

# 1 Introduction: A Supranational Central Bank as a Subject

In 1999, eleven EU Member States started a historic experiment. This consisted of introducing a common currency, the euro, safeguarded by a newly-founded central banking system with the European Central Bank (the ECB) at its centre. The new euro area monetary system was to provide a stable currency and an enhanced framework for further economic integration, stability and prosperity. The framework and objectives for common macroeconomic policy were elevated to a constitutional level in the Maastricht Treaty. The underlying economic, political and even constitutional assumptions and constraints were agreed upon by the Member States, but from different perspectives. Some Member States saw them as preconditions, some as a price to be paid for a common currency, while others largely ignored them. Nevertheless, the first decade showed mostly the positive sides of the Economic and Monetary Union (EMU) with an internally stable currency and a benign economic environment.

In 2008, the global economy was hit by the worst economic and financial crisis since the Great Depression. Many economies recovered relatively quickly once the negative shocks evaporated. However – and mainly in the richest countries – the crisis questioned their very economic model of the preceding decades. Trust in economic policy actors, first and foremost central banks, in smoothing economic fluctuations came to an abrupt end and the idea that private and public debt could increase without upper boundaries was at least temporarily questioned. No economy system was hit as fundamentally and from as many sides as the euro area, where the financial crisis was followed by economic and sovereign debt crises. In 2020, the euro area was, again, among the worst hit by the pandemic crisis.

This series of crises has questioned the whole EMU economic and constitutional model. The historic experiment with a common currency turned out to be poorly equipped to deal with crises that its constitutional model was assumed to prevent in the first place. Consequently, the carefully designed economic-constitutional model has been replaced by a constant flow of ad hoc measures that were largely responses to the economic and political realities of the moment and specific interests of individual Member States and their financial sectors. The ECB has found itself at the heart of this economic, political and also constitutional experimentalism with its measures pushing the boundaries of the traditional conduct of monetary policy.

The ECB measures have not been dramatically different from those taken by other major central banks that also deemed their well-tested policy responses insufficient. However, in practice and especially in constitutional terms the ECB differs from other central banks. As a supranational system it lacks a nation state's economic and political will-formation as its counterpart and as its ultimate control. Its main counterpart is the constitutional framework, called here the European Macroeconomic Constitution, based on specific assumptions concerning economic policy competences, accountability mechanisms and fundamentally also the democratic legitimacy of euro area economic governance. The ECB is a highly independent central bank insulated from the democratic process and not equipped to make value-based decisions. This in turn should have implications as to how it can expand its role.

Constitutions protect the most important values of their respective societies, and they should have a high level of suspicion concerning demands arising from urgency. At the same time, particularly economic constitutions can be too inflexible. Central banks need some discretion in implementing policies in the ever-changing economic circumstances and realities of financial markets. For the ECB this tension between innovative responses to new situations and its rigid legal mandate is more profound than with other central banks, because of its distance from the general executives and legislatures. Central banks that enjoy access to governments or parliaments can make the case for exceptional measures and even find a sensitive ear. In the EU, the mandates are anchored at the level of the Founding Treaties that are even more difficult to change than individual national constitutions.

How should the ECB be assessed? As an economic policy actor it needs to be assessed on the grounds of how it achieves its objectives and how it

performs its tasks.<sup>1</sup> However, as an EU institution with considerable independence, it needs to be assessed on the basis of how it operates in this complex economic-political setting, and how it respects and advances the values it is supposed to protect and serve. This constitutional perspective ensures that the ECB does not lose sight of the common objectives and values that the EU is based on. Both the economic and constitutional perspectives are important, but they differ in the period of assessment; economic assessment seems to focus more on short-term problems, while the economic constitution by nature has a longer perspective.

This book aims to shed light on this complex economic-constitutional setting to understand how and with what constraints the ECB and the European Macroeconomic Constitution should function. How and with what implications has the ECB's role changed during and after the crises when the constitutional model no longer ensured stability and prosperity? After all that has happened, where are we now and where can go from here?

### 1.1 EU Economic Constitutional Law as the Framework

Constitutional questions related to the ECB acquire some extra flavour from the EU law perspective. The research needs to be anchored on an understanding of its object, the concepts of law, legal systems and legal competence. The starting point is to define the legal system as an institutional normative order, which is not only the case with state law with its coercive elements, but also with 'the law of the organised associations of states such as the EC/EU'.<sup>2</sup>

There is, however, a conceptual problem stemming from the self-referential nature of legal systems. In the institutional order, institutions with power to decide upon legal competences are themselves part of the institutional order, as is well demonstrated by the Court of Justice of the European Union's (CJEU) role in defining the content and reach of EU law. The self-referential problem can be alleviated by claiming that the existence of institutions is only partially defined by their own norms. An additional element is efficacy through demonstrated power over the addressees of norms and some legitimacy by those who are governed.<sup>3</sup>

<sup>1</sup> It could still take at least a decade to become conclusive as it was with the Great Depression of the 1930s.

<sup>2</sup> MacCormick (1995), 'The Maastricht-Urteil', 261.      <sup>3</sup> *Ibid.*, 261–262.

The efficacy argument gains support from traditional legal theories.<sup>4</sup> Law requires as a pre-condition that some legal sovereign can be assumed and be based on efficacy arguments.<sup>5</sup> This existence of a legal sovereign is a reflection or even proof of the existence of a political entity (or polity).

In EU constitutional law, different interpretations exist on the construction of the legal system. In general terms, discussion on EU constitutional law and its relationship with national constitutional laws can take place under the concept of constitutional pluralism.<sup>6</sup> It sees the relationship between the EU legal order and Member State legal orders as interactive and intertwined rather than hierarchical.<sup>7</sup> For the ECB, its exclusive EU competence in monetary policy sets it clearly in the domain of the EU constitutional order, but only to the extent that its actual measures are legitimately included in competences conferred by Member States to the EU. Hence, whether a specific competence question falls under EU law or national law is not a precondition for research but rather a result of research. The German constitutional court's (the FCC) *Maastricht* judgment held that it (the Court) would continue to uphold the fundamental values of German constitutional law and it could in the future question any undue expansion of EU competences.<sup>8</sup> Accordingly, *Kompetenz-Kompetenz* to define the limits of conferred monetary policy competences would have remained with the Member States.

However, this ultimate *Kompetenz-Kompetenz* problem is complicated by the fact that both the CJEU and the national constitutional courts can legitimately claim to define the borders of their authority. The CJEU insists that it is competent to decide where EU authority based on the Founding Treaties ends, but Member State courts have also maintained the right to review EU Treaty changes and transfers of power to the EU to ensure that EU law is compatible with national legal orders.<sup>9</sup> Hence, it is the specific cases that define the limits of conferral, where the starting

<sup>4</sup> Kant (1797), 'Die Metaphysischen Anfangsgründe der Rechtslehre', 311. Kant sees sovereignty as an a priori condition for a legal system that facilitates the institutional framework for the common will.

<sup>5</sup> Schmitt (2005), *Political Theology*, 5.

<sup>6</sup> Walker (2002), 'The Idea of Constitutional Pluralism', 317; Davies (2012), 'Constitutional Disagreement'; Barber (2006), 'Legal Pluralism', 306–329.

<sup>7</sup> MacCormick (1995), 'The Maastricht-Urteil', 264. <sup>8</sup> FCC 2 BvR 2134/92.

<sup>9</sup> Subsequently, in the Lisbon Judgment, the FCC urged the limitation of the transfer of national powers to the EU to ensure that 'sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions'. FCC 2 BvE 2/08.

point can be either Member State courts or the CJEU. The recent *Weiss* judgment by the FCC elaborated the subject by insisting that the CJEU review of the ECB has to fulfil some qualitative criteria to be acceptable.<sup>10</sup>

A fully pluralistic approach would claim that no *ex ante* supremacy to decide on the subject needs to be found.<sup>11</sup> In cases of persistent conflicts, political solutions would need to be found, resulting ultimately in amending either the national constitutions or the Treaties.<sup>12</sup> Furthermore, accepting some pluralistic foundations for the EU constitutional model does not exclude that many universal themes or principles can be derived from the normative status of free and equal individuals of the EU. These universal constitutional principles include legality, subsidiarity, democracy and some basic rights and freedoms.<sup>13</sup>

In conclusion, for the purpose of this book, the constitutional law framework for the assessment of the ECB is essentially a pluralistic, interactive and intertwined institutional normative order located at the intersection of the EU legal order and Member State legal orders. Actual analyses of the interaction – and particularly the criteria concerning the validity of specific issues – need to consider both sides of the interaction. Even the highest political decision-maker, the EU Council, is a product of both the EU constitutional order and of Member State national constitutional orders. The EU constitutional order defines the role and competences of the Council, while national constitutional orders define the composition of the Council and give it legitimacy through the link to electorates.

The subject of EU constitutional law and the ECB touches upon another fundamental issue concerning the nature of law and legal science, the dual citizenship of legal science.<sup>14</sup> The questions are first and foremost scientific, and should be answered by the methods accepted by the scientific community. However, it would be scientific dishonesty to neglect that the questions are also an integral part of legal-economic-political reality and practice. Answers and even the formulation of

<sup>10</sup> FCC 2 BvR 859/15.

<sup>11</sup> Walker (2002), 'The Idea of Constitutional Pluralism', 317; Kumm (1999), 'Who Is the Final Arbiter of Constitutionality in Europe?', 351–386.

<sup>12</sup> Walker (2016), 'Constitutional Pluralism Revisited', 333–355 and Baquero Cruz, 'Another Look at Constitutional Pluralism'.

<sup>13</sup> See, Kumm (2007), 'Constitutionalism and the Moral Point of Constitutional Pluralism', and Kumm (2007), 'Institutionalising Socratic Contestation', 19.

<sup>14</sup> Tuori (2002), *Critical Legal Positivism*, 285.

questions can intervene in ongoing legal-economic-political debates with implications far beyond scientific interest in the issue. This, in turn, affects the value of some judgments, if they are perceived to be influenced by short-term political considerations.<sup>15</sup>

## 1.2 Three Roads Crossing: An Economic-Constitutional Methodology

The search for a methodology for scientifically solid answers to constitutional questions about the ECB results in something that could be called an economic-constitutional approach. The methodology incorporates the necessary information sources and theoretical considerations to a broadly based legal constitutional assessment. First, the key constitutional principles of the new euro area macroeconomic framework, the European Macroeconomic Constitution, will be constructed on the basis of its foundations. Second, these constitutional principles are used as normative premises for assessing the ECB's actions before, during and after a series of crises. Third, the overall impact of these events and measures are reflected on the European Macroeconomic Constitution to assess how it has changed and what that implies for the future.

The concept of the European Macroeconomic Constitution is a theoretical framework for collecting and systematising relevant information. Additionally, it is a theoretical reconstruction on the basis of that information that can be used as a normative premise to analyse the interrelations between various Treaty provisions but also the underlying economic and societal aims and assumptions. I will claim that the relevant Treaty provisions and EU legal principles, form a relatively coherent and internally consistent economic-constitutional whole that can be divided into two layers: a microeconomic layer consisting of the four economic freedoms and competition law, plus a macroeconomic layer that contains the single monetary policy, the euro currency and the framework for other macroeconomic policy-making in the Member States.<sup>16</sup>

The first part of the methodology is to discover the content of the European Macroeconomic Constitution to find out what kind of central

<sup>15</sup> Hydén (2011), 'Looking at the World through Lenses of Norms', 126–128.

<sup>16</sup> The two layers of the European economic constitution were first described in Tuori and Tuori (2014), *The Eurozone crisis*.

bank and monetary policy it implies. The legal framework for the EMU macroeconomic order, including the role of the ECB, was designed in a short period from 1989 to 1991, whereas the monetary policy framework had deeper origins that help us to understand its nature. Arguably, the EMU was possible because three different roads that could be described as its foundations happened to cross at the same time. These three roads, or foundations, are economic-constitutional thinking as the *philosophical foundation*, the institutional and theoretical evolution in central bank economics as the *economic foundation*, and the economic, political and legal developments in European economic integration as the *institutional foundation*. By the end of the 1980s these three foundations guided consensus on the specific model to introduce more macroeconomic elements in European economic integration. In order to understand the content and assumptions of the key constitutional principles, it is necessary to know how the three foundations shaped them.

The paradigms of legal science, particularly legal dogmatism, legal realism as well as law and economics, provide a broad but inconclusive list of methods that could be used as part of the methodology to discover the principles of the European Macroeconomic Constitution. However, the three foundations each have their own theoretical and empirical premises that need to be respected without superimposing one overriding approach. Most key concepts need to be analysed using the methods and traditions of economics as well as those of law and other social sciences. The connective methodology is the search for the substance of the concepts and Treaty provisions from the three foundations respecting the methods of each of these fields of science. These are incorporated into a broad constitutional analysis to bring coherence and structure to the overwhelming, inconclusive and even occasionally incompatible information and also validity claims.

The second part of the methodology focuses on the constitutional assessment of specific ECB measures, in which the legal dogmatic approach plays a larger role in finding the content of individual provisions in specific circumstances. The Treaty provisions are the basis for a legal assessment of actual policy measures, but they are complemented by the principles of the European Macroeconomic Constitution as normative premises for the EMU. This provided more substantive and less formalistic interpretations of the Treaty provisions.

The main body of legal assessment is then to analyse and interpret the relevant legal provisions to find out their legal meaning through

utilisation of legal sources and rules of interpretation.<sup>17</sup> However, this needs argumentative support from other areas of social science, in particular economics. It is evident that an EU-level monetary policy aimed at social and political effects that cannot be derived from strictly legal sources, and these aims can be necessary inputs for the constitutional assessment of actual monetary policy.<sup>18</sup>

In conclusion, the overall methodology to be applied is a collection of methodological tools that are held together by an overall narrative of EU monetary policy as a key element of the European Macroeconomic Constitution and of its philosophical, economic, and institutional foundations. It could be defined as a law in context approach, because it is based on analysing the underlying context in which the phenomena should be seen, taking into account the interdependencies. The lack of scientific rigour imposed by a well-tested single scientific approach demands that the chosen approach remains aware of and sensitive to the broader scientific requirements as well as keeps the argumentation as open as possible.

Additional items that need to be addressed include legal sources and sources of information on the content of legal norms covering the common monetary policy. Treaty articles are the starting point. The most important provisions – introduced in the Maastricht Treaty – have remained more or less intact. However, many important elements were already introduced in the Treaty of Rome (1957), including the four economic freedoms. In addition, relevant legal provisions appear in secondary EU law and even in national law concerning macroeconomic management. Furthermore, the legal form of an ECB measure does not dictate its constitutional importance, as many ECB critical measures do not get an explicit legal form. Hence, all material and practices by the ECB and other authorities can feature as sources of law. Measures are assessed on the basis of their substance, not merely their legal form. In addition, other strictly legal material includes decisions by the highest (constitutional) courts. The book followed developments until the end of 2021.

Classic EU doctrine already recognises a number of secondary sources of law, such as legal practice and foreign law, as well as some more general legal concepts. In addition, an extensive list of so-called source

<sup>17</sup> Aarnio (1989), *Lainlulkinnan teoria*, 194.

<sup>18</sup> Elderson (2005), 'Legal Interpretation within the European System of Central Banks', 93–114.



factors that have influenced relevant legal decisions might need to be included.<sup>19</sup> Hence, apart from traditional legal sources, other types of information sources are used, including the theoretical and historical background of the European Macroeconomic Constitution. For example, the ordoliberal school of thought and its concept of economic constitution can be relevant information in reconstructing the economic constitution at the European level, even if it is hardly a substantive legal source as such. Similarly, theoretical and empirical information on economic policy concepts is relevant. From the methodological perspective the inclusion of empirical information for the purpose of inductive theory-building as well as for its validation can be difficult, although it could be essential for legal interpretation, when ‘causal factors convert into sources of law’.<sup>20</sup>

Economic and monetary policy concepts introduced in the Maastricht Treaty were based on the economic thinking of the time they were introduced. However, this does not mean that the economic paradigms have validity claims beyond their influence on the formulation of the Treaty provisions. It could instead be assumed that concepts and terms on macroeconomic management were intentionally left open to keep the economic constitution flexible to developments in the economy. Against this background, it is preferable to consider the impact of economic theory more substantively on specific issues. For the actual ECB measures to combat crisis, the relevant theoretical and empirical information needs to include developments in economics up to that point. Economics as a science has an ongoing dialogue with actual economic policy, and the results of this dialogue influence subsequent policy measures. Indeed, central bank measures during the crises have also paved the way for new economic theoretical considerations that need to be included in the assessments, even if the scientific conclusions are tentative at best.

Institutional information on central banks can be relevant from two perspectives. Information concerning the predecessor institutions could help to fill some information gaps. A particularly useful informative source is the Deutsche Bundesbank that can be seen as a template for the ECB, though the practices of other national central banks could also be included. In addition, comparisons with other major central banks help to analyse the economic and operational concepts related to

<sup>19</sup> See Evald (2000), *Law, Method and Values*, and Eckhoff (1993), *Rettskildelære*.

<sup>20</sup> Pattaro (2007), *A Treatise of Legal Philosophy and General Jurisprudence*, 15.

monetary policy. This information could be particularly useful with regard to the unconventional monetary policy measures during the crises.

Finally, the rules for legal interpretation need to be explicated. First, literary interpretation of the Treaty provisions is the starting point even if the provisions might be too ambiguous for definitive literary interpretations. Second, systematic interpretation plays an important role. Provisions on monetary policy are part of the more general macroeconomic governance model that contains elements both at the EU level and at the Member State level. A broad list of provisions, general principles and rules needs to be incorporated in a systematic framework. Third, the teleological interpretation of Treaty provisions and other EU legislation is important, as the aims of European integration have been given a prominent role in the case law of the CJEU from the very outset. The teleological needs of integration are turned into systemic requirements for the EU legal order. This is close to a value-based interpretation incorporating the values inherent in EU law and interpreted by the CJEU such as the rule of law, fundamental and human rights, as well as values related to democracy.<sup>21</sup> Fourth, the role of preparatory works in interpreting and applying EU law is much more limited than in most national legal orders. The same applies to legal research on the ECB. Finally, comparative analysis and interpretations may help to find the underlying motivations and assist in defining concepts and measures in legal terms. In particular, it can be illuminating if unconventional ECB measures are differently termed or given different justifications than is the case with other major central banks that have different mandates.

### 1.3 Structure of the Book

The book is divided into three parts. Part I forms the key constitutional principles of the European Macroeconomic Constitution that set the normative premises for the assessment of common monetary policy and the ECB. This part ends with a description of these constitutional principles and of the ECB as it was built accordingly. Part II examines the impact of the financial, economic, sovereign debt and pandemic crises on the ECB and the constitutionality of its measures in the light of the European Macroeconomic Constitution. Part III takes a broader

<sup>21</sup> Tridimas (2006), *The General Principles of EU Law*.

perspective on the overall implications for the European Macroeconomic Constitution, ECB accountability and even the rule of law. The change in the importance of objectives from price stability to financial stability is seen to demonstrate a mutation of the ECB from a central bank of stability to a central bank of crisis.