National central banks in EMU: time for revision?

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Abstract
The national central banks of the euro area are crucial to the monetary policy of the euro. Their Governors sit (on a personal title) on the Governing Council of the ECB, and they execute most of the monetary policies. Whereas the recent ruling by the German Constitutional Court on the Public Sector Purchases Program highlighted the uncomfortable role of the German Bundesbank in between national and EU law, the euro-crisis already showed other legal strains on the position of the national central banks in Economic and Monetary Union. This article argues that EMU empowered national central banks, even when it took away their power to individually set monetary policies for their respective Member States. The euro-crisis then disturbed the balance struck in the construction of the ECB between protecting national interests and effective decision-making, resulting in several legal problems.

Keywords National central banks · ECB · Monetary policy · PSPP · Central bank independence · Eurozone

National central banks (NCBs) take a peculiar position in the Economic and Monetary Union (EMU). While EMU was famously ‘lop-sided,’ with strong centralization in monetary union and weak integration in economic union, the NCBs are a reminder of the fact that even in monetary union, European action is dependent on national players. The main decision-making body in the European Central Bank (ECB) is the Governing Council (GC) [17 art. 12], which consists of the Governors of the NCBs of the Eurozone and six Executive Board members [18 Art. 283(1)]. The Governors take their seat on the GC on a personal title and so are not bound by the positions of their NCB, but they are the product of national appointment procedures, and they are—of course—functionally embedded within their NCB. The execution of monetary policy is then often placed in the hands of the NCBs. NCBs are moreover the sole shareholders of the ECB, and the profits of the ECB are distributed among them [17 Art. 28(2), 32, 33]. Despite this reliance on NCBs, which shows that monetary policy is not conducted by a unitary actor, as it is often assumed to be, the ECB has been able to take decisive action during the euro-crisis. By contrast, the Council, European Council and Eurogroup were often incapable of taking timely decisions during the euro-crisis, as a sense of crisis was needed to create a consensus for crucial decisions. The institutional setup of the ECB has thus allowed a distinct balance between taking into account national concerns and meeting European needs through effective decision-making.

This article examines the peculiar position of the NCBs in EMU. It argues firstly that the NCBs were able to guarantee their own future within EMU in the negotiations of the Maastricht Treaty. It was recognized that for their collective success, it was necessary to encapsulate the NCBs within a European central bank that would be able to act effectively. This required the creation of a strict hierarchy between the ECB and the NCBs, and a procedure for decision-making within the ECB that would not be hampered by vetoes, but which would nonetheless work mostly based on consensus [14]. In this way, national concerns and sensitivities are taken into consideration in the planning and execution of policy, without hampering effective decision-making. The NCBs thus lost the opportunity to individually set monetary policies in their MS, and they would be obliged to execute policies with which they would disagree. This loss of power for NCBs was at least partially compensated by the strengthening of their independence, although this was more relevant for some NCBs than for others, as their level of independence before the creation of EMU varied. However, even for

\[1\] The protocol is an integral part of the EU Treaties and thus has the same legal status as those Treaties, see art. 51 Treaty on European Union (TEU).
NCBs who already had a high level of independence prior to the euro, something changed, as their independence was now protected through EU primary law as well, and thus, in effect, constitutionialized. NCBs are therefore creatures of national law, mixed with European elements. If the ECB is less the supranational institution than it sometimes appears, the NCBs are likewise more European than their name implies. The creation of the ECB is thus reminiscent of a particular argument about the nature of European integration, namely that the purpose of the EU is not to overcome the nation state, but to strengthen it [51].

The second aim of the article is to show that this aspect of the construction of monetary union is beginning to show some flaws. Especially, the euro-crisis (including the measures adopted to ‘resolve’ the crisis) has put strain on the relationship between the ECB and the NCBs. The strategy of using a strong, centralized actor as a means to embolden its decentralized constituents is showing its limits. These problems became visible for example by the resignation of several central bankers during the crisis and the breakdown of decision-making in the GC by consensus, but these problems also manifested themselves in the form of legal controversies, on which this article focuses [2]. What these legal problems show is another aspect of the reliance on law in the organization of the euro. The euro was conceived as a ‘rules-based’ currency, meaning among other things that legal rules were supposed to restrain actors in light of a certain set of economic ideas. In lieu of political union, legal rules were supposed to manage the process of integration [66]. For NCBs, this meant that the legal rules also had the task of arranging a shift in identity, from national bodies to part of a European entity. The role of law for the euro then stands in contrast to, for example, the U.S. Federal Reserve, which is also decentralized [19]. In the USA, the decentralized authorities did not originate from the separate states, but were creations of the federal law.

The article starts with (1) a brief analysis of the setup of the ECB and the position of national central banks in the Maastricht Treaty, followed by (2) an equally brief overview of the evolution of EMU through the euro-crisis and current developments in the COVID-19 crisis. The next part (3) then covers the following issues: (i) the provision of Emergency Liquidity Assistance (ELA), (ii) the lack of risk-sharing under the Public Sector Purchases Program (PSPP) and the Pandemic Emergency Purchases Program (PEPP), (iii) Monetary policy profits, (iv) National central banks within their national constitutional order, and lastly, (v) National central bank independence for non-euro area Member States (MS). Last Sect. 4 then reflects on what these issues may mean for the position of the NCBs in EMU as organized through law.

The focus in this article is on the position of NCBs in EMU. Since 2014, EMU has been complemented by the Banking Union, as readers of this journal are probably well aware. The creation of the Banking Union has complicated the position of NCBs, as some of them now also interact with the ECB as national competent authority under the Single Supervisory Mechanism [20 art. 6]. However, not all NCBs are also the national competent authority under SSM, creating a divergence among NCBs regarding their European tasks. In this article, the Banking Union is only discussed where it relates to the functioning of NCBs in monetary union. The reason for restricting the scope of the article is that the issues raised by the Banking Union in this regard are distinct from those raised by the rest of EMU. See for example the debates in administrative law about composite procedures in supervision [9, 72], and the constitutional debates about the application of national law by the ECB [8, 15].

**National central banks at the launch of monetary union**

NCBs played a big role in the negotiations toward the Maastricht Treaty and as a result would continue to play a big role in EMU [42]. Prior to the creation of EMU, it was the central banks of the MS that together ran the European Monetary System, and it was the Governors of the central banks of the MS who, together with Commission President Delors, wrote the authoritative report that laid the foundation for the Maastricht Treaty [69, 70]. Prior to EMU, the national central bankers had a difficult relation with the Community legal order. They chose to meet in Basel, outside the European Economic Community (EEC), in mostly informal sessions. Only when decisions would need to be taken as part of their work as the Committee of the Governors of the Central Banks of the Member States of the EEC under the EEC Treaty, did they ‘swap hats.’ The exchange rate agreements that were negotiated in the 1970’s and 80’s were also curious amalgams of EEC acts and non-binding declarations. The strategy of ‘integration through law,’ which had been successful for other areas of European integration, did not include the national central banks and monetary affairs. Instead, through informality, the central bankers managed to carve for themselves a space in the process of European integration that allowed them to take control over the process of integration despite the wide differences in their positions in the national political systems.

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2 An overview of the national competent authorities can be found on the banking supervision website of the ECB: https://www.bankingunion.europa.eu/organisation/nationalsupervisors/html/index.en.html.

3 Officially called the Report on economic and monetary union in the European Community.
Below is a brief outline of the position of the NCBs under the EU Treaties. Under the Maastricht Treaty, the NCBs became part of the European System of Central Banks (ESCB), together with the new ECB [55]. The main tasks within the monetary union are then attributed to the ESCB through what is now art. 127(2) TFEU. Although this suggests some equality between the central banks in the ESCB, the Treaty also established a clear hierarchy [46]. The ESCB is governed by the decision-making bodies of the ECB, and the NCBs shall act in accordance with the guidelines and instructions of the ECB [18 art 129, 17 art. 14.3]. Whether and to what extent monetary policy is executed in a decentralized manner is a matter of discretion for the ECB [65]. From a legal perspective, the use of the word guidelines raises some questions, as it suggests that the ECB need not adopt formal legal acts to bind the NCBs. As art. 132 TFEU provides, the ECB can adopt regulations, decisions and recommendations to fulfill its tasks. Guidelines then appear to be purely internal to the ESCB, without external binding effect. Outside of the tasks of the ESCB, the NCBs may also fulfill other tasks, based on national law.

All NCBs in the EU are part of the ESCB, even those of MS who do not take part in the euro [6]. The NCBs of non-euro MS (non-participating NCBs) are then exempted from many of the obligations under the Maastricht Treaty, according to art. 139(3) and (4) TFEU. As all MS except Denmark have an obligation to strive toward monetary union (i.e., adopting the euro) [44 p. 16], it was thought that EU membership and Eurozone participation would soon overlap. The obligation to try to join the Eurozone is not stated in so many words in the Treaties themselves, but may be assumed to follow from what is now article 3(4) TEU: “The Union shall establish an economic and monetary union whose currency is the euro.” Furthermore, article 140 TFEU specifies that the Commission must report to the Council on the progress of MS with a derogation on the fulfillment of their obligations regarding the achievement of monetary union [26 pp. 39–40]. For the MS that ratified the Maastricht Treaty, they all joined the euro, or they received opt-outs in the case of Denmark and the UK. For the MS joining the EU after the entry into force of the Maastricht Treaty, the point was made clearly that no new opt-outs would be provided [36 p. 1113–1114]. However, the EU Treaties do not specify the timeline under which new MS should fulfill the convergence requirements, nor set out specific incentives for MS in this regard. When Sweden decided, after a referendum, to not try to join the euro, the Commission did not launch the infringement procedure (article 258 TFEU) against Sweden, and the legal obligation thus lies dormant [66]. As a result, membership of the Eurozone does not overlap with the membership of the EU and likely will not for the foreseeable future.

This existence of a large group of ‘outs’ also led to some institutional innovation, as the ESCB includes both euro area and non-euro area NCBs. Hence, the introduction, first informally, then codified in the treaties, of the Eurosystem, which includes only the euro area NCBs and the ECB. The Eurosystem is thus the ‘operative’ part of the ESCB. The participation of non-euro areas’ NCBs is then limited to the General Council (article 140 TFEU). Although listed as the third decision-making body of the ECB, its tasks are mostly advisory and preparatory (Article 42–50 ESCB/ECB Statute). The position of non-participating NCBs is discussed at the end of the next section; for the rest of this article, the term ESCB thus refers in essence to the Eurosystem.

Decision-making in the ECB occurs through the Governing Council and the Executive Board. The members of the latter are appointed by the European Council and include the President and Vice-President of the ECB. The Governing Council is then composed of the members of the Executive Board and the Governors of the participating NCBs. Governors of the NCBs are appointed through national procedures, and the Treaties provide in article 14.2 ESCB/ECB Statute that a Governor may be “relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct.” The Governor or Governing Council may appeal such a decision directly before the CJEU (art. 14.2 ESCB/ECB Statute). The Governing Council meets at least 10 times a year and sets the overall direction of monetary policy. The Executive Board is then responsible for the current business of the ECB, including the preparation of the decision-making by the Governing Council. Decision-making in the Governing Council was originally based on majority voting with one person, one vote. With the growth of the Eurozone, the Governing Council grew and the balance between the Governors and the Executive Board members shifted. A highly controversial rotation system was created where the number

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4 As the institutional organization of the ECB and the NCBs has remained rather stable between the Maastricht Treaty and the Lisbon Treaty, references will be made to the latter.
5 See, however, the argument developed by Langner [46].
6 During the euro-crisis, a controversy also arose about the holding by NCBs of significant amounts of assets and liabilities outside their ESCB tasks. In 2016, the Agreement on Net Financial Assets (ANFA) was published. The ANFA is an agreement between the Eurozone NCBs and the ECB and limits the amount of assets the NCBs may hold outside their ESCB tasks.
7 In the negotiations for the Maastricht Treaty, the opt-out system was compared with a system of opt in, but the latter was rejected [25, pp. 243–244].
8 The term Eurosystem was first used informally and then, was integrated in the Lisbon Treaty (see art. 282 TFEU).
of Governors who could vote was reduced, based on the size of the economy of the MS [50]. The reform was contentious, as it touched upon the balance between efficient decision-making and the representation of the Governors of all euro area NCBs, and thus, affected a key aspect of the construction of the ESCB, or more particularly, the Eurosystem. The reform was effectuated through an amendment of the treaties (as part of a larger set of reforms), which allowed the Council (acting unanimously) to adopt new voting arrangements, based on a recommendation of the Commission or the ECB (based on unanimity in the Governing Council). It should be noted that although the rotation system affects the voting powers in the Governing Council, the practice was to act by consensus in the Governing Council, at least until the euro-crisis [59 for an analysis of the various conditions in the voting arrangements that may enable or frustrate decision-making based on consensus].

A central tenet of the euro is central bank independence. Article 130 TFEU expresses this principle in two ways: first, the ECB, the NCBs and their decision makers shall not seek or take instructions; second, the EU institutions and bodies, as well as MS governments shall not seek to influence the decision makers from the ECB and the NCBs. The EU Treaties then also guarantee the independence of the ECB with regard to specific aspects, such as financial independence. What was left open in the Maastricht Treaty, however, was the specific position of the ECB within the Union (then Community). Combined with the very high level of independence, this led the then Deputy General Council of the ECB to reason that the ECB was an “an independent specialized organization of Community law” [74]. After being rebuffed by the CJEU, which declined to take a strong position on the issue and took a functional approach to central bank independence [16 Para 134–137], the Lisbon Treaty then ‘transformed’ the ECB into a Union Institution (art. 13 TFEU). This transformation hardly affected the position of the ECB within the EU, as many aspects of the ECB are regulated in EU primary law. On the national level, the appointment of Governors has attracted some attention regarding the voting arrangements that may enable or frustrate decision-making based on consensus].

Lastly, the NCBs are the sole shareholders of the ECB and they have contributed to the ECB’s capital in accordance with the ECB capital key. The NCBs share the income from monetary policy they execute in accordance with the capital key. A portion of the profits from the policies executed by the ECB can go to the general reserve fund, and the rest is distributed among the NCBs in line with art. 33 ESCB/ECB Statute. Although losses are rare in central banking, it is noteworthy that the loss-sharing regime does not match the profit-sharing regime. Losses by NCBs in the execution of monetary policy can according to art. 32(4) ESCB/ECB Statute be indemnified by the ECB in exceptional circumstances for specific losses.

**Euro-crisis reforms of EMU**

From the ratification of the Maastricht Treaty until the euro-crisis, the law of the euro was relatively stable and enforced effectively. Prior to the start of the crisis, at the entry into force of the Lisbon Treaty, an analysis of ECB staff found that the ECB’s institutional provisions had “functioned well over the last decade” [30 p. 73], meaning that they had largely developed as foreseen by the Maastricht Treaty. In effect, the ECB was able to function independently, without effective oversight from other institutions. In this era, the GC was also able to function largely by consensus. Only with the euro-crisis did EMU become subject to significant innovations.

The first innovation in the field of EMU was the offering of financial assistance to MS, linked to strict conditionality [56 for an overview of measures adopted during the crisis]. Financial assistance was offered to several Eurozone MS that experienced dramatic economic downturns. Crucially, the financial health of the MS was connected to the financial health of the banking sector, which had deteriorated as a result of the Great Financial Crisis of 2008. The fact that financial assistance was tied to strict conditionality greatly affected its use in practice. It made MS hesitant to apply for assistance and gave the EU much deeper control over the economy of some of the MS. As the crisis evolved, so did the mechanisms to offer the financial assistance. As the MS chose a mechanism of offering financial assistance tied to strict conditionality as a piecemeal reform of EMU, the

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9 Bini Smaghi was a member of the ECB Executive Board.
10 Athanassiou was Senior Legal Council at the ECB.
11 It must be borne in mind that the infamous “3%” rule actually only required MS to avoid excessive deficits, with discretion by the Council to decide what an excessive deficit is (art. 126(6) TFEU. Where the Council found that an excessive deficit existed, the appropriate procedure was followed to remedy the problem. A more cynical assessment would be that the procedure was toothless by design and that failures to achieve a specific economic outcome demonstrated the continued discretion of MS to conduct their own economic policy.
banking systems in the MS became exposed to panics, as it would be unclear if or when financial support would be provided. This exposed the banking systems in those MS to panics, which their NCBs would have to quell through the provision of Emergency Liquidity Assistance.

The second part of the response to the euro-crisis was the adoption of very loose and unconventional monetary policies by the ECB [62]. The unconventional monetary policies started with the Securities Markets Program (SMP), through which the Eurosystem bought bonds of distressed MS, such as Italy, Spain and Greece. SMP was replaced by the Outright Monetary Transactions Program (OMT). Under OMT, the Eurosystem again may intervene in the sovereign bond market, but only for MS that have a financial assistance program (with strict conditionality). As no ex ante limit is set for interventions under OMT, the program is sometimes referred to as the ‘big bazooka.’ The announcement of OMT was a success in calming the markets, to such an extent that it has thus far not been necessary to use in practice. Where SMP and OMT were aimed at stabilizing markets, the Public Sector Purchases Program that was launched in 2015 aimed at increasing inflation [68]. Under PSPP, the Eurosystem (mostly the NCBs) buys large amounts of sovereign debt each month. The Eurosystem now holds over two trillion euro worth of MS debt [31]. During the COVID-19 crisis, the ECB moreover launched the Pandemic Emergency Purchases Program (PEPP), which aims at both stabilizing markets and increasing inflation [38]. Also under PEPP, the Eurosystem buys sovereign debt.

The third pillar of the euro-crisis response was the attempt to strengthen the Eurozone through a reform of the rules on economic governance and the creation of the banking union. The former aims at improving MS economic and fiscal policies, the latter at strengthening the European financial sector. The shared goal is then to break the doom loop between MS and banks.

The position of NCBs post-crisis

As a result of the euro-crisis, and the steps taken to solve the crisis, the integration of the NCBs in EMU has come under strain. Where the integration of NCBs was premised on the understanding that cooperation would serve to strengthen the NCBs through collective action in the ECB, the euro-crisis highlighted the national character of the NCBs. As the blame for the crisis was placed on individual MS, rather than the setup of the euro as a whole, a sharp divergence arose between the MS offering assistance, and those receiving it [61 for a succinct analysis of the politics of the euro-crisis]. The NCBs then brought that distinction into the discussions on monetary policy.

As the position of the NCBs is largely the result of the manner in which the euro is legally organized, namely through the EU Treaties, the issues highlighted below assume a constitutional character [52].12 The last issue analyzed below then concerns a development that is not as such connected to the euro-crisis, but which concerns the constitutional nature of central bank independence in EMU.

ELA

In the run-up to MS requesting and receiving financial assistance, serious doubts arose on several occasions about the viability of the banking sector in the troubled MS [5 p. 1593]. This affected both financially healthy banks and those with a weak financial position. When a MS may request or receive financial assistance, there are several factors that may contribute to widespread doubt about the financial system in a MS, such as the possibility of sovereign debt restructuring, capital controls or an overall economic downturn. Such doubts may then turn into a self-fulfilling prophecy, creating a financial panic.

Central banks have for a long time been seen as the main institution to quell such panics. In the late nineteenth century, Bagehot advised that central banks should lend ‘limitless’ to those who are in a financially secure position, albeit at a high interest rate [4]. Central bank intervention can remove the doubt that economic problems turn into a panic, thereby removing the rush to the exit, breaking the dynamics of the self-fulfilling prophecy. This stabilization function can even be seen as a core function of a modern central bank, and inherent to the conduct of monetary policy [37].

Surprisingly, providing liquidity in times of emergency in the Eurozone is not a task of the Eurosystem. In 1999, the ECB decided that ELA remains a national task [29]. Although monetary policy is emphatically a task of the Eurosystem, the ECB decided to interpret its own competence in a restrictive manner. The motivation was that ELA serves to guarantee financial stability, rather than price stability [29]. Moreover, providing ELA requires insight into the financial position of the banks to distinguish between solvent and insolvent banks. As NCBs can perform other tasks than those of the Eurosystem, national legislation then had to allocate a specific task to the NCB to offer ELA [63]. On the basis of article 14 ESCB/ECB Statute, the Governing Council can then block the execution of that task if it is deemed to interfere with the tasks of the Eurosystem. Meanwhile, the risks for providing ELA remain at the national level. The restrictive interpretation was an odd one, already

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12 It should be noted that although the ESCB/ECB Statute is part of EU primary law, art. 40 of the Statute allows certain provisions to be amended through the ordinary legislative procedure.
in 1999, as it confused the goal of a policy, with the scope of the policy. The fact that ELA is not primarily associated with price stability, but with financial stability does not mean that it is not part of monetary policy. Rather, it means that the monetary policy objective of the ECB might be too narrow in this regard. On the national level, ELA has to be provided through the NCB (which is the only national bank capable of creating central bank money). Hence, providing ELA is undoubtedly part of monetary policy and therefore, within the remit of the ECB.

Another argument for not including ELA within the job description of the ECB at the time was that it was thought that ELA was a policy tool that would not have to be used often. However, during the euro-crisis, ELA has been provided on numerous occasions by NCBs [47]. What has been particularly disturbing was that the ECB has used the threat of cutting off ELA through the application of art. 14.4 ESCB/ECB Statute to pressure MS to accept the conditionality attached to financial assistance [5]. This strengthens the understanding of ELA as a policy tool of the ECB, but with the risks kept at the national level.

The launch of the banking union further strengthened the case that ELA should be regarded as an exclusive competence of the ECB, in two ways [73 on the interaction between ELA and the creation of the banking union]. First, as banking supervisor the ECB is well-positioned to gauge the solvency of banks. Banks must be solvent to receive support, but especially in crisis times that is difficult to assess, also due to the political pressure that may exist on the national level to offer support. Moreover, some NCBs in the Eurosystem are not the national competent authority in the area of banking supervision, putting them at a disadvantage in the acquisition of the necessary information.13 Secondly, with the launch of the Banking Union, the ECB has also become responsible for contributing to the stability of the financial system, according to article 1 of Regulation 1024/2013. As ELA is a monetary policy tool with financial stability implications, it would then be logical to make the ECB exclusively responsible for the provision of emergency liquidity [45 p. 160]. Although the tasks and objectives of banking supervision may not interfere with the monetary policy tasks and objectives according to art. 25 SSM Regulation, this separation may become obsolete in practice, with regard to the function of the lender of last resort. The separation of supervisory and monetary policy tasks may in any case not be detrimental to the monetary policy tasks of the ECB.

The question then is how the Eurosystem could assume the exclusive authority to provide ELA. One can argue that it already has assumed the power to offer ELA, albeit under a different name and not exclusively [66 also see 75]. Throughout the euro-crisis, the ECB has launched numerous monetary policy measures in order to provide large-scale liquidity, against the background of a Eurozone-wide emergency. Although these programs officially have the goal of maintaining price stability, it was also acknowledged that financial stability and price stability were interlinked. However, to make ELA exclusively a European affair, the ECB would have to reverse its assessment that ELA is not part of the monetary policy task of the ECB [58]. Although there is no distinct legal reason standing in the way of such a declaration by the ECB, it seems unlikely that the ECB will do so in the near future. In 2015, Draghi observed that the allocation of competences for ELA could be questioned.14 However, given the judicial controversy over the competences of the ECB, it is understandable that the ECB is hesitant to assume new powers by reversing its interpretation of the treaties. A treaty amendment to correct this specific aspect of EMU seems unlikely as well, as it would invite further political scrutiny of the divergence in the financial positions of the MS.

**The lack of risk-sharing under PSPP and PEPP**

The unconventional monetary policies of the euro-crisis broke the consensus in decision-making in the GC. When it came to OMT, the majority of the GC seems to have pressed ahead, despite legal and economic concerns of especially German members of the GC. When it came to PSPP, the conflict appears to have been scaled down. The Bundesbank no longer objected to PSPP on constitutional grounds. In return, an important concession appears to have been made: NCBs would bear the risks of the purchases of the bonds of their MS. Under PEPP, the Eurosystem has bought over two trillion worth of sovereign bonds. These purchases were made in accordance with the capital key of the ECB, with NCBs buying the bonds of their own MS. It was explicitly stated at the launch of PSPP that risks were mostly kept at the national level [48 p. 55]. Only a small percentage of bonds under PSPP is bought by the ECB itself.

That the lack of risk-sharing was made explicit for PSPP was noteworthy, at least from a legal perspective, because it is the default position of the Treaties. As noted above, the Maastricht Treaty finds that only in exceptional circumstances can the GC decide to offset losses. This seems even to suggest that it would not be possible to decide *ex ante* that there would be risk-sharing between the NCBs. However, a

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13 This issue already existed prior to the Banking Union [63 pp. 183–184].

14 Appearance of ECB President Draghi before the European Parliament, 12 November 2015, transcript available at [https://www.ecb.europa.eu/press/key/date/2015/html/sp151112_Transcript_and_QandA.en.pdf](https://www.ecb.europa.eu/press/key/date/2015/html/sp151112_Transcript_and_QandA.en.pdf).
practice had grown under which risk-sharing had become common. As noted by the German Bundesbank itself in 2011, the general practice was that losses incurred in the execution of monetary policy would be borne by the NCBs collectively [22 p. 49].

For PSPP, the lack of loss sharing had apparently been crucial to convince at least the Governor of the Dutch Central Bank to tone down its opposition [10]. However, in the press conference following the announcement of PSPP, the lack of risk-sharing was defended on constitutional grounds [68]. As the risks associated with sovereign bonds reflect, at least in part, the level of fiscal prudence of a state, it was argued that the constitutional setup of EMU was aimed to keep fiscal risks at the national level.\(^{15}\)

In the judicial ‘dialogue’ on PSPP (discussed in more detail below), the CJEU observed that risks are inherent in the conduct of monetary policy, and that the small percentage risk borne by the ECB itself was neither problematic, nor could it be assumed to lead to unlimited risk-sharing. The CJEU further stated in the proportionality analysis of the PSPP that the ECB had “found it not appropriate to establish a general rule of loss sharing” [54]. Although the acceptance of the position of the ECB was probably necessary to assuage the German Constitutional Court, it is unfortunate that the CJEU did not examine the issue further.

Lastly, PEPP follows the example set by PSPP. That might seem logical, given that PEPP also concerns the large-scale purchases of sovereign bonds. However, the objective of PEPP is wider than that of PSPP. Whereas the latter is (officially) only concerned with increasing the level of inflation, the former is also concerned with maintaining the monetary policy transmission mechanism, as noted above. The fear has been that speculation on the disintegration of the Eurozone would lead to higher interest rates for some MS, which would in turn increase the likelihood of a MS getting into financial difficulties. The CJEU concluded in Gauweiler that maintaining the integrity of the Eurozone was part of the mandate of the ECB to maintain price stability [53 para 48]. Hence, the ECB was allowed to (promise to) intervene in sovereign bond-markets and remove the fear of Eurozone disintegration. The idea behind the lack of risk-sharing is then contradictory to that of maintaining the monetary policy transmission mechanism. The latter is premised on the belief that the markets must be corrected for falsely pricing in the risk of disintegration, whereas the former was based on the belief that the risk for sovereign bonds reflect the financial health of the MS. Hence, insofar as bonds are purchased to maintain the monetary policy transmission mechanism, risk-sharing would be more appropriate.

### Monetary policy profits

The other side of the coin, pardon the phrase, of loss sharing is the allocation of profits that result from monetary policy. Through SMP, the awkward situation arose where the Eurosystem made significant profits out of the purchase of Greek government bonds. These bonds were purchased as of 2010 and were bought well below their nominal value, meaning that there was a high expectation at the time that Greece would default and possibly leave the Eurozone.

First, as a result of the financial assistance of 2010, immediate default was prevented. Second, before Greek bonds were restructured in 2012, the ECB negotiated a swap of government bonds in order to acquire bonds that would not be affected by the restructuring. As the aim of the restructuring was to lessen the debt load of Greece, it can be argued that the removal of bonds held by the ECB from the pool of bonds that would need to be restructured necessitated a higher sacrifice from other bondholders. This is indeed what was argued by other bondholders before the General Court, which subsequently declared that the prevention of losses was a legitimate interest of the ECB [1, 71]. Therefore, the ECB was allowed to engage in the bond swap.

That the Eurosystem subsequently made a significant profit of the SMP purchases was not only politically contentious, but can also be challenged from a legal perspective. As the ECB argued in the Gauweiler case on the legality of OMT, the primary objective of the ECB also encompasses maintaining the integrity of the Eurozone [53]. This meant that the ECB was warranted in launching the OMT program, in order to buy government bonds where markets had attached a premium to reflect the possibility of a MS leaving the Eurozone. According to the ECB, the speculation on disintegration ignored the legal reality that entry into the Eurozone is irreversible. Hence, when it bought Greek bonds and subsequently made a profit, it benefitted from a situation which the ECB itself sought to prevent. Under these circumstances, it can hardly be argued that the Eurosystem, rather than Greece, should benefit from the profits of SMP. Recognizing the troubled nature of the SMP profits, the Eurogroup did indeed decide to return the profits of the Greek bond purchases to Greece [27]. However, it tied the repayment of funds to the implementation of the Memorandum of Understanding, thus, strengthening its hand in the ongoing negotiations with Greece.

\(^{15}\) Buiter has argued that the setup of PSPP leads the Eurosystem to resemble a ‘currency-board’ more than a single, integrated central bank. The lack of risk sharing could then contribute to a disintegration of the euro area [11]. In any case, it would not jeopardize the functioning of monetary union to centralize risk. In Accorinti (para 86), the ECB did make the argument that significant losses might impair monetary policy functions. It is unclear, however, on what this assertion is based, and it was later contradicted by ECB President Lagarde [12].
Whereas for the profits on SMP purchases, a case can be made that these should have flowed back without political haggling to Greece, and it can be argued for other profits resulting from monetary policy that these should flow to the EU budget. Former Advocate General to the CJEU Miguel Maduro has advocated that the EU should be funded through activities where it is clear that the EU produces added value [49]. Also the High-Level Group on Own Resources positively discussed seigniorage as a candidate for a new EU own resource, noting that “[t]here is a fundamental economic rationale which would justify seigniorage revenues financing the EU future” [40 p. 56]. In the run-up to the Five Presidents’ Report, a change to the allocation of monetary policy profits had apparently also been discussed.16

The difficulty with making either the profits of monetary policy or only the profits of the ECB, a EU own resource is the differentiated nature of EMU. Profits generated in relation to a policy in which not all MS participate would benefit all MS. This might be circumvented if the Eurozone MS agreed among themselves to use the profits they receive from their NCBs as a result from profits flowing from the ECB as ‘external assigned revenue’ for a specific budgetary tool devoted to the Eurozone MS. For example, external assigned revenues were seen as an option for the proposed Budgetary Instrument for Convergence and Competitiveness (better known as BICC) [28, 67]. However, this does not fully negate the problem of differentiation, as there is no appropriate legal basis to create a budgetary tool only for Eurozone MS. The proposal for the BICC moreover was overtaken by the COVID-19 crisis and the economic measures adopted in response [60 p. 23].

**National central banks within their national constitutional order**

A prominent aspect of the controversy over the PSPP-judgment of the German Constitutional Court was the finding that the German Bundesbank would no longer be allowed to participate in PSPP following a three-month transition period [43]. In this period, the ECB would have to take a new decision on the proportionality and the German Government and Parliament (Bundestag) would have to validate this decision. The judgment emphasized the national embeddedness of the NCBs. Despite their firm integration in the Eurosystem, they are the first and foremost creatures of national law. This had already been illustrated in the **OMT** case before the German Constitutional Court, with both a representative from the ECB and from the German Bundesbank submitting evidence. The Eurosystem did not speak with one voice, and the Bundesbank even argued that OMT went beyond the competences of the ESCB [23].

From the perspective of European law, the ruling of the BVerfG was obviously misguided where it asserted that the Bundesbank would no longer be able to participate in PSPP [21]. As part of the Eurosystem, the Bundesbank is required to follow the legal instructions of the ECB, with the CJEU deciding on the validity of the policies decided by the ECB. The judgment thus brings to light the continuing disagreement between, in this case, the BVerfG on the one hand and the CJEU on the other hand about the nature of EU law.

It should be noted that in other recent cases, EU law effectively intervened in the governance of the NCBs. In **Rimšēvičs**, the CJEU intervened when a national criminal investigation into the conduct of the Latvian Governor led to restrictive measures that prevented him from performing his duties as a Governor, including leaving the country [41]. Although the measures were based on national law, and involvement of the CJEU could normally only be the result of a preliminary reference by a national court, art 14.2 ESCB/ECB Statute foresees in this very specific situation direct recourse to the European Court. The Court then upheld the rule that a Governor can only be relieved of office if (s)he no longer fulfills the requirements for holding the office or is guilty of serious misconduct. The national measures were annulled by the CJEU insofar as they prevented Rimšēvičs from performing his duties as Governor of the Latvian NCB [57]. In **Commission v. Slovenia**, the CJEU found that by taking documents from the premise of the Slovenian NCB in the process of criminal investigations, the inviolability of Union archives was not respected [32].

Beyond the many contributions already made on the topic of the PSPP-judgment of the BVerfG,17 the approach taken in this article highlights the structural choice in EMU in favor of the national character of NCBs. In the setup of EMU, the choice could have been made to construct a new, regional set of decentralized branches of the ECB, in order to assert the supranational character of the euro. Instead, the choice was made to partially ‘Europeanize’ the NCBs through law, while maintaining their national embeddedness. This reflected—as is characteristic for the overall organization of the euro [66]—a high level of trust in law. This also suggests that instead of trying to resolve the legal conflict between the CJEU and the BVerfG, the focus should be on reducing the role of law in European integration.

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16 A reference to article 33.1 ESCB/ECB Statute can be found in a ‘hidden’ part of the report. On page 15 of the report, there is white text on a white background [35].

17 See the special edition of the German Law Journal (volume 25, issue 5) on this topic.
Independence as a requirement for non-euro area central banks

Independence is the cornerstone of the Eurosystem. As discussed above, article 130 TFEU states that the decision makers in the ECB and the NCBs shall not seek or take instructions from governments, EU institutions or other bodies “in the execution of the tasks conferred upon them by the Treaties” (article 130 TFEU) [63 p. 177, 41 para 46]. Hence, article 130 TFEU only applies insofar it concerns the execution of Eurosystem tasks as according to article 139 TFEU, the tasks of the ESCB do not apply to MS with a derogation. As NCBs of non-euro area MS do not execute Eurosystem tasks, the rule does not apply to them as such. Yet, this is not how article 130 TFEU is generally seen; it is often assumed (but not explained) that the obligation of independence applies to all NCBs in the EU. Such a broad understanding of article 130 TFEU also disregards the fact that some statutes of euro area NCB’s also only explicitly provide for independence in connection with the tasks of the ESCB.19

Strictly speaking, art. 130 TFEU only applies as of the moment when a MS joins the Eurozone. Prior to that, the Commission examines to what extent a MS with a derogation is ready to join the Eurozone through convergence reports in accordance with art. 140 TFEU. As MS (except Denmark) are under an obligation to try to join the euro, MS must also aim to get their legislation in line with the requirements of adopting the euro. It would then, theoretically, suffice for a MS to make the independence of their NCB conditional upon entry into the Eurozone. Given the importance of independence not only as a legal requirement, but also as a shared commitment by both central bankers and politicians, it is understandable that art. 130 TFEU is interpreted broadly when a MS wants to become part of the Eurozone. In two ways, the obligation under art. 130 TFEU is nevertheless interpreted too broadly.

The first is with regard to countries joining the EU. Here, article 130 TFEU is interpreted as being part of the EU acquis that a country needs to incorporate before becoming an EU MS [33]. In doing so, it differentiates between the convergence criteria for joining the Eurozone. For example, the participation in ERMII (the exchange rate mechanism) is not deemed as such an EU law requirement. Instead of requiring new MS to join the Eurozone upon becoming an EU MS, a specific requirement is set only with regard to the requirement of central bank independence.

The second problem is with regard to EU MS who are not trying to join the Eurozone. As discussed above, in 2003 Sweden decided after a referendum not to try to join the euro and no enforcement action has since been taken by the Commission. That created the de facto situation where MS with a derogation are free to decide whether they want to try to join the euro [6]. It should then be recognized that those MS are also free to decide upon the level of independence for their central bank. Over the last few years, debates have been flaring up about the benefits and problems of central bank independence, especially in the areas of inequality and climate change [13].20 It would then seem prudent to let non-euro area MS who are not close to joining the Eurozone decide on the proper institutional arrangements for their NCB.

Conclusion

National central banks are an obscure part of EMU. In the day-to-day functioning of the euro, the eyes are on the ECB, rather than the NCBs. This obscurity is testament to the balance struck in the construction of the ESCB between national interest and effective decision-making. The NCBs take part in almost every aspect of the functioning of the ECB, but they rarely overshadow the ECB. This article argued that the construction of the ESCB has been successful, especially in the early days of the euro; decision-making occurred mostly through consensus, meaning that national concerns were sufficiently taken into consideration, while the need for consensus did not hamper effective decision-making. Nevertheless, small cracks have appeared in the setup of the ESCB in relation to the position of NCBs. The euro-crisis and the measures adopted in response to the crisis, have then brought to the fore the difficult balancing in the setup of the ESCB, resulting in several legal problems, of which the recent judgment by the German Constitutional Court is only the most prominent one.

The legal problems identified in this article can be seen from different perspectives. On the one hand, it should not come as a surprise that the Eurosystem is encountering legal issues, some twenty years after its creation. In monetary affairs, it is not uncommon that the legal framework governing the central bank at some point in time no longer covers the day-to-day needs. The legal framework of the Dutch central bank, for example, was regularly updated after its creation early in the nineteenth century to reflect new practices, as well as to have political debates about the overall purpose and function of the central bank [64]. Central banks, and their legal frameworks, evolve. The issues identified above then simply indicate that the legal construction of the ESCB

18 An exception is Smits [57 p. 122, fn. 15].
19 See, e.g., article 3(3) of the Dutch Banking Law (Bankwet 1998).
20 It should be noted that the ECB is also becoming more vocal on the issue of climate change, even though no decisive steps have been taken yet.
requires some maintenance. Moreover, these issues do not (yet) seem to endanger the integrity of the euro itself.

Another perspective is that the persistence of the legal problems points toward a deeper problem in the Eurozone, namely the inability to come up with modest updates to the legal framework of the ESCB. It is then not the existence of some legal issues that is worrisome, but the fact that there are no viable political opportunities to reform the ESCB/ECB Statutes, at least in the short term. As noted for example in relation to ELA and the profit-sharing arrangements, the legal issues described in this article ultimately take on a constitutional character, as the relevant provisions are part of EU primary law. Since these issues arose over the last couple of years, few attempts have been made to do the necessary maintenance. Instead, the general reflex appears to be to paper over the cracks, lest the difficulties of reform give rise to new conflicts among politicians or judges. A possible solution might in some instances come from changes in the interpretation of the Treaties, as the euro-crisis has shown can happen quite rapidly. It would be unfortunate, however, if crisis is a requirement for Eurozone reform. The reform of the Governing Council through treaty-change prior to the euro-crisis stands out as a notable counterexample in this regard.

Whereas this article has tried to separate the legal from the political issues in the Eurozone, it must then be concluded that the two are—of course—intricately connected.

The choice to construct EMU on top of the NCBs, rather than to setup a wholly new decentralized network of central banks, flowed directly from the process of the negotiations for EMU that gave the Governors a crucial role in the Delors Committee. It is difficult to imagine European monetary union without the NCBs and their Governors, even if the focus has been mainly on the ECB as such. Through the euro-crisis, the national foundations of monetary union became visible again. The veil of obscurity was (temporarily) lifted. The attention to the NCBs thus means something is afoot. From a legal perspective, reforms of the Eurosystem are thus to be welcomed, but given the current political climate, they are unlikely to arrive any time soon.

Declarations

Conflict of interest The author states that there is no conflict of interest.

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