

The ECB's Role as Crisis Manager – Implications for its Independence and Accountability¹

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1. Introduction

The European financial and sovereign debt crisis has triggered the most fundamental overhaul of the legal framework on economic policy coordination since the inclusion of the chapter on economic and monetary policy in primary Union law by the Treaty on European Union. Moreover, decisive steps have been taken towards a comprehensive European framework for financial market regulation and supervision.³ In the course of the crisis much has been stated not only about these legal developments, but also on the monetary policy stands of the European Central Bank (ECB). Yet, in the light of the highly significant legal developments in the sphere of economic governance, the impact of the crisis and the regulatory responses on the institutional position of the ECB has yet to be fully explored. Indeed, the recent developments *de facto* have an impact on the position of the ECB in the Union constitutional framework, namely with regard to two major institutional features that have been a contentious bone from the time that the rules pertaining to the European System of Central Banks (ESCB) and the ECB were introduced into primary Union law, namely its independence and accountability.

Given the limited space available, what follows is by no means a comprehensive study of the (potential) effects of the ECB's role in the crisis on its degree of independence and accountability. Instead this contribution engages with a first mapping exercise that identifies relevant issues. To this end, hereafter, first of all the position of the ECB prior to the crisis with regard to these two key institutional features is briefly evoked. This is followed by a discussion of the ways in which the ECB's role in the crisis (potentially) impacts the institutional position of the ECB in the Union legal order.

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³ Do to the limited space available the impact of the ECB's new role in the Banking Union and namely in the Single Supervisory Mechanism cannot be discussed here.

2. The ECB as an independent and accountable Union institution

One of the most distinct institutional features of the ECB that define its position in the European Union constitutional order and moreover sets it apart from many other central banks is its statutory independence both from other Union institutions and Member States' governments. In fact, this independence has raised major concerns about the limited statutory accountability of the supranational monetary policy authority, triggering substantial steps mainly by the ECB to improve its position in this regard.

2.1. The ECB's constitutional independence

The ECB independent position derives from Articles 130, 131 and 282(3) TFEU, as well as Article 7 of the Statute of the ESCB and ECB and essentially comes down to a general prohibition for the ECB and for the national central banks to seek or receive instructions from EU and national institutions, bodies, offices or agencies in the context of the tasks and duties vested on them. Different to what can usually be observed for central banks in national settings, including the German Bundesbank, with the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Statute on the ESCB and ECB attached to these Treaties, the legal basis of the ECB has been positioned at the constitutional level of the supranational legal order.

The ECB's independence can be defined not only in institutional, but also functional, organisational and financial terms.⁴ With regard to its primary monetary policy objective, *i.e.* to ensure price stability in accordance with Article 127(1) TFEU, the ECB is not only autonomous in deciding on the application of the instruments at its disposal to achieve this objective (instrument independence) namely in accordance with Article 18 Statute ESCB and ECB, but also in deciding on the quantification of this objective (goal independence). Members of the Bank's Executive Board are appointed for a non-renewable period of 8 years and the term of the national central bank governors of the euro area countries participating on the Governing Council has to be at least 5 years.⁵ Dismissal of the members of the Executive Board and Governing Council is only possible if they no longer fulfil the conditions required for the performance of their duties or if they have been guilty of serious misconduct.⁶ The financial or budgetary independence of the ECB derives essentially from the fact that the Bank effectively finances itself through its own operations, whereby the resources of this Union institution do not form part of the general EU budget and the applicable appropriation process.

⁴ For more details see F. Amtenbrink, *The Democratic Accountability of Central Banks – A Comparative Study of the European Central Bank* (Hart Publishing 1999), at 18 *et seq.*, with further references.

⁵ Art. 11.2. and 14.2 Statute ESCB and ECB.

⁶ *Ibid.*, Art. 11.4 and 14.2.

This emphasise on the independent position of the ECB cannot only be explained with the professed autonomous position of the German Bundesbank⁷ that has been considered as an archetype of an effective monetary policy authority, but has also been influenced by the debate among political and monetary economists on what monetary policy can and cannot achieve and, moreover, to what extent a central banks should operate at a distance from the political business cycle to be able to effectively pursue its statutory objectives.⁸ Put differently, central bank independence has been perceived as ‘a way to protect policy makers against the temptation of using monetary policy in a distortionary way.’⁹

Arguably the credibility of the newly created supranational monetary policy authority very much depended on the establishment of sound institutional structures that would moreover be able to bridge the diverse traditions in the Member States with regard to the relationship between the central bank and government and namely the Ministry of Finance. At the same time this approach mirrored the position on the position of a future European monetary policy authority in at least one Member State, namely Germany, which was reflected in the introduction of today’s second sentence of Article 88 of the German Basic Law (*Grundgesetz*) at the time of the ratification of the Treaty on European Union according to which ‘Within the framework of the European Union, [the Bundesbank’s] responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.’¹⁰ What is more, the German Federal Constitutional Court in its well-known decision on the Treaty on European Union emphasised that from a German constitutional standpoint the independent position of the ECB can only be justified when restricting itself to the conduct of a stability-oriented monetary policy.¹¹

Falling effectively outside the simplified amendment procedure of Article 129(3) TFEU, changing the position of the ECB in terms of its independence would require an amendment of primary Union law in accordance with Article 48 TEU. It is not least do to this European constitutional guarantee of its position that the ECB has to be ranked among the most

⁷ It should be noted in this context that prior to the establishment of the ESCB and ECB the legal basis of the Bundesbank did foresee in a limited override mechanism allowing the federal government to temporarily suspend the decision-making monetary policy board of the Bank for a period of up to two weeks. See Amtenbrink (*supra*, n. 3), at 276-277.

⁸ Amtenbrink, n 3 *supra*, 11-17, with further references to relevant literature.

⁹ L. Bini Smaghi, ‘Central Bank independence: from theory to practice’ speech held at the conference Good Governance and Effective Partnership Budapest, Hungarian National Assembly, 19 April 2007. Available at <https://www.ecb.europa.eu/press/key/date/2007/html/sp070419.en.html#ftn.fnid17>.

¹⁰ Brackets added.

¹¹ BVerfGE 89, 155, para. 154.

independent central banks in the world.¹² At the same time the Court of Justice of the European Union (ECJ) has made clear in its decision in *OLAF* that the ECB does not hold a special status in the Community legal order that would for example shield it from investigative powers of the European Anti Fraud Office.¹³

Further adding to the insulation of the ECB from government influence, be it at the European or national level, is the prohibition of monetary financing included in Article 123 TFEU, which rules out overdraft facilities or any other type of credit facility with the ECB and, moreover, prohibits the ECB and the Member State's central banks from purchasing directly, *i.e.* on the primary market, debt instruments issued by the EU or Member States.

2.2. An accountable independence?

On the eve of the coming into force of the Treaty on European Union introducing today's Title VIII on economic and monetary policy Lastra had rightly made the case for an accountable independence of the ECB.¹⁴ Yet, an analysis of the legal framework prior to its coming into operation revealed a substantial imbalance between on the one hand the extensive safeguards applying to its independence and, on the other hand, the somewhat meagre legal framework allowing for the European monetary policy authority to be held to account for the pursued of its statutory primary and secondary objective. Indeed, while the extent of the ECB's powers, the lack of a statutorily quantified monetary policy objective and the complexity of the ECB's (forward-looking) analytical framework all call for extensive accountability mechanisms, namely the lack of minutes of the meetings of the Governing Board, the main decision-making organ of the Bank, the absence of the establishment of any formal mechanism ensuring the answerability to the European Parliament, as well as the notable absence of any effective instruments in the hands of the European Parliament, Council and Commission to actually correct the ECB in case of bad performance, supported the view that – at least on paper – independence was not matched by adequate accountability arrangements.¹⁵

While the legal basis of the ECB has not been changed in this regard since its coming into existence, observing the accountability arrangements in practice prior to the European

¹² For a recent study ranking central banks according to their independence see N.N. Dincer and B. Eichengreen, 'Central Bank Transparency and Independence: Updates and New Measures', *International Journal of Central Banking* Vol. 10, No. 1 (2014), 189.

¹³ Case C-11/00 *Commission v. ECB (OLAF)* [2003] ECR I-7147.

¹⁴ R.M. Lastra, 'The Independence of the European System of Central Banks', 33 *Harv. Int'l. L.J.* Vol. 33, No. 1, Winter 1992, 475, at 481.

¹⁵ Such instruments could for example include a performance-based dismissal of the President of the ECB and the possibility for government and/or parliament to override, under certain conditions and subject to review, monetary policy decisions of the central bank. Amtenbrink (*supra*, n. 3), p. 334 *et seq.*

financial and sovereign debt crisis allows for a somewhat more positive assessment of the accountability arrangements. This is largely due to the ECB's own recognition of what at some stage had become a broad consensus on the need for an accountable ECB, but maybe even more so the discovery of transparency as a tool for a credible monetary policy.¹⁶ The volume and scope of voluntary monetary policy publications of the ECB, including namely macroeconomic projections on a quarterly basis and the extensive press conferences following monetary policy decisions featuring the President of the ECB, bear witness to this approach. The same holds also true for the voluntary quarterly appearances of the President of the ECB before the Economic and Monetary Affairs Committee of the European Parliament in the so-called monetary dialogue that has taken place from 2000, which allow MEP's to engage with the Bank on its performance.¹⁷ In fact, having long refused to provide any insights on the deliberations of the Governing Council, mainly on grounds of secrecy and monetary policy effectiveness, since 2015 the ECB even publishes so-called Monetary Policy Accounts, which provide an anonymised report of the monetary policy considerations, monetary policy stand, as well as the related policy options that have been discussed at a given monetary policy meeting of the Governing Council of the ECB.

Still, any substantial improvements improvements of the Treaty arrangements pertaining to instruments of accountability are unfortunately still absent.

3. The role of the ECB in the crisis

Next to the euro area Member States and the other Union institutions, also the ECB took on an active role in addressing the crisis in its approach to the conduct of monetary policy and its involvement the financial assistance programmes for several euro area Member States. Arguably this role has not remained without challenges for the independence of the ECB, as well as for the legitimacy of its action and the way in which its accountability has to be looked upon.

3.1. The ECB's monetary policy stands

Accounts of the ECB's crisis involvement often start with its non-standard or unconventional monetary policy measures. Yet, arguably the most significant crisis measure that has been

¹⁶ J. de Haan, F. Amtenbrink, S. Waller, 'The Transparency and Credibility of the European Central Bank' (2004) *JCMS: Journal of Common Market Studies*, 42, 775-794.

¹⁷ On the effectiveness of the monetary dialogue as an accountability instrument see F. Amtenbrink and K. van Duin, 'The European Central Bank Before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue', (2009) *E.L. Rev.* August, 561-583. For an assessment on the effectiveness to influence the behaviour of the ECB see S.C.W. Eijffinger and E. Mujagic, 'An Assessment of the Effectiveness of the Monetary Dialogue on the ECB's Accountability and Transparency: A Qualitative Approach', *Intereconomics* July/August 2004, 190-203.

taken was the successive lowering of the key interest rates, thereby following, albeit with a time lag, the example of the U.S. Federal Reserve System. The interest rate on the main refinancing operations (fixed rate tenders) decreased from 3,75 percent in October 2008 to 0,05 percent by September 2014, the interest for the marginal lending facility for credit institutions with national central banks was lowered from 5,25 percent in July 2008 to 0,3 percent by October 2014, and between October 2008 and September 2014 the rate for deposit facility was lowered from 3,25 percent to –0,2 percent.¹⁸ These developments are significant in that they explain – to some extent – the ECB’s additional action, as the margin for interest rate policy decreased. The ECB has engaged in a series of non-standard monetary policy measures that vary both in scope and size, but in their totality are considered to be ‘unprecedented in nature, scope and magnitude’ even by the ECB itself.¹⁹ This included *inter alia* several covered bond purchasing programmes (2009-2010, 2011, 2014)²⁰, a securities markets programme (2010-2012)²¹, the announcement of outright monetary transactions (OMT) (2012)²², an asset-backed securities purchase programme (2014)²³ and a public sector asset purchase programme (2015).²⁴ The ECB itself has defended these measures mainly by pointing out that they have to be understood ‘as a *complement* to its interest rate instrument, not as a *substitute*, as is the case for the bulk of unconventional policies of other major central banks.’²⁵ In fact in view of the ECB the aim has been to enhance the transmission of interest rate decisions to the real economy, thereby improving ‘financing conditions and credit flows, in a context of dysfunctional developments in some segments of the financial system.’²⁶

¹⁸ ECB data from < <https://www.ecb.europa.eu/stats/monetary/rates/html/index.en.html> > (accessed: 25 November 2015).

¹⁹ According to the ECB’s own online presentation available at < <https://www.ecb.europa.eu/mopo/decisions/html/index.en.html> > (accessed 25 November 2015). For a general overview of the measures before 2014 see P. Cour-Thimann and B. Winkler, ‘The ECB’s Non-Standard Monetary Policy Measures. The Role of Institutional Factors and Financial’, ECB Working Paper Series No. 1528, April 2013.

²⁰ Decisions of the ECB of 2 July 2009 on the implementation of the covered bond purchase programme (ECB/2009/16); decision of the ECB of 3 November 2011 on the implementation of the second covered bond purchase programme (ECB/2011/17); decision of the ECB of 15 October 2014 on the implementation of the third covered bond purchasing programme (ECB/2014/40).

²¹ Decision of the ECB of 14 May 2010 establishing a securities markets programme (ECB/2010/5).

²² See ECB Press release of 6 September 2012. Available at < https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html > (accessed 25 November 2015).

²³ Decision of the ECB of 19 November 2014 on the implementation of the asset-backed securities purchase programme (ECB/2014/45).

²⁴ Decision 2015/774 of the ECB of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10).

²⁵ Cour-Thimann and Winkler (*supra*, n. 18), p. 20

²⁶ ECB, ‘Financial Integration in the European Union’, April 2015, p. 28. Available at < <https://www.ecb.europa.eu/pub/pdf/other/financialintegrationineurope201504.en.pdf> > (accessed: 25 November 2015).

Interestingly, even ECB officials acknowledge that – at least in effect - some of these measure may have also assisted to control the crisis. With regard to the Security Markets Purchasing Programme Cour-Thimann and Winkler have observed: ‘Even though the SMP was used for monetary purposes, it also provided time for governments to find durable solutions to the crisis and restore the sustainability of public finances’ and, moreover, that ‘ ECB policy-makers have been vocal in urging governments to use the time to provide for the necessary fiscal and macroeconomic adjustment and supporting financial stabilization tools.’²⁷

It was precisely this (potential) link between the ECB’s crisis measures and the precarious financial situation of several euro area Member States that has resulted in severe criticism of the ECB action in the face of the ECB’s primary monetary policy task, as well as the prohibition of monetary financing laid down in Article 123(2) TFEU, and the prohibition of Article 125 TFEU for Member States or the EU to take on the (financial) commitments of another euro area Member State (often referred to somewhat misleading as the no bail-out clause).²⁸ To put it short and in non-technical terms, the ECB has been accused of extending its activities beyond the monetary policy domain in intervening in the financial markets on behalf of Euro Member States on the brink of sovereign default. In some quarters the ECB was no longer perceived as an independent, impartial and maybe even technocratic broker of monetary policy in the euro area, but rather as an actor that takes decision, which the drafters of the Treaties according to these critics meant to rule out, but in any event should be the outcome of political decision making processes.

Such criticism was further fuelled by the fact that at several critical moments during the crisis the ECB could be perceived as a key player in deciding the faith of the euro area with the power to single-handedly tip the scale. One recent case in point is the ECB’s decision of 4 February 2015 – at a crucial moment in the negotiations between Greece and its lenders on the extension of the financial assistance programme – to lift the waiver of the collateral rules (minimum credit rating requirements) for marketable instruments issued or guaranteed by Greece. This triggered an implicit invitation to the ECB by the then Greek Minister of Finance in a letter to the Eurogroup President ‘to re-introduce the waiver in accordance with procedures and regulations.’²⁹ Thereafter, with reference to this letter, the Greek Prime Minister in a letter to the German Chancellor became even more explicit in referring to ‘a

²⁷ Cour-Thimann and Winkler (*supra*, n. 18), at 14.

²⁸ Exemplary in this regard are the critical contributions by German legal scholars. See *e.g.* D. Murswiek, ‘ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court’s Referral Order from 14 January 2014’ (2014) German Law Journal, 147-165. This author is the representative of one of the main plaintiffs in the *OMT/Gauweiler* case before the German Federal Constitutional Court.

²⁹ See ECB Press Release ‘Eligibility of Greek bonds used as collateral in Eurosystem monetary policy operations’. Available at < <https://www.ecb.europa.eu/press/pr/date/2015/html/pr150204.en.html> > (accessed: 25 November 2015). Letter of the Minister of Finance Yabis Varoufakis to Jeroen Dijsselbloem of 18 February 2015. Available at

number of issues that the Eurogroup ought to solve', thereby explicitly referring to a re-introduction of the ECB's waiver.³⁰ The fact that the Greek government officials addressed this demand not to the ECB, but rather the president of the Eurogroup can be interpreted as an attempt to organize political pressure on the statutory independent ECB to change its mind.

A somewhat more dramatic example of a situation in which the ECB's action or failure to act could have had a decisive influence on the developments in a euro area Member State arose in June/July 2015, when – with the prospect of a negative Greek referendum on the proposal for a new financial assistance programme - the ECB had to decide whether to restrict Emergency Liquidity Assistance (ELA) by the Greek central bank to Greek financial institutions that were – as was argued by the Greek central bank – only in temporary liquidity problems. The ECB has the statutory power to restrict such operations if 'it considers that these operations interfere with the objectives and tasks of the Eurosystem.'³¹ To be sure, ELA is a regular instrument available in the Eurosystem, if and to the extent that the financial institutions in question are indeed solvent. Yet in the prevailing economic and financial climate at the time, a restriction of these operations by the ECB's Governing Council was widely believed to have effectively resulted in a breakdown of the Greek financial system. Once again the ECB found itself in the position of a potential 'game changer'. In this situation the ECB decided to maintain ELA at its previous level. One can only speculate what the consequences would have been not only for Greece or the euro area as a whole, but also for the position of the ECB, if the latter would have taken a different decision.

Yet, arguably to date no single crisis measure by the ECB has attracted more profound discussions both inside and outside the ECB on the role of the ECB in the crisis than the September 2012 announcement of the unlimited purchase on secondary markets of government bonds of euro area Member States that are subject to a financial assistance programme as part of loans by the European Financial Stabilisation Mechanism (EFSM), the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM). In fact arguably for the first time in its history the constitutionality of the ECB's action was indirectly challenged before a national constitutional court of a euro area Member State, namely the German Federal Constitutional Court (*Bundesverfassungsgericht*).³² This challenge, which was not only supported by a German parliamentary group and a number of more or less prominent academics but also by more than ten thousand individuals, resulted in the review of the compatibility of the ECB's action with Union law, first by the German Court and, thereafter, by the ECJ in response to the first-ever preliminary reference by the German

³⁰ The letters are available from < http://blogs.ft.com/brusselsblog/files/2015/03/Letter_AM.pdf > and < http://blogs.ft.com/brusselsblog/files/2015/03/Letter_AM.pdf > (accessed: 25 November 2015).

³¹ Art. 14.4. ESCB and ECB Statute.

³² BVerfG, Order des Zweiten Senats vom 14 January 2014 - 2 BvR 2728/13 - Rn. (1-24), namely para. 56 *et seq.* and para. 84 *et seq.*. Available at < http://www.bverfg.de/e/rs20140114_2bvr272813en.html >

Federal Constitutional Court.³³ The reasoning and moreover the tone of the German Court have been rightly criticised.³⁴ More importantly for the purpose of this contribution, the fierceness with which the majority of its judges reject the OMT, essentially claiming a transgression of the ECB's monetary policy mandate and a violation of the Union prohibition of monetary financing, highlights the extent to which the ECB has become exposed to criticism in the crisis and underlines that the ECB's independent position within the Union legal order has by no means shielded its conduct of monetary policy from profound criticism or judicial review. In fact, courts were called upon to essentially enforce a restrictive reading of the scope of the exclusive competence of the Union for monetary policy in the euro area and more concretely to limit the ECB's broad discretion in conducting monetary policy in accordance with primary Union law.

To be sure, this uncomfortable position in which the ECB finds itself as a result of its crisis interventions, having to defend its monetary policy measures in court, finds its roots at least to some degree in the constitutional design of EMU. Indeed, from the outset there was an inherent tension between the asymmetric integration of economic and monetary policy in primary Union law on the one side and the deep interconnectedness of these two policy areas in reality on the other side. In the first instance this asymmetry can be observed from an economic point of view as a potential obstacle for an effective single monetary policy throughout the euro area in the face of the lack of convergence of the euro area economies. Yet, the developments during the crisis have highlighted that this asymmetry also stands for a somewhat artificial legal delineation, whereby the lines between economic and monetary policy, as perceived in primary Union law, can become rather blurred, in particular when considering the before-mentioned prohibition of monetary financing and the no bail-out clause. In fact during the crisis the ECB could be seen operating on the borderline between monetary and economic policy, something that the Member States had already previously tested with the establishment of the ESM Treaty.³⁵

In *Pringle* the ECJ for the first time had to deal with the delineation between economic and monetary policy. In this case the Court *inter alia* addressed the question whether the

³³ Case C-62/14 *OMT/Gauweiler* [2014] ECR I-nyp.

³⁴ M. Kumm, 'Rebels Without a Good Cause. Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of 'Chicken' and What the CJEU Might Do About It', *German Law Journal*, Vol. 15, No. 2, 203-215. See also the other contributions in *German Law Journal*, Vol. 15, No. 2, Special Issue 'The OMT Decision of the German Federal Constitutional Court'; H. Sauer, 'Doubtful it Stood...: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment', *German Law Journal*, Vol. 16, No. 4, 971-1002.

³⁵ As to the reception of the unconventional monetary measures by the ECB by legal academics throughout the EU and namely their compatibility with primary Union law, see the proceedings of the 2104 FIDE Congress: U. Neergaard, C. Jaqueson, J.H. Danielsen (eds.), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (DJØF Publishing 2014).

substantive scope of the ESM Treaty encroached the exclusive monetary policy competence of the Union.³⁶ The Court concluded that the fact that financial assistance granted by the ESM is aimed at the financial stability of the euro area as a whole, does not turn such assistance into monetary policy measures. Instead, in the opinion of the European judges, such assistance has to be considered to 'complement the new regulatory framework for strengthened economic governance of the Union' and as such 'the establishment of that mechanism falls within the area of economic policy.'³⁷ In its preliminary ruling in *OMT/Gauweiler* the ECJ follows up on this approach. While pointing out that 'the ESCB must act within the limits of the powers conferred upon it by primary law and it cannot therefore validly adopt and implement a programme which is outside the area assigned to monetary policy by primary law', the ECJ also finds that 'The fact that a programme such as that announced in the press release might also be capable of contributing to the stability of the euro area, which is a matter of economic policy', does not turn the measure into an economic policy' and, moreover, that 'a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area'.³⁸

While the ECJ in *OMT/Gauweiler* has thus stated that government bond purchasing can form part of monetary policy and can thus be validly adopted and implemented, this does require that 'the measures that it entails are proportionate to the objectives of that policy', whereby the ECJ has emphasised that

'[A]s regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion'³⁹

This means that judicial review of these ECB measures are limited to reviewing, whether and to what extent the limits of this discretion are breached.⁴⁰

Considering the rulings of the ECJ in *Pringle* and *OMT/Gauweiler* together, the ECJ's guidance on the separation of monetary and economic policy may be less clear cut than what it seems at first sight. Indeed, the Court seems to view the financial stability of the euro area as a general Union objective that is situated somewhere between monetary and economic policy,

³⁶ Case C-370/12 *Pringle* [2012] ECR I-nyr.

³⁷ *Ibid*, para. 58 and 60.

³⁸ Case C-62/14 *OMT/Gauweiler* [2014] ECR I-nyr., para. 40 and 41

³⁹ *Ibid*, para. 68.

⁴⁰ *Ibid*, para. 69. The ECJ in this context refers to 'a review of compliance with certain procedural guarantees', such as 'the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.'

effectively contributing to both. If this reading is correct, this implies that the clinical distinction that is very much induced by the attempt of the drafters of the Treaty provision on EMU to maintain a clear vertical separation of competences in line with the principle of attribution is untenable. In fact, the rather artificial and in any event very fragile separation of monetary and economic policy makes the ECB potentially constantly subject not only of political but also legal debates on the limits of its competences beyond what can be expected in a conventional (national) central bank context. This is even more so the case considering, as will be explained in the next section, that the ECB links its unconventional monetary policy to economic policy conditionality.

The discourse on the delineation of monetary and economic policy does not only have implications for the legality of the ECB's monetary policy measures in a normative sense and the scope of the independent conduct of monetary policy by the ECB, but - in a broader constitutional sense - also for the legitimacy of a Union institution whose crisis measures are considered to have considerable distributive effects between the taxpayers in the euro area, raising the question whether such decisions must not be reserved to democratically elected governments and parliaments.⁴¹ In this context it may be questioned whether the existing accountability arrangements both in law and practice are sufficient to ensure a proper accountability for the ECB's extensive crisis measures provide for, especially when it come to instruments to hold the ECB to account.⁴²

Next to this fundamental question of the delineation of monetary and economic policy in the euro area and the monetary policy mandate of the ECB, the latter's crisis response and namely the purchase on secondary markets of government bonds of Member States of the euro area has also been criticised for being incompatible with the before-mentioned prohibition of monetary financing laid down in Article 123(2) TFEU. Already in *Pringle* the ECJ has verified that this provision prohibits the ESCB inter alia from purchasing *directly from Member States* (i.e. on the primary market) debt instruments. At the same time this does not exclude the purchasing from the creditors of such a State (i.e. on the secondary market) of bonds previously issued by that euro area Member State.⁴³ At the same time the Court has stated that

'the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect

⁴¹ See the introductory statement by the President of the German Bundesbank Jens Weidmann on the occasion of the hearing in the main proceedings *ESM/ECB* at the German Federal Constitutional Court in Karlsruhe on 11 June 2013. Available at < https://www.bundesbank.de/Redaktion/DE/Kurzmeldungen/Stellungnahmen/2013_06_11_esm_ezb.html > (accessed: 15 November 2015).

⁴² See section 2.2. above.

⁴³ Case C-62/14 *OMT/Gauweiler* [2014] ECR I-nyp., para. 95.

equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU.⁴⁴

The ECJ has emphasised in this context that the ECB must provide for sufficient safeguards to ensure the aim of Article 123(2) TFEU that is

‘to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits’⁴⁵

The purchase of government bonds by the ECB on the secondary market must not *in effect* have ‘an effect equivalent to that of a direct purchase’. This would be the case, if

‘the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.’⁴⁶

In case of the OMT programme the ECJ did not find such a circumvention of the prohibition of monetary financing laid down in primary Union law, arguing that arrangement foreseen in the respective ECB draft decision and draft guidelines (minimum period between issue of a security on the primary market and its purchase on the secondary market & no prior announcement of purchases and volumes) provide a sufficient safeguard.⁴⁷

3.2. *The ECB’s role in the financial assistance programmes*

In response to the crisis the ECB has not only engaged in unconventional monetary policy measures, but has also become directly involved in the financial assistance programmes for various euro area Member States since 2010, including the bilateral loans to Greece (2010), the loans granted by the EFSM and the EFSF to Ireland (2011), Portugal (2011) and Greece (2012), the EFSF recapitalization of financial institutions in Spain (2012), and ESM loans to Cyprus (2013) and Greece (2015). To be sure, the ECB is not part of the financing under any of these financial schemes, but rather has become involved in the establishment of the substance and, thereafter the monitoring of the implementation of the Memoranda of Understanding (MoU’s) that define the conditions in terms of national policy measures that

⁴⁴ Ibid, para. 96.

⁴⁵ Ibid, para. 100 and 102.

⁴⁶ Ibid, para. 104.

⁴⁷ Ibid, para. 106.

have to be implemented by the Member State concerned to receive the agreed upon financial assistance in tranches.⁴⁸ From the beginning of financial assistance to euro area Member States the ECB has formed part of three bodies (the so-called 'troika') (bilateral loans, EFSM and EFSF), consisting moreover of the European Commission and the IMF, and in the case of the ESM of a set of the four bodies (the so-called 'quadriga') that moreover includes a representative of the ESM, that was effectively charged with the negotiation and monitoring of the economic policy conditions attached to the respective loans. In the case of the EFSM/EFSF, as well as the ESM this participation of the ECB is laid down in the respective legal bases. Thus, for example Article 3(3)(b) of Council Regulation 407/2010 states that 'the general economic policy conditions which are attached to the Union financial assistance [...] will be defined by the Commission, in consultation with the ECB.'⁴⁹ Section 2.1.a. of the EFSF Framework Agreement states that 'the Commission (in liaison with the ECB and the IMF) shall be hereby authorised to negotiate the MoU'.⁵⁰ Similarly Article 13(3) ESM Treaty vests 'the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance'. The description of the ECB's participation is rather vague. While it is clear that the ECB does not participate in any formal decision making in this regard, namely the wording used by the EFSF Framework Agreement and the ESM Treaty, 'in liaison with' (German: '*im Benehmen mit*'; French: '*en liaison avec la BCE*'), implies a cooperation of the European Commission with the ECB that goes beyond a simple consultation. The ECB itself has described its role in the context of the financial assistance programmes with providing 'advice and expertise on a broad range of issues which are relevant for ensuring a proper functioning of the transmission mechanism of monetary policy (including debt sustainability), for contributing to financial stability and ultimately for supporting the general economic policies in the Union',⁵¹ and even the European Parliament in its report on the enquiry on the role and operations of the Troika, with reference to the same phraseology states that the role of the ECB is 'reduced' to 'an

⁴⁸ Regularly consisting of a MoU of economic and financial policies (on main economic and financial policies), a MoU on specific economic policy conditionality (concrete policy action) and a technical MoU (performance criteria and indicative targets). In the case of Spain this came in the shape of a so-called MoU on financial-sector policy conditionality.

⁴⁹ Brackets added. Council Regulation 407/2010 establishing a European financial stabilisation mechanism, OJ 2010, L118/1.

⁵⁰ A consolidated version of this agreement is available at <
http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf> (accessed: 25 November 2015).

⁵¹ ECB's replies to the questionnaire of the European Parliament supporting the own initiative report evaluating the structure, the role and operations of the 'troika' Commission, ECB and the IMF) actions in euro area programme countries. Available at <
https://www.ecb.europa.eu/pub/pdf/other/140110_ecb_response_troika_questionnaireen.pdf> (accessed: 15 November 2015).

advisory role'.⁵² Yet, doubts may be raised about the validity of this interpretation of the ECB's role, in particular when considering the ECB's approach in OMT to subject the operationalization of the programme to economic policy conditionality. While the OMT has never been put into effect, a similar approach can also be found in the 2015 public sector asset purchase programme. In the ECB decision on a secondary markets public sector asset purchase programme reference it is made clear that 'in the event of a review of an ongoing financial assistance programme, eligibility for PSPP purchases shall be suspended and shall resume only in the event of a positive outcome of the review.'⁵³

One of the problems that arises from the participation of the ECB in the establishment and monitoring of economic policy conditionality is pointed out by the German Federal Constitutional Court in its order in *OMT/Gauweiler*. In support of the argument that OMT actually amounts to an economic policy measure, the German Court establishes a link between the economic adjustment programmes and the purchase of government bonds of the Member State in question. In this context the judges argue that the ECB must be independent in deciding on monetary policy measures 'ultimately without being tied to the decisions of the European Financial Stability Facility or the European Stability Mechanism, whether, to what extent, and under which conditions it may purchase government bonds in selected cases (Decision of 6 September 2012: "in full discretion") and/or to stop a purchasing programme that it had started.' In the view of the German Court 'This inevitably requires independent economic assessments which must not merely retrace the decisions of the Commission, the so-called Troika or other institutions, and which, for this reason alone, extends beyond a mere "support" of the economic policy in the Union.'⁵⁴

While overall rejecting the conclusion of the German Federal Constitutional Court that the ECB has acted outside its monetary policy mandate, in his reasoned opinion on *OMT/Gauweiler* Advocate General Cruz Villalón does consider the role of the ECB in the financial adjustment programmes as quite significant. He argues that 'the ECB's role in such programmes goes beyond its simply unilaterally endorsing them. The rules of the ESM [...] but also the experience of financial assistance programmes which have been implemented or which are still ongoing, amply demonstrates that the ECB's role in the design, adoption and regular monitoring of those programmes is significant, not to say decisive.'⁵⁵ For the AG this involvement is so substantial that he considers that the OMT can only be considered a monetary policy measure, if 'the ECB refrains - once the time has come to put that programme

⁵² European Parliament, Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277(INI)), para. 55.

⁵³ Art. 3(3)(d) ECB Decision 2015/774.

⁵⁴ BVerfG (*supra*, n. 38), para. 82.

⁵⁵ Brackets added. Opinion of AG Cruz Villalón in case C-62/2014 [2014] ECR I-nyp., para 147.

into effect - from any direct involvement in the financial assistance programmes of the ESM or the EFSF.⁵⁶

This view of the AG finds further support in the ESM Treaty and namely the decisive role that the ECB is given in triggering the emergency voting procedure for financial assistance in accordance with Article 4(4) ESM Treaty. In fact, if the Commission and the ECB 'both conclude that a failure to urgently adopt a decision to grant or implement financial assistance [...] would threaten the economic and financial sustainability of the euro area', a decision on the granting of financial assistance that would normally be taken by unanimity can be taken with a 85 percent majority of the votes cast.⁵⁷ As voting rights are directly linked to the share in ESM's capital, this essentially means that the consent of smaller euro area Member States may no longer be required in such a case, as the six largest Member States (Germany, France, Italy, Spain the Netherlands and Belgium) could take such a decision on their own, a fact that made the Supreme Court of Estonia residing *en banc* question the constitutionality of the ratification of the ESM Treaty in Estonia.⁵⁸

Unfortunately, in its preliminary ruling in *OMT/Gauweiler* the ECJ does not examine the actual role of the ECB in the establishment and monitoring of the economic adjustment programmes in any great detail. Instead the Court limits itself to observing in a somewhat cursory fashion 'that a government bond-buying programme may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes', yet that 'such indirect effects do not mean that such a programme must be treated as equivalent to an economic policy measure, since it is apparent from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union.'⁵⁹ In fact the ECJ primarily views this link between OMT and conditionality as an attempt by the ECB to 'ensures that the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States.'⁶⁰ Notably, the potential direct influence of the ECB on the direction of economic policy in countries that are subject to an economic adjustment programme is not problematized by the ECJ. Yet it is this influence as part of the troika/quadrige and the direct link to monetary policy decisions that may have a decisive influence on the future of a euro area Member State that have made the ECB subject to criticism and that arguably results in the ECB in some quarters being perceived as a potential political veto player, rather than an independent and neutral institution that only provides technical expertise.

⁵⁶ *Ibid*, para. 151.

⁵⁷ Brackets added.

⁵⁸ Supreme Court of Estonia, Case No. 3-4-1-6-12, decided on 12 July 2012.

⁵⁹ *Supra*, n. 38, para 58-59.

⁶⁰ *Ibid*, para. 60.

Another dimension that has remained somewhat underexposed is the legitimacy of the ECB in participating in the economic adjustment programmes and its accountability for its actions in this regard. In its Report on the enquiry of the role and operations of the Troika the EP has observed that ‘because of the evolving nature of the EU’s response to the crisis, the unclear role of the ECB in the Troika and the nature of the Troika decision-making process, the Troika’s mandate has been perceived as being unclear and lacking in transparency and democratic oversight’.⁶¹ The report moreover points out the ‘potential conflict of interest between the current role of the ECB in the Troika as ‘technical advisor’ and its position as creditor of the four Member States, as well as its mandate under the Treaty as it has made its own actions conditional on decisions it is itself part of’, as well as pointing out that the diverse composition of the troika, consisting of ‘three independent institutions with an uneven distribution of responsibility between them, coupled with differing mandates, as well as negotiation and decision-making structures with different levels of accountability, has resulted in a lack of appropriate scrutiny and democratic accountability of the Troika as a whole’.⁶² Indeed, there is no collective accountability of the troika or quadriga.

The constitutional implications of the economic adjustment programmes in which the ECB is involved also has a national dimension, as the indirect challenging of substantive elements of these programmes before domestic courts highlight.⁶³ Exemplary in this regard are several decisions by the Portuguese Constitutional Court *inter alia* on the constitutionality of the Annual Budget Plan for 2012 and, thereafter, for 2013, which foresaw in a suspension of Christmas and holiday payments for all public sector workers and retirees, as well as the suspension or reduction of various work and pension-related benefits for public administration staff and pensioners.⁶⁴ The Tribunal considered these measures in breach of the principle of equality, a principle which the Portuguese legislator had to take into account when deciding on measures aimed at reducing the public deficit. Such considerations by national courts are a reminder to all those bodies involved that the designing, adopting and regular monitoring of economic adjustment programmes should not take place in splendid isolation from constitutional principles and rights, as they can be found not only in the legal orders of the Member States, but also in the TEU, TFEU and the Charter of Fundamental Rights of the European Union. Following AG Cruz Villalón’s assessment, this then also applies to the significant role that the ECB has in the economic adjustment programmes. Rejecting any

⁶¹ Report of 28 February 2014 (A7-0149/2014), para 48.

⁶² *Ibid*, para. 56.

⁶³ Generally on the role of national courts in the legal assessment of crisis measures C. Fasone, ‘Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective’ EUI Working Paper, WMP 2014/25.

⁶⁴ Constitutional Tribunal, decision of 5 July 2012, Ruling No. 353/12; Constitutional Tribunal, decision of 5 April 2013, Ruling No. 187/13.

responsibility in this regard with reference to the absence of a formal decision making power and a role as a mere 'expert advisor', is hardly convincing and in any event do not enhance the legitimacy and credibility of the ECB in the eyes of the citizens, particularly of those euro area Member States that are subject to a economic adjustment programme.

4. Concluding remarks

What has become clear from the previous brief sections is that in recent years the ECB has become substantially engaged in crisis management in the euro area. This has exposed the ECB to a level of criticism, mainly concerning the question whether the various measures all fall within the monetary policy mandate, that is unprecedented in the short history of the ECB. Leaving aside the question to what extent underlying ideological differences on what monetary policy ought to be pursued played a role, this criticism was at least also routed in the constitutional characteristics of the supranational legal order. The latter is constructed on the principle of conferral, which in the case of EMU holds the presumption of a clear distinction between monetary and economic policy. The ECB has been established into this complex constitutional structure as an independent institution, being vested with a broad policy objective and instruments, and a large degree of discretion. Yet, recent events in the euro area clearly highlight that this legal distinction between monetary and economic policy is somewhat artificial and has effectively put the ECB between a rock and a hard place in conducting an independent monetary policy in times of crisis. Ironically, it could be argued that the ECB has largely taken the blame for its managing of the crisis in the face of European and national policy-makers and legislators that were unable or unwilling to act in a decisive and timely manner. As a result, the ECB is no longer only viewed as a neutral technocrat that exercises monetary policy within the alleged clear-defined limits of its monetary policy mandate, but at times rather as one of several potential political veto players in the euro area.

To the extent that the ECB has filled a vacuum in the crisis, this may not only relate to politicians and policy-makers, but also primary Union law itself. Indeed, the asymmetric integration of economic and monetary policy has resulted in the absence of effective fiscal policy mechanisms and moreover sufficient technical expertise at the European level to deal with the economic policy aspects of the crisis. The close involvement not only of the ECB, but moreover also the IMF are a case in point. Any attempts to fundamentally change this situation, namely through the creation of a more substantive economic policy competence at the Union level, calls for substantive Treaty amendments.

At the same time the ECB's approach to crisis management has also raised (new) concerns about the legitimacy of its position and action, and the extent to which it can be held to account for its conduct. Considering the potential distributive effects of the unconventional monetary policy measures, but also the deep impact that the implementation of the economic policy conditionality has on the (re-)distribute policies of the respective Europe

area Member States, these aspects deserve attention. In this context, as a first step, both from the point of view of the delineation of monetary and economic policy, as well as from the point of view of legitimacy and accountability, the structural role foreseen for the ECB in the ESM should be reconsidered.

Be that as it may, the present mapping exercise has provided sufficient evidence to conclude that the impact of the ECB's role in the crisis on its independence and accountability deserves more attention.
