Politics and Governance
2025 • Volume 13 • Article 8943
https://doi.org/10.17645/pag.8943

ARTICLE

Open Access Journal

Hybrid Governance Structures and Monetary Policy: The Legal and Institutional Position of National Central Banks in the Eurosystem

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Submitted: 12 July 2024 **Accepted:** 11 December 2024 **Published:** 30 January 2025

Issue: This article is part of the issue "Ditching the Maastricht Model? The Evolving Role of the European Central Bank in the Economic and Monetary Union" edited by Dimitrios Argyroulis (University of Luxembourg / Université Libre de Bruxelles), Anna-Lena Högenauer (University of Luxembourg), Joana Mendes (University of Luxembourg), and Nikolas Vagdoutis (University of Luxembourg / University of Edinburgh), fully open access at https://doi.org/10.17645/pag.i386

Abstract

National central banks (NCBs) are an integral part of the European System of Central Banks (ESCB)—a highly integrated system which comprises the ECB and NCBs, and is in charge of monetary policy in the Union. Various (primary) EU law provisions partly Europeanize NCBs, while also preserving their national embeddedness. This article explores the evolving legal and institutional position of the NCBs in the ESCB and the Eurosystem. The NCBs' hybrid status has proven fertile ground for tensions and has given rise to both centrifugal and centripetal forces in the Eurosystem. The discussion begins with the legal and institutional position of NCBs as established in Maastricht. The focus then shifts to centrifugal forces in the Eurosystem. NCBs can be confronted with conflicting loyalties and duties, which can compromise the singleness and effectiveness of monetary policy. We then turn to consider the emergence of centripetal forces in light of the recent case law of the EU Courts, which, together with the ECB's actions, has brought about a Europeanization of various aspects of the NCBs' organization and powers. The penultimate section considers the implications of the NCBs' institutional repositioning for their independence and accountability. Centripetal pressures can contribute to reinforcing the NCBs' independence vis-à-vis domestic political authorities and to reducing opportunities for accountability at the national level, which are only partly made up for at the EU level. The concluding section considers whether the developments adumbrated above consecrate a highly Europeanized, agent-like vision of NCBs.

Keywords

accountability; central bank governors; European System of Central Banks; Eurosystem; hybridity; independence; monetary policy; national central banks

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1. Introduction

Monetary policy in the eurozone is managed by the Eurosystem, a complex, hybrid administrative framework which brings together an EU institution, the ECB, and its national counterparts, the national central banks (NCBs). Partly "borrowed" by the EU, the NCBs are tasked with implementing the monetary policy set at the EU level. Institutionally, they are represented within the ECB's Governing Council and the General Council. EU law also places certain requirements on member states regarding NCBs, most notably that of independence. Next to their contribution to the Eurosystem, NCBs also retain an existence of their own. Most emblematically, NCBs remain free to perform other functions than those they assume under EU law, unless "these interfere with the objectives and tasks of the ESCB" (Article 14.4 of Protocol No. 4 on the statute of the European System of Central Banks and of the European Central Bank, hereafter referred to as the ESCB/ECB Statute). Other administrative templates, such as a fully integrated system based on a single supranational central bank supported by decentralized agents, could have been favored when the EMU was negotiated in Maastricht. However, due to political reasons, the complex multi-level template we have, partly Europeanizing NCBs while preserving their national embeddedness, proved the most workable compromise to the EU and the member states, thereby securing the singleness and effectiveness of the eurozone's monetary policy on the one hand, while preserving national diversity on the other.

Under this founding "federal" compromise, the precise status of NCBs remains somewhat unresolved. NCBs enjoy a dual, hybrid status in the Eurosystem. On the one hand, they constitute sub-units in an integrated European administrative system managed by the ECB, which they find themselves subordinated to as regards monetary policy (see also Hellwig, 2024). On the other hand, they remain part of broader national institutional systems and are subject to specific national constraints. The mantra faithfully repeated in the case law surveyed below is that NCBs and their governors are *national* authorities but that they act within the framework of the *European* System of Central Banks. This article will investigate that hybridity, thereby shedding light on the evolving institutional position of NCBs under the EMU constellation. In doing so, it aims to enhance the understanding of the role and status of NCBs in the Eurosystem, an important, but sometimes overlooked issue in the realm of EMU studies.

After a brief return to the role and position of NCBs under the Maastricht compromise and an exposition of their hybridity, this article will show that this hybridity, and the multiple affiliations which underlie it, have proven fertile ground for tensions and centrifugal forces within the EMU. Using the *Weiss* saga as an example, it will be argued that the NCBs' very hybridity inserts them in different systems of values and priorities, and confronts them with conflicting loyalties and duties, which in turn could compromise the singleness and effectiveness of the Union's monetary policy. This article will then examine how against the backdrop of competing claims of authority from the national level, and the risks that those entail, centripetal forces have recently emerged within the Eurosystem, which have contributed to further displacing NCBs and bringing them, following a centripetal dynamic, closer to the EU level. In that context, this article will closely examine the recent line of cases before the Court of Justice of the European Union (CJEU) regarding NCBs (*Banka Slovenije*, 2022; *Commission v. Slovenia*, 2020; *LR Ģenerālprokuratūras*, 2021; *Rimšēvičs and ECB v. Republic of Latvia*, 2019), which consecrates, so we argue, a Europeanized, agent-like vision of NCBs. This article will also consider the actions of the ECB itself. Using the case of Emergency Liquidity Assistance (ELA) as an example, it will assess its impact on the ECB's relationships with NCBs and show how the ECB has contributed to Europeanizing certain of the NCBs' retained powers. Finally, this article will seek

to uncover the implications of the NCBs' recent institutional repositioning for their independence and accountability. It will be argued that the centripetal pressures the NCBs are currently subject to contribute to further reinforcing their independence vis-à-vis domestic political branches and reduce opportunities for accountability at the national level, which are only partly made up for at the EU level.

2. The Institutional Position of the NCBs Under the Maastricht Compromise

Together with the ECB, the NCBs form part of the ESCB, which dates back to the Treaty of Maastricht (1992; see Articles 8 and 106 of the Treaty establishing the European Community, 2002). The NCBs of the member states whose currency is the euro constitute, together with the ECB, the Eurosystem (TFEU, 2016, Articles 282(1); ESCB/ECB Statute, 2016, Article 1). The Eurosystem conducts the monetary policy of the euro area (TFEU, 2016, Articles 282(1), 3(1)(c)). Given that "those Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters" (TFEU, 2016, Article 282(4)) and "are excluded from rights and obligations within the ESCB" (TFEU, 2016, Article 139(3)), our principal focus in this section shall be on the Eurosystem and the NCBs of the euro area member states.

In accordance with Articles 127(1) and 282(2) TFEU (2016):

> The primary objective of the [ESCB]...shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 [TEU].

Both the ECB, following Articles 282(3) TFEU (2016) and 9.1 of the ESCB/ECB Statute (2016), and the NCBs, in accordance with their respective national legal basis, have legal personality (Amtenbrink, 2018, p. 929; Langner, 2020, pp. 392–394). It should also be noted that the NCBs are "the sole subscribers to and holders of the capital of the ECB" (ESCB/ECB Statute, 2016, Article 28.2). Their shares "may not be transferred, pledged or attached" (ESCB/ECB Statute, 2016, Article 28.4).

"The ESCB shall be governed by the decision-making bodies of the [ECB], which shall be the Governing Council and the Executive Board" (TFEU, 2016, Articles 129(1), 282(2); ESCB/ECB Statute, 2016, Articles 8, 9(3)). The NCBs play an important role in ECB decision-making. Most notably, "[t]he Governing Council of the [ECB] shall comprise the members of the Executive Board of the [ECB] and the Governors of the [NCBs] of the Member States whose currency is the euro" (TFEU, 2016, Article 283(1); ESCB/ECB Statute, 2016, Article 10; see Amtenbrink, 2018, pp. 933–934 on the voting arrangements in the Governing Council; Hellwig, 2024 for the implications of the hybrid role of NCB governors for the politics of the Governing Council). NCBs also participate in committees and working groups (Fromage, 2022).

The tasks conferred upon the ESCB are implemented either by the ECB itself or through the NCBs (ESCB/ECB Statute, 2016, Article 9.2). These tasks primarily are:

> —To define and implement the monetary policy of the Union,
>
> —to conduct foreign-exchange operations [...],

> —to hold and manage the official foreign reserves of the Member States,
>
> —to promote the smooth operation of payment systems. (TFEU, 2016, Article 127(2))

Further, "[t]he ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system" (TFEU, 2016, Article 127(5)). The ECB also has "the exclusive right to authorise the issue of euro banknotes," and "the [ECB] and the [NCBs] may issue such notes" (TFEU, 2016, Article 128(1); ESCB/ECB Statute, 2016, Article 16).

It is further provided in Articles 130 TFEU (2016) and 7 of the ESCB/ECB Statute (2016) that:

> When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the [ESCB/ECB Statute], neither the [ECB], nor a [NCB], nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the [ECB] or of the [NCBs] in the performance of their tasks.

"Each Member State shall ensure that its national legislation including the statutes of its [NCB] is compatible with the Treaties and the [ESCB/ECB Statute]" (TFEU, 2016, Article 131; ESCB/ECB Statute, 2016, Article 14).

"The Executive Board [of the ECB] shall implement monetary policy in accordance with the guidelines and decisions laid down by the Governing Council" and "give the necessary instructions to [NCBs]" (ESCB/ECB Statute, 2016, Article 12.1). "To the extent deemed possible and appropriate [...], the ECB shall have recourse to the [NCBs] to carry out operations which form part of the tasks of the ESCB" (ESCB/ECB Statute, 2016, Article 12.1). The ESCB/ECB Statute explicitly states that NCBs "are an integral part of the ESCB" and that they "shall act in accordance with the guidelines and instructions of the ECB" (ESCB/ECB Statute, 2016, Article 14.3). Furthermore, "[t]he Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it" (ESCB/ECB Statute, 2016, Article 14.3). In this connection, Amtenbrink (2018) argues that the ESCB constitutes a two-tier system, but that the power for conducting monetary policy is not equally shared by the central and decentralized levels. The ECB constitutes the policy-making arm of the system, whereas the NCBs are mainly charged with the execution of monetary policy decisions. "The ESCB thus includes features both of a centralized and a decentralized system, whereby the emphasis lies on the former" (Amtenbrink, 2018, pp. 930–931).

The NCBs may also "perform functions other than those specified in [the ESCB/ECB Statute] unless the Governing Council finds…that these interfere with the objectives and tasks of the ESCB" (ESCB/ECB Statute, 2016, Article 14.4). Such functions, which may for example include the provision of ELA, supervisory tasks on the financial markets, or the resolution of credit institutions, "shall be performed on the responsibility and liability of [NCBs] and shall not be regarded as being part of the functions of the ESCB" (ESCB/ECB Statute, 2016, Article 14.4; see further Hellwig, 2024, pp. 10–22).

Last, a number of rules or prohibitions laid down in the Treaties that are addressed to the ECB are also addressed to the NCBs. Notable examples are Articles 123 TFEU (2016) and 21 of the ESCB/ECB Statute (2016) on the prohibition of monetary financing and Article 124 TFEU (2016) on the prohibition of granting privileged access to financial institutions.

Langner (2020, p. 388) notes that "[t]he [ESCB] and the Eurosystem respectively is quite a unique legal structure which is historically unprecedented." This unique structure:

> Reflects a typical European Union compromise. While it was clear that the Member States would have to give up their sovereignty with regard to their competences in the field of monetary policy, they were ultimately not too eager to give up their freedom with regard to the organizational structures of their existing [NCBs]. Many of the latter were institutions with very long histories and traditions; all were held in high esteem in the institutional environment of the Member States. (Langner, 2020, p. 388)

In this respect, Van der Sluis (2022, p. 26) further observes that when establishing the EMU:

> The choice could have been made to construct a new, regional set of decentralized branches of the ECB, in order to assert the supranational character of the euro. Instead, the choice was made to partially 'Europeanize' the NCBs through law, while maintaining their national embeddedness.

The result was, as Langner (2020, p. 389) notes:

> A two-layered structure with the [ECB] as on the one hand hierarchically superior central body designated to order the NCBs to execute the monetary policy it defines, but on the other hand maintaining the legal personality and structure of the NCBs on the second layer. That means that the ESCB does not represent a single authority (...), but rather it is a very complex network among the ECB and the NCBs—a system as the Treaties put it. This implies that on both the national and the supranational EU levels, independent institutions exist which hold or keep a certain measure of organizational independence and competences.

Under this founding "federal" compromise, the precise status of NCBs remains somewhat unresolved. NCBs enjoy a dual, composite status and affiliation, belonging both to the national and the European sphere at the same time. This article mobilizes the concept of "hybridity" to analyse the peculiar position and status of NCBs in the Eurosystem. Initially developed in the field of biology, hybridity refers to a state of mixture and fusion, synthesis and co-mingling, and in-betweenness, which necessarily resists fixity and absolute categorization (Camilleri & Kapsali, 2020, pp. 1–2). In social sciences, hybridity has been used to describe phenomena or institutions combining features from different ideal-types (Pieterse, 2001). In EU studies, the concept of hybridity has recently been deployed to study the Union's international identity (Drieskens et al., 2024), the notion of statehood in its close neighborhood (Faust & Franke, 2024), or specific governance arrangements in the fields of ECB banking supervision, external border management, and trade (Coman-Kund, 2024). "'Hybrid EU governance', and, more specifically, 'hybrid' executive power or administration, highlights in particular situations in which the tasks and powers of EU and national actors are increasingly entangled, often in obscure ways and under complex and hard-to-decipher legal frameworks" (Coman-Kund, 2024, p. 272).

As will be further explored in this article, the hybridity of NCBs, as both European and national institutions, is multifaceted. Their hybridity has a functional dimension, as NCBs crucially contribute to the Eurosystem's monetary policy by executing and implementing ECB decisions, but may at the same time retain other country-specific functions not provided for by the ESCB/ECB Statute. Hybridity is also institutional, as NCBs constitute the sub-units of an integrated European administrative system managed by the ECB, which they find themselves hierarchically subordinated to, while remaining simultaneously part of broader national institutional systems and subject to country-specific (legal) constraints and loyalties. Institutional hybridity also has a personal dimension, and NCB governors, as heads of national institutions and constitutive members of the ECB's Governing Council, impersonate this dual affiliation. It has for example been noted that:

> As a member of the ESCB, the Deutsche Bundesbank is not only a German institution but also a European institution; as a member of the ECB's Governing Council, its president is not only a German official but also a European official. (Hellwig, 2024, p. 6)

Finally, hybridity is also financial: while both NCBs and the ECB enjoy their own respective financial resources, NCBs remain the ultimate shareholders of the ECB and may directly or indirectly face consequences if the ECB bears losses.

As in-between, hybrid institutions, with an unresolved status, the position of NCBs in the Eurosystem and under the EMU constellation is subject to evolutions and dynamics which the rest of this article explores. As a result of a certain number of factors, NCBs can indeed oscillate between their two constitutive poles and are subject to forces which either keep them attached to the national pole (centrifugal forces) or draw them closer to the supranational pole (centripetal forces).

3. Hybridity as a Source of Tension: The Case of *Weiss*

Hybridity, and the compromise between unity and diversity it embodies, has proven fertile ground for tensions and centrifugal forces within the EMU, because of the multiple affiliations it implies, and the different legal and institutional systems NCBs are attached to. Some of these tensions have so far remained hypothetical. Think, for example, of the recent wave of ECB losses, and the discussion it has prompted around a (still theoretical) scenario of ECB recapitalization (see, e.g., Buiter, 2024). The hybrid financial architecture of the ECB, and the fact that NCBs are its shareholders, could seriously complicate such a scenario, and be conducive to conflicting dynamics within the Eurosystem, both between NCBs and the ECB, and among the NCBs themselves. Other tensions, however, have already started materializing. This was illustrated most vividly by the second *Weiss* judgment of the *Bundesverfassungsgericht* (2020), following the earlier "warning shots" which were fired by the same court in its second *Gauweiler* (Bundesverfassungsgericht, 2016) ruling.

It will be recalled that the constitutional complaints concerned the Public Sector Asset Purchase Program (PSPP), which involved the purchase of public sector securities by the Eurosystem. The complainants argued that the program violated the prohibition of monetary financing (TFEU, 2016, Article 123) and the principle of conferral. They further sought to argue that there was a violation of the constitutional identity enshrined in the Basic Law to the extent that the program infringed the budgetary powers of the *Bundestag* (Bundesverfassungsgericht, 2020, para. 1). In a much-criticised judgment, the *Bundesverfassungsgericht* ruled that the constitutional complaints were well-founded:

> To the extent that they challenge[d] the omission on the part of the Federal Government and the *Bundestag* to take suitable steps to ensure that the ECB, by means of purchasing securities under the PSPP, [did] not exceed its monetary policy competence and encroach upon the economic policy competence of the Member States. (Bundesverfassungsgericht, 2020, para. 97)

The PSPP decision by the ECB, as amended by subsequent decisions, neither assessed nor substantiated that the contested measures satisfied the principle of proportionality. Consequently, the impugned ECB decisions constituted "a qualified, i.e. manifest and structurally significant, exceeding of the competences assigned to the ECB" (Bundesverfassungsgericht, 2020, para. 116). The different view of the CJEU set out in its *Weiss* (2018) judgment did not merit, according to the *Bundesverfassungsgericht*, a different conclusion, "given that on this point, the judgment [was] simply not comprehensible so that, to this extent, the judgment was rendered *ultra vires*" and hence was not binding upon the *Bundesverfassungsgericht* (Bundesverfassungsgericht, 2020, para. 116).

The salient point for present purposes is that, following the *Bundesverfassungsgericht*'s judgment in *Weiss* (Bundesverfassungsgericht, 2020), the constitutional organs of Germany had a duty, on the basis of their responsibility with regard to European integration (*Integrationsverantwortung*), to take active steps against the PSPP (Bundesverfassungsgericht, 2020, paras. 229ff.). Furthermore, the court ruled that an:

> *Ultra vires* [EU] act is not to be applied in Germany and has no binding effect in relation to German constitutional organs, administrative authorities and courts. These organs, courts and authorities may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts. (Bundesverfassungsgericht, 2020, para. 234)

Following a transitional period allowing for the necessary coordination with the ECB, the *Bundesbank* "could no longer participate in the implementation and execution" of the PSPP decisions, "neither by carrying out any further purchases of bonds nor by contributing to another increase of the monthly purchase volume," unless it was demonstrated by the ECB in a comprehensible and substantiated manner that the monetary policy objectives pursued were proportionate to the economic and fiscal policy effects resulting from the program (Bundesverfassungsgericht, 2020, para. 235). The *Bundesbank* would otherwise also be required to "ensure that the bonds already purchased under the PSPP and held in its portfolio [were] sold, based on a—possibly long-term—strategy coordinated with the ESCB" (Bundesverfassungsgericht, 2020, para. 235).

The *Weiss* saga has shed light on the conflicting demands on the *Bundesbank* from the EU and the German legal orders, i.e., on the one hand, it being required to implement the PSPP which was given the green light by the CJEU, and, on the other hand, being requested to end its participation in the program if certain conditions were not met, as the relevant ECB acts (and the Court's ruling) were said to be *ultra vires*. "The judgment emphasized the national embeddedness of the NCBs. Despite their firm integration in the Eurosystem, they are first and foremost creatures of national law" (Van der Sluis, 2022, p. 26). Langner (2020, pp. 402–403), in this respect, notes that:

> The NCBs in the end remain national entities as part of the national governing structures, which employ national competences even if executing tasks of the ESCB. As a further consequence, all national law remains fully applicable to them, as long as it does not contradict European law..... In addition, they are

> in principle subject to controls by the national courts of auditors or parliamentary inquiry commissions. However, such control institutions have to accept the restrictions of their work stemming from the independence of the NCBs when carrying out tasks and duties conferred on them by the Treaties or the Statute of the ESCB.

Even though a compromise was ultimately found in this instance, such that the conflict is now dormant, this episode tellingly illustrates the tensions that pervade the Eurosystem, which can to a large extent be traced back to the hybridity model described above. What is more, it is not inconceivable that future ECB acts (and CJEU judgments) could be found by the *Bundesverfassungsgericht* to be *ultra vires*. This would inevitably compromise the highly integrated nature of the ESCB, especially insofar as the *Bundesbank* is concerned.

4. Hybridity as an Opportunity for Additional Centralization

Next to the tensions and centrifugal forces which the hybridity model entails, an opposite, centripetal trend has been at play, especially over the past decade, which has contributed to further Europeanizing NCBs and displacing them from the national legal orders by bringing them closer to the ECB and the EU legal order. In this case, hybridity, and the ambiguities it entails, can, following a neofunctional logic, create an opportunity for additional centralization.

4.1. Centripetal Trends in the Case Law of the CJEU

This section considers four recent cases in the Court of Justice, all decided by the Grand Chamber between 2019 and 2022, which contribute to further Europeanizing NCBs and uprooting them from their original national habitat. In each case, the Court was confronted with a particular type of legal tension produced by the hybrid nature of the NCB concerned and its dual belonging. As we shall see, it systematically favored the centripetal option, thereby reinforcing the Europeanness of NCBs.

The first case is the well-known *Rimšēvičs and ECB v. Republic of Latvia* (2019) case. As previously explored by, among others, Dermine and Eliantonio (2019), the case concerned the validity of a decision by the Latvian anti-corruption office to temporarily prohibit the Governor of the Central Bank of Latvia, Rimšēvičs, from performing his duties, due to ongoing criminal prosecutions and various charges pending against him. The decision was contested by both Rimšēvičs and the ECB itself, who argued that there were no indications of a serious misconduct, and that Rimšēvičs' removal thereby undermined the principle of central bank independence. The applicants based their action on Article 14.2 of the ESCB/ECB Statute (2016), which had never been previously activated. According to that provision, decisions relieving governors of NCBs from office "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" (ESCB/ECB Statute, 2016).

As also discussed elsewhere (see Dermine & Eliantonio, 2019), the Court's assessment of the nature of this atypical remedy and the effects of the judgment delivered in this context were central and ground-breaking. Basically, the Court was asked to choose between two possible options: Did that remedy constitute an infringement procedure of some sort, leading to a merely declaratory judgement, to be followed by national authorities (following Articles 258–260 TFEU)? Or did it amount to a specific type of annulment action,

which could produce cassatory effects (following the logic of Article 263 TFEU)? (see also Dermine & Eliantonio, 2019, p. 247). Unlike Advocate General Kokott (CJEU, 2018, paras. 36–68), the Court unexpectedly favored the second approach. Having found that Latvia had failed to establish that the decision to relieve Rimšēvičs from office was based on sufficient indications that he had engaged in serious misconduct (*Rimšēvičs and ECB v. Republic of Latvia*, 2019, paras. 88–96), the Court annulled the contested decision by the Latvian anti-corruption office (*Rimšēvičs and ECB v. Republic of Latvia*, 2019, para. 97). The Court's decision to classify the remedy provided for by Article 14.2 as an action for annulment relied on both a literal and a purposive reading of that provision. As also discussed elsewhere (see Dermine & Eliantonio, 2019), the Court indeed found objective similarities with Article 263 TFEU (length of the appeal period, nature of the pleas, and identity of potential applicants). More fundamentally, the Court deemed this derogation from the general distribution of powers between national and EU courts justified given the "particular institutional context in which the ESCB operates" (*Rimšēvičs and ECB v. Republic of Latvia*, 2019, para. 69). The Court held that:

> The 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. (*Rimšēvičs and ECB v. Republic of Latvia*, 2019, para. 69).

Further, building upon the hybrid status of the governors of NCBs in the ESCB (*Rimšēvičs and ECB v. Republic of Latvia*, 2019, paras. 70–71) and the centrality of the principle of independence in the ESCB's operations (*Rimšēvičs and ECB v. Republic of Latvia*, 2019, paras. 72–73), the Court ruled that only an action for annulment "is capable of addressing the concerns which led to the creation of that legal remedy" (*Rimšēvičs and ECB v. Republic of Latvia*, 2019, para. 74). Although the Court did not explicitly say so, the logical consequence of such a finding is that its competence to examine the compatibility of national removal decisions with EU law is exclusive and not shared with national courts (see also Dougan, 2022, pp. 1316–1317). *Rimšēvičs and ECB v. Republic of Latvia* (2019) constitutes the first instance of an EU Court directly annulling an act of *national* law and extracting it from the domestic legal order concerned. This outcome was very much conditioned by the specificity of the remedy provided for by Article 14.2 of the ESCB/ECB Statute (2016), the type of decisions it covered, and the peculiar features of the Eurosystem and monetary policy as an EU competence (see also Hinarejos, 2019; Tridimas & Lonardo, 2020). However, it arguably has a bit of a revolutionary flavor, in that it goes beyond the principled separation of legal orders which normally underpins the EU legal space and beyond the general distribution of powers between EU and national courts flowing from it (Sarmiento, 2019). As the judgment consecrates the Court's (exclusive) jurisdiction to examine the legality of national removal decisions, and eventually annul them, *Rimšēvičs and ECB v. Republic of Latvia* (2019) further Europeanizes NCBs and the status of NCB governors.

The second case is *Commission v. Slovenia* (2020), which concerned an infringement action launched against Slovenia for having breached the inviolability of ECB archives, as protected by Articles 343 TFEU (2016) and 39 of the ESCB/ECB Statute (2016) and 2 and 22 of Protocol No. 7 on the privileges and immunities of the EU (2016; see Butler, 2021). At stake was a criminal investigation conducted by the Slovenian authorities, in the context of which they searched the premises of the Slovenian central bank and unilaterally seized, without regard to their content and the tasks they related to, documents in the governor's possession.

The case required the Court to determine the scope of the concept of "ECB archives," which the principle of inviolability protects, and whether or not it could cover documents in the possession of a NCB. Relying upon a functional interpretation of privileges and immunities and their objective of avoiding any interference with the functioning and independence of the EU (*Commission v. Slovenia*, 2020, para. 73), the multi-layered structure of the Eurosystem, the integral part NCBs form in such construct, and the hybrid status of NCBs and their governors in that context (*Commission v. Slovenia*, 2020, paras. 79–83), the Court went on to favor a broad understanding of "ECB archives," as covering all documents connected to the performance of the tasks of the Eurosystem, whether held by the ECB directly or by NCBs, such that documents held by NCBs were also protected by the principle of inviolability, unless they were not linked to the performance of tasks of the Eurosystem (*Commission v. Slovenia*, 2020, paras. 84–85).

The third case, *LR Ģenerālprokuratūras* (2021), stands as the aftermath of the *Rimšēvičs and ECB v. Republic of Latvia* (2019) case. Following the annulment by the Court of Justice of the temporary removal of the governor of the Latvian Central Bank, the criminal investigation was continued, and AB, the governor, was subsequently charged with bribery, corruption, and money laundering. The district court of Riga, which was conducting the criminal proceedings, felt hesitant as to whether AB should enjoy immunity under Protocol No. 7 (2016), as a former governor of a NCB, and, therefore, a former member of the ECB's Governing Council, and thus referred questions to the Court of Justice for a preliminary ruling. The Court first clearly established that, in spite of their particularities as national authorities, who are "not subject to an EU institution" (*LR Ģenerālprokuratūras*, 2021, para. 44), NCB governors assume a "dual professional role resulting in a hybrid status" and act on behalf of an EU institution, namely the ECB, in the performance of their duties as members of the Governing Council (*LR Ģenerālprokuratūras*, 2021, para. 45). Taking into account the need to safeguard the performance of the ECB's tasks and its independence (*LR Ģenerālprokuratūras*, 2021, paras. 45–46), the Court found it purely logical that NCB governors should enjoy the immunity from legal proceedings provided for in Article 11(a) of Protocol No. 7 (2016) for acts performed by them in their official capacity as members of an ECB organ (*LR Ģenerālprokuratūras*, 2021, para. 50). The Court also made clear that immunities under Protocol No. 7 have a functional (*LR Ģenerālprokuratūras*, 2021, para. 57) and therefore relative character (*LR Ģenerālprokuratūras*, 2021, paras. 74, 95), hence the immunity of NCB governors can only cover acts performed in an official capacity as members of the Governing Council and only includes a very limited proportion of the criminal acts they could possibly commit. Acts of fraud, corruption, or money laundering, such as those at stake in this case, could not be considered acts carried out in an official capacity (*LR Ģenerālprokuratūras*, 2021, paras. 67–68). It was for the national authorities to determine whether the act at stake was carried out in the governor's official capacity and, depending on the outcome of the assessment, to either continue the proceedings or request a waiver from the ECB, which would then decide in the light of the interests of the EU (*LR Ģenerālprokuratūras*, 2021, paras. 73–74). The Court also emphasized the importance of sincere cooperation between national and EU authorities in this context, which for example required that national authorities consult with the ECB anytime the application of the immunities to NCB governors raised doubts or questions (*LR Ģenerālprokuratūras*, 2021, para. 73). Finally, the Court stressed that the proper functioning of the EU's system of privileges and immunities in the context of the Eurosystem, respect for the respective competences and responsibilities of national authorities and the ECB in that context, and strict adherence to the principles of sincere cooperation and independence would be ensured by the Court under the various remedies provided for by the treaties (*LR Ģenerālprokuratūras*, 2021, paras. 75, 96).

The *Banka Slovenije* (2022) case (see Martinelli, 2023) concerned Slovenian legislation passed in the aftermath of the financial crisis, which had enabled its central bank, acting as resolution authority (which at the time was still a purely national competence), to cancel certain financial instruments of banks likely to become insolvent and threaten the financial system as a whole. Following a ruling by the Slovenian Constitutional Court, the Slovenian legislator adopted a new law laying down rules for the effective judicial protection and financial compensation of these former holders of instruments cancelled by the Central Bank of Slovenia. This law set up two separate, alternative liability regimes. The first was a fault-based liability regime: liability could only be incurred if the non-necessity of the cancellation or its incompatibility with the "no creditor worse off" principle could be established and, in any case, only if the central bank failed to establish that it had acted with due diligence. The second was an objective liability regime which enabled natural persons whose annual income was below a threshold defined by that legislation to be automatically compensated up to 80% of the value of the cancelled instrument, with an upper threshold of €20,000. The Slovenian legislator decided that the funding of this compensation scheme would fall upon the central bank itself. Three different sources of funding were foreseen, by order of priority: (a) the allocation to special reserves of all the profits made by the Slovenian Central Bank as of 2019; (b) 50% of its general reserves, if the special reserves were insufficient; and (c) a loan with interest from the Slovenian authorities. The new law was challenged before the Slovenian Constitutional Court and a reference for a preliminary ruling was made to the CJEU. The questions essentially revolved around the Slovenian scheme's compliance with, on the one hand, the prohibition of monetary financing (TFEU, 2016, Article 123(1)) and, on the other, the independence of central banks (as protected by TFEU, 2016, Article 130 and ESCB/ECB Statute, 2016, Article 7).

The Court highlighted that the implementation of reorganization and resolution measures for credit institutions was not included among the tasks to be carried out through the ESCB (*Banka Slovenije*, 2022, para. 47). This task constituted a "retained" function which the Slovenian authorities had decided to confer upon their central bank (*Banka Slovenije*, 2022, para. 51). The Court, recalling its now classic characterizations of the Eurosystem as a "novel legal construct in EU law" and of NCBs as enjoying a "hybrid status" (*Banka Slovenije*, 2022, para. 52), ruled that retained functions of NCBs are, in accordance with Article 14.4 of the ESCB/ECB Statute (2016), to be performed under those NCBs' responsibility and liability, as regulated by national laws (*Banka Slovenije*, 2022, paras. 53–55). Though it fell on the member states to define the conditions under which their NCB could incur liability in the context of the performance of its retained functions, member states remained bound by EU law in exercising that power, notably by rules and principles such as those enshrined in Articles 123 and 130 TFEU (2016, paras. 56–58). Article 123(1) TFEU (2016) did not rule out, *per se* and as a matter of principle, the incurring of liability by a NCB by reason of the exercise of a retained function conferred on it by national law (*Banka Slovenije*, 2022, para. 68). Not only would this run counter to the letter of the treaties and the diversity of national practices they intend to preserve (*Banka Slovenije*, 2022, paras. 69–70), but it would also overlook the fact that such liability is in principle the consequence of the actions of the said NCB, and not the assumption of a pre-existing obligation incumbent on the other public authorities vis-à-vis third parties (*Banka Slovenije*, 2022, para. 71). As a consequence, it was only in the light of the conditions under which such liability could be incurred that a breach of Article 123(1) TFEU (2016) could be established. In that regard, the Court ruled that the objective liability regime established by the Slovenian authorities entailed:

> An obligation on the part of the national central bank concerned to compensate certain former holders of financial instruments cancelled by it solely on account of that cancellation, even if it is established

> that that central bank had fully complied with the relevant rules in that regard, in particular by acting with due care. (*Banka Slovenije*, 2022, para. 82)

Such a regime placed on the NCB's shoulders the financial consequences of a political choice made by the legislature and not of its own actions and choices made in the performance of one of its functions (*Banka Slovenije*, 2022, para. 84), thus leading "it to be responsible, in place of the other public authorities of the Member State concerned, for the financing of public sector obligations under the national legislation of that Member State" (*Banka Slovenije*, 2022, para. 85), in a way that contravened the prohibition of monetary financing (*Banka Slovenije*, 2022, para. 90). In contrast, the Court considered, thereby not following the conclusions of Advocate General Kokott (CJEU, 2022, paras. 95–100), that a fault-based liability regime, structured around compliance with the duty of care, did not *per se* violate Article 123 TFEU (2016, para. 75). The Court however required that such regimes be structured around infringements of the duty of care of a serious nature, a clarification deemed necessary considering the "high degree of complexity and urgency" characterizing the implementation of reorganization measures (*Banka Slovenije*, 2022, para. 75).

Furthermore, the Court, rather unsurprisingly, followed the Opinion of Advocate General Kokott (CJEU, 2022) and ruled that the financing of the Slovenian scheme violated Articles 130 TFEU (2016) and 7 of the ESCB/ECB Statute (2016; *Banka Slovenije*, 2022, para. 106). Although the hybridity of NCBs could allow a differentiated application of the principle of independence, depending on the function at stake (Eurosystem or retained; *Banka Slovenije*, 2022, para. 95), national rules organizing the exercise of retained functions could not place a NCB in a situation which undermines its ability to carry out independently a Eurosystem task (*Banka Slovenije*, 2022, para. 97). At stake in this case was the financial dimension of central bank independence (see Baez Seara, 2023) and more specifically the role that NCBs' reserves play in the implementation of the EU's monetary policy (*Banka Slovenije*, 2022, paras. 98–100). In that regard, the Court considered that the impugned scheme not only deprived the Slovenian Central Bank of a substantial part of its financial means of action (profits and general reserves) but also placed it in a situation of dependence on the political authorities of Slovenia, as it could end up having to negotiate a loan with those authorities, thereby exposing the bank to potential political pressure, which the principle of independence sought to shield it from (*Banka Slovenije*, 2022, paras. 101–104). The Court however made it clear that the position would have been different, had Slovenia ensured that the central bank would have had the funds necessary to pay the compensation, while retaining its ability to carry out its tasks falling within the scope of the ESCB effectively and completely independently (*Banka Slovenije*, 2022, para. 105).

All four cases concerned complex legal questions which the multi-levelness of the Eurosystem, the hybridity of NCBs, and their dual institutional belonging produced. More fundamentally, they also embody the type of tensions and competing forces NCBs are currently subject to, between the clear centripetal dynamics supported by the EU and the ECB, and resistance mounted in the "periphery," through various attempts to keep NCBs within the national remit. Interestingly, in all four cases, these tensions were solved in favor of the center. EU rules were interpreted broadly, as encompassing NCBs, thereby contributing to expanding supranational control and oversight on NCBs but also the protection accorded to them and their governors by EU law. The legal ambiguities stemming from the hybridity model and the NCBs' dual belonging were thus consistently solved in favor of the supranational pole, at the expense of the state pole, thereby reinforcing the NCBs' Europeanness. The justification supporting such centripetal dynamics, and the Europeanized, agent-like vision of NCBs underlying it, is consistent in all four cases: the Eurosystem as a

"novel legal construct," closely intertwining the ECB with NCBs, the NCBs' hybridity, the dual professional role of NCB governors, the principle of central bank independence underpinning the Eurosystem, and the effectiveness of the EU's monetary policy. The judicial outcomes reached in *Commission v. Slovenia* (2020) and *LR Ģenerālprokuratūras* (2021) appear fairly logical and in line with the functional approach favored by the Court in EMU-related cases. Although groundbreaking and, to many, surprising, the Court's findings in *Rimšēvičs and ECB v. Republic of Latvia* (2019) are also substantiated. Altogether, these rulings certainly contribute to further Europeanizing NCBs and introducing a greater degree of uniformity insofar as their status and organizational modalities are concerned. With *Banka Slovenije* (2022), the Court has made clear, in the name of a rather rigid reading of the principle of central bank independence and of the prohibition enshrined in Article 123 TFEU (2016), that NCBs exercising retained functions can—unlike other public authorities—only incur liability under highly restrictive conditions and that the mobilization of NCB financial resources in the context of the performance of these functions—to the extent that it is likely to affect the implementation of the EU's monetary policy—is *per se* off-limits. This indirectly limits, in a substantial manner, the member states' ability to confer additional (non-monetary) tasks upon their NCB and thereby contributes to further uprooting them from their original national habitat.

4.2. Centripetal Forces and the Actions of the ECB: The Case of ELA

The previous section showed how the legal and institutional hybridity of NCBs as dual bodies, both European and national, and the ambiguities flowing from it, enabled the Court of Justice, in a recent line of cases, to further Europeanize NCBs, following a centripetal dynamic. This section considers how the actions of the ECB itself have also contributed to such a dynamic and how the expansive use by the ECB of its prerogatives has led to a *de facto* contraction of the NCBs' domain of retained powers and therefore to their further Europeanization.

The most telling example of this phenomenon is that of ELA. The provision of ELA to banks facing liquidity issues has historically been considered, in the Eurosystem, as a function retained by NCBs, in accordance with Article 14.4 of the ESCB/ECB Statute (2016). Responsibility for the provision of ELA lies at the national level, with each individual NCB. However, we have seen in the aftermath of the Great Financial Crisis a slow but clear trend towards the centralization and progressive Europeanization of ELA provision. First, at the height of the crisis, the ECB repeatedly threatened states, such as Greece or Ireland, to use its power to limit or prohibit national ELA provision under Article 14.4 of the ESCB/ECB Statute (2016) and pressured them to adopt a certain economic policy. Second, ELA is the subject of increasingly detailed rules set by the ECB which govern all its main aspects (solvency criteria, maturities, volumes, collateral and guarantees, and penalty interest rates; see ECB, 2017) and signal a clear will of the ECB to frame, control, and harmonize the provision of ELA across the eurozone. Finally, and perhaps most tellingly, the ECB has explicitly called, through its former President Mario Draghi, for example, for the full centralization of ELA within the ECB (Draghi, 2018). Although the ECB considers that such transfer of ELA powers to the ECB is currently not feasible *de lege lata*, other commentators consider that the ECB already has the power, under the current treaty framework, to supplant NCBs and directly provide ELA itself. In any event, one might wonder, in light of the policy context and the heavy regulation which frames the provision of ELA, how "national" it remains and how "Europeanized" it has become.

5. The Institutional Repositioning of the NCBs and Its Impact on Their Accountability

As necessary as the CJEU judgments previously examined (in Section 4.1) may have been for safeguarding the highly integrated nature and proper functioning of the ESCB against threats to the NCBs' independence at the national level, a lurking concern is that the centripetal pressures which NCBs are currently subject to contribute to further reinforcing their independence vis-à-vis domestic political branches and may hence reduce opportunities for accountability at the national level, which are only partly made up for at EU level. The more the NCBs are detached from their national (institutional) context, the more integrated the ESCB is rendered, and the more important it is that the ECB be accountable for the activities of the ESCB, which comprises the ECB and the NCBs, at Union level. However, it is well-known that the accountability framework of the ECB is lacking in various regards (see generally on the accountability of the ECB, among many others, Amtenbrink & Markakis, 2022; De Boer & Van 't Klooster, 2020; Hellwig, 2024; Markakis & Fromage, 2023; Monnet, 2024; Tucker, 2018). What is more, there is no formal framework for scrutiny of the ECB's monetary policy by national parliaments.

More specifically, the NCBs are also subject to scrutiny by the respective national parliaments. The respective powers of national parliaments vis-à-vis their central banks and their level of scrutiny can vary from one member state to another. For example, Högenauer and Howarth (2019, pp. 582–583) look at the formal and informal mechanisms of parliamentary scrutiny of NCBs in Germany, France, and Belgium. They find "substantial differences" in both the *ex ante* powers of control and the *ex post* scrutiny powers vis-à-vis NCBs. The actual levels of scrutiny, namely the parliamentary practice of plenary debates, committee hearings or debates, and (written or oral) questions, can also differ from one member state to another, with the proportion of activities that can be defined as "scrutinizing the central bank" being very small in some cases, even if a generous definition is adopted that includes any document that requests information or MP comments on a central bank activity (Högenauer & Howarth, 2019, pp. 583–585). Notwithstanding these very interesting findings, it should not be forgotten that:

> National parliaments and governments can hardly make their respective NCB governor personally responsible for a decision which has been collectively taken by the Executive Board of the ECB and the other NCB governors participating in the Governing Council and—considering the rotation system—possibly even without a voting right of the NCB governor concerned. (Amtenbrink, 2018, p. 937)

Furthermore, it should be stressed that the anxieties voiced by the *Bundesverfassungsgericht* with respect to *ultra vires* review of ECB acts in its second *Weiss* (Bundesverfassungsgericht, 2020) judgment, which was examined above in Section 3, were partially prompted by its assessment that "the ECB *and the national central banks* are independent institutions (…), which means that they operate on the basis of a diminished level of democratic legitimation" (Bundesverfassungsgericht, 2020, para. 143, emphasis added). It was therefore imperative, according to the *Bundesverfassungsgericht*, that the mandate of the ESCB be subject to strict limitations and that adherence to the limits of the ECB's competence be subject to full judicial review (Bundesverfassungsgericht, 2020, para. 143). To be absolutely sure, the judgment of the German court was problematic and unsatisfactory, from the perspective of both EU law and German constitutional law (see further, among others, Amtenbrink & Repasi, 2020; Bobić & Dawson, 2020; Dermine, 2020). It does serve, however, to illustrate that the institutional features of the ESCB and the increasing detachment of the NCBs from their national context, as interpreted and perhaps partly prompted by the CJEU in its case law, may

lead to “pushback” from national courts and other authorities. Strengthening the ECB’s accountability at the EU level could be helpful in this regard, and “a debate in the [European] parliament might also keep the discussion of the legitimacy of monetary policy from being sent back to the national constitutional courts” (Monnet, 2024, p. 153). The *Weiss* saga, together with the *Gauweiler* rulings, is also indicative of the attempt by at least one national court to set legal limits to the actions of the ESCB, which can be policed, according to that court’s jurisprudence, within the confines of *ultra vires* or identity review.

6. Conclusion: The NCBs’ Status 30 Years After Maastricht

The NCBs’ status under the Maastricht compromise remains fundamentally unresolved. As national Europeanized authorities (Fromage, 2022, p. 322), belonging both to their historical national habitat and to the highly supranationalized ESCB, they constitute inherently hybrid institutions. This multi-faceted hybridity features functional, institutional, and financial dimensions. As this article has shown, this hybridity or in-betweenness is conducive to opposing forces. On the one hand, as national systems might seek to keep NCBs embedded in their domestic framework, hybridity can constitute a source of tension and a risk for the effectiveness and singleness of the EU’s monetary policy. On the other hand, hybridity also provides ample scope for further centralization and supranational control and for the reinforcement of the NCBs’ Europeanness. The NCBs’ institutional features and actions “are strongly influenced by European integration” (Fromage, 2022, p. 322) and they and their governors can be “conflicted between their European and their national responsibilities and interests” (Hellwig, 2024, p. 4).

This article has shed light on the *centrifugal* and *centripetal* forces to which the NCBs are subject, as a result of developments in the case law of a prominent national constitutional court, i.e. the *Bundesverfassungsgericht*, on the one hand, and developments in the CJEU’s case law and the ECB’s practices, on the other hand. More specifically, actions by national institutions, such as rulings by constitutional courts providing alternative legal interpretations centering on the national affiliation and loyalty of NCBs and challenging the authority of the CJEU’s judgments, can give rise to centrifugal forces. However, as this article has shown, centripetal pressures have flown from both the CJEU’s case law regarding NCBs and the actions of the ECB itself. Be it with regard to the status of NCB governors, the privileges and immunities NCBs should enjoy, the performance of retained functions, or their financial independence, this centripetal dynamic has, over the past decade, impacted the NCBs’ position within the EU polity and their relationship with the ECB in the context of the Eurosystem and has contributed, in the view of the current authors, to a highly Europeanized, agent-like vision of NCBs. Although not definitive—as the pendulum might swing back in the future, in response to other developments—such repositioning of the NCBs carries with it a number of important legal and institutional implications. Notably, it can further reinforce the independence of NCBs vis-à-vis domestic authorities and reduce opportunities for accountability at the national level. Considering the various well-known limitations to the ECB’s accountability, the loss of opportunities to hold NCBs to account at the national level due to their further Europeanization may not have been compensated by robust accountability controls at the EU level.

Acknowledgments

We are very grateful to the organizers and participants of the conferences held at the University of Luxembourg (24–25 November 2022) and the University of Victoria (2–3 November 2023) for their helpful feedback. The usual disclaimer applies.

Conflict of Interests

The authors declare no conflict of interests.

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