Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank

MARIJN VAN DER SLUIS

I. INTRODUCTION

The new constitutionalization of budgetary constraints represents an evolution of economic constitutionalism: the belief that it is appropriate, necessary or even sufficient to endow constitutions with economic objectives. In a way, all constitutional topics are economic, if we understand economics in a wide sense. This explains why economic constitutional law also encompasses all fields of constitutional law. Nevertheless, the focus of economic constitutionalism and economic constitutional law lies on topics that deal more directly with the economy. European integration has brought forth several such subjects, competition law and the four freedoms being the most prominent examples. The Maastricht Treaty brought a new dimension to European economic constitutional law: Economic and Monetary Union (EMU). This new dimension was not only innovative in its substance—monetary integration and limited economic and fiscal co-ordination—it was also an exercise in constitutional and institutional engineering. The European Central Bank (ECB) was created to conduct European monetary policy, independent from EU institutions and Member State governments. Securing said independence was a main feature of the Maastricht Treaty. Understanding EMU is impossible without taking into account the economic goals that it tried to achieve. The excessive deficit procedure, the no-bailout clauses and the independence of the ECB are not normative objectives by themselves, but parts of a mechanism designed to deliver economic gains: price stability and economic growth. EMU is therefore a prime example of economic constitutionalism.

The constitutionalization of budgetary restraints is not a new phenomenon, but the euro-crisis measures do give it new attributes. Avoiding excessive deficits was—of course—already an obligation under the Maastricht Treaty. The new obligations of the six-pack and the Fiscal Compact are the expanded and more
elaborate versions of this earlier commitment. They show the new direction of economic constitutionalism, with a strong emphasis on national constitutional law and national commitments to further European goals. They also show a renewed belief in the capabilities of law in shaping the political and economic future of Europe. To describe the pitfalls and possibilities of this new approach, it would be very interesting to describe and analyse the developments of the fiscal restraints from the Maastricht Treaty to the present. This chapter, however, takes a different approach and focuses on the belief in constitutional law to accomplish economic objectives. It revisits the Maastricht Treaty to look once again at the position of the ECB in the EU's constitutional construct and starts with a comparison of the ECB and the Bundesbank. This comparison shows that it is the constitutionalization of EMU that is vital in explaining the unique position of the ECB. This, in turn, will show how European constitutional law has incorporated the economic objectives under EMU and what can be expected from the new developments in economic constitutionalism. Accordingly, this chapter concentrates on the Treaty of Maastricht: not because I believe subsequent developments of the euro crisis are irrelevant, to the contrary, but because it was such an important step in the evolution of economic constitutionalism. The current reliance on constitutional law to satisfy the demands of European integration cannot be understood without taking into account the particular shape of the constitutional construct, erected in Maastricht. Explaining the euro crisis and the subsequent measures through reference to the substance of the rules is not sufficient: it is the nature of these rules that tells the better part of the story.

The similarities between the Bundesbank and the ECB have been the subject of many academic texts. Mostly, these comparisons focus on the economic context or on the substance of the rules governing the ECB and the Bundesbank. However, and this has received far less attention, the creation of the ECB also provides us with a legal experiment on the nature and role of EU constitutional law. If the rules are, in substance, quite similar for the ECB and the Bundesbank, but different in their legal status, the following question arises: how does the nature of the rules affect their functioning? What did it mean for EMU, and for the ECB, to become part of EU constitutional law? A legal comparison between the Bundesbank and the ECB seems rather troublesome, however, because the Bundesbank was the product of fifty years of German history. No institution can properly be described merely by reference to its legal framework: an institution's culture, traditions and history must always be considered. This seems


3 The comparison naturally excludes for the Bundesbank the period after 1999.
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II. THE BUNDESBANK

After experiencing several periods of extreme monetary instability, German society after World War II longed for a stable currency and was fearful of possible inflation. It is thus somewhat surprising that the German Constitution (Grundgesetz, GG) does not explicitly secure the independence of the central bank to pursue price stability, but only requires that there is a Federal central bank that possesses certain competences. This requirement is fulfilled by the Bundesbank Act (Bundesbankgesetz) of 1957, which created the Bundesbank and regulated its independence and mandate. With some minor limitations, the GG itself leaves much discretion to the legislature to attribute or withhold competences, to organize the appointment procedure, to determine the institutional structure and to regulate the relations with the federal government. The question whether independence is implicitly guaranteed by the GG has never been directly put before the Federal Constitutional Court (Bundesverfassungsger-


5 This presumption is criticised in H Berger, 'The Bundesbank’s Path to Independence: Evidence from the 1950s' [1996] Münchener Wirtschaftswissenschaftliche Beiträge 1–2, 9–11. Berger states that a legal analysis of the independence is a misleading indicator. Interestingly, she infers this, partly, from the fact that the Bundesbank Law could be changed at any moment (ibid 24), in contrast to the earlier legal instruments that created the predecessor of the Bundesbank, the Bank Deutsche Länder. The criticism by Berger has been refined in further work: H Berger and J de Haan, 'A State Within the State? An Event Study on the Bundesbank (1948–1973)' (1999) 46 Scottish Journal of Political Economy 17, 18. A counterargument is provided in P Moser, 'Checks and Balances, and the Supply of Central Bank Independence' (1999) 43 European Economic Review, 1569. He argues that the legal instruments of independence matter, especially the way the legal instruments can be changed. In a system of checks and balances and hence with multiple veto-players, independence is usually more strongly entrenched.

6 Comments by C Joerges in F Snyder (ed) Constitutional Dimensions of European Economic Integration (Dordrecht, Kluwer Law International, 1996) 23. Art 88 GG now reads (translated): Article 88 The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability. The second sentence was added in 1992.

7 The legislature as an institution must not be confused here with the institution of the Bundestag. Whereas the Bundesbank was not accountable to the Bundestag, as a result of its special status as part of the executive, it is not independent from the German legislature. See K Stern, 'The Note-Issuing Bank within the State Structure' in Deutsche Bundesbank (ed), Fifty Years of the Deutsche Mark: Central Bank and the Currency in Germany since 1948 (Oxford, Oxford University Press, 1999) 111.

icht, BverfG). That has not stopped the BverfG from providing ambiguous clues about its opinion on the independence of the Bundesbank.9 In contrast, the Federal Administrative Court (Bundesverwaltungsgericht) has explicitly stated that there is no constitutional guarantee of the Bundesbank's independence.10 Legal opinion is equally divided.11

The main governing bodies of the Bundesbank were the Central Bank Council (Zentralbankrat, CBC) and the Directorate (Direktorium). The latter was a body of eight members maximum (including the president), centrally nominated and appointed, and responsible for executing the decisions of the CBC, and was responsible for taking the important decisions on monetary policy. The members of the CBC include the members of the Directorate and the presidents of the Landeszentralbanken. The latter were nominated decentrally, by the Länder, and appointed by the federal president.12 There is thus a strong federal element in the setup of the Bundesbank.

Article 3 of the Bundesbank Act describes the main responsibility of the Bundesbank: 'safeguarding the currency'.13 Its competences were then found in other parts of the law and included, amongst others: issuing banknotes, conducting monetary policy, setting minimum reserve policy and acting as the bank of the federal government.14 Furthermore, the Bundesbank was obliged to provide advice to the federal government and support its general economic policies, insofar as its own objectives allowed. The mandate of the Bundesbank, safeguarding the currency, was both internally (price stability) and externally (stable exchange rates) oriented, but decisions on external monetary policy were mainly the prerogative of the federal government. As a result, the room for manoeuvre of the Bundesbank was sharply reduced when Germany participated in an exchange rate regime, such as the European Monetary System.

Article 12 of the Bundesbank Act expressly stated that the Bundesbank was independent from instructions of the federal government in the execution of its competences. The latter did have the right to participate in meetings of the CBC and to postpone its decisions by two weeks. Although that option has officially never been invoked, decisions have sometimes been postponed after consultations.15 Independence from parliament is a result from the Bundesbank’s special status in the executive branch. The Bundestag, therefore, could not give direct

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9 BverfGE 14, 125 and BverfGE 62, 169.
10 BverwGE 41, 354.
11 See Stern (n 7) 144–47 and Atenbrink (n 1) 159–64.
13 Translation from Atenbrink (n 1) 195.
14 Sections 14–16 of the Bundesbank Act. Stern (n 7) 126 and Atenbrink (n 1) 96–97.
instructions or hold the members of the CBC or Directorate directly accountable. Judicial control of the Bundesbank was marginal. Bundesbank decisions were subject to administrative law and could thus be challenged in court. In practice, the judiciary was little involved in controlling the monetary policy of the Bundesbank.16

Naturally, this brief description of the legal context of the Bundesbank does not fully capture the position of the Bundesbank on the German political scene. To get a glimpse of the political role of the Bundesbank in German (and European) politics, it is interesting to look at the controversy that exists about the role of the Bundesbank in German reunification and European monetary integration. One side, represented by Marsh, argues that the failure of the Bundesbank to set the terms of monetary union in German reunification and the failure to stop EMU revealed the weakness of the Bundesbank.17 After years of rising power, its success in maintaining the strength of the Deutschmark had become its weakness. First, it was the East Germans who wanted their share of the success of the Deutschmark, then it was the rest of Europe. The Bundesbank failed to protect the Deutschmark. This line of argument is countered by Heipertz, who argues that to ascribe the Bundesbank with the political power to influence these greater political movements of history, and then to say that it failed in doing so, misrepresents the character of the competences and interests of the Bundesbank. During the negotiations, 'the Bundesbank was as strong as one could possibly have expected from a central bank'.18

The debate reveals how far the expectations about the powers of Bundesbank have strayed from its legal foundations. The central argument by Heipertz is that it never was the function of a central bank to interfere with these inherently political developments. Marsh correctly points out how, in previous times, the Bundesbank had managed to use its mandate and competences to influence political decisions and that it failed to do so this time. These arguments also point towards another interesting feature of the Bundesbank. Whereas Heipertz based his arguments on the official statements that indicate that the Bundesbank never wanted to stop EMU and actually got what it wanted in Germany's reunification, Marsh interviewed many of the direct participants to paint a different picture.19 Given that there is a kernel of truth in both arguments, it is revealing in that it lays bare the tactics of the Bundesbank in negotiations with the government. When it came to topics outside the remit of Bundesbank competences,
the Bundesbank framed its (official) arguments so as to appeal to the German public, using its authority as ‘guardian of the currency’.

Both observations are exemplars of the position of the Bundesbank within the German political system. The Bundesbank has used its monetary policy competence to exert political influence on other policy fields, most notably external monetary policy, fiscal policy20 and wage formation,21 and the Bundesbank actively tries to retain public support as a shield against political attacks. The interactions between Frankfurt and Bonn have been most colourfully described by Marsh, who attributes the fall of at least three chancellors to the actions of the Bundesbank. He quotes Bundesbank President Blessing after Chancellor Erhard resigned because of a conflict with the Bundesbank over expansionary fiscal policies: ‘We had to use brute force to put things in order.’22 Marsh notes how Blessing had warned against fiscal profligacy several times and had threatened—and made good on those threats—to raise interest rates. In the recession that followed, Erhard had to resign.23 In subsequent periods of disagreement, politicians had seen how a conflict with the Bundesbank could hurt their political future and were less inclined to pick a fight. Nevertheless, when, in 1969, the Bundesbank communicated to the federal government its desire for a revaluation of the Deutschmark in the Bretton Woods system, the federal government refused. Chancellor Kiesinger opposed a revaluation, but stood little chance against the continuous actions of the Bundesbank to undermine his position. The Bundesbank knowingly exacerbated the disequilibria that made a revaluation necessary. Kiesinger continued to resist, which eventually led to the fall of his coalition. The new coalition quickly took the formal decision to revaluate the Deutschmark.24

Despite its political clout, the Bundesbank might not have been as politically independent as many thought. There is some evidence that in times of conflict, the monetary policy of the Bundesbank has been influenced by the government.25 One reason why the Bundesbank might have incorporated the demands or wishes of the German government is to avoid conflict with the federal govern-

20 For a general overview, see W Kitterer, ‘Public Finance and the Central Bank’ in Deutsche Bundesbank (ed), Fifty Years of the Deutsche Mark (p 7). Compare Leaman (n 4) chs 4–6.
22 Marsh (n 15) 170 and 187. The three Chancellors were Erhard, Kiesinger and Schmidt.
23 Also see Berger and De Haan (n 5) 34; Holtfrerich (n 12) 146.
24 See Leaman (n 4) 146–47; Marsh (n 15) 188; Holtfrerich (n 12) 147. See for the influence of the Bundesbank on the negotiations on the EMS, see Kennedy (n 21) 80–81; Bernholz (n 19) 756–57.
ment over the best co-ordination of fiscal and monetary policy. Monetary policy is most effective when it is credible and in conformance with fiscal and economic policy, and so the Bundesbank walks a fine line between appearing independent and accommodating pressure from the government. As Marsh notes, both the Bundesbank and the government have an interest in avoiding conflict; differences of opinion are voiced behind closed doors. Whether or not to give in to governmental demands might therefore not always have been a question of the best monetary policy, but a result of strategic reasoning to accomplish the goals of monetary and economic policy. To constitutional lawyers such interactions are not unfamiliar, because they resemble a system of checks and balances. Although both actors are formally independent of each other and have different foundations of legitimation, they require each other's support to effectively accomplish the tasks they have been given. Another reason why the Bundesbank might have jeopardized its aura of independence and incorporated government demands is because it knows that its independence is only protected by ordinary law. Bundesbank President Schlesinger once said: 'Our independence is dependent on our ability not to overstep our limits.' If the Bundesbank were to go against the public's (or the political elite's) preferences too often, a political incentive would arise to strip the Bundesbank of its independence. The limits are thus as much defined by the legal division of competences, as by the Bundesbank's ability to persuade the public of the right course of monetary or economic policy and on the legal division of competences.

The Bundesbank's relation with the German public was an intricate one. Whereas the Bundesbank externally needed to portray itself as independent of public opinion in order to be a credible negotiator with the government and in the wage-setting process, there is plenty of evidence that public opinion was an important factor in decision-making and communication. The Bundesbank was all too aware that its independence was, in the long term, dependent on broad support from both politicians and the public. As Berger and De Haan have shown, even the initial enshrinement of independence, first in 1951 for

26 Marsh (n 15) 169 and 174. Also see Holtfrerich (n 12) 145.
28 On the possibility of revoking independence, see Holtfrerich (n 12) 106; Berger and Schneider (n 25) 60; Lohmann (n 12) 5; P Maier and T Knaap, 'Who Supported the Deutsche Bundesbank? An Empirical Investigation' (2002) 24 Journal of Policy Modeling 834; Moser (n 5) 1569–93. Both Lohmann and Moser focus on the federal nature of the German state as a guarantee of the independence of the Bundesbank. They seem to assume that the Bundesrat could hinder the repeal or amendment of the Bundesbank Act, whereas Stern is of the opinion that the Bundesrat would not be involved. See Stern (n 8) 473.
29 As quoted in Marsh (n 15) 256.
30 A German central banker, as quoted by Goodman in Berger and De Haan (n 5) 22: 'From 1948, we made a very deliberate policy of getting the public on our side. We attempted through all our publications and our speeches to explain our policies to the public and to convince them. By explaining everything and making a very deliberate effort, we never came to a situation where a major party has ever attempted to touch our autonomy.' Also see Amtenbrink (n 1) 177
the Bank Deutsche Länder (BDL, the predecessor of the Bundesbank) and later in 1957, was a result of public support. The defeat of Chancellor Adenauer, who wanted to rein in the power of the central bankers, came only after highly public disagreements between the BDL and the Chancellor in both 1950 and 1956, in which the Chancellor had to back down, due to lack of public support. When in 1967 the Stability Act (Stabilitätsgesetz) was introduced with the aim of laying down the general economic objectives of the whole government, there were politicians who wanted to reduce the independence of the Bundesbank to better co-ordinate policies. Again, they were swimming against the tide of public opinion. But not only has the legislation rested on a widespread support of the public for the independence of the Bundesbank, the Bundesbank itself has made it no secret that it has tried to engage the public on the issue of monetary policy. This, of course, includes a communication strategy to warn the public against inflation, but it also meant that in conflicts with the government, the Bundesbank acted strategically to avoid getting blamed for either a recession or high inflation. Support by the public and by special interest groups have been found to be explanatory factors for the monetary policy of the Bundesbank, suggesting that it has kept a close eye on these societal actors. Lohmann also found that whether or not the Bundesbank would give in to demands of the government was indeed a function of public support, but not for the Bundesbank, but for the government. The more popular the government, the less inclined the Bundesbank was to go against it.

III. THE ECB (PRE-CRISIS)

The exercise of monetary policy at the European level after the introduction of the euro required the creation of a new European body, the ECB. National central banks continued to exist and retained their legal personality, but they became part of the European System of Central Banks (ESCB), which is governed by the decision-making bodies of the ECB. European monetary policy is thus decided upon centrally, but executed in a decentralized manner. The competence of the ECB to set monetary policy is flanked by other competences to secure the effectiveness of that policy. The Council, the Commission and the European

31 Berger and De Haan (n 5) 23–27; J Bibow, ‘On the Origin and Rise of Central Bank Independence in West Germany’ (2009) 16 European Journal of the History of Economic Thought 155, 164 and 181. Bibow describes the political game, played by the BDL, during the transition from Allied rule to secure independence. Nevertheless, he mentions public support in the early 1950s as a factor for creating BDL independence, which was then carried over to the Bundesbank.

32 Holtfrerich (n 12) 149. Also see Sturm (n 12) 3.

33 For the conflicts between the BDL/Bundesbank and the federal government in 1951, 1956 and 1961, see Berger (n 5). For conflicts in 1959, 1966, 1969 and 1972, see Holtfrerich (n 12). For the conflict in 1980, see Kennedy (n 21) 40–54. Also see Marsh (n 15) 76.

34 Maier and Knaap (n 28). Also see Maier, Sturm and De Haan (n 25) on political pressure and support from the financial sector.

35 Lohmann (n 12) 5.
Parliament have supportive roles with regards to the technicalities of the execution of monetary policy within the eurozone, through the adoption of secondary legislation. Externally, the Council may conclude international agreements on exchange rate systems, as well as formulate general orientations in the absence of such a system, without prejudice to the objective of the ESCB to maintain price stability. Given that it is unlikely that the euro will become part of an exchange rate regime and that the ECB can easily discard the general orientations (whilst still being bound by them), external monetary policy is a lot less constrained for the ECB than for the Bundesbank. The external representation of the euro area in international organizations is a rather complicated matter, due to the overlay of economic and monetary policy, the ambiguous position of the EU in the international community and the resistance of some Member States, resulting in a less than uniform representation.

The decision-making bodies of the ECB are the Governing Council and the Executive Board. The latter consists of six members, including the president and the vice-president. The procedure for their appointment is regulated in the EU treaties, with the final decision reserved for the heads of state of the governments of the participating Member States, on recommendation of the Council, after consulting with the European Parliament. In practice, certain seats are reserved for the bigger eurozone countries, with the rest of the seats rotating amongst the other countries. The Governing Council consists of the members of the Executive Board and the governors of the central banks of the participating Member States of the euro. The latter are appointed according to national procedures. The division of labour between the Executive Board and the Governing Council is regulated in the Statute, as are the voting modalities of both bodies.

Compared to other central banks, the ECB has been granted a high degree of independence in setting monetary policy. If the four most common indicators for independence of a central bank (institutional, functional, personal, financial) are taken into consideration, the ECB scores rather high on all four counts. Also the economic branch of EMU is, in part, concerned with the independence of the ECB, albeit not in the legal, but in the economic-political sense. The prohibition on the monetary financing of government debts (which is located in TFEU in the chapter on ‘Economic Policy’) is an obvious example. If the ECB could directly buy government bonds, it might be pressured by governments to do so, thereby endangering its independent decision-making. The prohibition (with its obvious loophole that allows the buying of government bonds on the

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36 Formerly Art 109 EC Treaty, now in part in Art 219 TFEU.
38 This created a problem when Mario Draghi was appointed President, as there were two Italians on the Executive Board. Lorenzo Bini Smaghi resigned after strong political pressure, to allow for the appointment of a French central banker to the Executive Board.
39 Governors of national central banks shall be appointed for a period of at least five years. Art 14 Statute of the ESCB and of the ECB.
40 Arts 10–13 Statute of the ESCB and of the ECB.
secondary market) thus serves the purpose of protecting ECB independence. In a similar vein, the excessive deficit procedure in the Maastricht Treaty, the Stability and Growth Pact, and more recently, the six-pack, the two-pack and the Fiscal Compact, also partially serve the function of protecting the independence of the ECB by ensuring that—or at least trying to ensure that—Member States will not entertain unsustainable deficits and debts, which might have to be ‘monetarized’ by the ECB. As noted, the word ‘independence’ has a different meaning in this context. Here it does not refer to the ability of the ECB to take decisions without interference from other actors, but to the dominance of monetary policy over fiscal policy. In this sense, the independence of the ECB is restricted if the fiscal policymakers can create such circumstances that would force the ECB to take actions it would—in other circumstances—prefer not to take. This does not mean that the decision-makers are unduly influenced or that it is irrational to take such a decision. It only means that fiscal policy has created a situation in which the ECB feels obliged to act.

What sets the ECB apart from other independent central banks is the fact that its independence is regulated in detail in the EU treaties and thereby constitutionalized. This makes the relations the ECB has with other institutions and players in the EU radically different from the interactions between the Bundesbank and the German body politic.

With regards to economic policymakers, there is no central, Europeanised economic decision-maker. The ECB has no economic policy partner. Although this is, of course, a result of the particular form of EMU, it is of importance for the constitutional position of the ECB. In Germany, the independent exercise of monetary policy was carved out of the general responsibility of the government for economic policy (in the broad sense). Interactions between the Bundesbank and the government were a game of equals. Both institutions have their domain of influence, but recognise the existence and functions of the other. The position of the ECB in the Union’s constitutional construct is therefore relevant, not in the sense that it has a strongly enshrined legal position, but in that it is the only economic player with such a position. With equal partners and a development of monetary and economic policy side-by-side, there is the assumption of an ongoing dialogue. This was, at least, what the German Minister of Economics Erhard had in mind when he defended Bundesbank independence from attacks by Chancellor Adenauer.

Even if the co-ordination of Member States’ economic policies can be regarded

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42 G Majone, ‘Rethinking European Integration after the Debt Crisis’, University College London Working Paper 3/2012 (2012) 14–16: I exclude the Eurogroup because it has not formal decision-making power.
43 There is a difference from a strictly legal perspective. The Bundesbank is not a Verfassungsorgan, but another high federal body. This difference is not relevant in relation to the exercise of monetary and economic competences, as described above. See Stern (n 7).
44 Bibow (n 31) 179.
as European economic policy, there is no viable partner for the economic/monetary debate that characterized the relation between the Bundesbank and the German government because of the fragmented nature of the process of co-ordination. For the ECB, not only is there no such partner, but all EU institutions and Member State governments are forbidden from trying to influence the ECB decision-makers. There is no European government or European finance ministry. Naturally, one may expect the ECB to create and maintain constructive relationships with all the eurozone Member States, especially the bigger Member States. Nonetheless, such interactions are of a fundamentally different nature to the interactions between, for example, the Bundesbank and the German Federal Government: individual Member States cannot sway economic policy in the eurozone to such an extent as to force the ECB to change its monetary policy, or the other way around. Monetary policy is to a very large extent to be set for the entire eurozone. Monetary policy in a single currency area can hardly be differentiated. As a consequence, the ECB cannot credibly use its monetary policy to demand an individual Member State change its fiscal policy, because that Member State knows the ECB has to set monetary policy for the entire eurozone.

One of the initial complaints about the Bundesbank’s independence was its undemocratic character. Chancellor Adenauer even stated that it would be unconstitutional. Similar complaints have been voiced for the ECB. To counter this problem, much emphasis is placed on the role of the European Parliament in holding the ECB accountable. At first glance, the relation between the ECB and the European Parliament seems to reflect an improved form of interaction, compared to the relation between the Bundesbank and the Bundestag, the latter being almost non-existent in day-to-day politics. This is misleading, because of the strong, but indirect, democratic legitimacy of the German government. In effect, the Bundesbank’s interaction and constant negotiation with the government provided for a better form of accountability than the European Parliament can, given the current shape and nature of EMU. The accountability relationship between the European Parliament and the ECB is flawed, due to the constitutionally enshrined competences of both institutions. Without going into much detail, it can furthermore be expected that parliaments are in an institutionally weak position to hold a central bank accountable. Monetary policy is a highly technical field of policy and heavily intertwined with other aspects of economic policy. Given the dominance of the executive in economic policy and a general lack of expertise in parliament, the latter is a second-best

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45 Majone (n 42) 14. The term ‘institutional loneliness’ is from Padoa-Schioppa, as quoted in F Torres, ‘The EMU’s Legitimacy and the ECB as a Strategic Political Player in the Crisis Context’ (2013) 35 Journal of European Integration 287, 294.
46 Bibow (n 31) 181.
48 Gormley and De Haan (n 1) call the European Parliament the ‘appropriate body’ for holding the ECB accountable.
49 Amtenbrink (n 1) 304.
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candidate to ensure accountability from a comparative point of view. This holds true for the European Parliament. It has no active role in the co-ordination of national economic policies and consequently lacks the economic information and bargaining position to hold a meaningful debate with the ECB. Moreover, the tools available for the European Parliament to hold the ECB accountable are weak, not least because the European Parliament cannot, in any way, sanction the ECB or dictate its policy. The ECB merely has the duty to provide a report on its activities, and the president of the ECB has a duty to show up in the European Parliament. He may be asked questions, but he is under no obligation to provide substantive answers. The European Parliament’s role in the appointment procedure of the members of the decision-making bodies of the ECB is as close to non-existent as possible. This would not be problematic if the EP had the ability to give itself the competence, through secondary legislation, to sanction the ECB. The mere threat of legislative change might in that case be enough to create a true relationship of accountability, as is the case in the relationship between the Federal Reserve Bank and the US Congress. The exhaustive constitutionalization of the marginal relationship between the European Parliament and the ECB restricts such a possibility. Put simply, the ECB has nothing to fear from the European Parliament. The fact that intricate interactions exist between the ECB and the European Parliament, or that both the ECB and the European Parliament have dubbed their interactions a ‘monetary dialogue’, does not counter the central claim that the European Parliament is powerless with regards to the monetary policy of the ECB. One can hardly expect a dialogue if one of the two partners is obliged to refrain from trying to influence the other. Hence, it is exactly because of the powerlessness of the European Parliament that the ECB is willing to indulge such interactions. It gives it an aura of democratic legitimacy, whilst allowing it to avoid external influence.

In his work on the democratic accountability of central banks, Amtenbrink posed the question whether democratic accountability and independence of a central bank are mutually exclusive. He argues that that is not necessarily the case: ‘It makes sense to remove monetary policy from short-term political consideration, but at the end of the day it is the electorate which must have the basic choice between different alternatives.’ This leaves open the question through which process the electorate and its representatives can make this choice between different alternatives. Should it be through ordinary law (secondary legislation) or through constitutional law (EU primary law)? And more importantly, what are the determining factors in deciding this question? In other words, what kinds of arguments are acceptable in this debate? The difficult relation of accountability between the ECB and its subjects—the eurozone peoples—must be explained as resulting from the position of the ECB in the EU treaties. Whereas the legitimacy of the Bundesbank was derived continuously from the Bundesbank Act

50 Gormley and De Haan (n 1) 108.
51 Ibid 109. Also see Amtenbrink (n 1) 287.
52 Amtenbrink (n 1) 380 and 59–61.
of 1957—which the German legislator could change at any time—the legitimacy of the ECB is of a different character. The EU treaties derive their legitimacy from the ratification of all Member States in accordance with their constitutional requirements. This creates, in theory at least, a high level of democratic legitimacy, but with a limited shelf-life.

Whereas the decision-making by the ECB is to a large extent shielded from political influence, the institution is still bound by the rule of law. The argument here focuses on two elements of the basic agreement concerning the establishment of the ECB: the independence and its mandate. As Issing (a former member of the ECB Executive Board) has pointed out, these two elements are ‘mutually dependent’. They are two sides of the same coin. Setting the priorities of monetary policy is a genuinely political decision and therefore ought not to be taken by an independent organization. Hence, in the Maastricht Treaty the goal of a Europeanized monetary policy was set: maintaining price stability. The ECB was given independence in order to secure this goal and it was the consensus at the time that only an independent central bank could fulfil that goal. Therefore, independence requires a strict mandate and the mandate in the Maastricht Treaty required independence. And this is where the CJEU comes in.

As noted above, the other institutions of the EU are prevented from interfering with ECB policy because of the prohibition on trying to influence the ECB, the lack of centralized economic policy and the overall constitutional enshrinement of the institutional relations. As a result, it falls to the CJEU to determine the legal meaning of the independence of the ECB and the limitations on the exercises of its competences, most notably the mandate. With regards to the independence of the ECB, the CJEU is in a fairly good position to assess and protect it. Even before the Maastricht Treaty, the CJEU had been active in protecting and sometimes redrawing the lines of institutional balance. As long ago as Meroni, in 1958, the Court showed that it was willing to intervene in the way in which institutions and bodies exercise (in this case through delegation) their competences. The struggle of the European Parliament for its place amongst the European institutions was, in no small part, fought before the CJEU. The ECB lacks the general qualification to bring cases to the Court on the basis of a treaty infringement, but it may do so to protect its prerogatives. In such cases, it is up to the CJEU

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54 Case C-11/00 Commission v ECB [2003] ECR I-7147.
55 Dutzler (n 27) 134–40.
to decide on the scope and goal of central bank independence. The Court also plays a significant role as regards the personal independence of the members of the decision-making bodies of the ECB. Members of the Executive Board can be compulsorily retired only by the CJEU, and removal of a national governor can be directly appealed to the Court.58

The possibilities for the CJEU to guard and/or limit the independence of the ECB are disconnected from its ability to effectively control the exercise of competences by the ECB in light of its mandate, for three reasons. Firstly, the mandate of maintaining price stability is conceptually weak in the sense that it provides few easy clues for the Court to assess the conduct of the ECB. Although ‘maintaining price stability’ is a more precise concept than the German mandate for the Bundesbank (safeguarding the currency because it more clearly refers to the internal value of the currency), it still leaves much room to the ECB to choose what it thinks it should mean. Smits refers to the supposedly limitless discretion of the ECB to determine the goal of monetary policy as ‘auto-interpretation’.59

The only real clue to its meaning is that both inflation and deflation should be prevented. There are good economic reasons to fear deflation more than inflation, legitimating the ECB’s current interpretation of its mandate as aiming for inflation below, or close to, 2 per cent in the medium term,60 but there is nothing in the EU Treaties that would suggest that, for example, a goal of 3 per cent inflation would not also fall under its mandate. The fact that the mandate is vague is not the biggest problem: it is also inherently forward-looking and therefore practically impossible to enforce. This becomes clear when the relation between the primary mandate and secondary mandate is discussed. Besides the objective of maintaining price stability, the ECB (as part of the ESCB) is bound by a multitude of other objectives. Without prejudice to the primary objective of maintaining price stability, the ESCB is obligated to support the general economic policies of the EU. The ESCB is furthermore obligated to act in accordance with the principles of an open market economy and free competition.61 The activities of the EU in the field of economic and monetary policy should also comply with the principles of stable prices, sound public finances and monetary conditions, and a sustainable balance of payments. The general objectives of EU are also applicable to the ECB, such as a high level of employment, the quality of life and economic and social cohesion.62 To determine the relation between the primary and secondary objectives, it is paramount to evaluate the particular nature of the primary objective. What is meant exactly by ‘maintaining price stability’? Economic theory guides the interpretation here. When economists and

58 Arts 11.4 and 14.2 Statute of the ESCB and of the ECB.
59 Smits (n 57) 186.
60 Decision of the Governing Council of the European Central Bank of 13 October 1998: ‘Price stability shall be defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%. The phrase ‘or close to’ was added later.
61 Formerly Art 105 EC Treaty, now Art 127 TFEU.
central banks are concerned with inflation, they generally mean future inflation. Monetary policy cannot—or at least should not—be concerned with offsetting the negative effects of past inflation, but with the expectations of future inflation. The primary objective of the ECB clearly reflects this by emphasizing that price stability must be maintained. The primary objective of the ECB is never fulfilled: inflation might be just around the corner. As a result, the obligation to support the general economic policies of the EU without prejudice to the primary objective is quite insubstantial. The secondary objective can hardly ever play a role in limiting the discretion of the ECB to set monetary policy because the primary objective is never achieved. The inherently forward-looking nature of the mandate also makes it difficult to apply as a legal standard for reviewing the actions of the ECB.

Secondly, the exercise of monetary competences is a rather technical discipline, one in which the CJEU will be hesitant to intervene. Smits expected that the Court would apply similar restraint in assessing the actions of the ECB as it does to economic policy actions by other institutions, or even more so, because of the independence of the ECB. However, it would be inappropriate to compare the ECB in this sense with the other institutions, and their discretion to set economic policy. For those institutions, judicial control comes only after political control; with almost all actors of the EU being responsible (in some way) to a democratically elected body. For the ECB, that political accountability is lacking, thereby changing the role of the judiciary. An example shows the difficulty the CJEU faces in using the mandate of price stability to review the actions of the ECB. As mentioned, the EU treaties prohibit the buying of government bonds on the primary market, but do not prohibit buying them on the secondary markets. Many have argued that it would also be illegal for the ECB to buy bonds on the secondary markets, if the goal is indirectly to bail out a Member State. Hence, were the issue to come before the CJEU, the judges

63 Issing (n 53) 65.
64 But see Smits (n 57) 184.
65 For the relationship between inflation and employment and the role of the ECB, see Issing (n 53) 65. Dutzler states that only the ECB can decide whether to pursue its second objective. Dutzler (n 27) 207.
66 Smits (n 57) 110. Smits sees a role for the Court in ‘determining whether the level of price stability achieved is within the limits of the law’. The focus by Smits is thus on the achieved level, not on future levels of inflation. Such an analysis is, I believe, incongruent with the treaties, which are inherently forward looking. Also see Dutzler (n 27) 113. She makes a similar mistake, saying that the ‘obligation to maintain price stability is not a justiciable benchmark, as the ECB’s acts are not illegal if its objective is not fully met’. Craig (n 56) 111 expects the CJEU to scrutinize actions of institutions ‘less intensively where the subject matter involves complex economic determinations’.
67 For a similar argument, but a very different context, see SP Croley and JH Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’ (1996) 90 American Journal of International Law 193, 207–09 about whether the level and structure of deference to administrative agencies in the US is also appropriate for the WTO. They argue that, since the administrative agencies are embedded in a constitutional, democratic environment, deference is due. In case of the WTO, such a democratic embedding (to the WTO community as a whole) was lacking and hence a different level of deference to national governments is appropriate.
68 Not in the least the Bundesverfassungsgericht. BverfG, 2 BvR 1390/12.
would have to assess the credibility of the claim by the ECB that the bond-buying actually serves the purpose of maintaining price stability. To do so, it would have to analyse the effects, intents and alternatives of monetary policy—a highly contentious task, from which the judges are likely to shy away.

Thirdly, only a limited number of actors have the possibility to challenge acts by the ECB that violate its mandate. Individuals will rarely have standing before the CJEU to pursue a complaint against the ECB, and the other EU institutions will lack incentives to do so, at least in case of a crisis in which the ECB is the only institution capable of acting forcefully.

To conclude the comparison: the position of the ECB vis-à-vis other actors in the EU is entirely different from the relations the Bundesbank had with the German body politic. The difference between the two is mainly due to the different nature of the legal instruments that regulate their independence. The difference is then amplified by the particular setup of EMU in which economic policy remains decentralised, as a result of which no economic government could function as a counterweight to the ECB.

IV. THE ECB (POST-CRISIS?)

The analysis above has highlighted the factors that determined the position of the ECB in relation to the other EU players: the institutions and the Member States. Now follows a brief and non-exhaustive summary of the developments of the euro crisis that have significantly affected the position of the ECB, and which will consequently affect the way in which the budgetary restraints function. Firstly, it is important to reiterate that before the crisis the ECB had few options to influence policy on the Member State level, both in terms of competences (it was not involved in the excessive deficit procedure) and in terms of the dynamics of monetary and fiscal policy (it did not have the bargaining power in relation to individual Member States to coerce them). The crisis has provided the ECB with more options to differentiate its policies for the different Member States in the eurozone, thereby changing its relationship with the individual Member States. The ECB has bought, in substantial amounts, government bonds of Member States that were in financial trouble. Although these purchases occurred on the secondary market, since directly buying them on the primary market is forbidden, this has provided the ECB with leverage over the governments of these Member States. Buying government bonds on the secondary market lowers the interest rates at which governments can borrow. These purchases by the ECB also reduce the risk of a downward spiral, where the interest rate

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69 Craig (n 56) 103.

70 The role of the ECB in the euro crisis is described in more detail in the next chapter by Prof Baroncelli.

71 The ECB already had the legal capacity to buy government bonds before the crisis, but only started using it on a large scale during the crisis.
increases, reducing the sustainability of government finances, thereby increasing the interest rates. Although anecdotal, the letter sent to the Italian government in August 2011 by the ECB, urging it to implement a ‘golden rule’ in its constitution, proves that the ECB is no longer afraid of interfering with the domestic politics of Member States. The deferential reaction of the Italian government at that time shows the strength of the voice of the ECB.\textsuperscript{72}

Secondly, representatives of the ECB had to appear in court to defend the legality of Outright Monetary Transactions (OMT), although in a different court than many considered opportune: the German BVerfG. The OMT is a programme that promises to buy government bonds of countries that have also asked the ESM for assistance, and are therefore receiving aid ‘under strict conditionality’. The case before the BVerfG is, amongst other things, about whether the ECB acts ultra vires.\textsuperscript{73} Naturally, it has been controversial whether the BVerfG is the appropriate forum to discuss such matters.\textsuperscript{74} However, there is a case before the CJEU that involves a rather similar question, yet it is likely to fail the test of admissibility.\textsuperscript{75} Leaving aside whether the BverfG ought to refer the question to the CJEU, the relevant fact here is that a court is examining the boundaries of the discretion of the ECB to act, thereby enforcing the original ‘constitutional agreement’ of the Maastricht Treaty.

Thirdly, the steps being taken to establish a ‘banking union’ will bring the ECB in closer contact with the EU legislature and into the political arena. A ‘firewall’ is supposed to protect decision-making in monetary policy from pressure from, and on, the prudential supervisor, but already the fact that prudential supervision is exercised in close proximity to monetary policy will alter the current institutional landscape. Although the relationship between the ECB and the other actors in the EU in this construction will still be quite different from the ‘normal’ relationship between a central bank and its Ministry of Finance, the setup of the banking union through secondary legislation is a step towards a different kind of accountability of the ECB.

Fourthly, the reinforcement of the rules on national budgetary deficits can be seen as an attempt to reinstate the dominance of monetary policy over fiscal policy.\textsuperscript{76} By strengthening the rules and increasing their enforceability on budgetary deficits and limiting the discretion Member States have in setting economic policy, the chances that the ECB will be forced to use its monetary tools to save the euro (if the underlying presumptions of economic growth hold, that is) are

\textsuperscript{72} See the statement of former Italian Prime Minister, M Monti on 9 May 2013: www.state-oftheunion.eui.eu.

\textsuperscript{73} At the time of writing, no decision had been announced. For an account of the proceedings, see M Steinbeis, ‘Die EZB vor dem Bundesverfassungsgericht’, Verfassungsblog, 11 June 2013, www.verfassungsblog.de/de/die-ezb-vor-dem-bundesverfassungsgericht-teil-1.

\textsuperscript{74} C Eckes, ‘To Rule or Not to Rule? Should the German Constitutional Court Have the Last Word in the Eurocrisis?, ACELG Blog, 18 June 2013, www.acelg.blogactiv.eu/2013/06/18/to-rule-or-not-to-rule-should-the-german-constitutional-court-have-the-last-word-in-the-eurocrisis.

\textsuperscript{75} Case T-492/12 Von Storch and Others v ECB, nyd.

\textsuperscript{76} Yiangou, O’Keeffe and Glöckler (n 41).
reduced. From this perspective, the independence of the ECB during the crisis was ambiguous. On the one hand, it was hailed as the only institution capable of acting forcefully, and ECB President Draghi was the man of the hour. On the other hand, monetary policy during the crisis, including OMT, can be seen as the defeat of independent central banking in the EU. Monetary policy in the crisis was forced to respond to the situation created by fiscal and economic policy. Fiscal policy dominated monetary policy.

V. CONCLUSIONS—ON ECONOMIC CONSTITUTIONALISM

The focus of this chapter was on the Treaty of the Maastricht, not on the euro crisis. Instead of showing the peculiar nature of the institution of the ECB in or after the crisis, this chapter aimed to show how fundamental characteristics of the EU’s constitutional construct have allowed the ECB to take on such an idiosyncratic role. My argument is that the separation between the economic and monetary branches of the EU and the detailed constitutionalization of the position of the ECB vis-à-vis the other public actors on the European level contributed to the ‘institutional loneliness’ of the ECB. By artificially severing the ties between economic and monetary policy, there is no counterweight to keep the ECB in check. No institution can fill this gap, due to the detailed regulation of the independence of the ECB in the EU treaties.

What does the position of the ECB in the EU’s constitutional construct teach us about economic constitutionalism? I argue that three lessons are of value here. Firstly, it is possible to successfully construct new institutions through treaty amendment. Many doubted whether it was possible to create a European Central Bank that would be just as independent as the Bundesbank. If the ‘myth of the Bundesbank’ is punctured and its operations objectively assessed, it was not significantly more independent than the ECB is now. The institutional engineering of the Maastricht Treaty has—in this sense—succeeded, in no small part due to the strength of EU constitutional law. Secondly, limiting the discretion of economic (in the wider sense, thus including monetary and fiscal) policymakers through ambiguous legal mandates or prohibitions is likely to be unsuccessful. European constitutional law is doctrinally not equipped to deal with questions of economic policy of this kind. Relying on courts to enforce the (constitutional) prohibitions of EMU is naïve, because of the enormous financial and political pressures that exist within the system. If new limits or mandates are introduced, the broader implications for the constitutional framework must be assessed. Pressure to comply should be built into the structure and enforcement should not be reliant only on the strength of the rule of law. Thirdly, using constitutional law to accomplish economic objectives raises, almost by definition, questions of democratic legitimacy. Although constitutions serve multiple functions or roles, they are always counter-majoritarian, and thus, in a way, undemocratic. Although, of course, certain topics are of such importance that
they ought to be outside the scope of majoritarian decision-making, it remains
doubtful whether economic topics are amongst these. Even before the question
of how economic topics can be integrated into constitutional law, the question
must be asked whether the principle of democracy would permit such a turn
of events.