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DOCTORAL THESIS

European Central Bank – an institution with legal personality

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1. The topic under research

Motto: *"It is well enough that people of the nation do not understand our banking and monetary system, for if they did, I believe there would be a revolution before tomorrow morning"*.

Although we do not share the fears of Henry Ford related to knowledge, his opinion is the starting point of our research, since it actually highlights both the importance of the banking system within the society and the need for every citizen to improve their concepts in this field, given that, no matter the domain of activity, we can say without overstating the matter, that interaction with the banking system is inevitable for each and every one of us.

The evolutionary process undergone by the banking system in general, while developing modern society, on the ground set by the creation of the European Union, provided new meanings, including for the concept of the central bank. While before the setting up of the Economic and Monetary Union, in 1999, central banking in Europe was traditionally identified with the classic task of issuing and managing the national currency and was regarded as a manifestation of national sovereignty, nowadays the issuing of currency is just one of the many skills of a modern central banking.

Once it came the acknowledgement of the value of banknotes as means of payment and the development of a modern economy, central banks, the issuers of national banknotes and coins, acquired an increasingly important role and the conduct of monetary policy has become an essential component of the economic policy of the states.

In the context of the historical environment, reaching an agreement among the Member States of the European Union and the transfer of competences, in the late twentieth century, for creating an Economic and Monetary Union in Europe, can be perceived, without overstating it, as representing an unique phenomenon worldwide, from the perspective of its concept and realization, since it introduced a new monetary regime and a single currency for Member States that acceded to it.

Moreover, achieving an Economic and Monetary Union was not only a major step in the process of integration of the economies of the Member States, but also the emergence of an important subject, at the global level, of a core of countries with strong economies and a vision, which is coordinated, in order to develop a common one, through the institutions of the European Union.

Therefore, the Member States of the European Union and, in particular, Member States which joined the euro, waived their powers to the European Union as a whole and to

its institutions, in practice, for the purpose of attaining a single market and a closer integration.

In order to carry out the duties entrusted and to strengthen its special status within the European Union - centre of monetary policy for the Eurozone - the European Central Bank has legal personality and enjoys in each of the Member States the most extensive legal capacity given to the legal persons under its internal law. Legal personality represents a key prerogative and precondition for the European Central Bank to fulfil its mandate, as our research will properly emphasize.

In this context, the topic under research is the European Central Bank - an institution with legal personality and it was addressed by an analysis developed both from a general perspective, but also from a legal, practical perspective, in order to facilitate the understanding of various concepts.

2. The importance and the utility of the research topic

The researched topic is of general interest, since the European Central Bank conducts, together with the national central banks of the Member States of the European Union, the monetary policy of the European Union, a continuously evolving phenomenon, which influences the economic, social and political situation in Romania, as well as in the European Union and the rest of the world.

The main objective of the European Central Bank, that is to maintain price stability and the actions arising from achieving this objective, in the context of the recent economic crisis, determine that the study and the understanding of this institution are of wide interest.

The importance of the topic under debate is also emphasized by the fact that, since November 2014, the European Central Bank assumed the responsibility for supervising the euro area banking, which increases the importance of this institution.

Moreover, one should give consideration to the fact that Romania accession to the European Union on 1 January 2007 created the premises that it is now indispensable to any jurist to deepen and to assimilate the theoretical and practical aspects of European Union law, in the process of training and professional development. In order to develop a comprehensive and professional legal opinion and to provide appropriate legal solutions, a jurist, whether legal adviser, lawyer or magistrate must, in addition to the provisions of national law, consider and apply also those of the European Union.

An additional argument for sustaining the interest in the topic is that, as far as we know, it has not been broadly analysed in our doctrine so far yet, from this the point of view of the legal personality and of its effects.

Romania's statute as a Member State of the European Union and the consequences arising therefrom, in particular the fact that the National Bank of Romania joined the European System of Central Banks, requires the understanding of the legal issues involved thereof.

An important aspect deriving from Romania's accession to the European Union is the aim of the transition to euro, which falls within the competence of the European Central Bank, the sole institution which has the role to issue and manage the single currency. This grants the researched subject particular importance towards the transition to the euro, but also in the context of the efforts currently made by Romania, so as to fulfil the convergence criteria.

The way we approached this work highlights the concern about conducting a research both from a theoretical and legal, practical perspective, by analysing either case law or specific case studies, depending on the matter under discussion.

3. Scope and objectives of the research

This paper aims to analyse the European Central Bank, European Union institution with legal personality.

Therefore, in our scientific research, we pursue as main objectives, the following:

1. Establishing the relevant provisions;
2. The conceptual delimitation of the issues identified during the research;
3. Analysis of the historical evolution of the activity of the European Central Bank;
4. Determination of European Central Bank's role, in line with the developments at European and international level, in the context of the economic crisis;
5. Analysis of the concept of legal personality and its effects – both nationally and internationally;
6. The reasoning behind the legal personality conferred to the European Central Bank;
7. Identify and analyse the effects of the legal personality of the European Central Bank.

4. Methodological and theoretical basis of the research

During our research we are using, separately or correlated, several methods of research, as follows:

- The historical method;
- The logical method;
- The comparative method;
- The quantitative method.

The historical method is used to emphasize how the European Central Bank has evolved, from a simple idea to the institution responsible for the conduct of monetary policy in the euro area - the largest economy in the world, after the United States.

The logical method contributes to the understanding the considerations that stand behind the regulations of the European Union, while highlighting their theoretical and practical aspects, and synthesizing the research results, in the conclusions drawn at the end of our analysis.

The comparative method is effective in benchmarking the various existing financial institutions, both at the European Union level and internationally and also in analysing the various opinions identified in the specialized literature.

The quantitative method is used for analysing and presenting the most important case-law of the Court of Justice of the European Union.

Our scientific research is also assisted by consulting and analysing the main doctrinal opinions on this matter, both Romanian and abroad. Furthermore, there are used existing electronic information media, in particular by accessing the database of national legislation and jurisprudence, specifically of the European Union, but also dictionaries, encyclopaedias and other materials electronically available.

Simultaneously, there are presented and interpreted in the paper the main regulations of the European Union. In this regard, our work covers legislation and jurisprudence published until October 1st, 2015.

5. Presentation of the thesis

The first chapter of the thesis is dedicated to presenting the general issues of the topic addressed and to establishing its objectives. At the same time, we emphasized the role of the

European Central Bank within the institutional setting of the European Union, while making a conceptual delimitation of the terms used throughout the research.

The second chapter - Establishment of the Economic and Monetary Union and of the European Central Bank - involves elements of historical nature, on the creation of the Economic and Monetary Union. Although these issues are usually overlooked, most probably due to lack of applicability, this is, in our opinion, an essential part of our research. Even if the intention of this work is not achieving an insight into history, we believe that, in order to fully understand the work and the role of the European Central Bank, we must have a unitary perspective. To this end, we should go back in time and observe the beginning of the construction of the European Union, how it developed over time and the reasons for which it was encouraged the establishment of a central bank of the European Union.

Also, in this chapter we covered the main pros and cons of the Economic and Monetary Union and the euro. These debates are interesting not only in terms of understanding the phenomenon regarded from the perspective of that historic moment; on the contrary, we think they will always be valid. We believe the debate, for or against integration, for or against the euro, will never cease, being a topic that has determined vivid reactions, while creating currents of opinion. After all, Eurosceptics have their role, the current of opinion they generate is useful, beneficial, since critics often serve to all forms of progress.

At the end of the chapter we approached, from a practical perspective, a case study on the position of a state which, although meeting the convergence criteria, decided not to adopt the euro: United Kingdom.

We continued the research with the *third chapter - The regulatory powers of the European Central Bank* - which aimed to analyse the legal acts adopted by the European Union institution, in order to fulfil its duties. We argued that these regulatory powers contribute to accomplishing the mandate of the institution, independently, autonomously, so that it can achieve its tasks, without relying on the legal acts adopted by European Union institutions or member states.

However, these powers are not discretionary, they are limited by the principle of subsidiarity and they are controlled in terms of legality by the Court of Justice of the European Union, through the action of annulment.

Hereinafter, we saw the conditions for forwarding such an action and we addressed the practical aspects of the action for the annulment of a legal act of the European Central Bank, by analysing the case law of the Court of Justice of the European Union. To this end, we selected both cases where the action was upheld and cases in which it has been rejected, in

order to produce an overall assessment of the applicability of the judicial review, carried out by the institution of the European Union.

The fourth chapter - National, European and international legal personality of the European Central Bank - is the main chapter of the thesis. In particular, for confirming its position within the European Union, that is, the centre of the Eurosystem monetary policy for the Member States, the European Central Bank has legal personality under article 282 of the *Treaty on the functioning of the European Union*. It enjoys, according to art. 9.1. of the *Statute of the European System of Central Banks and of the European Central Bank*, the most extensive legal capacity accorded to legal persons under its law.

Based on the issues discussed in the previous chapters, which are fundamental in the research of this chapter, we have covered, in detail, all the implications of the legal personality of the European Central Bank: from the concept of legal personality, nationally and internationally, to its effects, from the perspective of the European Central Bank.

The consequences of the legal personality of the European Central Bank are investigated over several sections, both theoretically and practically, by using comparative elements that have the utility to emphasize the role of the institution, nationally, internationally and in the European Union. According to article 39 of the *Statute of the European System of Central Banks and of the European Central Bank*, by virtue of its status as an European Union institution and its legal personality, at national level, the European Central Bank shall enjoy in the territories of the Member States such privileges and immunities which are necessary for the performance of its tasks. Other prerogative at national level, which derives from the legal personality of the European Central Bank, is the ability to acquire and/or dispose of movable or immovable property, which is subject to the taxation arrangements.

The links between the European Central Bank and the international organizations are also a consequence of the legal personality, this institution being able to conclude international agreements in fields related to its competence and to participate in activities of international organizations. Therefore, we have also envisaged the activity of the European Central Bank at the international level. Thus, we revealed the European Central Bank's work at the international level and its links with other international organizations. We analysed it in connection with other financial institutions (such as the International Monetary Fund, Organisation for Economic Co-operation and Development, Bank for International Settlements).

Its legal personality also implies the European Central Bank's right to be subject to the Court of Justice of the European Union, for supporting its rights when violated by other European Union institutions or by other Member States. But, at the same time, it includes the corresponding obligation: the European Central Bank may be brought before the Court of Justice of the European Union, if the subjects having this capacity, consider its actions inconsistent with the Treaties of the European Union.

The conclusion of this chapter is that the legal personality enjoyed by this institution of the European Union is, in fact, a prerequisite and a precondition for accomplishing the mandate of a central bank.

Chapter five of the thesis is called “*The principle of central bank independence, in theory and practice*”. Besides legal personality, independence is a second fundamental condition for the performance of central banking, which is why we developed the analysis of this principle from three perspectives: how it was configured when founding the European Central Bank, how it was regulated and, finally, how it is implemented by the Member States of the European Union, highlighting, thus, the importance of its effective application.

At the same time, we approached the main theories and arguments for and against the provision of this principle in legislation and we identified, in practice, various cases in which independence was questionable, in order to argue that, indeed, there is and there will always be pressure on the central bank. The important issues in this context are the means of protection at the national and the European Union level.

Finally, we argued on the answer to an interesting question: whether there is any link between central bank independence and economic performance, by analysing relevant studies prepared in the field by economists. We noticed that not all studies identified a direct connexion between central bank independence and economic performance, but, still, the importance of having an independent central bank is undeniable. On the other hand, taking into account their conclusions, we must not overlook the prevalence of the studies showing the link between the two factors and claiming the beneficial effect on the economy of an independent central bank.

Aside the economic calculus, we concluded that an independent central bank is a prerequisite, a vital factor in fighting inflation in a modern society and we argued that, having in mind the level at which the society evolved, this assertion can hardly be contested.

The objective of our doctoral thesis, that is the research of the legal personality of the European Central Bank and the consequences arising therefrom, cannot be realized without understanding central banking.

Therefore, in the *sixth chapter*, named “*Central banking - legal, institutional and organizational perspectives*” we develop on the concept of "central banking" in essence, by identifying the main differences between central banking and the activity of a commercial bank - two institutions with different purposes, but whose activities interact. Thus, we concluded that central banking, although essentially different from the activity of a credit institution, interrelate with the latter and the two types of activity depend on each other.

From a practical perspective, for stressing different concepts of the organization of central banks, we presented three case studies: Bank of England, Federal Reserve Bank and National Bank of Romania. We chose a robust central bank (Bank of England), but whose organization is atypical, compared to the European organization; second, the Federal Reserve Bank, which is a central federal bank of the United States of America, the largest economy in the world, and the third, the National Bank of Romania, a central bank, which, in its efforts of integration, aligned mostly the requisite standards of the European Union.

The case study was concluded with the analyse of the European Central Bank, a European bank in the accurate sense of the word, perceived, as we pointed out in the paper, as one of the most independent central bank in the world and, even if the manner of its organization, in terms of its objectives, does not coincide with the activity of a national central bank, it is a genuine standard, including the way of its internal organization.

The challenge of adopting healthy decisions, when carrying out the tasks of the European System of Central Banks cannot be achieved without an efficient inter-institutional cooperation. This is the reason why this chapter closes, by analysing the way in which the European Central Bank, while exercising its powers, cooperates with other institutions of the European Union.

As a conclusion, we raised several questions:

Is there an "almost" perfect model for organising central banking? Did the developments of the society, in the on-going effort to improve central banking and to correct the errors, have led to such a model? Is the European Central Bank such a model?

Our view is that the answer can only be negative. The conclusion is based on the fact that society is changing and the institutions must constantly face new challenges. Errors are inevitable and, as the economic crisis has proved, we must constantly find ways to reinvent in our actions.

In *chapter seven - Monetary policy of the European Central Bank* - we made a brief introduction on the tasks of the European Central Bank, in terms of its monetary policy operations. Although economic issues are of no interest to the objectives of our research, we

consider that, understanding the purpose of monetary policy, as well as which are the main instruments of monetary policy and their meaning, is a requirement for any professional who wants to address the issue of the European System of Central Banks.

In the *eighth chapter – The impact of financial crisis on the European Union* - we made an analysis of the economic crisis, which started since December of 2007 and represented a turning point in the existence of the European Union and the Economic and Monetary Union. We began the research on this topic by identifying possible origins and consequences of this crisis, manifested not only in the European Union, but worldwide.

In the history of the European Union, the crisis signified a critical moment and, at the same time, a change for the European Union institutions and especially for the European Central Bank, but also a change in terms of measures and legislation adopted. Institutions and policy makers at European Union level had to reinvent themselves in order to overcome that very moment. In retrospect, by comparison with other important moments surpassed by the European Union and the Economic and Monetary Union, none has compared, in terms of impact and vulnerability with that of the recent economic crisis.

The strong impact it has had on the Member States of the European Union outlined a difficult conclusion for central banks: these, which were expected to prevent the emergence of imbalances in the financial system, or at least be able to manage, have failed to remedy them, which led to the spread of the crisis, primarily because they have not benefited of sufficient tools to respond in an appropriate and effective manner.

In this chapter we have also analysed the response of the European Union and of the European Central Bank to the economic crisis. One of the lessons learned from the economic crisis was that the financial sector in the European Union requires a better and improved coordinated regulation and supervision, and, in the later years, regulatory activity at European Union level increased, aiming to cover vulnerable areas and to promote a set of rules for ensuring that all actors in the financial system are regulated and supervised properly and efficiently. The approach was that a comprehensive harmonization of the legal framework of the Member States of the European Union, would lead to a consistent and optimal functioning of the single market.

Finally, we addressed a case study, involving Greece, a country which, although it joined the euro in 2001, the economic crisis has had such a powerful impact over it, that it created a whole debate whether it should continue to be part of the Eurozone.

Chapter ninth - Recent developments following the economic crisis: Banking Union - was dedicated to the analysis of the project called banking union, comprising its three pillars:

the single supervisory mechanism, the single resolution mechanism and the single deposit guarantee scheme.

Finally, we presented the situation of non-euro area Member States, in relation to which is regulated a special procedure to be included in the project.

The last chapter of the thesis, namely *the tenth chapter – General conclusions and de lege ferenda proposals* - contains our conclusions on the issues addressed in our research.

Finally, our contribution includes a series of proposals, in order to improve the analysed legal framework. Legal norms, in general, and those of European Union, in particular, are being in constant adaptation and evolution. Thus, as two lawyers can think of a particular concept in two different ways, any legal framework is likely to be improved or modified in some form that turns out, in practice, not be the best choice.

Among our proposals, we mention:

a. the legal force of the opinions, adopted by the European Central Bank, in exercising the obligation of consultation of the Member States on acts affecting the activity of the European System of Central Banks.

Based on the objective of ensuring the proper functioning of the European System of Central Banks, we believe that the opinions adopted by the European Central Bank, considering the importance of the issues involved, should be binding and, thus, its opinion to be enforced in the Member States.

b. regulating the principle of central bank independence

Analysing the concept of central bank independence, theoretically and practically, revealed the importance of respecting this principle, both at European Union level and at national level. In the context referred to above, we consider that, *de lege ferenda*, it should be considered the possibility of regulating it at the national level, even in the Constitution, which is the fundamental legal act of a state. In this way, the central bank would have an important instrument of defending itself against potential influences, exercised by the political factor.

c. the role of central banks outside the euro area in the process of decision making, associated with the activity of the European System of Central Banks

This proposal aims to find ways in which central banks outside the euro area may be allowed a greater role in the decision-making procedure, associated with the activity of the European System of Central Banks. As long as it was possible to identify a manner for the

Member States outside the euro area to participate in the Single Supervisory Mechanism, by a legal construction, called close cooperation and which (although still imperfect and uncertain in terms of the practical functioning) allows non-euro Member States, even in this preliminary phase, to cede supervisory powers to the European Central Bank, we believe, analogously, that it should be acknowledged a way for a considerable participation in the decision-making process.

d. the issue of euro area membership

Having in mind the Greek situation case-study, in the context of the economic crisis, we revealed that discussions concerning the continuance of its status of member state of the euro area. If, from its economic value point of view of, the opinions are divergent, the legal issue that emerged was whether the European Union Treaties actually allow the exit from the Eurozone, trying, thus, to identify a technical solution to accomplish it.

The difficulty is that the *Lisbon Treaty* introduced for the first time at the European Union level, the clause which allowed the possibility of a state to terminate its membership of the European Union, but there is no provision regulating the withdrawal from the euro zone.

The proposal, drawn from our analysis, is a clear regulation, at the next revision of the European Union Treaties, of the following:

- what happens if a Eurozone member state faced, for a long time, economic instability problems, which are likely to spread over the other Member States;
- if a member state of the European Union can exit the European Union, a Member State, once inside the euro area, may or may not come out of it? Is joining euro an irrevocable decision or not?
- if it is unequivocal, on reasons associated with the interest of the Economic and Monetary Union, that raising the derogation is an irrevocable decision, it should be clarified how this fact is corroborated with the article which allows a Member State of the European Union to leave this European architecture.

e. lack of clarity concerning the situation of the euro area Member States, which are willing to participate in the Banking Union

Our research, on the Banking Union project, has highlighted a number of uncertainties on the situation of non-euro area Member States, which are willing to participate in the Banking Union. Thus, in order to clarify all the problems in legislation of the Single Supervisory Mechanism with regard to this topic, we consider that, at European Union level,

it should be given deeper attention to this issue and to be regulated, in detail, not only the procedure to be followed for accession, but also the actual way in which this cooperation is to take place.

Therefore, we have proposed the development/improving of the European Union legislation on this topic, by adopting a measure which may take the form of a binding act (decision, regulation) or the form of a non-binding explanatory act.

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