The Constitutional Design of the European Central Bank

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Foreword**

It formulates the monetary policy of the European Union, a policy primarily committed to monetary stability. But it also specifically facilitates the further indebtedness of the governments of economically low-performing member states. It buys government bonds that the rating agencies have assigned junk status and with its measures subsidises individual banks. Nonchalantly it accepts accusations of violations of the rules and the law, including the prohibition of the monetary financing of government budgets. What is the European Central Bank and what are the interests and motivations that guide its policies?

Introductory remarks

In popular opinion, the European Central Bank (ECB) is modelled on the German Bundesbank and, as the Bundesbank was for Germany, is entrusted with the monetary policy of the European Union. But both are not the case. At the Maastricht Conference monetary policy was indeed transferred to the European Community, however, two new institutions of the European Union were entrusted with this responsibility, namely the ECB and a related though not identical entity, the "European System of Central Banks" (ESCB). However, the four main tasks that a central bank traditionally performs in the context of a nation state, namely "the definition and implementation of monetary policy for the Community" the "conduct of foreign exchange operations", the "holding and management of the official foreign currency reserves" of the member states and the "promotion of the smooth operation of payment systems", the Conference of Maastricht did not assign to the ECB but to the European System of Central Banks.[1] Not the ECB but the non-identical entity, the ESCB, is the monetary authority of the EU (see Seidel 1998a). The ESCB, in its current composition of only 17 of the 27 EU member states, refers to itself as the "Eurosystem".

The "European System of Central Banks" as the European monetary authority

The "European System of Central Banks" (ESCB) is a purely intergovernmental association with no legal capacity, composed of the central banks of the member states and the European Central Bank (ECB) created at the Maastricht Conference. The national central banks and the European Central Bank, according to the Treaty of Maastricht/Lisbon, are not members but an "integral part" of the ESCB. The Treaty of Maastricht/Lisbon does not give a more precise definition of the ESCB and declares it to be neither an organisation nor an institution of the European Union. From the contractual rules of the Maastricht Treaty the conclusion can be drawn firstly that the national central banks as an "integral part" of the ESCB are not new institutions of the European Community; instead, regardless of the obligations imposed on the member states to release them as far as necessary into independence, they remain institutions of the member states. Their affiliation as an "integral part" of the ESCB does not make them an organisational association in legal terms, neither with one another nor with the ECB as a system partner and, despite the opinion heard even in expert circles, is not comparable to the status which characterised the former German central bank branches (Landeszentralbanken) within the German central bank organisation. The German central bank branches were at no time institutions of the federal states but with their regionally-based

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[1] Article 127 TFEU, ex Article 105 of the EC Treaty.

tasks and competencies were dependent divisions of the German Bundesbank (Seidel 1998b).

As an intergovernmental association composed of national central banks that remain national institutions and the ECB as an institution of the European Union, the ESCB is not an independent intergovernmental or supranational organisation that exists alongside the European Union or that is integrated into the EU. To be able to make this claim, the national central banks would have to have been separated from the state organisation of the member states, which was in fact under consideration. The Maastricht Treaty also did not upgrade the ESCB into an organ of the European Community, not because the ESCB had no structure similar to that of the other organs but because if the ESCB had been given the status of an official organ, the ESCB's independence from the policy making and from the other institutions of the European Union was considered to have been at risk. The ECB has legal capacity and, as we will show, even exercises sovereignty for both the European Union as such and for the ESCB. However, the consequent higher status of the ECB as an "integral part" of the ESCB in comparison to the national central banks as system partners, has no constitutive effect on the organisational and legal status of the ESCB as such.

The ESCB or the "Eurosystem"[2] is led by a "Governing Council", composed of the – currently – seventeen governors of the national central banks and the six members of the European Central Bank. The methods by which the members of the Governing Council, the main body of the ESCB, are appointed or vested with their office, are different depending on group membership and reflect the purely intergovernmental nature of the ESCB. The six members of the Executive Board of the ECB are chosen by the usual method of appointment of members of the so-called unitary organs of the European Union, the Commission and the European courts jointly by the member states – since the Treaty of Lisbon by a majority – for a period of eight years. In contrast, the governors of the national central banks are not appointed in such a "Community procedure", in itself only confederally structured, but by the respective national governments according to national law and national practice, without there having to be agreement between all member states. European Union law, which has no specific statutes for the national central banks, stipulates only that the term of office of the national central bank governors must be at least five years and that recourse to the European Court of Justice is possible in cases of the dismissal of a governor by a member state. The rules for the two bodies differs also in that the governors of the national central banks presidents can be re-elected, whereas for reasons of rotation of offices among the member states (or perhaps to strengthen the position of the national governors in the Governing Council?), the re-election of members of the Executive Board of the European Central Bank is not possible.

Voting in the Governing Council

The Governing Council of the ESCB makes its decisions by a simple majority on monetary policy issues, especially in interest rate decisions, which for the business world are by far the most important decisions of the European Union. The President of the Executive Board of the ECB or the six members of the Executive Board together have no veto rights. The Executive Board of the ECB can thus be overruled at any time by a majority of the governors of the national central banks. In terms of the decision making of the Governing Council in monetary-policy issues, even though this has been delayed with regard to its application, there exists since several years a sophisticated system of rotation and the temporary exclusion of the right to vote, according to which, depending on the importance of their national economy, the national central bank governors are divided into three groups and are excluded from voting for a certain period of time (see also Seidel 2008, 545).[3]

European Central Bank

From the perspective of the general public, business, the banking world and even large segments of the professional experts, the European System of Central Banks (ESCB), which is still the Eurosystem, does not shape the monetary policy of the European Union but solely the European Central Bank (ECB) acting autonomously. This impression is primarily fuelled by the fact that in order not to irritate the capital and financial markets, central banks or central

[2] The ESCB in its present still narrow composition of only 17 member states participating in the currency area.

[3] Article 10.2 of the ESCB/ECB Statute.

bank systems are only allowed to speak with one voice, usually that of its president, and also in the case of the ESCB, the President of the ECB communicates with the financial and capital markets on behalf of the ESCB. To the extent that also the ESCB is anchored in the consciousness of the general public, business and professional circles as the true designer of monetary policy, it is assumed that within the ESCB the ECB assumes a prominent position and directs the ESCB, namely the national central banks, just as once the German Bundesbank directed the German central bank branches.

The ECB stands out from the national central banks, its system partners, by means of a unique organisational structure and interlacings with the ESCB in that the ECB as an organ-like institution of the European Union exercises its own powers. The appraisal that it assumes a leadership role within the ESCB and even must be identical with the ESCB is therefore understandable.

The ECB, as the ESCB, has a governing council as its main body and an executive board as its second body. The bodies of the ECB are not only similar to the two bodies of the ESCB in terms of personnel, but both organizations have one and the same organs. Evidently in order to establish a certain dominance of the ECB, the Treaty of Maastricht/Lisbon prescribes the allocation of the two organs to the ESCB and the ECB not such that the ECB is directed by the organs of the ESCB, but conversely the ESCB is headed by the two organs of the ECB.[4]

The presumed independence of the ECB or even its supremacy over the ESCB and the national central banks is, however, called into question by the allocation of competencies to the two bodies of the ECB. The functions and powers allocated to the ECB, which are examined more closely below, fall within the ECB not in the area of competence of its six-member Executive Board but are almost predominantly the responsibility of the Governing Council. In principle they are contractually distributed in such a way that the Governing Council determines the "guidelines and decisions" and that the competencies of the Executive Board are limited to the "execution"[5] and to the "operational management".[6]

EU law clearly stipulates that additional competencies of the Executive Board require a decision by the Governing Council to transfer these competencies.[7] The power of the ECB set down in the treaties to issue regulations and decisions is not exercised by the Executive Board but the Governing Council.[8]

The peculiar structure of the central bank system created in Maastricht has nothing in common either with the German Bundesbank, with its predecessor the Bank of the German States (Bank Deutscher Länder) or with the US central bank organisation, the Federal Reserve System (FED). The structure can only be explained by the fact that at the Conference of Maastricht the ESCB as the designated body responsible for monetary policy, given its confederative nature was indeed entrusted with the tasks of a central bank in the political sense but could not be given all the other powers of a central bank, which, for example the issuing of bank notes, would require it to have a legal capacity. In order for the ESCB as the organ responsible for monetary policy to be able to carry out the functions of a issuing bank to the full extent, the ECB had to be placed along its side as its "agent". To secure the material dominance of the ESCB over the ECB, the unity and identity of the ESCB and the ECB had to be contractually anchored in the institutional area as well as within the ECB the predominance of the Governing Council over the Executive Board. The ECB owes its existence to the fact that the ESCB, which encompasses the national central banks and whose logical transference to the responsibility in the European Community was not desired, can only carry out the function of a central bank in its entirety if it has a legal "outer face" at its side, the role assumed by the ECB. In that the Governing Council of the ECB and the Governing Council of the ESCB is identical and given that the ECB Governing Council, whose competencies with few exceptions are exerted by the Executive Board, there are grounds to doubt that the purported primacy of the ECB over the ESCB and also over the national central banks, will prove to be illusory.

The authority assigned to the ECB to give instructions to the national central banks is indeed one of the few competences that is exercised not by the

[4] Article 8 of the ESCB/ECB Statute.
[5] Article 12.1 of the Protocol on the Statute of the European System of Central Banks (ESCB) and the European Central Bank (ECB).
[6] Article 11.6 of the ESCB/ECB Statute.
[7] Article 12.1 of the ESCB/ECB Statute.
[8] The European Central Bank, represented by the Board of Governors and based on the unequivocal wording of the relevant rules of the Maastricht Treaty, and now the Treaty of Lisbon, uses this power not to fulfil its own or its delegated competences but "in order to carry out the tasks entrusted to the European System of Central Banks"; See Article 132 TFEU.

Governing Council of the ECB but by the Executive Board as its own responsibility.[9] This does not contradict, however, the above-made observation that (contrary to opinions sometimes expressed) a dominance of the ECB over the ESCB cannot be assumed. According to both EU and national law, "instructions" are not legally binding. They develop binding effects only indirectly on the condition that a hierarchical legal relationship marked by dependence exists between the issuer and the recipient of the instruction. The effectiveness consists in the fact that the recipient, in the event that he does not follow the instruction, must reckon with adverse consequences due to his dependence on the issuer of the instruction. Within the ESCB, however, there is no such structured dependency of the national central banks. The integration of the national central banks in the ESCB as its "integral part" has not led to a subordination of the national central banks to the ECB. The European Union for its part has no general authority over the member states to issue instructions from which an effective authority of the ECB over the national central banks could be derived. Its regulatory power is based on the so-called principle of limited individual authority, according to which the discretionary powers of the European Union just as its legislative powers require a special legal authorisation. The Commission, which is responsible for supervising the proper implementation of policies and compliance with the law of the European Union by the member states, because of a lack of subordination of the member states, has at its disposal for implanting its task no authority over the members states but only the option of taking a case before the European Court. Recognising that the granting of "authority" would otherwise be completely meaningless, the Conference of Maastricht granted the ECB the right to lodge complaints against the national central banks at the European Court of Justice.[10] To enforce an instruction by means of lodging such a complaint, the Executive Board of the European Central Bank, however, requires a decision of the Governing Council.[11,12]

It is also worth inquiring into the alleged authority of the ECB to issue banknotes. Under the Treaty of Maastricht the authority to issue central bank money has been transferred not exclusively to the ECB but also to national central banks.[13] In fact, the coins as well as the banknotes, as seen by the letters assigned to each member states on the serial number of the bank note, are issued by the national central banks and not by the European Union. However, because the ECB has been assigned to sole right to "approve" the issuing of banknotes, it presents itself indeed as a "bank notes issuing, i.e. complete, Central Bank" that supplies the economy if not directly at least indirectly in a centrally controlled manner with money and which ensures monetary stability. The national central banks as well as the ECB itself are subject to the obligation to supply the economy with money and to ensure the stability of the currency. The powers of the ECB extend so far that if necessary it can require the national central banks to fulfil their obligation by calling on the European Court of Justice.

However, within the ECB the responsibility for granting permission to the national central banks to issue banknotes rests not with the Executive Board but with the Governing Council. The responsibility for ensuring the stability of the currency of the European Union in supplying central-bank liquidity thus lies – and the same applies to the creation of so-called bank money by the commercial banks – with the ECB in conjunction with the ESCB. As with the adoption of general guidelines for monetary policy, the Governing Council decides on the granting of permission to issue banknotes with a simple majority, so that a majority of the national central bank presidents can outvote the members of the Executive Board.

It is also worth enquiring into whether the ECB can sufficiently control the "collateral" in the issuing of banknotes by the national central banks. The national central banks provide money to commercial banks only against collateral that must be provided in the form of securities. Since the security types have different security values, it is necessary – in a system in which several central banks issue money that affects the entire currency notes and that supply commercial banks with money – to have uniform rules on the admission of securities as collateral. However, EU law defines neither the permissible securities nor does it provide a binding framework for a uniform practice of collateralisation of the national central banks. The Maastricht Treaty contains no authorisa-

[9] Article 12.1 paragraph 2 of the ESCB/ECB Statute.
[10] Article 35.6 of the ESCB/ECB Statute.
[11] This is the case because bringing a case before the European Court requires a preliminary procedure. In this preliminary procedure the so-called "reasoned opinion", which is required for the bringing of the action, is not done, as usual, by the Commission, but, according to a special legal regulation, by the European Central Bank, represented not be the Executive Board but by the Governing Council.
[12] Article 12.1 paragraph 2 of the ESCB ECB Statute.
[13] Article 128 TFEU, ex Article 106 TEC.

tion on the basis of which either the European Parliament and the European Council as joint EU legislators or the ECB itself as a legislator could set down the requirements with which the securities of the national central banks would have to comply. Traditionally, the national central banks of the European Union accept not uniform but quite different collateral when issuing banknotes. To be sure, the ECB has developed – via the "General documentation on Eurosystem monetary policy instruments and procedures of the European System of Central Banks" – concepts regarding acceptable collateral, which however, because they are not legally binding, the ECB cannot enforce via the courts in cases of non-compliance on the part of the national central banks. For enforcement, neither is the ECB's authority nor are the special rights to lodge complaints that the Treaty of Maastricht/Lisbon specifically granted the ECB sufficient in the event that a national central bank breaches an obligation of EU law.[14] Moreover, the "General documentation" of the ECB states, with some restrictions, that more or less all traditional forms of collateral are permissible.[15]

Policy Areas of the European System of Central Banks

The actual policy area of the ESCB and the ECB is the shaping of monetary policy, by which the economy is supplied with money, at the same time ensuring the monetary stability as an economic and social-policy objective (Seidel 2005, 505-37). The primary goal of monetary stability also applies to exchange rate policy, a task that has been assigned to the Council of the European Union in co-operation with the ESCB.[16]

Economic policy

The powers of the ESCB are not restricted to monetary policy, however. Instead, the ESCB also supports the "general economic policy in the Union".[17] In the process, however, stabilising the price-level and the value of the currency must remain the primary monetary-policy target.

The member states are primarily responsible for "general economic policy" in the European Union and not the European Union itself. At the Conference of Maastricht, monetary and exchange rate policy was transferred to the European Community to be sure but not economic policy as well. In the area of the Economic Union, the competences of the European Union are limited in that it coordinates the economic policies of the member states via the European Council by means of a legally non-binding procedure. The reason for the "restraint" in the transferring of powers in the Economic Union is that the shaping of a central economic policy presupposes a "dominant budgetary power" of the European Union. This in turn requires as a controlling instrument a central economic policy, with the member states entrusting their social policies, education and training policies, their economically relevant areas of infrastructure policies and possibly even their defence policy to the European Union. In these policy areas, the European Union would have to be given legislative powers, and for the financing of the tasks to be assumed by the European Union also comprehensive taxation powers. The concept of the Maastricht "Economic and Monetary Union" with a centralised monetary policy and decentralised responsibility for economic policy is not based on the principle of subsidiarity but on the political unwillingness of the member states to transform the European Union into a federation.

The powers of the European Union in its policy of "economic and social cohesion" allow no independent economic policy of the European Union. These powers consist of participation and co-determination competences that neither replace nor call into question the primary responsibility of the member states for their economic policies.

The ESCB and the ECB, while maintaining their commitment to a policy of stability, therefore support not a central economic policy but at best the coordinated economic policies of its member states or the economic policies of individual member states.

Moreover, the authorisation of the ESCB to support economic policy is limited to the so-called "general economic policy". It does not include the "special economic policies" of the member states, i.e., neither the regional and sectoral economic structural policies nor employment policies and labour market policies, both of which are part of economic policy not social policy, nor the economically relevant infrastructure policy nor economically relevant areas of

[14] Article 271 (d) of the TFEU, ex Article 237 (d) of the EC Treaty.
[15] On "The implementation of monetary policy in the euro area", see especially Heinsohn and Steiger 1999.
[16] Article 219 TFEU, ex Article 111 TEC.
[17] Article 127 TFEU.

education and training policy nor all other areas of social policy that are sub-areas of national economic policy.

Stabilization of financial systems and bank rescue

The "stabilization of financial systems" and the "rescue of banks" are to be regarded as special areas of economic policy. As areas of national competence, at no time was the responsibility of stabilising financial markets – similar to agricultural economic policy, transport policy and trade policy – transferred to the European Union; neither to the European Parliament nor to the European Council as legislators of the European Union nor to the ESCB. In order to have transferred this area of economy policy to the European Union, a specific act of transferring would have been necessary, based on the principle of conferred powers, a fundamental constitutional principle of the European Union, which excludes a creeping transfer of sovereignty to the European Union. The provisions of the Treaty of Maastricht, which are often claimed to assert the contrary, are clear. It does not follow from Article 127, Section 5, TFEU that "the supervision of financial markets" is the responsibility of the European System of Central Banks; instead, this provision stipulates that the "the supervision of financial markets" is the responsibility of separate other "authorities" – currently still authorities of the member states but in future the EU's "authorities". The ESCB, and in its midst the ECB, are solely empowered to contribute "to the smooth conduct of policies pursued by the authorities to stabilise the financial system". The limitation of the tasks of the ESCB to a mere involvement in the supervision of the banking industry by other "authorities" serves and ensures the independence of the ECB and the ESCB. If the supervision of credit institutions and thus the assurance of the stability of the financial regimes were transferred to the ECB or the ESCB as an exclusive responsibility, the European System of Central Banks would be subject to the instructions of the Commission and the European Council in the same as national supervisory authorities are to subject to their governments.[18] The recently revealed purchase of government bonds by the ECB, and by the ESCB possibly also via the Greek central bank, is not a legitimate "contribution" of the ECB, and the ESCB, to facilitate the "implementation" of measures adopted by one or more other "authorities" responsible for the stabilisation of financial markets. It is an independent measure of the ECB and the ESCB alongside the rescue efforts of the other 17 countries of the so-called Euro Group and the International Monetary Fund to assist Greece and particularly alongside the "euro rescue package" that the EU member states established to help other member states that are threatened by sovereign default. The European Union and with it the Governing Council of the seventeen member states represented in it currently have no administrative supervisory authority. The transferring of monetary policy to the European Union has not led to a simultaneous transferring of the ensuring of the stability of financial markets and the bailout of the banks as an "annex competence" of the European Union (Seidel 2010, 521).

Independent authority

The independence of the ESCB and thus especially of the ECB is generally regarded to be sufficient.[19] However, some doubts have arisen. The Treaty of Maastricht/Lisbon does not require the member states have to grant their central banks absolute independence, especially the exemption from other duties. The Treaty also does not regulate the independence from instructions in the area of exchange rate policy, i.e., the independence of the members of the Governing Council, who are responsible for exchange-rate policy. According to EU law, in the matter of exchange rate policy, the representatives of the governments in the Governing Council are subject only to the condition that their consensus "is in line with the objective of price stability".[20]

The commitment of the organs and officials of the European System of Central Banks to independence has a more appellative than legal character. Neither the obligation of the member states to safeguard independence from instructions nor the determination of a violation of this independence by an organ of the ESCB, by a national central bank or by one of the officials is likely to be enforceable before the European Court of Justice. The same holds for a Governing Council decision on an exchange-rate policy that does not maintain the stability obligation.

[18] Paragraph 6 of Article 127 TFEU does not alter this conclusion. This provision does not authorise the legislature of the European Union to assign the sole responsibility for the supervision of the credit institutions to the ECB. The authorisation of the legislature is limited to transferring to the ECB the "special duties in connection with the supervision of credit institutions".

[19] Article 130 TFEU, ex Article 108 TEC; also Article 7 of the ESCB/ECB Statute.

[20] Article 219 TFEU, ex Article 111 TEC.

There are tight limits on an expansion of the independence from instructions via the rulings of the European Court of Justice, as has always been the case in other regulatory areas of EU law. In the case of a national central bank disregarding the obligation to independence, only the member state and not the central bank concerned can be prosecuted, whereby the right to bring proceedings rest only with the Commission and other member states. It is quite unlikely that the European Court of Justice in its further interpretation of EU law will consider complaints from private individuals. The decisive prerequisite for a supplementary right of private persons to bring charges, according to the present rulings of the European Court of Justice, namely a secondary and direct effect of the obligation of independence of the ECB and the ESCB and their officials, is as impossible to assume as is a fundamental right to price stability.

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