff.

⁶⁸On the level of accountability and independence of the national supervisory authorities in Italy, Germany, France and United Kingdom before the Banking Union, see SICLARI, *Costituzione e autorità di vigilanza bancaria*, Padova, Cedam, 2007.

⁶⁹See CURTIN, *Challenging Executive Dominance in European Democracy*, No. 57 *supra*, notably 15.

Developing the Monetary Dialogue format, the introduction of a sort of “banking dialogue” – and therefore the empowerment of democratic oversight and parliamentary informational rights in the banking sector – identifies a further indicator of the crossing (*rectius*, of the upgrade) of the old “communicating vases” paradigm. According to the doctrine inaugurated by the *Bundesverfassungsgericht* with *Maastricht-Urteil*, the devolution of powers at EU level is admissible insofar as this transfer is compensated by the transferring of the scrutiny and oversight powers by the National Parliaments to the European Parliament⁷⁰.

This conception of parliamentary democracy in Europe, long “ridden” by the European Parliament in order to lay claim to the strengthening of its own powers, tends to be overturned within a contest characterized by a plurality of parliamentary players in the EU institutional scenario. Besides the traditional channel of political representation offered by the European Parliament, the representative democratic principle established by art. 10, par. 1 TEU has to be nurtured also by the National Parliaments’ contribution. Rather, it is on these last institutions that the attention of the scientific community is mainly focused today because they present a wider innovation and improvement margin: with the risk, however, of compromising the good functioning of the EU decision-making process in the case of the giving of a proper veto power to the National Parliaments.

In conclusion, the analysis of the democratic accountability mechanism introduced within Banking Union governance offers a confirmation of one of the most relevant aspects of the Euro-national parliamentary system theory: the considerable extent of the informal activities (or anyway a low degree of formalization) which precede or follow the adoption of formal decisions and the natural calling for the discreet usage of persuasion powers. In other words, that

⁷⁰On the “communicating vases” paradigm, see MANZELLA, *Il parlamento federatore*, in *Quad. cost.*, 1, 2002, 35 ff. and notably 46 ff.

legal category of influence would be at issue which is something more than the consultation method and something less than co-decision⁷¹.

On the other hand, it is not sufficient that Parliaments in Europe feel, in a more or less active manner, like a part of the system. Today it is also necessary that Parliaments “make the system”. In other words, the European Parliament and National Parliaments should overcome the traditional preconception according to which an expansion of the European Parliament’s position would entail a strengthening of National Parliaments in an inversely proportional way (and vice versa).

During the next months we shall see whether or not the players of the Euro-national parliamentary system choose to interpret their own role within Banking Union governance in the light of the “coexistence” method or in coherence with the opposite method of “cooperation”: in the first case, the parliamentary bodies within the exercise of the oversight function will interact in the strictly indispensable measure to minimize the negative effects of the interference (therefore, remaining anchored to a competitive approach in interparliamentary relationships); in the second case, the European Parliament and National Parliaments will propose to make this same interference convenient for the own position and for that of the “system” as a whole.

⁷¹See, CAPUANO – GRIGLIO, *La nuova governance economica europea. I risvolti sulle procedure parlamentari italiane*, in MANZELLA – LUPO (eds.), *Il sistema parlamentare euro-nazionale. Lezioni*, No. 4 *supra*, 227 ff. and notably 258.