

Christiane Schnell and  
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**Working for  
Democracy?**  
On Employee  
Participation in  
European Institutions

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Christiane Schnell and Hermann Kocyba

## **Working for Democracy?** **On Employee Participation in European Institutions**

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### **Abstract**

Democratic participation rights in the workplace are a central demand of the labour movement but have been increasingly contested in recent decades. The institutions and agencies of the EU investigated in our research are not only characterized by the absence of externally defined and controlled labour rights. In fact, from a constitutional perspective, they rather appear as premodern legal monsters. In this paper three aspects of this labour regime will be discussed: how to gain a foothold in interest representation in a union-averse environment, the nexus between unionism and professionalism, which is important for understanding the mechanism of political participation in this field, and finally the institutional framework and legal constructions which led to a situation where labour rights must be reclaimed from scratch. This working paper documents selected findings of the pilot study funded by the European Trade Union Institute (ETUI), which allowed us to explore this largely unexplored field of 'Interest representation and labour relationships at the supranational level' and develop our current and ongoing project with a broader focus on labour in supranational organizations.

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## Preliminary Remarks

Democratic participation rights in the workplace have been a central demand of the labour movement for over 150 years and a precondition for collective agreements and wage negotiations. But individual and collective rights as social accomplishments institutionalized through national law have become increasingly contested (again) in recent decades. Difficulties in mobilizing workers outside well-regulated, male-dominated, industrial labour, old and new strategies of union busting and bypassing labour rights requirements in new industries as well as overall deregulation have weakened the idea that employees' interest in representation and participation at work are a premise in and for democratic societies. While a lack of labour rights mostly appears as a problem for low-qualified workers, the research we present here elaborates on a labour regime that is mainly – but not exclusively – characterized by highly skilled and economically privileged labour within supranational organizations.

The institutions and agencies of the EU we investigate are characterized by the absence of externally defined and controlled labour rights. In fact, they are to a great extent permitted to define the standards they want to follow by themselves. Collective labour rights, independent interest representation and institutionalized collective bargaining have not been part of their institutionalization. We met union activists from the European Central Bank (ECB) for the first time in the context of the public debate on the austerity regime supported by the German federal government and executed by the ECB, which was implemented in the aftermath of the financial crisis and the European sovereign debt crisis. Contrary to the image of a completely monolithic institution, we soon learned about internal criticism from ECB employees and about the union, which had established itself against all odds at the European Central Bank. What began as an intellectual exchange led us to a topic that is mostly overlooked, to some extent contradicting traditional understandings of labour relations and collective action, but also extremely instructive regarding the current challenges to unionism and work regulation: On the one hand, we learned that this strategically important and growing segment of transnational public sector work operates outside national or international labour law. In the context of the prevailing combination of neoliberalism and authoritarianism in recent decades, this legal extra-territoriality is based on international treaties and an overstretched interpretation of the functional autonomy of the respective organizations. Yet, within these organizations, there are attempts to organize and unionize employees who disagree with both the formal legitimization and the ideological justification of discretionary internal legislation violating any principle of separation of powers. Based on quite heterogeneous understandings of interest representation, the union activists had to start more or less 'from scratch'. How they try, succeed and fail to mobilize colleagues who are usually considered unorganizable and rely on strong individual bargaining power within a work regime that denies the need for institutionalized labour relations and the corrective effect of independent interest representation, is empirically, theoretically and strategically insightful.

This working paper is based on unpublished discussion papers and keynotes from a workshop with activists and employee representatives. In the following three chapters, we discuss different aspects of our current research on labour relations and participation rights in supranational institutions. The empirical foundation for these contributions is mainly provided by our anchor case, the ECB. In the first chapter, we discuss the situation at the ECB and how to gain a foothold in interest representation in a union-averse environment (1).

In the second chapter, Christiane Schnell discusses the nexus between unionism and professionalism, which is important for understanding the mechanism of political participation in this field. Employees frequently come into conflict with the working regime of supranational organizations, if the preconditions for professional work are neglected (2). In the final section, Hermann Kocyba elaborates on the institutional framework and legal constructions, carving out the maze employee representatives and activists have to navigate within supranational organizations (3).

Our empirical approach combines document analysis, observations of the union's activities and events, expert interviews with active and former employee representatives, and qualitative interviews with employees. These papers are obviously a documentation of work in progress and some first steps in our research on this complex. We are currently further elaborating on the field of supranational organizations in a research project at the Institute of Social Research at the Goethe University, Frankfurt, funded by the Hans Böckler Foundation. To develop this research, we enjoyed the privilege of a pilot study "Interest representation and labour relationships at the supranational level" funded by the European Workers' Participation Competence Centre (EWPPC) at the European Trade Union Institute (ETUI), which allowed us to explore this largely unexplored field of "Interest representation and labour relationships at the supranational level". Based on the thorough exploration of the ECB as introduced in the following pages, we developed our broader focus on comparable transnational organizations and agencies.

## **1 Starting from Scratch? On Trade Unions in European Institutions (Hermann Kocyba and Christiane Schnell)**

### **Introduction**

During the process of European integration, social security standards and labour rights have been constantly contested. An important aim of trade unions has been to promote social policy at the European level while defending social achievements at the national level. In general, the discussion here focuses on the private sector and the difficulties in establishing regulations at powerful transnational corporations; however, the public sector is usually not considered a focal arena of labour conflicts and new trade union strategies. The aim of this analysis is to challenge and extend this perspective on trade unions and the European project. Therefore, labour relations as well as trade union strategies to organize labour and to force political reforms within European institutions are elucidated. The findings presented in this article provide insights into social rights and trade unions in supranational organizations by considering the specific constellations at the European Central Bank (ECB).

As a matter of course, European institutions are considered authorities that impose regulations on member states while it is also widely known that they determine their own internal labour regimes. In fact, they are not bound to the legal system of the state they are located in, and they have no obligation to implement the terms of the European Charter in detail. For example, the ECB is organized as an 'extra-territorial' institution to ensure independence from national interests with respect to its monetary policy mandate (see Paternoster 2019). This status of autonomy also includes the competence to define its own labour regulations. The ECB not only acts as an employer towards its employees, but also as an authority

that defines the legal framework for employment contracts and as a pension and health insurance provider for its employees.

In general, workers' and social rights – or the absence of rights, to be more specific – in European organizations are shaped by specific legal immunities of transnational institutions. Even agencies outside the contractual framework of the EU, such as the European Patent Office, are exempt from the social standards and legal obligations of the respective state in which their headquarters are located (Singer 1995). Employees in these institutions could be viewed as a highly privileged group in terms of general labour market standards. They are mostly highly qualified, earn relatively high wages and profit from tax privileges resulting from the specific status of the employing organizations. At the same time, these employees perceive heteronomy and arbitrary discretion as quite characteristic of their actual employment situation. This should be concerning not only as another example of the decline of labour market regulation in the face of globalization, but also because the nature of work conducted in these organizations and agencies – as privileged as it is – includes particular vulnerabilities.

These organizations and agencies fulfil complex tasks and require a high level of reflexivity in order to make reliable decisions and provide solutions to the public they serve. They represent not only a bureaucratic structure, but also incorporate research and institutional expertise in their area of responsibility, such as monetary policy or patent licensing, which calls for collective knowledge development, sociologically conceptualized as an epistemic community. Therefore, it is argued that the deficiencies in individual and collective labour rights lead to problems related to legitimization and dysfunctionality which could affect the public purpose of European organizations.

Unions attempting to establish labour relations based on mutual consent and participation structures within these institutions must start more or less from scratch and still have many tasks to accomplish. At the same time, the strategies developed in this context might be exemplary for mastering today's challenges for trade unions: such strategies need to cope with the obvious difficulties of organizing a workforce that is characterized by heterogeneous nationalities, contract conditions and specialist backgrounds. Furthermore, the union is demanding reliable democratic participation and employment standards in institutions that incorporate new governance principles and tend to neglect or delegitimize internal conflicts of interests.

The following analysis of the challenges to union activism in a supranational organization begins with a short sketch of the specific legal framework of the ECB as a regulatory agency (1.1) and its internal governance problems as an independent regulatory agency (1.2) as the backdrop to an analysis of the interplay between innovative and traditional approaches to mobilization and staff representation (1.3).

### **1.1 The ECB: Pillar of a Social Union? Labour Law and Participation Rights in European Organizations**

An assessment of social rights in the ECB must consider the specific legal characteristics of EU institutions and transnational organizations operating in the EU and to which extent



social rights are actually implemented in supranational organizations in Europe in general.<sup>1</sup> With the EU's official self-portrayal in mind, it may seem paradoxical that EU organizations are exempt from EU social regulations. The ECB is not the only institution characterized by a legal 'quasi-extra-territoriality', yet it is a paradigmatic example of the implementation paradox of European labour rights proclaimed in the Charter of the European Union.

Nowadays, the EU no longer presents itself as a 'Common Market' or simply a 'European Economic Community'. Due to its normative self-image as a community based on social rights and democratic accountability, in addition to basic economic freedoms, its Charter of Fundamental Rights encompasses the "Freedom to conduct a business" and the "Right to property" (art. 16 and 17), the "Workers' right to information and consultation within the undertaking", the "Right of collective bargaining and action", "Protection in the event of unjustified dismissal" and "Fair and just working conditions" (art. 27 to 31). According to the Charter, all workers in the EU should have certain minimum rights relating to health and safety at work, with respect to equal opportunities and equal treatment for women and men, to information and consultation and to collective bargaining. Each individual Member State must ensure that their national laws respect and protect these rights laid down by EU directives.

All Member States of the Union are obliged to implement these directives in their national law so that they become compulsory for all firms and organizations operating on their national territory. However, European and other transnational organizations enjoy immunity so that they are explicitly exempt from national law by a contract of seat with the state they are located in. Hence, when it comes to the rights and obligations resulting from their employment contracts, ECB employees cannot rely on or invoke national labour or social security law: the ECB and the Federal Republic of Germany concluded a Headquarters Agreement which stipulates in its Article 15 that "the conditions of employment of the members of the Executive Board and the employees of the ECB shall not be subject to either the substantive or the procedural labour and social welfare law of the Federal Republic of Germany."<sup>2</sup>

Moreover, the EU's *acquis communautaire*<sup>3</sup> does not apply directly and immediately to ECB employees. The ECB's Governing Council stipulated that the "ECB shall apply the EC regulations and directives concerning social policy which are addressed to Member States", but only whenever they seem to be necessary.<sup>4</sup> Determining whether it is necessary to

1 Based on its Charter of Fundamental Rights, the European Union proclaimed in November 2017 with respect to the European Pillar of Social Rights: "The European Pillar of Social Rights should be implemented at both Union level and Member State level" (see EU Publications Office 2017: 9).

2 Other European organizations are also not under the jurisdiction of the national law of the seat state, but the European Council and Parliament have defined some rules. Yet, the ECB's employees cannot invoke the rules of Regulation No. 31 European Economic Community (EEC), laying down the Staff Regulations and the Conditions of Employment and which govern the labour relations of EU Officials. Pursuant to Article 36 (1) of the Statute of the European System of Central Banks and of the European Central Bank, "[t]he Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB." Thus, the Treaty on the Functioning of the European Union, to which the Statute is attached as Protocol (No. 4), confers upon the ECB's decision-making bodies the power to act simultaneously as legislator and employer.

3 The accumulated legislation, legal acts and court decisions which constitute the body of European Union law.

4 Article 9 (c), first subparagraph, Conditions of Employment (CoE) (in the version applicable as of 16 April 2018) reads: "No specific national law governs these Conditions of Employment. The ECB shall apply (i) the general principles of law common to the Member States, (ii) the general principles of European Community (EC) law, and (iii) the rules contained in the EC regulations and directives concerning social policy which are addressed to Member States. Whenever necessary, these legal instruments will be implemented by the ECB. EC recommendations in the area of social policy will be given due consideration. In interpreting the rights and obligations under the

implement regulations in the area of social policy is at the discretion of the ECB. While the *acquis communautaire* presupposes comprehensive national labour and social security legislation, the ECB has never provided a fully-fledged and coherent legal framework (let alone a corpus of jurisdiction and swift and effective access to justice in this field) for its labour and social security relations. In a sense, when issuing its own labour law, social security, disciplinary rules and other relevant law in this field, the ECB acts as an independent state outside the EU. The Charter, which guarantees the inalienable right to collective bargaining, does not seem to have any real impact on the ECB because tariff negotiations are generally refused. The ECB has been granted the power to govern its own labour relations or civil service or other relations with its employees independently of the national laws of the EU Member States. Even if this complies with the provisions of Article 36 ESCB and the ECB Statute, it basically collides with the principle of separation of powers.<sup>5</sup> On this basis, the ECB acts not only as an employer but also – by deciding on the legal conditions of employment – as a legislator. Within this framework, its employees have no access to national courts. The European Court of Justice can make rulings “within the limits and under the conditions laid down in the conditions of employment”. This is a rather minimalistic form of legal control, though nevertheless quite a necessary one.

The exceptional combination of roles is inconsistent with the democratic principle of separating legislative and executive authority, but it is also not functionally necessary to fulfil the ECB’s tasks for maintaining price stability: it follows from Article 130 of the Treaty on the Functioning of the European Union (TFEU) and Article 7 of the Statute, which both state:

[...] when exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and this Statute, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body.

The “conferred tasks and duties” mentioned include the conduct of monetary policy and all the other tasks conferred upon the ECB. These tasks and duties clearly do not include the setting of civil service or labour law.

Consequently, the Governing Council of the ECB, its main decision-making body in which the governors of the national central banks of the Eurozone’s member states form the majority, was awarded an extraordinary power. Even the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, already passed many years ago by the European Commission, European Council and European

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present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case law which apply to the staff of the EC institutions.”

5 The decisive documents on the question of immunity are the Agreement between the European Central Bank and the Government of the Federal Republic of Germany on the seat of the European Central Bank of 16 September 1998 and Protocol No. 18 of 29 July 1992 annexed to the Treaty establishing the European Community, which bears the title Protocol on the Statute of the European System of Central Banks and of the European Central Bank. This Protocol defines the actual legal basis for the governance and actions of the ECB, which can only be supplemented or amended by a unanimous decision of the Member States. The Headquarters Agreement ensures in Article 15 the “Non-applicability of German labour and social welfare law” and states: “Pursuant to Article 36 of the ESCB Statute, the conditions of employment of the members of the Executive Board and the employees of the ECB shall not be subject to either the substantive or the procedural labour and social welfare law of the Federal Republic of Germany.” Articles 36.1 and 36.2 of the Statute state: “The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB ... The Court of Justice of the European Union shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.”

Parliament, do not apply. A possible explanation might be that the Delors Committee, which formulated the text of the Maastricht Treaty, consisted of mainly central bankers<sup>6</sup> who may have had an interest in extending independence beyond the scope that was functionally necessary to carry out the tasks and duties of the ECB. Apparently, these drafters did not wish to equate ‘their’ ECB with the standard EU civil service. Whether or not this genealogy is correct in all details, it may serve as an explanation – yet not as a justification – for the contested practices.

#### **1.1.1 Frictions resulting from unbalanced power – The interplay of Board and Council**

An all too extensive concentration of competences and of discretionary power may not always be an advantage. It sometimes leads to dysfunctionalities and internal frictions if too many responsibilities are assigned to an institution. This seems to be true for the ECB’s responsibilities concerning its staff and their employment: the ECB’s Governing Council not only decides on the conditions of employment but also decides on the ECB’s ‘headcount’, i.e. the level of official staffing; however, because a majority of the Council members are the governors of the national central banks, this poses a serious conflict of interest. The governors are simultaneously responsible for their national central bank and for the ECB. They are appointed at the national level, not at the EU level, and thus when it comes to staffing levels and allocating work within the system, they are likely to want to prevent too many resources from the national level being transferred to the ECB. In terms of the allocation of tasks, the Statute contains the principle of operational decentralization (Article 12.1), i.e. anything that can be best handled by the national central banks shall be done by the national central banks. Tasks that can be more effectively, or perhaps even more efficiently, handled by the ECB should be carried out by the ECB according to its statutes; however, in practice, tasks are conferred upon groups of central banks that perform the work for the entire system, e.g. the development and operation of market infrastructures. The Statute itself does not address specific governance structures for such specialized work sharing. In addition, there is little public debate on the governance structures that have developed within the Eurosystem. The governors of the national central banks form the majority in the Governing Council, and in financial matters, voting is weighted by GDP and population. Therefore, the governors of ‘big’ countries carry particular weight in these decisions. The conflict of interest mentioned above plays a particularly intricate role in this context. The Council has set a headcount ceiling while leaving some budgeting discretion to the Board of the ECB, which is relatively free to use ‘non-headcount’ employees, such as temporary agency staff or external service providers. This leads to a high percentage of atypical employment within the ECB and an unprecedented heterogeneity of contract conditions throughout the workforce. Furthermore, the conflicting staffing strategies result in a situation in which highly sensitive domains and the fulfilment of critical tasks must rely on ‘external’ employees who are hired on the basis of contract work or via temporary employment agencies.

#### **1.1.2 Role of the Court of Justice of the European Union**

This legal situation means that the ECB’s employees are neither protected by national labour law nor do they have access to national courts. Instead, the “Court of Justice of the European Union shall have jurisdiction in any dispute between the ECB and its servants within the

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<sup>6</sup> This is Amy Verdun’s (1999) interpretation.

limits and under the conditions laid down in the conditions of employment.”<sup>7</sup> Article 36.2 has important consequences: no local labour court has jurisdiction – only the Court of Justice (ECJ) in Luxemburg. This court is not a specialized labour or industrial court, and it is not only very expensive to conduct a lawsuit there but also involves a quite intricate process to file a lawsuit at all. In order to sue, the claimant normally requires legal advice and the support of a union. They should be aware that the Court will not decide on whether the ECB complies with the Charter or the directives of the EU. The Court will proceed only if the ECB is measured against those regulations the ECB itself has laid down in its conditions of employment. The Court assesses the internal consistency of the ECB’s policy with respect to social and labour rights, but it does not decide on the question of whether this policy conforms to the EU’s proclaimed fundamental rights.

The European Court of Justice supports the position of the ECB not only in formal decisions but also quite often in dismissing applications as legally invalid or as inadmissible on formal grounds. In the case of an appeal against a decision by the ECB not to conclude tariff agreements, the Court dismissed the case with the argument that the claimants were not “individually affected in their rights” because the ECB rejected tariff agreements categorically, i.e. it refused to conclude a tariff agreement with any union (T-238/00 – IPSO and USE v ECB). Therefore, the Court decided not to admit the plea – there was no discrimination and therefore no harm it felt obliged to address.

Even in cases in which the Court explicitly refers to the EU Charter, the decisive argument is whether the ECB’s actions conform to the ECB’s own legal regulations.<sup>8</sup> The Charter as such did not establish a “directly applicable rule of law”; however, the President of the ECB had signed a framework agreement entitled Memorandum of Understanding between the ECB and IPSO on Recognition, Information-sharing and Consultation, and the ECB is now obliged to fulfil this agreement. Therefore, despite occasional judgements in favour of claims to social and participation rights, it must be concluded that the ECJ does not fully serve as an authority for reviewing the conformity of the ECB’s internal regulations with the principles of the Charter.

## 1.2 Governance: Efficiency Problems and Constitutional Anomalies

The ECB’s legal construction is justified by the independence its mandate requires, but its institutional architecture is particularly inflexible as every change requires the consent of all member states. Therefore, some observers consider the European Monetary Union (EMU) a failed construction (Joerges 2015). The problem is that even if every state agrees

7 Maastricht Treaty; Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, Article 36.2.

8 To give an example, IPSO, the union of ECB employees (see below Section III.4), successfully argued against a decision by the ECB concerning the legal status of IT staff (where the union was not informed and not consulted). The decisive fact was not that such information rights were included in Article 27 of the European Charter and in Article 2(d) of Directive 2002/104/EC, but rather that the ECB itself had conceded such rights in a framework agreement with the union. The ECJ judged that the ECB had not complied with its own regulations. “The applicant refers first of all to the right of workers to information and consultation, provided for in Article 27 of the Charter of Fundamental Rights. [...] However, according to the actual wording of Article 27 of the Charter of Fundamental Rights, the exercise of the rights laid down in that article is confined to the cases and conditions provided for by European Union law and national laws and practices [...]. It follows that Article 27 of the Charter of Fundamental Rights, which does not lay down any directly applicable rule of law, is not in itself sufficient to confer on individuals an individual right to consultation and information which they may invoke as such [...]. Consequently, the applicant cannot rely, in this instance, on rights to consultation and information based solely on Article 27 of the Charter of Fundamental Rights.”

with a reform in principle, a veto might serve as an instrument for accomplishing other political or economic goals. Therefore, it seems highly unlikely that the legal situation will change as long as the overall legal framework of the EU persists.

At the same time, it is strictly forbidden for political actors, be they governments, parliaments or the Commission, to give orders, directions or instructions to the ECB – and concomitantly for the ECB to accept them. The intention is to protect the ECB's autonomy in monetary policy, but under present circumstances the ban also serves as a barrier to any efforts to reform other aspects of ECB policy, such as with respect to social and labour rights. Even outside the core issue of monetary policy, the ECB's immunity proves to be a sort of firewall not only against attempts at intimidation by powerful political and economic actors but also against democratic participation.

### **1.2.1 The ECB could act differently**

The structure of the Governing Council and the immutability of the ECB's legal constitution imply that there is no mechanism for compelling the ECB to fully implement the Charter in the sense of establishing enforceable rights. The way in which the principles of Social Europe are adopted is in fact subject to the bank's discretionary power. Even those regulations that proved to be effective on the national level can be ignored in the ECB's self-regulation.

Against this backdrop, it is important to recognize that alternatives are available to the ECB for its handling of the conditions of employment. Even if the Board is not allowed to accept orders or instructions, it nevertheless might follow arguments, including arguments put forward from research and scholarship, from civil society discourse and from political debate; however, accepting arguments might presuppose that the institution implicitly acknowledges that its mandate for regulating the conditions of employment is not as robust as that in the domain of monetary policy. The independence of the Bundesbank, for example, does not presuppose its immunity from Germany's labour law and social security system. The case of the Bundesbank shows that an independent monetary policy is not *prima facie* incompatible with a system respecting social rights as well as individual and collective labour law. Therefore, the ECB's reluctance to establish labour rights is not a question of functional necessity with regard to its institutional mandate or of legal force.

Hence, why does the ECB not follow the Bundesbank, which is its role model in other respects? Why does it instead follow a governance strategy that is quite hostile to labour rights? Article 36 of the Statute does not prevent the ECB from accepting or establishing forms of collective bargaining or from accepting or establishing participation rights based on its own legislation.

Beyond the requirements for executing its monetary policy mandate, there is the question of a constitutional anomaly of the ECB, especially with respect to the separation of powers and the democratic accountability of the ECB as an independent authority legally based on a public mandate. Within the limits of its mandate, the ECB is an autonomous agency, which on the one hand has to make binding decisions and on the other hand is also expected to organize knowledge processes pertaining to possible threats or shocks to economic stability by considering heterodox modelling and analyses.

### 1.2.2 Constitutional overstretch and governance anomalies

The ECB is an independent regulatory authority constitutionally based on a public mandate, but it is obviously not unaffected by the conjuncture of economic and legal reasoning. In fact, it operates in a social and intellectual field (Lebaron 2008; Mudge and Vauchez 2016) which is dominated by two different but nevertheless complementary discourses: the discourse on corporate control and the discourse on New Public Management (in Germany also referred to as 'neues Steuerungsmodell' [Jann and Wegrich 2019]). Both have in common that they developed as regulation strategies which seem to have overcome traditional ideas of bipartite conflicts of interest and therefore will not further pursue concepts of codetermination and economic democracy. The concept of corporate governance (Williamson 2011) is centred on issues of shareholder control, principal-agent relations (Magetti and Papadopoulos 2018), incomplete contracts and the optimal allocation of residual rights. From this perspective, there is no economic argument in favour of extending control rights of the workforce, although it might be possible to achieve positive effects from co-determination by means of informal arrangements or forms of voluntary participation. Conceptions of New Public Management developed in the context of the modernization of the public sector are considered alternatives to traditional forms of direct control and as new methods of open, more participatory forms of coordination; however, the shift to soft law, informality and dialogue collides with ideas of enforceable legal rights.

The ECB's actual practice in staffing and employment matters and with respect to participation is not determined by any given legal regulations; it is more like a question of governance and therefore is influenced by the underlying theoretical models of governance and their normative as well as analytical presuppositions. At the core of the discourse on governance are questions of efficiency rather than of rights, but with respect to efficiency, even critics of collective agreements and of participation rights do not generally argue that these are not generally incompatible with employment rights. They point to possible efficiency arguments in favour of governance rights for employees (MacCain 1980) and at efficiency arguments for collective representation (Davies 2015), or discuss whether employees, on the basis of participations rights, might be motivated to engage in corporation-specific investments (Furubotn 1988; Blair and Stout 2011).

The question here is not primarily about efficiency in a narrow sense as might be appropriate for a private enterprise. Prevailing concepts of governance in the private sector indicate that this is a principal-agent problem, i.e. the question of how the owner may control the directors is not just the core problem of a public institution.<sup>9</sup> The ownership-centred standard interpretation of corporate control is not compatible with a supranational public institution based on international treaties. Residual control rights resulting from incomplete contracts (Grossman and Hart 1986; Hart 2017) that may regulate the performance of "capitalist acts between consenting adults" (Nozick 1974: 163; Lindblom 2009) do not fit well with institutions based on a public mandate incorporating the exercising of tasks presupposing epistemic excellence. Therefore, it seems to be misleading to evaluate the intricacies of the ECB's governance policy exclusively in terms of ownership control and of costs of agency.

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<sup>9</sup> Tucker (2018: 9) argues that "standard p-a accounts do not capture the nature of the relationship when, in choosing to grant independence to the monetary authority or to various regulators, the purpose is formally to insulate policy from shifting political currents."

Nevertheless, with respect to legal and economic discourse on governance, the debate on New Public Management offers further arguments that might be persuasive with respect to the question of social rights. Both lines of argument are not too favourable to employees' participation and union activism, but an ownership and efficiency-centred perspective from corporate management discourse as well as a perspective based on new governance concepts should not simply be transferred to a knowledge-based organization like the ECB. The case of the ECB illustrates that mechanical application of a steering model developed for another type of task and organization proves to be problematic: ownership-centred and accounting-based models of governance do not map the complexity at stake.

The discourse on new governance marked a reaction to the inconveniences of the public sector control paradigm, which had assumed a clear-cut differentiation between the subject of control and its objects or addressees (Mayntz 2008). Now, the addressee has become an active player in the supervision process. For corporations and administrative agencies, this is much more comfortable than receiving instructions or directives or to be the addressee of direct control, but it is a particularly favourable coordination model for corporate actors with a strong bargaining position. The position of representatives of civil society, unions or citizens is admittedly weakened in this scenario. With respect to soft law, informal coordination and open decision-making processes, not all stakes and not all actors are equal. They neither have equal access nor equal opportunities to transform informal dialogue into contracts and enforceable rights. These effects reinforce pre-existing inequalities. The very idea of an independent agency (Puppis et al. 2014; Papadopoulos 2018) presupposes a narrow and concise mandate defined in terms of technical expertise, epistemic authority and professionalism (Tucker 2020). It is not an administrative body executing political directives nor a super-authority beyond democratic principles. The governance of an independent agency may not operate as an 'unelected government'.<sup>10</sup> Yet, under conditions of crisis and when political actors are not prone to making unpopular decisions, the independent agency may feel encouraged to enlarge its mandate by defining new goals formally defined as prerequisites to achieving its established goals and tasks.

When operating outside its core mandate, the ECB faces serious critique, such as with respect to the distributional effects of its decisions (which would require political legitimation beyond a basically technical mandate).<sup>11</sup> It cannot respond simply with 'there is no alternative'. The monolithic media performance might have worked for a while, but it cannot provide support when confronted with distrust and critique based on the language not only of interests but of fundamental rights and when it is lacking transparency and democratic accountability (Brandema 2010) that go far beyond the request for participation within the organization on labour, health and social security issues. It is about the right to engage in academic as well as in public debate without the narrow control of the institution.

These politics of informality disregard the rights of those without social and economic power. While the addressees of regulation are incorporated into the pre-decision discussion process, less powerful actors such as unions, NGOs or initiatives from civil society are viewed primarily as clients of the organization's PR division. Dawson (2015) observed that EU post-crisis governance departs from mechanisms of legal and political accountability

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<sup>10</sup> For the problem of "democratising a non-majoritarian institution", see Tucker (2018); Goldmann (2018); Vauchez (2016); Braun (2018).

<sup>11</sup> On distributive effects cf. Chang (2017).

without substituting them with new principles. This points to a problem that exists for the ECB as well and refers to its constitutional anomaly. Obviously, the open method of coordination is not just a result of the crisis; it seems to be much more of a façade for a policy of governing beyond the law, of de-juridification (Joerges 2008).

### 1.2.3 Dialogue without rights?

Since it is an independent agency based on economic (and legal) expertise and staffed with independent experts who produce reliable information (cf. Tucker 2018: 94), governing the ECB involves tasks that are not really mapped by models developed for ownership control problems or for reforming social bureaucracies or other administrative agencies. The ECB tries to solve the problem of giving its staff a say and respecting its employees' professional competence by committing to an 'intensive social dialogue', but the number of unsolved problems likely only proves how limited and misplaced this governance concept truly is. In particular, the selective effects of informality are ignored: on the topic of social rights, the ECB prefers not to interpret them as enforceable and justiciable rights but more as a sort of guideline for government action.<sup>12</sup> There are no reliable employee participation rights intended in this arrangement: staff representatives have no official role in the recruitment processes, no say in career and promotion decisions or on questions relating to the conversion of contracts and about the choice of staff in general. Furthermore, the Board and Council refuse to accept collective bargaining. The Board of the ECB has committed itself to the principle of 'social dialogue', yet if there is no time or if other problems arise, the staff must – at least temporarily – live without social dialogue or diversity management. The ECB's annual report may provide the number of meetings with the Staff Committee, but this says very little about the concrete outcomes or the quality of the exchange.

The overall picture of social dialogue practised in this context implies relinquishing enforceable rights and displacing social rights by soft law and informality. It can be viewed in the context of a post-crisis displacement of Social Europe that accentuates selective activism, whereas other more traditional social issues are neglected.<sup>13</sup> With respect to substituting formal rights with informal agreements, one observer even speaks of an "auto da fé of social Europe" (Supiot 2016) and describes the Open Method of Coordination (OMC) as a form of post-democratic governance, which is at the same time weak, ineffective and inconsistent, committed to basic economic freedoms and market justice that can be interpreted as an attempt to displace the *acquis*, which leads to a renewed strengthening of economic freedoms and free enterprise (Guibboni 2018a and 2018b).

## 1.3 The Trade Union's Strategies, Aims and Obstacles

Despite the ECB's participation-adverse employment regulations, the International and European Public Service Organisation (IPSO) has been able to organize about 20 per cent of the permanent staff.<sup>14</sup> It took a rather lengthy launch phase and initial funding from the German union ver.di to develop unionized employee representation at the ECB. Strategically, the challenge was at least twofold: demanding participation rights above and beyond the

<sup>12</sup> For the debate on fundamental rights as rights or as principles, see Dawson (2017) and Kornezow (2017).

<sup>13</sup> For the debate on 'selective activism' see Kilpatrick (2018); Robin-Olivier (2018).

<sup>14</sup> Information provided by the IPSO Secretary. Before the integration of the European Banking Supervision in 2015, which changed the structure of employment significantly, IPSO claimed membership of 40 per cent of the permanent staff of the ECB (<https://www.ipso.de/wordpress/#whoware>).



existing legal basis (as explained above) and at the same time overcoming the obvious mobilization hurdles to achieving a collective voice and collective action within a transnational organization.

It is a widely accepted idea that highly skilled employees are less attracted to unions. The main argument is their individual bargaining power, following the assumption that professional expertise and reputation provide a solid starting point for individually negotiating working terms and conditions (Abel and Pries 2007; Pernicka et al. 2018). In the wake of structural changes in the labour market and the rise of so-called knowledge work, the negative consequences of individualized labour market participation have become apparent. In addition to the individual bargaining power argument, the lack of a collective organization and difficulties in building collective bargaining power have become apparent (Camacho and Rhodes 2015). Compared to workers in traditional industry, collective mobilization to form a critical mass able to make demands on employers is more likely to be undermined by the plurality of professional identities and the heterogeneity of working conditions.

Both obstacles became apparent at the ECB: The ECB's staff is characterized by highly skilled employees with heterogeneous backgrounds in terms of nationality and professional specialization. Another factor undermining the formation of a collective interest is the plurality of contract conditions described in Section III.1, and last but not least, a divisive workplace culture characterized by favouritism and exclusive networks (presumably with national background also playing a role). In addition, the usually quite heavy workload does not leave much room for critical thinking and non-conformist action.

To deal with these barriers to organizing and to be able to collectively represent workers' interests, union strategies need to reconnect individual concerns with structural problems. Therefore, the empirical findings of the study suggest distinguishing between more traditional approaches to unionizing employee representation, such as focusing on social security or occupational health, and more unconventional approaches, such as cooperating with NGOs, addressing the working culture in a critical manner and in particular addressing employees' professional identity.

### **1.3.1 Adapting traditional approaches of employee representation**

Attempts to change the ECB pension scheme to the disadvantage of many employees in the summer of 2009 proved to be a common ground for collective action (Die Presse 2009). The announcement mobilized the first strike to strengthen staff rights and attracted international media attention. For the International and European Public Services Organisation (IPSO), this conflict was the launch pad for further establishing itself in representing employee interests and as a more serious counterpart to ECB management. The strike could be characterized as an attempt at traditional unionism in the non-traditional context of a transnational public service organization, which was successful because a significant number of employees faced a deterioration in their social security. Thus, the union's first approach addressed the issue of social security. Obviously, even highly paid employees with a strong labour market position appreciate stable working conditions, institutionalized social security and robust protection against life's risks. In the past, experiences of unfairness and overwork had led to employees' disillusionment and critical distance to the ECB's ideology of performance orientation, expressed in mottos like 'high demands and high rewards' promoted by Human Resource Management, but an attack on the pension scheme was necessary to connect individual experiences with collective protest.

A second approach is related to the heterogeneity of employment contracts throughout the ECB workforce. As explained above, atypical employment is more or less standard in the bank. The range is from delegates from national banks with permanent civil service contracts to ECB employees with different types of fixed-term contracts to contractors working for external service providers or temporary employment agencies. In fact, only half of the workforce is directly contracted with the ECB. This segregation is a direct outcome of the lack of regulation and labour rights, which is as important as it is difficult to tackle by the union. Insecurity and arbitrariness of employment conditions counteract employees' abilities to criticize or demand structural reforms in general. Furthermore, an enduring controversial issue is whether IPSO is even allowed to represent the whole of the ECB workforce or only employees who have an employment contract with the bank. In some cases, supporting individual lawsuits has been the only way to challenge contract conditions, which is very cost intensive. Obviously, it is central to the union's approach at the ECB to challenge management's view and generally to improve contract conditions.

A third approach focuses on health risks, particularly those relating to the heavy workload and mental stress faced by ECB employees. Although most employees can be considered privileged in terms of status and financial rewards, the working culture at the ECB is described as exhausting. Aspects mentioned here are overlong working hours and an erosion of the boundaries between work and private life due to the expectation of permanent availability and reactivity via phone and email. Interviewees said that the bank's working style, which was developed before the euro was launched, has never really transformed into a more sustainable working culture. Another influence could be the work attitude in the neighbouring field of investment banking characterized by the admiration of male can-do qualities, constant attention and high adrenalin levels.

The combination of a working culture led by constant high performance twinned with presenteeism is understood by ECB employees as the cause of the high risk of mental breakdown or burnout. The experience of a loss of control, mental illness or simply not being able to meet expectations is addressed by the employees' representation. In this dimension, mobilization is based on giving advice, offering support to the person concerned, and at the same time, politicizing the structural reasons for individual problems. From a systematic perspective, the very traditional union topic of addressing individual health risks is translated into a structural problem resulting from the specific pressures on the highly skilled workers in a risk-ignorant environment.

The union offers confidential advice and individual support to colleagues who experience such negative impacts of the working culture. This approach is important and increased the union's reputation as a true agent of employees' concerns. At the same time, it is highly resource intensive, and it is difficult to politicize the underlying problem without exposing individual employees who are in a vulnerable situation. This could be one reason why it took an ECB employee's suicide before further progress towards political mobilization could be made. The tragic incident forced leadership to recognize mental health problems and work overload (Der Spiegel 2015; Lauer 2015). A survey was conducted to shed light on the problem and to determine the predisposition of ECB employees towards mental health risks, such as burnout and depression. The alarming outcome of the survey strengthened IPSO's position as a collective representative in two ways: encouraging employees to trust the union representatives and strengthening its role as a negotiator with ECB management.

A fourth approach also refers to the above-mentioned stress levels and related health problems. Not only the workload and its intensity but also the working culture at the ECB lead to mental stress and employees' frustration and exhaustion. The working culture is characterized as highly unsatisfying due to a lack of fairness and transparency. Highly skilled employees with professional expertise believe that they have a certain responsibility for the results of their work, whereas interviewees state that ECB employees more frequently face a lack of transparency with regard to the further use of their findings. This results in the view that the evaluation of their work performance is not transparent or fair. Individual work and promotions seem to depend on the goodwill of superiors rather than on professional standards. This favouritism seems to be a source of stress and discontent, which the employee representation is attempting to transform into collective mobilization.

Overall, the union gained popularity by giving personal support and legal advice and by addressing the structural foundation of unfairness; however, as described, IPSO must often consider individual lawsuits to support employees and to promote fair treatment, which consume significant resources and are difficult as the affected employees may be intimidated by personal exposure. This is particularly the case with regard to fixed-term employees, who are torn between the need for support and further jeopardizing their positions within the organization by demanding decent working conditions.

### **1.3.2 An innovative approach to mobilization: Addressing the epistemic community**

In addition to adapting traditional approaches to employee representation to the organizational framework of the ECB, the union also developed more unconventional paths towards interest representation. In a series of seminars called 'IPSONomics' as well as other presentations and cultural events, the union initiated a discourse on the role and impact of monetary policies, macroeconomic developments and general issues in the context of social change, globalization and capitalism. Examples include a lunch-break lecture with Thomas Piketty and watching the Costa-Gavras film *Adults in the Room* (2019) in the presence of the director during IPSO movie nights at the ECB tower. Of course, unions have always positioned themselves with regard to social policy; however, in this case, debating questions related to the bank's socio-economic environment with international scholars, experts and NGOs serves the essential aims of collective action. First, the union became a voice to be heard outside the bank, in particular because IPSO members also engage in related debates in other contexts. Even more important was the initiation of an internal discussion on the role and societal function of the ECB. This approach takes into account the highly skilled professionals' desire for improved recognition of their work and puts the union's different strategies for organizing and representing employees into the context of democratic participation in a public institution.

While specialist knowledge is traditionally understood as a resource for exclusionary social closure (Parkin 1981), its associative potential is often underestimated. The conflict between employees' identification with their professional expertise and the tight technocratic organization of the bank is key to the ECB union's approach. In sociological terms, the situation of employees with specific expertise who are integrated into a bureaucratic organization can be described as 'situated professionalism' (Noordegraaf 2007; Schnell 2017). Situated professionalism represents a hybrid between two contradictory modes of controlling work: professionalism and bureaucratic hierarchy. While professionalism is defined by specialized knowledge applied to societally relevant problems and therefore requires a certain

degree of autonomy and discretion, bureaucratic organizations are defined by strictly regulated hierarchies and top-down decision-making. The tension between these principles became apparent in the interviews with ECB employees, particularly regarding the devaluation of their professional expertise, resulting in a feeling of status uncertainty and outright dependency on superiors. The working culture is described as inadequate and dysfunctional with regard to the complexity of the tasks employees must perform and the responsibility implied by working for such a powerful institution. The bargaining power argument, which regards highly skilled work from a purely instrumental perspective (professional skills are solely exploited for monetary reasons), proves to be too narrow in this context. Instead, working in an environment like the ECB might be better understood in terms of professional work, which is based on internalized knowledge and conveys intrinsic motivation and professional identities. The empirical exploration indicates that the choice of a career in the public sector is often shaped by the appeal of societal relevance and responsibility. Therefore, approaches to mobilizing employees within this type of organization must connect the demand for democratic participation with a critique of a technocratic working culture.

Hence, the union's successful development within the ECB cannot be understood without its strategy for facilitating an intellectual debate across the disciplines and a space for critical thinking within the bank. Legal experts and economists as well as social scientists, IT experts and other occupational groups are invited to reflect on and discuss the organizational segregation within the bank. The demand for participation within this type of organization refers to employees' experiences of unfairness as well as to the nature of tasks this type of transnational organization must fulfil. The combination of institutional independence and public responsibility theoretically requires a balance between bureaucratic organization and epistemic community to guarantee organizational reflexivity and self-regulation. Facilitating internal discussions and collegial exchanges serves both functional and social aims: it initiates the collective creation and justification of knowledge while helping to overcome an individualizing work culture. A shared reflection on the overall role of the institution and reactivating the suppressed dimension of professionalism function to a certain degree as a counterbalance to the dividedness, heterogeneity or structural atomization of employees (Köngeter 2009; Schützeichel 2018; Seabrooke 2014). The empirical findings indicate that the union's accomplishments within the given institutional framework are still quite limited; however, individual frustrations about the technocratic handling of knowledge, favouritism and the lack of serious interdisciplinary exchanges became addressable as a shared structural problem.

### **1.3.3 Limitations to employees' representation**

The explorative material collected by the study leads to the overall assumption that the union developed an effective framework for attracting employees and for overcoming the very first hurdle of the individualizing work culture (see Svenson 2006). With regard to the lack of institutionalized participation, it is still a challenge to translate these quite successful attempts at re-collectivization into collective action.

Because the institutional architecture does not include the concept of independent employee representation outside of a staff committee, the union's scope for manoeuvre is quite narrow. The 'social dialogue' does not provide any effective procedures for dispute or conflict resolution and does not lead to binding obligations on management. In 2008, IPSO negotiated a Memorandum of Understanding, which symbolized a first attempt to recognize

the union at the ECB.<sup>15</sup> Still, the compromise achieved in this memorandum does not provide reliable participation rights.<sup>16</sup> It provides information and allows consultation but only by written statement and not in person during meetings of decision-making bodies. A discussion in the sense of an oral exchange of arguments back and forth is not foreseen. Obviously, the main problem with this type of non-proprietary agreement is that it can be terminated by one party at any time. In the summer of 2020, ECB management threatened the union that it would revoke the Memorandum of Understanding between IPSO and ECB.

The strategies described above for organizing ECB employees within a union can be understood as a historical reconstruction and interpretation of the organization's development over the last two decades. Of course, the concept 'union' is anything but a conclusive definition. In fact, the transnational character of the organization is also reflected in IPSO. Activists from different traditions of unionism tend to interpret the situation and collective action differently. The German idea of co-determination played an important role in the development of the union because it was influenced by the German context. Of course, other concepts of solidarity and collective action are advocated within the union, which leads to conceptual debates and potential conflicts. In addition, a competing new employee initiative was founded recently, which pursues a less conflict-orientated, more 'management-friendly' approach. Although this initiative is not very successful so far, its emergence shows the risk of further splitting the workforce and weakening attempts at association.

As explained with regard to the union's strategies, mobilizing employees is challenging and encounters limitations as well. The working culture, which is based on strict hierarchical ranks, personal dependencies and – in contradiction to the omnipresent diversity rhetoric – a male can-do attitude, promotes individualism and conformity. If employees are encouraged to articulate demands for participation and work rights, this is most often rooted in their experiences at previous workplaces or earlier influences. Professional and also political socialization affect how working conditions are perceived, so that specialist disciplinary and generational factors have to be considered with regard to the probability of collective mobilization. In particular, employees who have experienced the privileges of a traditional civil service career in terms of job security and retirement provision seem to be more conscious of labour standards and working rights and tend to commit to unionism and employee representation. Generally speaking, the union gathers employees with a strong public service identity who develop a critical perspective on the institutional governance principles, recognize conflicts and seek solidarity and collective association. On the other hand, employees who have been socialized in an individualizing working regime and have adapted the competitive 'can-do' attitude will be difficult to mobilize for collective action. In contrast to situated professionalism, which embodies the contradictions of professionalism and technocracy, another figure can be observed in this context, which could be described as a new type of transnational legionnaire who pursues a career path through European institutions. These employees cope with fixed-term contracts by considering their stays

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15 The Memorandum of Understanding from 2008 includes agreements between IPSO and the ECB on providing information, early involvement and consultation, which were extended in 2011. The Memorandum implies the union's role as an employee representative, while previous regulations assumed that employees are solely represented by the Staff Committee.

16 Apparently, the Memorandum refers to the "principles contained in the Charter" and not explicitly to enforceable rights.

within the bank proactively as a temporary job with a positive impact on their CV and are less likely to oppose restrictive employment conditions.

To overcome the hurdles to collective action at the ECB, the union has pursued strategies which combine traditional unionist goals, such as addressing overall employment conditions with regard to basic risks, health and social security, with a specific approach addressing the employees' professional identity as experts and public servants. While the structural employment conditions and the working culture at the ECB tend to individualize employees, discussions on the purpose and consequences of ECB policies frame a common interest. The intellectual reflection on the broader context of working for the ECB seems to strengthen the mobilizing power resulting from concrete social conflicts. Furthermore, addressing the epistemic community also strengthens the corrective measures within an organization with a particular public responsibility, such as the ECB.

#### **1.4 Conclusions: Enabling independence by participation?**

One of the interesting aspects of the ECB case is that the organization is involved in European social policy in at least in two different ways. On the one hand, the ECB promoted the dismantling of social security and workers' rights in several European countries in response to the economic crisis (Rödl and Callsen 2020). On the other hand, reliable labour rights have been more or less abolished within the bank as in many supranational organizations all across Europe; however, paradoxically, the ECB's internal and external democratic deficits could be viewed as one of the reasons that the union IPSO could become successfully established over recent decades.

The combination of more traditional approaches to employee representation and strategies to develop collective interests in a context that for many reasons confirms segregation within the workforce is key to understanding a quite successful mobilization. Furthermore, the union addresses the contradictory and dysfunctional aspects of situated professionalism, which are perpetuated by the strict confidentiality regulations at the ECB and critique from the outside. A space for critical thinking not only serves as an outlet for frustrated employees but also promotes an internal public.

Setting and implementing monetary policy for the Eurozone is a politically highly sensitive task which should be executed on the basis of professional expertise unbiased from particularistic interests. According to this understanding of the ECB mission, complex issues, such as price stability within the Eurozone, need to be sheltered from political interest and power dynamics and cannot simply be left to parliamentary majority decisions. At the same time, this perspective provides the justification for treating strategic decisions of the ECB confidentially, given their impact on the economy and financial markets. Given all plausible arguments for its institutional architecture as an independent agency, by refusing public control as well as any attempts at internal participation, the ECB incurs legitimate criticism.

The unionist approach addresses the epistemic community within the ECB while initiating a debate across disciplines and specializations and beyond inflexible hierarchies and empty efficiency standards. For a broader socio-political perspective, which also considers the consequences for the general public, external experts, international scholars and NGO representatives are invited to this forum. This approach is exemplary for the development of contemporary unionist politics on a transnational level. It also shows that professionalism matters for collective mobilization, which has traditionally focused on the contractual

aspects of employment conditions. Addressing the epistemic character of the work and the need for collegial exchange forms a social cement within the heterogeneous and fragmented workforce and therefore a basis for solidarity. This is the foundation for developing a wider perspective and resistance against technocratic instrumentalization.

Otherwise, of course, the union's development within the ECB is to be viewed as another puzzle – not less but also not more – with regard to the institutional configuration of a 'Social Europe'. As exemplified in this chapter, there is room for manoeuvre with regard to the implementation of social standards even under the current ECB framework. But as long as democratic participation in supranational organizations is not legally secured, unionist accomplishments remain fragile. Beyond the technical side of social rights and labour relations, the example of the ECB represents a broader meaning of democratization, which implies that a positive and productive relation to goals and targets formulated by the EU also requires a reflection on the conflicts inherent to the implementation process. Therefore, the mobilization from within the institution and public calls for democracy and social rights are somehow interrelated, which needs to be further investigated. The obvious question raised while studying the employment conditions and labour relations at the ECB is: How can a European institution support or respect social policy regulations in Member States if it ignores basic employment rights within its own organization? This could be translated into the broader question: How should an institution answer the demands of the people if it is only equipped with an elaborate sensorium for financial markets?

## **2 Representing European Public Servants. Why professionalism is a matter of unionism (Christiane Schnell)**

### **Introduction**

Sociological theories traditionally differentiate between two forms of collective action in the labour market: Association or usurpation, and social closure (see Selander 1990). Labour unions represent the association and usurpation strategy. They attempt to organize a critical mass which can be mobilized for strikes. Workers' potential to stop the production process defines their bargaining power, whereas social closure is a strategy pursued by occupational groups who are able to monopolize a specific field of work and jurisdiction. Usually these occupations are based on academic knowledge that plays a key role to society (Parsons 1965). Closing the market and avoiding competition is their way to establish and defend a privileged labour market position. Both types of collective action in the labour market are an expression of social status: those at the bottom of the social hierarchy need to defend their interests with solidarity, while those at the top of the labour market are in the position to defend the exclusivity of their field of work. Obviously both perspectives correspond with opposing political ideologies as the progressive fight for social justice versus a conservative attempt to stabilize social inequality.

But of course these ideal-typical models of organizing work have changed and began to interrelate with each other over the course of time. The economic transformation from industrial production to service work and the rising importance of knowledge work led to "hybridization" which combines aspects of professional work and industrial labour (Noordegraaf 2007). Even though this phenomenon is anything but new, it has received little

attention over many decades. In Germany this changed when employees with occupations such as pilots and train drivers organized themselves separately from the transport trade union in so called 'Berufsgewerkschaften' (occupational trade unions). Breaking with solidarity within the transport sector was heavily criticized by the sector's trade unions and is still discussed as a confirmation that single occupations or professional interests act as splitters and pose a danger to the trade union movement as a whole. The occupational unions exploit their indispensable role within the (transport) system to enforce their claims and leave weaker employees behind. But, and this is the lesson learned particularly from our research on the ECB, there is also an underestimated productive combination of labour and professionalism with regard to trade union matters.

In the following I will revisit the concept of professional work and its ongoing changes over recent decades. In doing so, I will characterize work and employment within EU institutions with the term 'situated professionalism' (2.1). I am referring to findings from our ETUI-funded study "Challenges to employees' interest representation at the supranational level" to connect the diagnosis of situated professionalism to collective interest representation. The ECB will be discussed as an institution with a dual structure, comprising an epistemic community and a bureaucratic organization. Based on our empirical material I am going to describe three dimensions of conflict or struggle, resulting from a work regime shaped by a technocratic bias (2.2) and analyse the capacity for collective mobilization within the ECB as a combination of traditional and new strategies, which refer to the professional self-conception of public servants in a supranational institution (2.3). In the concluding section, professionalism is considered as a dimension of employees' interests and therefore a matter for contemporary unionism (2.4).

## 2.1 'Situated professionalism' in European institutions

The concept of the professions stems from the Anglo-Saxon context and is comparable with the continental European notion of *profession libérale* or *freie Berufe*. But the sociological term professionalism abstracts from various manifestations in different institutional contexts and characterizes expert work of high relevance to society. Professionalism is based on theoretical knowledge and practical experience in dealing with grave societal problems such as illness in medicine or injustice in the legal profession. The ideal-typical profession has always been medicine, which stands for the combination of specialized knowledge with a universal value orientation (Parsons 1965). Specialist knowledge is associated with power and responsibility, since society, personified in an individual client or patient, is vulnerable and could be easily exploited if professionals were only to follow their self-interest. In order to secure and reproduce their knowledge, professions traditionally claim occupational autonomy and independence from bureaucratic hierarchies and market constraints. Since only those who are part of the epistemic community that shares the specialist knowledge and professional experience are able to define standards or evaluate performance, professions have developed means for internal oversight through collegial self-regulation.

But of course this idea of 'pure professionalism' has come under pressure due to socio-economic change over recent decades. Economization, welfare state transformations, new governance and the rise of knowledge work across the labour market have changed the picture fundamentally. Professional work is currently much more in the focus of external control – which will be discussed below – and professionals are more often employed by public or private organizations. One concept derived from this development is 'situated



professionalism', describing a contemporary manifestation of the tension between knowledge work and bureaucracy. And this figure might be a great eye-opener when studying ECB employees and other highly qualified professionals working for public institutions within the EU.

Situated professionalism refers to employees who conceive of themselves as professionals, have an academic education, have experienced professional socialization, possess expertise relating to crucial societal problems, but who work in hierarchical organizations. In our empirical material, the following trait became very clear: individuals choose a public sector career based on their specific personal value orientation. This is explained by the fact that the public servant career paths is, compared to private sector careers, often less rewarding in monetary terms. Most of the highly skilled employees we talked to have a strong sense of relevance and responsibility due to the general mission of their institution and its role within Europe. At the same time, they start with a high level of confidence about their value to the organization and expect recognition for their expertise and commitment. But the actual working culture at the ECB clashes with these expectations. Instead of professional reflexivity and academic discussions of findings and their further implications, the organization seems to reward employees' subordination in a strictly hierarchical system, opportunism with regard to superiors and professional trade-offs in order to meet pre-set political objectives.

## **2.2 Employees' struggles and the future of the public servant – empirical findings from the ECB**

The material allowed a deeper insight into the employment situation at the ECB and the conflicts employees face. Four, in many ways interrelated contradictions have to be mentioned.

### **2.2.1 De-professionalization**

The first observation relates to the above-mentioned clash between professional background and self-conception on the one hand and the hierarchical working culture at the ECB on the other. Most of the employees are not only highly skilled specialists but also driven by the idea of dedicating their work and career to the European project. But this motive is not further supported by the institutional structures. On the contrary, the working situation is described far more as a bureaucratic organization, which seems particularly static with regard to the division of labour and hierarchies. Obviously, strict obligations to secrecy related to the ECB's monetary policy play a role here, since they also strengthen internal boundaries at the institution and lead to employees being more dependent on their direct superiors. There are only very few opportunities for collegial exchange, instead it seems that in most divisions of the bank work is conducted in a very individualized manner. Overall, most of the employees experience disillusionment and frustration along two dimensions: Coming from an academic background and a successful career, some experience an invisible downgrading, in particular if their supervisor lacks professional authority. In addition, the interviewees highlight the dysfunctionality of this working culture since the complex research and problems they are working on require discussion and contextualization. Both dynamics could be interpreted sociologically as de-professionalization.

### 2.2.2 Over-exhaustion

Working conditions at the ECB are described as mentally and physically exhausting. Employees report high work intensity and overly long working hours due to a rising workload and a culture of presenteeism. They are regularly expected to stay in standby mode even after hours, resulting in further difficulties in balancing work and private life. Tensions arise from dependency on the personal goodwill of superiors and frustration results from the invisible downgrading and de-professionalization. This might be particularly true for the majority of contract workers and fixed-term employees, who feel constantly on trial. The combination of a heavy workload with a lack of resonance is a very common cause of burnout and depression, which was confirmed by a survey conducted at the ECB. In particular, highly motivated professionals, for whom their work is their calling, often lack self-protective psychological mechanisms. At the same time, employees do not really profit from the energizing rewards of a satisfying job, so that the vicious circle of overworking and distress can accelerate easily.

### 2.2.3 Mental resignation

A third consequence resulting from the working culture at the ECB is that employees choose the exit option, meeting frustration and exhaustion with mental resignation. In contrast to a superficial discourse of performance orientation and open communication in the bank and also to the knowledge that a narrow instrumental working attitude is counterproductive for complex problem solving, employees are directly and indirectly encouraged just to focus on the very concrete tasks at hand. Thinking outside the box is not desired. Instead of critical thinking, a universalistic value orientation, pugnacious dedication to the mission of the institution, a very individualistic work attitude and career orientation are promoted.

### 2.2.4 Dismantling the 'public servant'

Employees' struggles with the work regime – experiences of de-professionalization, health issues and mental resignation – are the result of a cultural shock for those who internalized professional values throughout their academic education and previous career. But the current tension between technocracy and professionalism might vanish with a new generation of employees who escape the structural contradictions and the risk of discontinuance due to fixed-term labour by proactive and consistent self-sufficiency. In our material we find several indications that some of the younger employees, who were professionally socialized during the neoliberal era and in a New Public Management-shaped institutional setting, follow a different career path, focusing on their individual bargaining power and their chances for upward mobility. They have a high level of technical expertise, have internalized an instrumental work motivation and are hardly or not at all interested in a permanent position. The ECB looks good on their CV, but they do not identify with the institution and its societal role. Instead, they are working in the way that mercenaries do. Since they have been notoriously individualized, they are obviously not interested in and do not feel in the need to organize and to fight for collective interests. If this generation of new legionnaires substitutes for the old idea of the public servant, it might be understood as a victory for technocracy, but probably not for the European project.

In the context of 'situated professionalism' it can be argued that the lack of regulations and democratic participation have led to a situation which is not sustainable. The status quo tends to over-exhaust employees' physical and mental capacities and contradicts genuine elements of professionalism such as critical thinking and the contextualization of

specialized knowledge and scientific findings. The tension between professional work attitude and the need for exchange within an epistemic community to further develop reflexivity on the one hand and a bureaucratic institution on the other, seems to be solved in favour of hierarchy and strict control. Criticizing and attempting to change this situation is not only morally motivated but very much touches the functioning of the institution itself. From a societal perspective, the struggles employees go through are important, because they indicate a need for institutional change.

### **2.3 Collective mobilization within the ECB**

Given the employment constellation at European institutions, which is characterized by situated professionalism, collective mobilization needs to combine traditional and new strategies. The International and European Public Service Organisation (IPSO) developed an approach which exemplifies this requirement excellently. Referring to our material, four pillars of collective mobilization can be distinguished systematically.

#### **2.3.1 Fighting for social security**

After a rather lengthy launch phase, supported by the German union ver.di, the success of the ECB union IPSO cannot be explained without the mobilization leading to the first strike to strengthen employees' rights. In June 2009, 500 staff members participated in the strike and attracted international media attention by their actions. Attempts to change the pension scheme with adverse effects for many ECB employees mobilized employees not only to strike but also to join the union. This approach could be characterized as an attempt at traditional unionism in a non-traditional organization and it showed that unionism becomes an option, even in an organization like the ECB, when a significant number of employees face a collective deterioration in their social security. For IPSO this conflict was the kick-off for further establishing themselves as a legitimate representative of employees' interests and as a more serious counterpart to the ECB management.

#### **2.3.2 Translating individual risks into structural problems**

The second dimension of political mobilization is connected to health risks, particularly due to the heavy workload and mental stress experienced by ECB employees. Even though most employees can be considered privileged in terms of status and financial rewards, the working culture at the ECB is described as exhausting. Frequently mentioned aspects include overly long working hours and eroding boundaries between work and private life due to the expectation of being on permanent standby and reacting promptly to calls and emails. Interviewees said that the campaign working style, which primarily developed before the euro was launched, has never been really transformed into a more sustainable working culture. Another influence might be the work attitude in the neighbouring field of investment banking and in large financial law firms and international consultancies, characterized by the admiration of male can-do qualities, constant attention and high adrenalin levels.

The combination of a working culture led by constant high performance twinned with presenteeism is understood as a cause for the high risk of mental breakdown or burnout among ECB employees. The experience of a loss of control, mental illness or just not being able to meet expectations is addressed by the employees' representation. In this dimension mobilization is based on giving advice, offering support to the person concerned and at the same time politicizing the structural reasons for individual problems. In a systematic perspective,

the very traditional topic for unions of addressing individual health risks is translated into a structural problem, resulting from the specific pressures on the highly skilled workers in a risk-ignorant environment.

Since IPSO first of all offers advice and individual support to colleagues, a systematic limitation to their mobilization potential also comes to the fore: even though the connection between individual cases and collective problems became more transparent over time and the union's reputation as a true agent of employees' concerns increased, there are hidden barriers against the conversion of outrage into collective power. Without a regulative framework, individual cases could not just add up to a (quantitative) relevant problem or concern. Furthermore, affected employees usually ask for discrete support from employee representatives and might be even more afraid of being exposed than is already typical in cases of mental health problems.

Against this backdrop, it was union activists in the ECB Staff Committee who launched a dedicated psychological test-survey to detect health risks at work in the ECB. The findings of this survey seemed to have nudged the ECB leadership to verify for themselves the possible existence of mental health problems and work overload at the ECB. The survey was conducted to shed light on the problem and determine the ECB employees' predisposition to mental health risks such as burnout and depression. The alarming outcome of the survey strengthened IPSO's and the Staff Committee's credibility as observers and analysts of the work-life situation within the ECB and could perhaps encourage employees' mobilization and strengthen the union's role as intermediary vis-à-vis the ECB management.

### **2.3.3 Politicizing an unsustainable working culture**

A third dimension of mobilization is connected to the stress level and related health problems described above. Our material shows a close link between mental stress and employees' frustration and exhaustion. Not only the workload and intensity are mentioned, but the working culture is also characterized as very unsatisfying, due to a lack of fairness and transparency. Highly skilled employees with professional expertise usually feel a certain responsibility for the results of their work, whereas interviewees describe that ECB employees more often face a lack of transparency about the further processing of their findings. Not knowing how work results are processed also corresponds with experiences of a non-transparent evaluation of work performance which is perceived as unfair. Individual work assignments and promotions seem to depend on the goodwill of superiors rather than on professional quality or standards. This favouritism seems to be a source of stress and discontent, which the employees' representation tries to transform into collective mobilization.

The union gained popularity by giving advice and addressing the structural foundation of unfairness. But as described above, IPSO often has to consider individual lawsuits to support employees and promote fair treatment, which is difficult, as the affected employees might be afraid of the personal exposure in a precedence case. This becomes particularly evident with regard to fixed-term employees, who are torn between the need for support and the risk of their position becoming even more insecure if they demand fair working conditions.

### **2.3.4 Forming an epistemic community**

The fourth dimension of collective mobilization ties together the social and the professional dimensions of employee representation at the ECB. IPSO initiated a series of talks, presentations and cultural events to create a space for reflection and discussion on questions

related to the socio-economic environment, the role and impact of monetary policies, macro-economic developments and general issues in the context of social change, globalization and capitalism. With regard to the often-addressed imbalance between the public relevance and responsibility of the ECB as one of the most powerful institutions in Europe and the technocratic handling of knowledge and functions within the ECB, the union meets the demand of highly skilled professionals for further reflection on their work.

IPSO's capacity for collective mobilization results from a combination of traditional union strategies, addressing overall employment conditions with regard to basic risks, health and social security, and focusing on the specific problems of ECB employees. Moreover, the employees' professional identity as experts and public servants in a democratic European Union is addressed by offering a space for reflection and discussion. While the structural employment conditions and the working culture at the ECB tend to individualize employees, questions about the purpose and consequences of ECB policies form an area of common interest. The intellectual reflection about the broader context of working at the ECB seems to strengthen the mobilizing power resulting from concrete social conflicts.

The explorative material collected by our study leads to the overall assessment that the union developed a very effective framework for attracting employees and for overcoming the very first hurdle posed by the individualizing and isolating working culture. Given the lack of institutionalized participation, it is still a challenge to translate these quite successful attempts at re-collectivization into effective change. The pre-democratic working culture, favouring a male can-do attitude, in combination with extensive use of short-term employment contracts and other types of atypical employment have to be seen as restraining factors that are difficult to overcome.

#### **2.4 Conclusions: Professionalism as a source of critique and solidarity**

The employment situation at the ECB and probably other EU institutions as well can be described as 'situated professionalism', combining the characteristics of expert work with the logics and constraints of multileveled bureaucratic organizations. In contrast to an understanding of professionalism as a labour market strategy based on exclusionary social closure and opposing union strategies of solidarity and collective mobilization, the professional self-conception of public servants within this institutional framework has a progressive impetus. It conflicts with an overall technocratic and undemocratic work regime and does not easily come to an arrangement with a superficial discourse of 'new governance'. Instead, professionalism is an important source of critique, in particular with regard to institutional requirements such as accountability and societal responsibility. Furthermore, the professional self-conception is a foundation for re-collectivizing highly skilled employees working in a systematically individualizing working culture. Therefore, professionalism *is* a matter for unionism.

The union IPSO exemplifies the development of employee representation strategies to achieve democratic participation and sustainable working conditions, which are an important contribution to a contemporary understanding of unionism. In particular, the combination of traditional unionist aims and strategies focusing on collective rights and social security with new strategies addressing the lack of space for professional reflexivity and critical thinking is innovative and evidently effective.

Of course, employees at the European Central Bank or other European institutions are positioned at the privileged end of the labour market. But their demand for collective rights and democratic participation as well as the critique of an overly technocratic regime at European institutions is of general importance for the further development of the European project.

### **3 Democratizing Europe? Working conditions, employee participation and interest representation at the ECB (Hermann Kocyba)**

My analysis of governance practices and participation rights at the European Central Bank starts with the legal framework for working relations at the ECB (3.1). In a second step I refer to specific governance practices that appear detrimental to staff participation at the ECB and their consequences for employee interest representation (3.2). In a third step I describe the constraints on union activism and the role of legal enforcement of claims related to employees' collective and individual rights (3.3). Against this backdrop, I will – in a fourth part – tackle the role of the Court of Justice of the European Union (ECJ) with respect to claims for democratic participation and fundamental rights defined by the Charter of Fundamental Rights of the European Union (3.4).

With this review of the governance situation and resulting practices, I would like to facilitate the identification of possible similarities and differences in the respective situations at different EU institutions – or at international institutions such as the European Patent Office (EPO). At the same time, such a comparison between institutions may also shed light on the particularities of the ECB. The objective is to discuss and identify perspectives of interest common to staff representation in international organizations and thus to contribute to an ongoing broader debate on civil rights as well as employee rights within international agencies that understand themselves as knowledge organizations. (Cf. Ellermann 2001; Weaver 2007; Christian 2022)

#### **3.1 The legal framework**

The Statute of the European System of Central Banks (ESCB) and the ECB (hereafter 'the Statute'), which came into being as part of the Maastricht Treaty, states in Article 36.1: "The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB." On this basis, the ECB acts not only as an employer, but also – in deciding on the legal conditions for employment – as a legislator. This exceptional combination of roles (inconsistent with the democratic principle of the separation of powers) is not functionally necessary in order to fulfil the ECB's tasks (to maintain price stability and to carry out the other tasks conferred upon the ECB). This follows in my view without doubt from the Treaty on the Functioning of the European Union (TFEU) (Article 130) and Article 7 of the Statute which both state:

when exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and this Statute, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body.

The terms “conferred tasks and duties” mentioned are the conduct of monetary policy and of all the other tasks conferred upon the ECB. These tasks and duties clearly do not include the setting of civil service or labour law.

The independence of the Bundesbank was perfectly compatible with the application of German general labour law and civil service law (and, I take for granted, the same remark applies to the legal situation in all other EU Member States). Why then does the ECB’s Governing Council have this extraordinary power? The answer, of course, is not that the Council is composed of experts in labour or civil service law. There is a fact that could lead to a plausible explanation: the ‘author’ of this part of the Treaty, the Delors Committee, was mostly composed of central bankers (cf. Verdun 1999). These persons may have had an interest in extending the notion and thus also the practice of ‘independence’ beyond the scope that was functionally necessary to carry out the tasks and duties of the ECB without undue influence. There was, at the time, no problem whatsoever, for the negotiators of the Maastricht Treaty to identify the appropriate legislative body for the formulation and development of the ECB staff’s conditions of employment: Commission, Council and European Parliament had already for many years legislated on the “Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union”. Concededly, the EU Parliament has and had only weak competencies in the process of this law-making and that apparently the drafters did not wish to equate ‘their’ ECB with the ‘ordinary’ EU civil service. Now, twenty years into ECB legislation and labour governance, the ECB’s Governing Council and Executive Board – as it looks to me – actually seem to be quite unhappy with this situation and their duties. That may perhaps be one of the reasons why they established the position of a ‘Chief Services Officer’. This function, not foreseen in the TFEU, aims to keep HR quarrels and matters out of the Board and Council as far as possible.

The ECB’s Governing Council does not only decide on the conditions of employment, it also decides on the ‘ECB’s headcount’, i.e. on the number of employment positions. Here, the majority of Council members – being at the same time governors of their respective national central banks appointed at the national level – faces a serious conflict of interests. They are responsible not only for the ECB, but – and this is their primary role – for their national central bank, too. They are appointed at the national level, not at the EU level. And when it comes to questions of staffing and allocating work within the System, they may decide in a way that does not confer too many resources from the national level to the ECB level. Concerning the allocation of tasks, the Statute contains the principle of decentralization and delegation (Article 12.1 of the Statute), i.e. all that can be better done by the national central banks shall be done by the national central banks. Tasks that can be performed more effectively on the supranational level or, perhaps, even more efficiently should be carried out by the ECB. Yet, one can observe another practice: there are tasks that were conferred upon groups of central banks that do the work for the entire System. The development and operation of market infrastructures is a point in case. The Statute itself has not foreseen specific governance structures for such specialized work sharing. There is also not much public debate about the cost, efficiency and effectiveness of the work sharing and governance structures developed ad hoc in the Eurosystem.

Concerning the allocation of human and other resources, the Statute foresees a clear allocation of powers to the Governing Council and within the Governing Council to the governors of the national central banks. They hold the majority and, since in financial matters the voting is weighted by GDP and population, the ‘big’ countries’ governors have particular weight

in these matters. It is in this sphere where the conflict of interest, mentioned above, plays a particularly intricate role for the ECB's staff and the representatives of staff interests. From a governance perspective, it must be always kept in mind that the Governing Council holds the reins when it comes to staffing and budget spending. In practice, the Council has so far set a headcount ceiling and left some discretion on budgeting, which allowed the ECB itself to decide relatively freely on the use of 'non-headcount' personnel such as temporary agency staff or external service providers.

As a result, the ECB employees' union is confronted with a situation in which only half of the actual workforce works on the basis of a contract with the ECB. The question arises for the union as to whom to represent. In its agreement with the ECB, which takes the form of a Memorandum of Understanding, the union IPSO is the union only of the ECB staff and not of the agency staff or people working for and at the ECB but employed by an external service provider. Still, the union is free to determine its own mandate and has achieved a recognized function which encompasses being heard on the interests of temporary agency staff. This has been confirmed by the ECJ which, in a ruling, supported the position of IPSO according to which we have to realize that – on the basis of a complex arrangement “specific to labour law involving a twofold employment relationship” – an employment relationship between the ECB and its temporary agency workers exists, too.

Let us look now on Article 36.2 of the Statute: “The Court of Justice shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.” The “servants” have no access to national courts. And the European Court has to decide “within the limits and under the conditions laid down in the conditions of employment.” This may appear a rather minimalistic form of legal control, but, as it proves to be, it is quite a necessary one.

The question of democratic accountability seems quite incompatible with the very idea of a non-majoritarian independent organization. But there exists an interinstitutional arrangement between the ECB and the EU Parliament:

The ECB President reports to the European Parliament on monetary issues in a quarterly Monetary Dialogue. The ECB also prepares an Annual Report on monetary policy which is presented before Parliament. Parliament adopts a resolution on this annual report. The new supervisory responsibilities of the ECB are matched with additional accountability requirements as laid down in the SSM Regulation. The practical modalities are governed by an Interinstitutional Agreement (IIA) between Parliament and the ECB. The accountability arrangements include the appearance of the Chair of the Supervisory Board before the competent committee; answering questions asked by Parliament; and confidential oral discussions with the Chair and Vice-Chair of the competent committee upon request. In addition, the ECB prepares an annual supervisory report, which is presented to Parliament by the Chair of the Supervisory Board.<sup>17</sup>

What does this reporting mean in practice? It means Parliament may dislike a report and adopt a critical resolution, but it cannot reject it. This form of accountability consists in its very essence in the obligation for story-telling in the Committee on Economic and Monetary Affairs. And this may be quite a touchy affair when it comes to questions of staffing and

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<sup>17</sup> Cf. Dario Paternoster in a European Parliament Factsheet (European Parliament 2024).



employees' rights. But it has nothing to do with accountability, neither in a strict sense nor in a lax sense. It is just window-dressing. Or in the words of Transparency International: "The ECB's accountability framework is not appropriate for the far-reaching political decisions taken by the Governing Council." (Braun 2017: 5) If another observer states: "[...] with greater powers come greater accountability requirements that the ECB should not be free to direct" (Chang 2017: 33), we have to understand this as a normative statement, not a descriptive one. A more realistic picture states: "The ECB [...] allows elected politicians to shirk their responsibilities, thus forcing unelected technocrats to do the 'dirty work' for them" (Braun 2017: 17). This might explain why there is not more pressure for democratic accountability.

### 3.2 Governance

Article 36 of the Statute does not prevent the ECB from accepting forms of collective bargaining or from accepting or establishing participation rights by its own legislation. The actual governance practices are not imposed by the Treaty. The Council and the Board could do differently. They could adopt good practice experiences from the national level; they could implement the stipulations of the Charter of Fundamental Rights or the EU labour law Directives more seriously. But Board and Council act in a more restrictive way, they adopt such regulations "whenever necessary". And who decides what is necessary and when it is necessary? It is the independent organization itself. The ECB is not obliged to explain or to justify its interpretation of eventual necessities and there is no government, no parliament, no Community institutions or bodies to give instructions that would have the power to limit its independence in this field. It must not explain why it does not accept regulations adopted in other EU institutions, why it does not adopt common EU practices in recruitment or why it does not rely on the services of EPSO (the European Personnel Selection Office).

The ECB prefers practising 'social dialogue' and commits itself to 'diversity management'. Social dialogue and diversity management are fine, are positive goals, but no real substitute for employee participation. They do not define rights for the staff, no arena for interest representation and do not lead to binding obligations for management. On the contrary, the practices are at the disposal of the managing body: if there is no time or if other problems occur, we have to live – at least temporarily – without social dialogue or diversity management. The ECB's annual report may inform about the number of meetings with the Staff Committee, but this says very little about the quality of the exchange. The Staff Committee and/or the union may make proposals, i.e. write texts that may serve as written documents for a management meeting which the members of the Staff Committee cannot attend and where they cannot present their position or react to arguments. This practice of non-(direct) communication raises serious doubts as to the quality of such a type of 'social dialogue'.

But besides the quality of the conversation, one crucial feature of the situation is the refusal of Board and Council to engage in collective bargaining. Staff representatives have no official role in the recruitment processes, no say about questions of career and promotion decisions, on conversion of contracts or about the choice of staff in general.

### 3.3 Constraints

The absence of collective bargaining did not prevent strike activities (as in the case of a cut in pension rights combined with an abrupt and unexplained overruling of the on-going

social dialogue thereon) and demonstrations (e.g. in solidarity with IT-personnel affected by outsourcing). But there is a problem: access to justice. The ‘regular staff’ have no recourse to national labour law and cannot bring their cases at national courts. The legal conditions of the ECB do not offer an effective juridical control. The ECJ, which is the competent court, is far more costly, has restricted powers and vis-à-vis the ECB there is doubt as to who has the power to enforce its rulings. Institutions can repeat their decisions that certain practices have been found unlawful – but no sanction is foreseen for such action. The ‘irregular workforce’ has rights either on the basis of the national legal system or directly vis-à-vis the ECB at the ECJ. The ECB, being exempt from national law and national jurisdiction for its own staff, cannot be taken to national courts in such cases. The ECB holds the view that this will, as a rule, also apply to non-statutory staff.

Problems of health, stress and overwork (due to the phenomenon of understaffing explained above) play a serious role as well as grievances and motivation to support the claims of the union. Stress and health issues play an important role in the public debate on the ECB – in the media of a number of Member States, but also in the political debate, for instance at the European Parliament, but also for members of national parliaments and for political activists at the local level. One of those who supported the interests of staff was the Mayor of the City of Frankfurt who attended a solidarity demonstration supporting IT-staff in their struggle against the ECB’s outsourcing policy. This implies new forms of action and cooperation with national and local unions as well as with non-union activists, media, NGOs, academia et cetera. IPSO and the Staff Committee will have to develop new forms of activism (and have done so), new ways to communicate employees’ concerns and probably even new topics to be addressed by union activities. I will return to this in more detail in the final section.

### 3.4 The Role of the Court of Justice

Due to the poor recognition status of individual rights and the lack of collective rights that have been established at national level for many decades, legal cases and therefore the Court of Justice play an important role. This has consequences not only for the rights of individual employees, but also for the issues of collective labour law and for union strategies to implement a more balanced labour law in the European Union.

National legislators are legally obliged to implement EU Directives into national law. In this way, individual employees may (hopefully) benefit from Regulations and Directives adopted by the EU legislator. But this implementation mechanism does not exist in the case of the ECB since “directives are addressed to the Member States and not to the EU’s institutions or bodies” (Case T-713/14). The German state, for instance, is the addressee of Directives and has the task to apply and enforce Regulations that oblige employers to comply with their legal duties. But given the legal status of the ECB, neither the German government nor the German legislator can force the ECB to do so on the basis of being the host country of this EU institution. The directives are addressed to the Member States, not to companies, institutions or bodies. In this legal constellation, a union or a staff committee cannot bring a legal case in order to force the ECB to implement the right to collective bargaining. Things are more complicated here.

Let’s begin with the ‘simple’ case of information rights. The union IPSO successfully argued against a decision by the ECB concerning the legal status of IT-personal where the union was not informed and not consulted in an appropriate manner. The decisive fact was not

immediately that such information rights were included in Article 27 of the European Charter and in Article 2(d) of Directive 2002/104/EC. The relevant fact was the circumstance that the ECB itself had conceded such rights in a framework agreement with the union and an individual decision to set up a working group. In this case the ECJ found that the ECB did not follow its own regulations. The question arises as to whether in the long run the ECJ can afford to protect the ECB against its laggard implementation practice (cf. Case T-713/14) without jeopardizing its own legitimacy and reputation:

The applicant refers first of all to the right of workers to information and consultation, provided for in Article 27 of the Charter of Fundamental Rights. In that regard, it should be noted that Article 27 of the Charter of Fundamental Rights lays down the right of workers to information and consultation within the undertaking. According to the case-law, those provisions may apply in relations between the EU institutions and their staff, as is apparent from the judgment of 19 September 2013, *Review of Commission v Strack* (C-579/12 RX-II, EU:C:2013:570). However, according to the actual wording of Article 27 of the Charter of Fundamental Rights, the exercise of the rights laid down in that article is confined to the cases and conditions provided for by European Union law and national laws and practices (judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 45, and order of 11 November 2014, *Bergallou v Parliament and Council*, T-22/14, not published, EU:T:2014:954, paragraph 33). It follows that Article 27 of the Charter of Fundamental Rights, which does not lay down any directly applicable rule of law, is not in itself sufficient to confer on individuals an individual right to consultation and information which they may invoke as such (see, to that effect, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47). Consequently, the applicant cannot rely, in this instance, on rights to consultation and information based solely on Article 27 of the Charter of Fundamental Rights.

No directly applicable rule of law: The same problem exists with Directive 2002/14. The decisive role is that of a framework agreement entitled Memorandum of Understanding between the [ECB] and [IPSO] on Recognition, Information-sharing and Consultation. Here it becomes clear: The ECB has committed itself and now it is obliged to fulfil the agreement. But it is still irritating that on the one side “the institutions must, in accordance with their duty to act in good faith, take account, in their actions as employer, of the legislation adopted at Union level”, whereas this does not create a directly applicable rule of law.

Besides consistency, the issue of non-discrimination is of great importance for the jurisdiction of the Court, but non-discrimination has many facets. The cases *Bowles v ECB* (F-94/14) and *Seigneur v ECB* (F-95/14) focus on “violation du principe de non-discrimination.” The Court argues with “une réglementation [...] qui place les représentants du personnel dans une situation défavorable et discriminatoire par rapport aux autres membres du personnel.” But there is another case in which the Court refers to the principle of non-discrimination, but not in favour of employees’ rights. When IPSO claimed (Case T-238/00) the right to collective bargaining (“to conclude collective agreements for the benefit of the employees of the European Central Bank, in order to participate in restructuring the conditions of work and employment of their members”), the Court declared that IPSO was not individually concerned: “A trade union organization may seek the amendment or withdrawal of those acts only in so far as it is directly and individually concerned by them within the meaning of the fourth paragraph of Article 230 EC” and concluded: “The provisions of the Conditions of

Employment and the Staff Rules applicable to the staff in question affect the applicant in the same way as they affect all other trade union organizations currently or potentially active in defence of the interests of those workers.” Here we see a specific use of the discrimination argument: If the ECB generally refuses negotiation agreements, then this position is consistent with the Maastricht Treaty. According to Article 230, “the Court of Justice shall review the legality of acts”, but access to a review process is restricted: “Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.” To this extent, Article 230 provides no review procedure to control the adherence of decisions to basic principles of the legal order as defined in the Charter and the Directives, it just addresses the problem of inconsistency and arbitrariness in decision-making. Can that be acceptable?

In recent years, after the Lisbon Treaty, the Court had to cope with the fact that in this treaty, Article 6.1. declares: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.” Yes, they have the same legal value, but since the Charter “does not lay down any directly applicable rule of law”, its provisions might be of limited direct relevance in the decisions of the Court unless the Court decides otherwise. The same may be the case with the problem of “adverse effects on the unity or consistency of European Union law” discussed in the review of the Case Commission v Strack (C-579/12 RX-II). Those “adverse effects on the unity or consistency of European Union law” may be caused by disregarding articles of the Charter and/or EU Directives. That’s a good point, but is it robust and of direct consequence?

Even if those arguments are not part of a decision referring to the governance of work-related issues within the ECB, they may have some influence for the further development of labour relations. If the Articles of the Charter had the same legal status as Article 36.1 of the Statute, then there would be no free choice for the ECB to adopt or not to adopt the practice of collective agreements. And if the Court acts in the interest of the unity or consistency of European Union law, this has consequences for European labour law as well. Up to now, one strategy of the ECB to avoid lawsuits is the practice of government by non-decision. As the ECB declared in the 2002 IPSO case (T-238/00): If there is no decision at all from the side of the ECB, IPSO cannot go to court: Just doing nothing perfectly prevents any admissible case pursuing the conclusion of collective agreements. Therefore, it might be important to state that the Charter and Directives should serve as legal standards in domains in which Board and Council do not feel determined to fulfil their function of rule setting, their role “to lay down the conditions of employment.”

Because of the technicality of legal arguments, it is a very difficult task to develop an integrated perspective on political and legal aspects of the ECJ’s jurisdiction. But preparing and supporting legal cases as well as communicating experiences and results become important tasks for unions in the defence of rights, also for the further development of the legal basis for the union’s activities. It is precisely there where the question of cost and duration of cases at the ECJ becomes crucial.

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