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13. Assessing and (Re-)situating Today's ECB in the EU's Institutional Landscape

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I. Introduction

The European Central Bank (ECB) is different from the other European Union (EU) institutions: it presents unique features, on several accounts. Furthermore, its institutional structures have suffered important changes since it was first created two decades ago, such that the balance between, on the one hand, its supranational nature and, on the other, national component within its governance structures has evolved over time.

The ECB became an EU institution with the entry into force of the Lisbon Treaty only: it was originally an 'independent specialized organization of Community law'¹. It is the only institution whose decision-making bodies can adopt legal acts without the direct involvement of Member States representatives and without any prior authorization being required: as is further examined below, in the Governing Council, (euro area) National Central Bank (NCB) governors participate in their personal capacity. Those governors thus wear a 'supranational hat' when they sit in the Governing Council thereby endorsing then a role similar to the one played by Commissioners in the European Commission, which is also a supranational institution like the ECB.² Contrary to those, they can however rely on, and benefit from, the knowledge and the expertise of their NCBs whereas Commissioners primarily rely on Commission administrative services, which are also supranational. In other words, the importance of the role played by national administrations in the system of the European System of Central Banks (ESCB) is greater than the one played by national administrations in 'standard EU' areas in which the Commission commonly operates. Among the reasons for

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¹ Chiara Zilioli and Martin Selmayr, 'The European Central Bank: An independent specialized organization of Community law' (2000) 37 CML Rev 591.

² That is that both the European Commission and the ECB represent and act in the interest of the Union as a whole, as opposed to for example the Council and the European Council, which are intergovernmental organs, meaning that Member States government representatives come together and represent the various national interests.

the ECB's unique status are also its strong independence,³ its standing in-between the EU27, the euro area and, since 2013, the European Banking Union (EBU).⁴

While some of these characteristics stem from the ECB's original design as it was included in the Maastricht Treaty, others are rather the result of subsequent evolutions observable in law and practice within the EU. Against this background, this chapter first seeks to examine how the ECB's institutional design has evolved over the past twenty years. Much ink has, for instance, already been spent on the consequences of the creation of the EBU for the ECB's governance structure. However, very little is known generally about the preparatory organs of the ECB (that is the ECB's Committees). Furthermore, the institutional logic – and thus also the relationship between EU and national authorities – that underpins the governance structure in the area of monetary policy arguably differs from the one in place in the area of banking supervision. This chapter's second objective is hence to evaluate how today's ECB compares to the other EU institutions, while also outlining the balance between national and supranational components in the various ECB bodies and procedures. In so doing, it outlines the tensions that arise from the dual – national and European – nature of the NCBs and their governors. In fact, the national component or dimension that exists within the ECB may take different forms, including for instance that of representation, influence or interests. This analysis pursues to highlight them rather than to strictly categorize them, a task which the secrecy that characterizes part of the functioning of the ECB makes impossible. This chapter finally asks what the implications of these evolutions might be for the accountability structures in place.

To this end, this chapter firstly considers how the ECB's institutional structures have evolved over time (II). It then proceeds to ask how national influence within the E(S)CB's structures has evolved over time (III). Today's ECB institutional structures are subsequently compared to those of other EU institutions and bodies (IV). The final part concludes (V).

It is undeniable that the ECB has been submitted to important shifts since its creation. These include for example the fact that the divide between euro area and EU27/internal market where the ECB is involved in EU27-matters in a variety of instances and capacities never vanished (and likely never will), contrary to what had originally been planned. As a consequence, today's ECB stands in-between the EU27, the EBU (21 Member States since October 2020), and the euro area (19 Members). The participation of non-euro area Member States in the EBU also has important consequences for the ECB as the relationship it entertains with the Competent Authorities of those Member States differs from the one that exists between it and the Competent Authorities of euro area Member States. Finally, as a consequence of the co-existence of the internal market and the EBU, and of the different levels of integration achieved within them, important questions related to the divide of responsibilities between, on the one hand, the EU-wide European Banking

³ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter TFEU), art 130.

⁴ See on the ECB's role in the EBU chapter 7 by Kern Alexander, and chapter 8 by Federico Della Negra and Gianni Lo Schiavo, in this volume.

Authority and European Commission and, on the other, the euro area-focused ECB have arisen over time. Although they are significant and bear important consequences for the ECB, these developments are not considered in the present chapter, which more modestly focuses on the ECB's institutional structures and how these compare to the structures of other EU institutions and bodies.⁵

II. The ECB's institutional structures: from Maastricht to Lisbon to today

This first part first examines what the ECB's original institutional structure was (A). Subsequently, the structures in place in the area of banking supervision are considered (B). The next section focuses on the evolution of these structures, and asks how the share of the national component have evolved over time both *de jure* and *de facto* (C).

A. The ECB's original institutional architecture

The ECB's institutional architecture is contemplated both in the core of the EU Treaties (today in the Treaty on the Functioning of the EU (TFEU)), and in Protocol no. 4 on the System of European Central Banks and the European Central Bank (ESCB Statute), annexed to the Treaties. These provisions provide for the existence of organs for EU-wide, as well as for Euro-area specific decision-making bodies (1), and for the establishment of preparatory bodies (ECB Committees) (2).

1. ECB decision-making bodies: Balancing EU-wide representation and euro area-specific interests

As noted, the ECB's institutional architecture was first defined in the Maastricht Treaty,⁶ and is thus the result of the negotiations that preceded its adoption. On '[t]he Road to Maastricht',⁷ national preferences, and especially French and German ones, shaped the ECB's characteristics. As is well-known, the ECB's independence was a pre-condition to Germany's agreeing to the creation of the EMU,⁸ but a national dimension in the ECB's structure and functioning were advocated by the French government. Then French minister of Economy and Finance, Pierre Bérégovoy, believed that 'the more operational functions passed to the ECB, the more the market operators would shift their business to its location', and he wanted to protect the French financial markets in the event that the ECB would not be established in France.⁹ Hence, he called for the ECB's

⁵ See nonetheless the other chapters included in this edited volume as well as its introduction, which examine individual aspects of these questions, eg chapter 6 by Jonathan Bauerschmidt, chapter 7 by Kern Alexander, and chapter 8 by Federico Della Negra and Gianni Lo Schiavo, in this volume.

⁶ Treaty establishing the European Community [2002] OJ C325/33, arts 105-109b and Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank [2016] OJ C202/230 (hereafter ESCB Statute).

⁷ Kenneth Dyson and Kevin Featherstone, *The Road to Maastricht. Negotiating Economic and Monetary Union* (OUP 1999).

⁸ This was for instance stated by the then governor of the *Bundesbank* in a speech he held in Paris on 16 January 1990; *ibid* 386-387.

⁹ *ibid* 211.

operation to be decentralised.¹⁰ Also, the French (unsuccessfully) suggested that members of the Governing Council be accountable to both the European Parliament and national parliaments.¹¹ Solidarity among Member States (as opposed to two-speed integration dividing those Member States participating in Stage 3 of EMU from those that did not) was dear to the French as well: they called for the establishment of both a euro area-only Governing Council and an EU-wide General Council to ‘facilitat[e] co-operation between ‘ins’ and ‘outs’.¹²

The Maastricht Treaty – like the Lisbon Treaty still does too – defined three decision-making bodies: the Governing Council, the Executive Board and the General Council whereby the former two have, however, a significantly more important role to play within the ESCB. This is evidenced both by the tasks assigned to these bodies examined further below, as well as by their standing in the Treaties. Indeed, Art. 129(1) TFEU unequivocally provides that ‘[t]he ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board’. By contrast, Art. 141(1) TFEU clearly points to the temporary character of the General Council in stating that ‘[i]f and as long as there are Member States with a derogation [from their belonging to the Euro area foreseen in the Treaties], and without prejudice to Article 129(1), the General Council of the European Central Bank referred to in Article 44 of the Statute of the ESCB and of the ECB shall be constituted as a third decision-making body of the European Central Bank’.

The main decision-making body of the ECB is thus the Governing Council composed of governors of the NCBs whose currency is the euro, who participate in their personal capacity, and the members of the ECB’s Executive Board.¹³ The balance between supranational and national representation has evolved over time to the benefit of the latter since the number of euro area Member States went from 12 to 19 since the euro was first introduced. Hence, balance which was originally 1 to 2 in favour of national representation is now 1 to 3, and no mechanism is foreseen with a view to compensating for this,¹⁴ except perhaps for the This combination of national and supranational representation has been viewed as a sign of the federal character of the ESCB.¹⁵ The Governing Council ‘adopt[s] the guidelines and take[s] the decisions necessary to ensure the performance of the tasks entrusted to the ESCB under these Treaties and this Statute [...] shall formulate the monetary policy of the Union [...] and shall establish the necessary guidelines for their implementation.’¹⁶ The Executive Board, which comprises six members (the President of the ECB, its Vice-President and four other members),¹⁷ ‘implement[s] monetary policy in accordance with the guidelines and decisions laid down by the Governing

¹⁰ *ibid* 210.

¹¹ *ibid* 242.

¹² *ibid* 242.

¹³ TFEU (n 3) art 283(1) and ESCB Statute (n 6) art 10.

¹⁴ Chiara Zilioli, ‘Art. 283 AEUV’ in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015), para 4.

¹⁵ Ulrich Palm, ‘Art. 283 AEUV’ in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV* (CH Bech 2021), para 7.

¹⁶ ESCB Statute (n 6) art 12.1.

¹⁷ TFEU (n 3) art 283(2) and ESCB Statute (n 6) art 11.

Council'.¹⁸ It also prepares the meetings of the Governing Council,¹⁹ and additional powers may be delegated to it if the Governing Council so decides.²⁰ Lastly, the General Council allows for EU-wide participation as it is composed of the President and the Vice-President of the ECB, and of the governors of all EU NCBs. Although the other members of the Executive Board may participate as well, they have no voting rights.²¹ As mentioned, NCB Governors sit in their personal capacity on the Governing Council (this derives from the strict independence they are submitted to). Nonetheless, they are arguably still (and perhaps even increasingly) influenced by their status as the Governors of a *national* institution even when they sit on the Governing Council (see also section IV further below). NCBs indeed remain primarily national institutions, even if they now belong to the Eurosystem, which is composed of the ECB and the NCBs from euro area Member States and which 'conduct[s] the monetary policy of the Union'.²² This means that they have become *national Europeanised institutions* in so far as their actions are strongly influenced by European integration²³ and as they – and not the ECB – shall 'carry out the operations which form part of the tasks of the ESCB' wherever possible,²⁴ but also with the consequence that (some) of their institutional features are governed by EU rules. For instance, NCBs have to be guaranteed a status of independence,²⁵ and the duration of the mandate of NCB Governors may not be inferior to five years. Those Governors are also protected from severe national injustices due to their dual status as NCB Governors and members of the Governing Council as is examined more in detail subsequently. The ECB is to be consulted on national legislation in its fields of competence, and it may thus have influence on NCBs by this means.²⁶ And, of course, NCBs have the duty to implement Governing Council decisions.

All this notwithstanding, NCBs in their quality as *national* institutions play a key role too. The ECB heavily relies on them to gain the information that underpins its monetary policy decisions, and NCBs are strongly involved in the ECB's preparatory bodies considered in the following sub-section.

2. Uncovering the unknown: ECB preparatory bodies

As mentioned in the introduction, only scarce information is available on the three kinds of Committees that exist within the ECB (Eurosystem/European System of Central Banks (ESCB) committees, *ad hoc* Committees established by the Governing Council, Audit Committees), and they have attracted close to no

¹⁸ ESCB Statute (n 6) art 12.1 (emphasis added).

¹⁹ *ibid* art 12.2.

²⁰ *ibid* art 12.1.

²¹ TFEU (n 3) art 141 and ESCB Statute (n 6) art 44.

²² TFEU (n 3) art 282(1).

²³ Each Member State indeed has a duty to 'ensure that its national legislation including the statutes of its central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB'; TFEU (n 3) art 131 and ESCB Statute (n 6) art 14.1.

²⁴ ESCB Statute (n 6) art 12.1.

²⁵ TFEU (n 3) art 130.

²⁶ *ibid* art 127(4). See for instance: Opinion of the European Central Bank of 30 November 2020 on amendments to the Law on Parliament [2020] (CON/2020/30) concerning the Swedish NCB and Opinion of the European Central Bank of 21 July 2020 on the amendment of the appointment criteria of Banco de Portugal's Governor and other members of the Management Board [2020] (CON/2020/19).

academic attention to date.

The existence of the ESCB Committees is recognised in the ECB's Rules of Procedure,²⁷ and their task is to 'assist in the work of the decision-making bodies of the ECB'.²⁸ they hence 'provide expertise in their fields of competence and facilitate the decision-making process and implementation of decisions'.²⁹ They report to the Governing Council via the Executive Board, which has the capacity to establish and dissolve them. In the committees, NCBs and the ECB are set on an equal footing being each represented by up to two representatives selected by the NCB governors and the Executive Board, respectively. They are chaired by one of the ECB representatives, and the ECB provides secretarial support.

Both the Governing Council and the General Council may request studies to the Committees, this latter possibility being specifically recognised and further detailed in the General Council's Rules of procedures with a view to defining the involvement of non-euro area NCB representatives. Indeed, the General Council may 'request studies of specific topics by [the ESCB] committees'.³⁰ Furthermore, '[t]he national central bank of each non-participating Member State may appoint up to two staff members to take part in the meetings of a committee whenever it deals with matters falling within the field of competence of the General Council and whenever the chairperson of a committee and the Executive Board deem this appropriate'.³¹ Beyond this, the possibility exists to involve representatives of other EU institutions and bodies and other third parties under the same circumstances.³²

Considering that only limited information on these Committees is available publicly,³³ the information on the existing committees presented here corresponds to the list published by the Slovenian NCB, and was valid as of 31 December 2016.³⁴

There are 17 committees which deal both with substantive issues linked to central banking and banking supervision (Accounting and Monetary Income Committee (AMICO), Financial stability Committee (FSC), Market Operations Committee (MOC), Monetary Policy Committee (MPC), Market Infrastructure and Payments Committee (MIPC), Risk Management Committee (RMC)), and with more organisational aspects (Banknote Committee (BANCO), Committee of Controlling (COMCO), Eurosystem/ESCB Communications

²⁷ Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) [2004] OJ L80/33, art 9 (hereafter 'ECB Rules of Procedure').

²⁸ *ibid* art 9.1.

²⁹ Hanspeter K Scheller, *The European Central Bank: History, Role and Functions* (European Central Bank 2004) 64.

³⁰ ECB Rules of Procedure (n 27) art 9.2 and Decision of the European Central Bank of 17 June 2004 adopting the Rules of Procedure of the General Council of the European Central Bank (ECB/2004/12) [2004] OJ L230/61, art 8 (hereafter 'Rules of Procedure of the General Council').

³¹ *ibid*.

³² ECB Rules of Procedure (n 27) art 9.4.

³³ This state of affairs was confirmed by a request for information to the ECB. Exceptions to this are nonetheless the sections of the ECB's website dedicated to the Audit Committee and Internal Auditors Committee < <https://www.ecb.europa.eu/ecb/orga/governance/html/index.en.html> > accessed 21 November 2021, and the information on the Ethics Committee: European Central Bank, *Institutional Provisions: Statute of the ESCB and of the ECB, Rules of Procedures, Ethics Committee, Implementation of Separation* (European Central Bank 2015).

³⁴ National Bank of Slovenia, 'Committees' < <https://www.bsi.si/en/about-us/eurosystem/committees> > accessed 21 November 2021.

Committee (ECCO), Information Technology Committee (ITC), Internal Auditors Committee (IAC), International Relations Committee (IRC), Legal Committee (LEGCO), Organisational Development Committee (ODC), Statistics Committee (STC), Budget Committee (BUCOM), Human Resources Conference (HRC)). Note that the Governing Council may also ‘decide to establish ad hoc committees in charge of specific advisory tasks’.³⁵

As is evidenced by the above summary, the existing permanent Committees cover very different areas including both substantive and organisational issues. Consequently, they may be expected to fulfil different functions, and may thus be viewed as contributing to a varying (that is, more or less important) degree to the ECB’s fulfilling its tasks, and to the ESCB’s overall functioning. It is nonetheless impossible to draw more meaningful conclusions amid the absence of more detailed publicly available information.

The Committees’ existence arguably corresponds to the need for the ECB’s decision-making bodies to receive input from, and coordinate their actions with, the NCBs, which, according to the structure of the ESCB, and as already noted, play a decisive role in the implementation of ECB decisions and in its operations generally. Committees contribute to the channelling of national preferences and, more neutrally, they may be expected to allow for the exchange of information and best practices among NCBs and with the ECB. They do not, as such, a priori respond primarily to other needs, which could include shortage of staff on the ECB’s side, but are rather the sign that Governing Council meetings need preparing, and that ECB decisions are largely implemented by NCBs. In view of the important role they play, it would therefore be desirable for more information to be made publicly available. It is indeed understandable that some of the data shared within some of the Committees is sensitive and cannot easily be disclosed, as such disclosure could have adverse economic effects or could constrain the ECB in the conduct of its monetary policy. But it is hard to comprehend why at least the list of committees that currently exist, as well as the list of the topics discussed, would not be published on the ECB’s website, particularly because the ECB has been adamant and indeed pro-active in its efforts to increase transparency on its activities.

B. The adaptation of the ECB’s institutional design to the EBU: increased national influence in the functioning of the ECB?

Following the decision made by the Member States in 2013 to rely on the possibility opened by Art. 127(6) TFEU to confer some supervisory tasks upon the ECB,³⁶ the ECB became the main supervisor of EBU credit institutions as part of the Single Supervisory Mechanism (SSM). Nonetheless, it is to fulfil this function in complete independence from its monetary policy and other functions.³⁷ Its institutional structures thus had to

³⁵ ECB Rules of Procedure (n 27) art 9a.

³⁶ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (hereafter ‘SSM Regulation’).

³⁷ *ibid* art 25.

be adapted to allow it to perform this new function whilst guaranteeing that this happened independently from the performance of its monetary policy functions. This resulted in the creation of the Supervisory Board (1), in the establishment of Joint Supervisory Teams (2), whilst Common services also exist (3).

1. Supervisory Board

The Supervisory Board in charge of preparing supervisory decisions is an ECB internal organ established by secondary law³⁸ (as opposed to the decision-making organs whose basis is found in the Treaties). It is composed of NCA representatives (one per participating Member State), but the participation of those NCBs that are not NCAs is also foreseen.³⁹ Where that is the case, the national representatives involved share the vote allocated to the Member State in question, but two representatives sit at the table. National representation is hence significantly superior to ECB (that is, supranational) representation which is only ensured by the Chair, the Vice-Chair, and the four additional members. The imbalance between national and supranational representation is even more pronounced than in the Governing Council. Board members shall act in the interest of the Union as a whole,⁴⁰ thus they do not seek the individual interests of the Member State they represent. It remains the case that, on the one hand, the voting system in place is less supranational than the one in place today within the Governing Council, and that, on the other hand, NCAs' independence is less strictly guaranteed than the independence of NCBs. More generally, the characteristics of their institutional set up are more left up to the individual Member States than those of NCBs which are in part defined in EU primary law. For what concerns the applicable voting arrangements, each member of the Supervisory Board has one vote, and 'decisions shall be taken by a simple majority of its [the Supervisory Board's] members. [...] In case of a draw, the Chair shall have a casting vote'.⁴¹ In contrast to this, each member of the Governing Council has one vote too (so there is no weighing mechanism either in most cases). However, since the total number of members of the Governing Council now exceeds 21, a rotating system is in place.⁴² As to the NCAs' requirement of independence and institutional settings, they are defined in Art. 19 SSM Reg. (independence), the ECB Code of Conduct for the Members of the Supervisory Board,⁴³ and in the Capital Requirements Directive (CRD IV).⁴⁴ As such, NCAs, too, have become *national Europeanised institutions*. However, the applicable rules are less stringent than those defining the characteristics applicable to NCBs. In accordance with article 4(4) CRD IV, 'Member States shall ensure that the competent authorities have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to prudential supervision, investigations and penalties set out in this Directive and in Regulation (EU) No 575/2013'. They 'shall ensure that the functions

³⁸ *ibid* art 26.

³⁹ *ibid* art 26(1).

⁴⁰ *ibid* art 26(1).

⁴¹ *ibid* art 26(6).

⁴² ESCB Statute (n 6) art 10(2).

⁴³ Code of Conduct for the Members of the Supervisory Board of the European Central Bank [2015] OJ C93/2.

⁴⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338, art 4 (hereafter 'CRD IV').

of supervision pursuant to this Directive and to Regulation (EU) No 575/2013 and any other functions of the competent authorities are separate and independent from the functions relating to resolution',⁴⁵ and adequate cooperation between NCAs and National Resolution Authorities shall be guaranteed.⁴⁶ However, these provisions leave ample margin of (national) discretion to the Member States. Whilst this is certainly in line with the duty set on the Union to respect its Member States' constitutional identities recognised in Art. 4(2) Treaty on the EU, and allows Member States to define their institutional structures in the way that is most suitable to their individual institutional setting and (political) traditions, this is also likely to lead to important differences and perhaps even to some shortcomings. For instance, the limited independence of the Austrian and the German NCAs, FMA and BaFin, from their government could be criticised,⁴⁷ and in any case confirms that the national component is stronger within the Supervisory Board than it is within the Governing Council. The fact that numerous NCBs – that are shaped by more stringent EU obligations – act as NCAs may not be obviated. As a consequence of this, the attribution of supervisory tasks to the ECB following the establishment of the SSM points to the ECB's institutional structure having arguably become less supranational, or at least more prone to national influence, than had previously been the case when it was only in charge of the conduct of the EU's monetary policy even if in this domain as well, the national component has become stronger as a result of the growing number of NCB governors sitting on the Governing Council. This numerical superiority does not necessarily mean that the influence of the single governors has been reinforced however. The rotating system could point in the opposite direction, and the secrecy of the deliberations within the Governing Council makes it impossible to draw definite conclusions in this regard. We also observe varying dynamics because of the attribution of supervisory powers to the ECB: on the one hand, the centralization of supervisory tasks with the ECB is a clear sign of supranationalization within the EU. On the other hand, however, compared to the ECB's internal bodies devoted to monetary policy, the internal institutional structure of the ECB in the supervisory pillar is arguably less supranational, in the sense that it could be more prone to national influence. This tendency is confirmed by the composition of the Steering Committee, which is tasked with supporting the Supervisory Board's activities.⁴⁸ Indeed, it is formed by the Supervisory Board's Chair, its Vice-Chair, one ECB representative and five NCA representatives designated on a rotating basis; the national component is stronger than it is in the Executive Board, which supports the Governing Council, as the latter is composed of six supranational representatives, that is NCB representatives do not take part in it. This difference may nonetheless be justified by the fact that the conduct of the EU's monetary policy has been attributed to the Union in full, whereas banking supervision is a shared competence that is exercised jointly by EU and national authorities, as examined in the next paragraph.

⁴⁵ *ibid* art 4(7).

⁴⁶ *ibid* art 4(8).

⁴⁷ See on this: European Banking Authority, 'EBA Report on the Supervisory Independence of Competent Authorities' (EBA Report no 29, 18 October 2021) <https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2021/1022092/EBA%20report%20on%20supervisory%20independence%20of%20competent%20authorities.pdf> accessed 21 November 2021.

⁴⁸ SSM Regulation (n 36) art 26(10).

2. A strong role for NCAs: Joint Supervisory Teams⁴⁹

As noted above, the SSM is composed of both the ECB and the NCAs, which play an important role in its functioning. This is the case for two main reasons. First, NCAs remain primarily responsible for the fulfilment of certain tasks (for instance, they supervise Less Significant Institutions (LSIs) and may be instructed by the ECB to perform certain tasks).⁵⁰ Second, they participate in Joint Supervisory Teams (JSTs).

These Teams are composed of both ECB and NCA officials.⁵¹ They were created with a view to supporting the ECB, which, arguably, could not exercise the day-to-day supervision of all SIs directly and on its own, both on the ground of insufficient staffing and on the ground of insufficient knowledge of the individual banking sectors and supervisory cultures. Their tasks include *inter alia* the conduct of the Supervisory Review and Evaluation Process (SREP) for SIs, the participation ‘in the preparation of a supervisory examination programme to be proposed to the Supervisory Board’, the implementation of said programme and any ECB supervisory decision, the co-ordination with on-site inspections teams in the implementation of the programme, and the liaison with the NCAs.⁵²

JSTs allow the ECB to benefit from the NCAs’ national experience,⁵³ thereby insuflating a national dimension to the SSM, one that comes in addition to the already significant national dimension inherent in the SSM’s institutional structure within the ECB outlined above. This notwithstanding, it remains the case that the ECB keeps the upper hand (as it should be in view of the ultimate responsibility it bears for the prudential supervision of SIs): Even if NCAs may appoint the person(s) of their choosing to become part of a particular JST,⁵⁴ the ECB keeps the control over this as it ‘may require the NCAs to modify the appointments they have made if appropriate for the purpose of the composition of a joint supervisory team’.⁵⁵ This provision interestingly leaves ample margin of discretion to the ECB in its application, and the Supervisory Board’s Rules of procedure do not shed any light on this aspect.

3. ECB decision-making bodies and Shared services

Despite the creation of specific independent structures for the conduct of prudential supervision within the ECB, the separation between the supervisory and the monetary policy functions is nonetheless not absolute (and rightfully so).

⁴⁹ See also chapter 8 by Federico Della Negra and Gianni Lo Schiavo, in this volume.

⁵⁰ See for a critical stance on the allocation of supervisory powers between the ECB and the NCAs within the ECB: Raffaele D’Ambrosio, ‘Single Supervisory Mechanism: Organs and Procedures’ in Mario P Chiti and Vittorio Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Palgrave Macmillan 2019) 165ff.

⁵¹ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) [2014] OJ L141/1, arts 3 and 4 (hereafter ‘SSM Framework Regulation’).

⁵² *ibid* art 3(2).

⁵³ Gianni Lo Schiavo, ‘Il ruolo della BCE’ in Mario P Chiti and Vittorio Santoro (eds), *L’Unione bancaria europea* (Pacini Giuridica 2016) 218.

⁵⁴ SSM Framework Regulation (n 51) art 4(2).

⁵⁵ *ibid* art 4(3).

This is so because the Governing Council remains in charge of approving the Supervisory Board's decision following a non-objection procedure, but also because some of the services of the ECB are shared between both functions.

As noted above, the decision-making bodies of the ECB are defined in the Treaties such that the Supervisory Board alone could not make supervisory decisions. The euro area-wide dimension brought about by the consent procedure by the Governing Council may nonetheless be viewed as limited, considering that it is not a decision-making procedure proper, but one that essentially takes the Governing Council's consent as the course of action by default. Hence, the Supervisory Board has been viewed as having 'a certain *de facto* decision-making power in the field of banking supervision'.⁵⁶

On the other hand, shared services 'providing support to both the monetary policy and the supervisory function [may be established] in order to ensure that these support functions are not duplicated, thus helping to guarantee the efficient and effective delivery of services'.⁵⁷ Despite being shared services, '[d]ivisions dedicated to supervisory tasks have been established within several 'shared service' business areas'.⁵⁸ The existence of these shared services hence corresponds to an attempt to minimise unnecessary bureaucratic structures, and does not affect the supranational nature of the ECB (support) services in question.

In summary, whereas the creation of these shared services or the involvement of the Governing Council in supervisory decisions may not necessarily significantly affect the balance between the national and the supranational components within the ECB, the same may not hold true of the addition of the supervisory pillar itself and the creation of the Supervisory Board and the JSTs it has demanded. In fact, other developments witnessed over the past two decades beg the question whether the national component has not grown significantly within the ECB; the next section is thus devoted to this matter.

III. Has the national component within the supranational ECB grown larger?

Having now mapped the features of the ECB's institutional structures in both the area of monetary policy as well as in supervisory matters, and thus how the ECB's institutional structure generally has evolved since it started to function two decades ago, the question that remains is whether, on the whole, the ECB (and perhaps also the ESCB) should be viewed as having become more or less supranational an EU institution (or a System) over time, in the sense that the balance between national and supranational influence has shifted in favour of the former.

As is shown in the next sub-sections, what emerges is rather a mixed picture for there are arguments that point both to the ECB's having become more nationally-oriented and to its being more (or as equally as ever)

⁵⁶ Raffaele D'Ambrosio, 'Single Supervisory Mechanism: Organs and Procedures' in Mario P Chiti and Vittorio Santoro (eds), *The Palgrave Handbook of European Banking Union Law* (Palgrave Macmillan 2019) 159.

⁵⁷ Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39) [2014] OJ L300/57, art 3(4).

⁵⁸ *ibid* Recital 11.

supranational. This is the result of the representation of national interests having become stronger within the ECB's institutional structures (A), and of its national component having become more salient in practice (B). The reinforcement of the ECB's supranational character by means of recent EU judicial decisions nonetheless stands in stark contrast to these tendencies speaking in favour of enhanced national influence (C).

A. Enhanced representation of national interests in the ECB's institutional structure proper

In terms of the elements that point to the ECB's institutional structure having allowed for national interests to become more strongly represented,⁵⁹ the first element that bears mentioning is the enlargement of the euro area and the subsequent growth in the number of NCB governors who now very significantly outnumber Executive Board members in the Governing Council. Second is the addition of the supervisory pillar. As shown, the creation of the banking supervision pillar has undoubtedly brought about an influx of national positions. This is so because of the structural features mentioned above (that is, the composition of the Supervisory Board and NCAs' characteristics; the composition of the Steering Committee and the existence and the importance of the JSTs), but also because of the idea that the Supervisory Board appears to abide by a logic that is closer to that of an EU agency (i.e. the coordination of national positions) than is the case within the supranational Governing Council. As has been noted, '[t]he SSM constitutes a 'system of financial supervision composed by the ECB and national competent authorities of participating Member States' (Article 2 para. 9 of Council Regulation 1024/2013 [SSM-Regulation]). This administrative network is comparable to those coordinated by some European agencies (the EFSA, the ECHA, the ESAs and the Single Resolution Board [SRB]), but its organisation is, due to the strong powers of intervention of the ECB vis-à-vis the [individual] national authorities, certainly more hierarchical than that of the latter.'⁶⁰

In any case, the (necessary and welcome) existence of the JSTs composed of both ECB and national officials, on which the ECB is dependent in the conduct of its supervisory tasks are means for the Member States to channel their preferences in a way that is stronger than the influence NCBs can exercise in the conduct of monetary policy, not least because of the important differences that still exist among the single national supervisory cultures, and because of the high degree of differentiation of all kinds that remains within the EBU, for instance vertically as NCAs supervise LSIs autonomously.⁶¹ This strong national character of the SSM characterized by the fact that decisions are made for individual (national) credit institutions also justifies, for instance, the original democratic accountability mechanisms in place, whereby national parliaments may directly hold ECB representatives to account by inviting them to

⁵⁹ At least collectively. As noted previously, whether this is true of individual NCBs or Member States is unclear.

⁶⁰ Paul Weismann, 'The Supervisory Board of the ECB: An Agency-Like Body to Stabilise the Banking Sector?' in Johannes Pollak and Peter Smolinski (eds), *The role of EU agencies in the Eurozone and migration crisis: Impact and future Challenges* (Palgrave Macmillan 2021) 80.

⁶¹ See on this Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial review in the European Banking Union* (Edward Elgar 2021) especially. Chiara Zilioli and Karl-Philipp, 'European Banking Union: A giant step towards European integration and a challenge for judicial review' in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial review in the European Banking Union* (Edward Elgar 2021) 1-15.

appear before them under certain circumstances together with a representative of their respective NCA.⁶² This possibility represents the first time ever that a *national* institution may directly exercise accountability functions on an *EU* institution.

A further illustration of the (controversial yet undoubtedly important) role national institutions possess within the SSM can be found in the outcome of the judicial disputes brought before the Court of Justice and the German Federal Constitutional Court whose main object is yet to be fully settled.

On the occasion of the *L-Bank case*,⁶³ the General Court stated that ‘exclusive competences [have been] delegated to the ECB [by the Council, and that these have] to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation [SSM Reg.]’.⁶⁴ This interpretation was later confirmed by the Court of Justice which unequivocally found on appeal that ‘the ECB is ‘exclusively competent’ to carry out, for prudential supervisory purposes, the tasks listed in Article 4(1) in relation to ‘all’ credit institutions established in the participating Member States, without drawing a distinction between significant institutions and less significant institutions’, and that ‘[t]he national competent authorities [...] assist the ECB in carrying out the tasks conferred on it by Regulation No 1024/2013, by a decentralised implementation of some of those tasks in relation to less significant credit institutions’.⁶⁵ By contrast, the *Bundesverfassungsgericht*, while generally agreeing with the Court of Justice’s interpretation and not finding the creation of the EBU to be unlawful, still came to a more ambiguous conclusion in the *European Banking Union case*.⁶⁶ It bears the potential for a new conflict between the Federal Constitutional Court and the EU to arise in the future, and thus deserves to be quoted at length here. The Federal Court indeed posited that:

‘Even with regard to the SSM Regulation, the national supervisory authorities ultimately retain important tasks and powers relating to banking supervision [...]. They carry out these tasks based on Member State competences and not as a result of a re-delegation of competences that had been conferred on the ECB [...]. According to the allocation of tasks between the ECB and the national supervisory authorities as laid down in the SSM Regulation, the latter remain competent for significant elements of the supervision of individual credit institutions [...]. All tasks and powers not conferred on the ECB remain with the national authorities [...]. A re-delegation of EU administrative tasks would require that all supervisory tasks had been fully conferred on the ECB, which is evidently not what the SSM Regulation provides; otherwise, it would amount to an *ultra vires* act [...]. Under Art. 127(6) TFEU, it is only possible to confer “specific tasks” relating to banking supervision on the ECB. Thus, the ECB’s competences are limited to precise and clearly defined areas of banking supervision. Art. 127(6) TFEU does not allow a full conferral of banking supervision [...]; consequently, the Member

⁶² SSM Regulation (n 36) art 21. See on the use of this mechanism in practice: Diane Fromage, *Changing parliaments in a changing European Union: The role of national legislatures in larger Member States* (Hart forthcoming).

⁶³ Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank* [2017] EU:T:2017:337 (hereafter ‘Landeskreditbank case (2017)’) and Case C-450/17 P *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank* [2019] EU:C:2019:372 (hereafter ‘Landeskreditbank case (2019)’).

⁶⁴ Landeskreditbank case (2017) (n 63) para 54 later confirmed by the Court of Justice.

⁶⁵ Landeskreditbank case (2019) (n 63) paras 37 and 41.

⁶⁶ BVerfG, Judgement of the Second Senate of 30 July 2019 no 2 BvR 1685/14 ECLI:DE:BVerfG:2019:rs20190730.2bvr168514.

States retain the competence for all tasks and powers that are not conferred on the ECB under the SSM Regulation. [...] A re-delegation of EU administrative tasks would require that all supervisory tasks had fully been conferred on the ECB, which is specifically not what the SSM Regulation provides.’⁶⁷

As is obvious, the Court of Justice’s and the Constitutional Court’s views on the role and standing of national authorities and the ECB within the SSM differ, although the Court of Justice’s interpretation is naturally the only valid one within the EU legal order. In particular, according to the Court of Justice, the creation of the SSM has led to prudential supervision being the sole responsibility of the supranational ECB, although national influence remains strong. In contrast, according to the Federal Constitutional Court national influence is strong, not only because of the role NCAs play within the ECB and the JSTs but also because NCAs themselves remain primarily responsible of the supervision of Less Significant Institutions. In any event, these judicial disputes both confirm the key role played by NCAs in the SSM, a role which may further be inferred from the fact that the ECB’s authority vis-à-vis NCAs is more limited than the authority it possesses vis-à-vis NCBs in the area of monetary policy.

The addition of the supervisory pillar may thus be viewed as having increased the national component inherent to the ECB’s structures. Beyond this, it may be argued that also in the field of monetary policy practice over the past decade has pointed towards the emergence of publicly-expressed discrepancies with the supranational decision taken by the Governing Council; this trend is considered next.

B. The potential reinforcement of the national dimension in practice

Before looking into this issue, it must admittedly first be acknowledged that the supranational character of the ECB in the field of monetary policy was strengthened during the euro area crisis when decisions started to be taken by majority voting whereas consensus had been the norm until then. It was also undoubtedly, and strongly, reinforced following the change in the applicable voting rule within the Governing Council that intervened after the accession of the nineteenth euro area Member State.

As has been noted:

Following long debates,⁶⁸ ‘[i]n another evolutionary step transforming the ECB’s initial setup [of the Treaty of Maastricht, which had established the principle of ‘one member, one vote’], the Treaty of Nice therefore called for a revision of the Governing Council’s decision-making procedures. In March 2003, the Governing Council introduced a rotation system, in which NCB governors would receive voting weights as a function of their economic significance, once the number of governors (or, equivalently, euro area countries) reached 15. In December 2008, the ECB decided to postpone the actual implementation of the reform until the number of governors reached 18.’⁶⁹

This reform responded to the need to ensure that decisions could still be made by the Governing Council as it

⁶⁷ *ibid* paras 183-187.

⁶⁸ Peter Stella and Jerome Vandenbussche, ‘Governance and Monetary policy decision-making at the ECB’ in Jakob de Haan and Helge Berger (eds), *The European Central Bank at ten* (Springer 2010) 143.

⁶⁹ Jakob de Haan and Helge Berger, ‘Introduction’ in Jakob de Haan and Helge Berger (eds), *The European Central Bank at ten* (Springer 2010) 8.

was deemed that the group of 33 representatives that would have eventually been able to cast a vote (six members of the Executive Board and 27 NCB governors) would have been unable to come to an agreement.⁷⁰ The introduction of the rotating system in place today undeniably makes the structure of the main decision-making body of the ECB more supranational. At the same time however, it should not be forgotten that personal and even critical views on the ECB's monetary policy are now regularly made public by individual NCB governors indeed.⁷¹ Admittedly, these may be the expression of disagreements on the way in which the monetary policy is conducted in general, or discontent inspired by the impact of the euro area monetary policy on the Member State of respective governors. The question may naturally also be asked whether the rise in the (public) opposition expressed by some Governing Council members was provoked by the reform of the voting rules that resulted in more supranationalism being the rule.⁷² It is certainly hard to determine what may have prompted this trend, especially considering that it intervened at a time when the ECB was called to play a much more active and indeed political role to preserve the common currency after the outbreak of the Global Financial Crisis. This is also a period characterised by a significant change in the way in which it conducts its monetary policy,⁷³ whereby the ECB has had to resort to unconventional monetary policy instruments. These, in turn, have significant economic effects, which have adversely affected the various Member States resulting in controversies and judicial disputes.⁷⁴ Regardless of what the trigger for the public expression of disagreements may have been, that is whether it is the change in the voting arrangements within the Governing Council or whether it is the resort by the ECB to unconventional monetary policy and its more active and less neutral role, it remains the case that the recurrent public expression of disagreements, or at least of public opinions, constitutes a very dangerous development. This is so because it goes counter to the principle of ECB independence, which justifies the non-publicity of Governing Council proceedings. As has been noted, 'the [ESCB] Statute does not permit publication [of the individual voting of the members of the Governing Council because, rather than contribute to further transparency, this would jeopardise the independence of its members, since they would then be more likely to come under national or other pressure'.⁷⁵ In expressing their opinion publicly, Governing Council members *de facto* risk jeopardizing the protection afforded to them by the ESCB

⁷⁰ *ibid.*

⁷¹ A recent illustration of this phenomenon may, for example, be found in Bundesbank's governor statement in favour of a potential tightening of the ECB's monetary policy. Jens Weidmann, 'Erfolgsgeschichte Soziale Marktwirtschaft – mit Rat und Tat in die Zukunft' (Speech at the 70th anniversary of the German Economic Institute, Frankfurt am Main, 27 May 2021) <https://www.iwkoeln.de/fileadmin/user_upload/Institut_der_deutschen_Wirtschaft/Veranstaltungen/2021/70_Jahre_IW_Festrede_Jens_Weidmann.pdf> accessed 21 November 2021.

⁷² This remark is owed to Klaus Tuori whom I thank for it (as well as for the discussion on this topic).

⁷³ See also chapter 2 by Vestert Borger and chapter 3 by Klaus Tuori, in this volume.

⁷⁴ As illustrated most notably by the *Gauweiler and Weiss judgements* (Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* [2015] EU:C:2015:400 and Case C-493/17 *Proceedings brought by Heinrich Weiss and Others* [2018] EU:C:2018:1000, respectively). The question whether the way in which the ECB conducts its unconventional monetary policy is governed by a supranational euro area-wide logic or by a logic that also leaves significant room for national preferences is beyond the scope of the present analysis. Suffice it to note for the purpose of the present analysis that the way in which the Public Sector Purchase Programme operates has a very limited supranational component in as far as the ECB purchases only a limited share of national bonds, which are in their majority held by the NCBs of the respective Member States.

⁷⁵ European Central Bank, 'The institutional framework of the European System of Central Banks' (ECB Monthly Bulletin July 1999) 57 <<https://www.ecb.europa.eu/pub/pdf/mobu/mb199907en.pdf>> accessed 21 November 2021.

Statute. This, in turn, may lead to the re-nationalisation of the debate on the (euro area-wide) monetary policy, and could for example incentivise national parliaments or governments to try and exercise influence on their individual governors; we shall return to this issue in the conclusion of this chapter.

C. The Eurosystem's and the ECB's supranational character (still) reinforced by recent judicial developments

In stark contrast to the trend toward an overall stronger national dimension in the structure and the operation of the ECB outlined in the two previous sub-sections stand two recent important decisions of the Court of Justice, which have strongly reinforced the supranational character of the Eurosystem and the ECB's powers within it.

The first of these two cases is the *Rimšēvičs case*,⁷⁶ in which the Court of Justice was called to interpret article 14 ESCB Statute on NCBs for the first time. This provision sets an obligation on Member States to guarantee that their legislation including the statutes of their NCBs is compatible with the Treaties. NCB Governors' mandates must be longer than five years and a 'Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. *A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application*' (emphasis added).

In the case at hand, the Latvian Anti-Corruption Office had temporarily prohibited Mr Rimšēvičs from performing his duties as Governor of the Central Bank of Latvia. This case provided an opportunity to the Court of Justice to clarify the status of NCBs within the ESCB, and to reinforce its supranational character since it set the emphasis on the importance of and the consequences that derive from the fact that NCBs are part of the ESCB even if they remain national institutions. The Court forcefully found that '*[t]he ESCB represents a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails. [...] Article 14.2 of the Statute of the ESCB and of the ECB reflects the logic of this highly integrated system which the authors of the Treaties envisaged for the ESCB and, in particular, of the dual professional role of the governor of a national central bank, who is certainly a national authority but who acts within the framework of the ESCB and sits, where he is the governor of a national central bank of a Member State whose currency is the euro, on the main decision-making body of the ECB.*'⁷⁷

Owing to the ESCB's highly integrated nature, the Court of Justice went as far as annulling directly the national decision that prevented Mr Rimšēvičs from exercising his functions within the ESCB. This should be viewed

⁷⁶ Joined Cases C-202/18 and C-238/18 *Rimšēvičs and European Central Bank v Republic of Latvia* [2019] EU:C:2019:139. See for a discussion of this case chapter 12 by Takis Tridimas, in this volume.

⁷⁷ *ibid* paras 69 and 70 (emphasis added).

as a signal to the Member States that their NCBs are part of a supranational system, the ESCB, and not only national institutions which they manage as they please. The Court could arguably have reached the same outcome without taking such a drastic measure. However, in my view, it is likely that the Court wanted to make a point. It wanted to stress the NCB's character as *Europeanised* national institution, but it probably also wanted to use this case as an example in the hope that it could strengthen both the NCBs' and the NCAs' independence as it has very limited tools to protect the NCAs' independence.⁷⁸

The Court's findings in the recent case *ECB v Slovenia*⁷⁹ regarding the inviolability of Union archives may, too, be viewed as having reinforced the *dual national-European nature* of NCBs. It indeed clarified the scope of the protection afforded to the ECB, and considered that a Member State is not entitled to unilaterally seize ECB documents located at the premise of an NCB without the ECB's authorisation.⁸⁰ The ECB's independent nature as a supranational EU institution was re-confirmed, even if it heads the ESCB composed also of the (Europeanised) NCBs led by (Europeanized) governors, and even if it heavily relies on the NCBs in the conduct of its monetary policy.

As noted in the introduction to this section, contradictory trends that point both toward the national component within the ECB having become stronger and towards its supranational character having become reinforced exist, thus making any assessment uneasy. They are likely to fluctuate over time in as far as these developments at least partly relate to evolutions observable in practice as opposed to resulting from changes to the legal framework in place. Additionally, the factors that play a role in these changes are particularly varied.⁸¹ For instance, the euro area crisis was only one element that triggered direct change. The expansion of the euro area was also a factor, as was the creation of the Banking Union and arguably the maturing process of a still particularly young central bank and currency Union. Contradictory tendencies coupled with limited information make an assessment of the balance between supranationalism and national influence difficult, arguably more so than in other EU institutions. The next section seeks to compare today's ECB with the other EU institutions and bodies.

IV. Re-situating the ECB in the EU's institutional landscape: How do the institutional logics that govern today's ECB compare to those of other EU institutions and bodies?

To try and evaluate the ECB's institutional structure and the supranational and nationally-oriented logic(s) that underpin it, a comparison with the other EU institutions and bodies that exist may be useful, even if both

⁷⁸ See for a discussion on the potential of spill over of this area of banking supervision (or the absence thereof): René Smits, 'A National Measure Annulled by the European Court of Justice, or: High-level Judicial Protection for Independent Central Bankers' (2020) 16 *EuConst* 120, 139ff. Although I fully share René Smits' view that the remedy provided for under ESCB Statute (n 6) art 14(2) is unique under the Treaties and that, therefore, possibilities for similar judicial actions to protect national authorities involved in other national-EU procedures are inexistent, I still believe that this case sends a strong warning to the Member States. Furthermore, as noted above, in a majority of Member States the NCA functions are, in fact, assumed by the NCBs such that NCAs could indirectly be protected by this provision.

⁷⁹ Case C-316/19 *European Commission v Republic of Slovenia* [2020] EU:C:2020:1030.

⁸⁰ *ibid* paras 100ff.

⁸¹ See further on this the introduction to this edited volume.

types of influences are admittedly always present, only in different proportions. Furthermore, in view of the limited space available, it is only a modest attempt that is made here to shed some light on the ECB's structure.

In the area of monetary policy, the ECB with its supranational Governing Council operating on a collegial basis and with NCBs governors participating in their personal capacity and thus following a supranational logic may be viewed as resembling the European Commission.⁸² Indeed, the Commission is independent, and like NCB Governors are too when they participate in the Governing Council, Commissioners are expected to act in full independence.⁸³ It is not foreseen that at some point in time some NCB Governors cease to be members of the Governing Council like it is prescribed that, unless the Member States decide otherwise (as they have) not all of them should have 'their' Commissioner.⁸⁴ However, it remains that the rotating system of vote in place within the Governing Council may be viewed as pursuing the same goal of efficiency whilst being underpinned by the same supranational logic.

As noted in the introduction to this chapter, there nonetheless exists a crucial difference between the ECB's and the Commission's structures, which affects their supranational nature. Commissioners are supported by supranational Commission Directorate Generals and services, whereas the Governing Council is supported by supranational ECB services too, but individual NCB Governors rely on the administrations of their NCBs as well.

In this context, how should ECB preparatory committees be assessed? These do not appear to fulfil the same function as the committees traditionally involved in the comitology procedure, for these committees of national representatives are called to voice an opinion on an implementing act proposed by the Commission, whereas ECB preparatory committees contribute to the preparation of the decisions subsequently made by the ECB decision-making bodies. As such, the ECB committees rather appear to fulfil a function similar to that of the Council Working Groups, in whose framework national representatives discuss and prepare the decisions made by the Council of the EU.⁸⁵

In view of these characteristics, the ECB's institutional structures may be viewed as corresponding to an institutional logic that may best be qualified as hybrid in as far as it is partially similar to that of the supranational Commission, and partially similar to that of the intergovernmental Council. The departure from the collegial logic that would demand for the (common) decisions of the Governing Council to remain uncontested by its members might point towards the more nationally-focused logic that governs ECB Committees affecting the supranational Governing Council too. The relationship between the ECB and the NCBs within the ESCB has nonetheless remained unaffected over time, meaning that, for example, its hierarchical nature whereby NCBs

⁸² As noted above, NCB governors' influence may nonetheless also lead to stronger national influence if their policy stance were to be dictated by the impact of the euro area monetary policy in their own Member State. See also Manuela Moschella and Nicola M Diodati, 'Does politics drive conflict in central banks' committees? Lifting the veil on the European Central Bank consensus' (2020) 21 *European Union Politics* 183.

⁸³ Consolidated version of the Treaty on European Union [2012] OJ C326/01, art 17(3).

⁸⁴ *ibid* art 17(5).

⁸⁵ See on these organs: Jonathan Bauerschmidt, 'Council of the European Union: internal organisation' in Laurence Gormley et al (eds), *EU Encyclopedia* (OUP forthcoming).

have to implement the decisions at the EU level has not been compromised (even if the findings of the German Federal Constitutional Court in the *Weiss case* threatened this). If anything, the integrated and supranational nature of the ESCB has only been reinforced over time, as shown by the recent *Rimšēvičs* and *ECB v Slovenia cases*. Notwithstanding this, as illustrated in this chapter, it is undeniable that tensions have arisen as a result of the dual national and European nature of NCBs and their governors, a characteristic that has over time given rise to evolving and sometimes contradictory dynamics between national and supranational dimensions.

In the area of Banking Supervision, the corresponding ECB internal organs and institutional structures function in a radically different way, although the SSM too, like the ESCB, is a system composed of the ECB and national authorities. The Supervisory Board's and the Steering Committee's compositions, and the JSTs that assist in the supervision of SIs, have a much stronger national component than the Governing Council and the Executive Board do. The division of tasks and the collaboration between the ECB and the NCAs also operate differently than they do between the ECB and the NCBs, and they rather resemble the system in place between the Commission and the National Authorities in the area of competition law – although the Commission admittedly does not participate in the day-to-day supervision, contrary to the ECB within the SSM.⁸⁶ In fact, '[t]his model of integration has [been found to have] functioned very well and has served as a template in other cases, such as the European Public Prosecutor's Office'.⁸⁷ The SSM's structures however also present similarities with those of EU agencies, as already noted above.

Even if the system of cooperation between national and EU authorities and the model for their representation as they exist within the SSM may therefore be qualified as unique (as opposed to their being identical to other institutional structures in other areas of EU law), it is beyond doubt that they differ significantly from those in place in the area of monetary policy, as is only logical in view of the different types of EU competences and of the various types of decisions involved.

V. Conclusion

This chapter has shown that the ECB's institutional structures and logics of functioning have significantly evolved both *de jure* and *de facto* since its creation two decades ago, pointing to its having become a 'new ECB'. It has also highlighted that parts of this structure (that is, its committees) are still largely unknown up until today. Furthermore, it has highlighted that the dual *national* and *European* nature of NCBs and their governors have given rise to tensions and varying dynamics.

The institutional structure of today's ECB is to be viewed as situated somewhere between the supranational Commission, the intergovernmental Council of the EU, the coordinated systems that underpin the coordination

⁸⁶ See on the role and divide between the Commission and the National competition authorities: Giorgio Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network' (2014) EUI Department of Law Research Paper no 2014/01 < <https://cadmus.eui.eu/handle/1814/29218> > accessed 21 November 2021.

⁸⁷ Chiara Zilioli, 'Twenty years of building bridges: the process of legalisation of European central banking' in European Central Bank, 'Building bridges: central banking law in an interconnected world' (ECB Legal Conference 2019) 11 < <https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf> > accessed 21 November 2021.

among national authorities within EU agencies such as the European Supervisory Authorities, and the multilevel or composite systems of administrative cooperation as they exist for example in the field of competition law.

Considered as a whole, the ECB's institutional framework and functioning has shifted towards less supranational logics in the sense that national influence has grown over time. In the area of banking supervision, this is less problematic as it is an area in which harmonisation is still limited and in which individual decisions are made that have a significant impact on the single national economies. Although it is a policy area in which, too, independence is key, banking supervision is commonly assumed by institutions other than NCBs that are less independent. As such, the strong national component that exists is perhaps unavoidable as long as higher levels of integration are not achieved.

The partial shift towards renationalisation visible in the field of monetary policy as illustrated by the recurring expression of dissenting views is arguably more concerning for it goes against the ECB's independence, and for this is an EU exclusive competence in which euro area-wide decisions are made. At the same time, considering the activism that has characterised the way in which monetary policy has been conducted since the euro area crisis, and especially considering the ECB's resort to unconventional monetary policy instruments that have had a significant economic impact (economic policy being an area which is only meant to be coordinated among Member States at the EU level), this shift was perhaps difficult to avoid. As noted, there is nonetheless an inherent danger to the renationalisation of the debate and the ensuing shift to the background of the general European interest, as evidenced by the very launching of, and the findings in, the *Weiss case* of the German Federal Constitutional Court and the procedure on the Pandemic Emergency Purchase Programme pending before the same court.

In conclusion, mention should also be made of the fact that these shifts, and the undeniable increase in the level of complexity they have provoked over the past two decades, arguably raise important issues of accountability.⁸⁸

The ECB's supranational character alongside with the fact that monetary policy is a competence that is exclusively exercised at the EU level arguably calls for administrative, democratic and judicial accountability to be solely guaranteed at the EU level. It follows that only the European Court of Auditors may control the ECB's actions in the area of monetary policy (with due observance of the existing limitations), that only the Court of Justice may assess the legality of the ECB's actions (which arguably calls for easier individual access to the Court to be created), and that democratic accountability can, at present, only be guaranteed by the European Parliament (even though another organ in which the euro area alone would be represented should arguably be involved in parallel to ensure that the chain of legitimacy which the relationship between (affected) voters and representatives is not broken like it is at present with the participation of all MEPs regardless of whether they are elected in euro area Member States or not). The informal relationships that have

⁸⁸ See on the ECB's accountability regime generally chapter 11 by Fabian Amtenbrink and Menelaos Markakis, in this volume.

developed between the ECB and national parliaments in the area of monetary policy over the past decade may be viewed as one that fulfils a radically different function for it serves information purposes more than accountability proper. The same applies to the relationships between NCB governors and national parliaments: considering the significant impact ECB decisions have on the Member States and their economies, it is undoubtable that national parliamentarians should be duly informed, also because these decisions should influence the decisions they make in areas in which they do have powers (contrary to what is the case in the field of monetary policy because of central bank independence and monetary policy being an EU exclusive competence).

The evolution of the ECB that leads it to become subject to stronger levels of national influence may, though, call for the redefinition of the accountability mechanisms in place, like it has already been done in the field of banking supervision where original mechanisms of accountability between the ECB and national parliaments exist. But, the intrinsic supranational nature of the accountability mechanisms in place should be preserved, and any renationalisation of the debates regarding the ECB's policies avoided if the ECB is to remain capable of achieving its objective to maintain price stability.