

# My PhD thesis on the ECB – looking back after 22 years

René Smits\*

## 1 Looking back after twenty-two years

Surprised by the request to formulate reflections on my PhD thesis, decades after its defence, I was eager to ruminate its origin and composition and the tenets I submitted at the outset of the Economic and Monetary Union (EMU). My thesis preceded the establishment of the object of its study, the European Central Bank (ECB), by over one year. The defence took place on 4 April 1997 while the ECB was established on 1 July 1998. Its predecessor, the European Monetary Institute (EMI), had been in operation since 1994 and the provisions governing the ECB had been adopted a few years before, when the Maastricht Treaty was signed and, ultimately ratified (after a first Danish ‘nej’ had been overcome by four detailed opt-outs). The timing of the book *The European Central Bank – Institutional Aspects*<sup>1</sup> was therefore very fortunate. It came in time to become for some their ‘Bible’ on the new European monetary authority, as I learned afterwards from readers who were studying the new institution.<sup>2</sup> Looking back, this is also the drawback of writing so early on a novel legal entity with a central position in Europe’s monetary union: many of the later developments could

not be not foreseen or included, so that the book’s value is time-bound. For instance, only basic elements of the ECB’s most recently conferred task, undertaken since 2014, of supervising banks in the Euro Area<sup>3</sup> could be discussed at the time.

**My thesis preceded the establishment of the object of its study, the European Central Bank, by over one year. It came in time to become for some their ‘Bible’ on the new European monetary authority**

## 2 The origin and composition of the thesis

My thesis was constructed on the basis of already-existing building blocks: contributions on the EMU provisions of the EC Treaty (as it then was) to the 5th edition of a major German-language handbook, *Kommentar zum EG-Vertrag*,<sup>4</sup> and chapters of or contributions to previous work on EMU. Notable among these was a joint work directed by Jean-Victor Louis, Professor

\* Prof.dr. R. Smits is professor of the Law of the Economic and Monetary Union at the University of Amsterdam. He is an alternate member of the ECB’s Administrative Board of Review and an assessor at the Belgian Competition Authority; he is also a consultant on EMU law and banking regulation. This contribution is written in a personal capacity and does not reflect the views of the ECB, the SSM or the Eurosystem.

- 1 R. Smits, *The European Central Bank – Institutional Aspects*, The Hague/London/Boston: Kluwer Law International 1997.
- 2 For precision’s sake: the ECB only became an ‘institution’ of the European Union with the Lisbon Reform Treaty (2007); before, its status was so unclear that I could devote my inaugural address (2003) to discussing the position of the ECB in the European constitutional order, see R. Smits, *The European Central Bank in the European constitutional order*, Utrecht: Eleven International Publishing 2003.
- 3 Disclosure: since 2014, I contribute to this task as an alternate member of the Administrative Board of Review, the independent body mandated to review the ECB’s supervisory decisions at the request of an applicant.
- 4 Commentary on Articles 105, 109 and 109 M of the EC Treaty, and on Articles 2, 3, 4, 5, 6, 17 to 24, and 25 of the Statute of the European System of Central Banks and the European Central Bank, in: H. von der Groeben, J. Thiesing & C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, Baden-Baden: Nomos Verlagsgesellschaft 1997, p. 3/152-3/179, 3/244-3/286, 3/532-3/567, 3/609-3/663.

at the Université Libre de Bruxelles and General Counsel of the National Bank of Belgium.<sup>5</sup> Early work on a draft for the statutes of a European System of Central Banks (ESCB) had been undertaken under his chairmanship.<sup>6</sup> I submitted these proposed statutes to the late Huib Muller, then director in charge of banking supervision at De Nederlandsche Bank NV (DNB), the Dutch central bank where I worked. He noted that such preparatory work from academics and practitioners was likely to be helpful once the establishment of a European central bank would be taken up by politicians. Around that time, politicians were, indeed, seriously taking up this issue: in 1988, the European Council mandated the Delors Committee<sup>7</sup> to examine and propose concrete stages leading to EMU, resulting in the blueprint for EMU.<sup>8</sup>

## The idea of ‘stapling together’ previous contributions is how I ‘sold’ the idea of writing a PhD thesis at home

The idea of ‘stapling together’ previous contributions is how I ‘sold’ the idea of writing a PhD thesis at home. Professor Martijn van Empel, who taught public economic law at the University of Amsterdam, was enthusiastic about my plans and agreed to supervise my PhD thesis. Starting a thesis was adding another burden on an already full professional life. As head of the legal department at DNB, I worked full-time and intensively on the preparations for the introduction of the single currency. My last, 11th, ‘tenet’ or *stelling*, when defending my thesis would show the stress I had experienced: ‘Ideally, writing a thesis requires mastery of balancing acts’. Fortunately, the central bank had allowed me to have eight weeks research study leave, spread out over several months, to finalise my thesis.

### 3 Issues still relevant today

Several observations which I made in the thesis are still topical today.

First, the ‘juridification’ of central banking. Hitherto, central banks had predominantly been operating on the basis of a few statutory provisions on the monetary authority: its composition, the relationship with the government and its tasks. There was the odd national statute on money and on foreign exchange relations but central banking was largely an unregulated affair. Preparations for EMU led to the adoption of a host of legal provisions which replaced informal arrangements that previously had been dominant in the area of monetary policy. Also, the transition to the single currency required novel legal acts and the requirement to adapt national law to the EU’s monetary union provisions entailed identifying which national provisions needed adapting and modifying laws and regulations at State level. My second ‘tenet’ referred to this juridification of central banking; it mentioned the rule of law and the primacy of the law:

‘<Maastricht> marks not only the *communautarisation* but also the *juridification* of central banking in the European Union: the transfer of monetary competences to the Community level implies the embedment of the European Central Bank and the National Central Banks in a system based on the rule of law. This necessarily limits the scope for informal arrangements and political understandings which fail to do justice to the primacy of the law’.

There is continuity here: I recently presented a paper at the ECB’s 2019 Legal Conference annex Legal Workshop on ‘The ECB and the rule of law’.<sup>9</sup>

Second, accession of the Community (now: the EU) to the International Monetary Fund (IMF) remains topical but has still not been fulfilled after so many years. I strongly pleaded for IMF accession. I argued that with the Community assuming – in the area of money, a central element of sovereignty – characteristics of a ‘country’,<sup>10</sup> it should become a member of the IMF. A European Treaty provision allows for unified representation at international financial institutions.<sup>11</sup> While the Commission proposed the first steps towards such representation<sup>12</sup> in 1998, nothing was done with this and the proposal was withdrawn.<sup>13</sup> A new proposal<sup>14</sup> was submitted in 2015 in

- 5 R. Smits, ‘The Community and International Context’, in: *Banking Supervision in the European Community: Institutional Aspects* (Report of a Working Group of the ECU Institute under the Chairmanship of Jean-Victor Louis, Études Européennes), Brussels: Université de Bruxelles 1995.
- 6 *Vers un système européen de banques centrales: projet de dispositions organiques* (Rapport du groupe présidé par Jean-Victor Louis, Études Européennes), Brussels: Université de Bruxelles 1989.
- 7 Officially: the Committee for the Study of Economic and Monetary Union.
- 8 Committee for the Study of Economic and Monetary Union, *Report on economic and monetary union in the European Community*, 12 April 1989, at: [www.cvce.eu/en/obj/725f74fb-841b-4452-a428-39e7a703f35f.html](http://www.cvce.eu/en/obj/725f74fb-841b-4452-a428-39e7a703f35f.html) (last consulted on 6 December 2019).
- 9 R. Smits, ‘The ECB and the rule of law’, in: *Building bridges: central banking law in an interconnected world* (Proceedings of the ECB Legal Conference 2019), Frankfurt am Main: European Central Bank 2019, p. 350-384, available at [www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912-9325c45957.en.pdf](http://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912-9325c45957.en.pdf).
- 10 Article II section 2 of the IMF’s Articles of Agreement opens membership ‘to other countries’ than those represented at the Bretton Woods Conference that led to the adoption of the IMF’s statutes.
- 11 Art. 109(4) EC Treaty; currently, Art. 138(2) TFEU.
- 12 Proposal for a Council Decision on the Representation and Position Taking of the Community at International Level in the context of Economic and Monetary Union, COM(1998) 637 final.
- 13 Commission Decision of 21 October 2015 withdrawing Commission proposal for Council decision on the Representation and Position Taking of the Community at International Level in the context of Economic and Monetary Union COM(1998) 637 final, C(2015) 8001 final.
- 14 Proposal of 21 October 2015 for a Council Decision laying down measures in view of progressively establishing unified representation of the euro area in the International Monetary Fund, COM(2015) 603 final. See also, Communication of 21 October 2015 from the Commission to the European Parliament, the Council and the European Central Bank on ‘A roadmap for moving towards a more consistent external representation of the euro area in international fora’, COM/2015/0602 final.

the context of a roadmap for strengthening EMU. This latest proposal is also stalled in the Council.<sup>15</sup> Giving up the external features of monetary sovereignty apparently is harder than sharing monetary sovereignty domestically. Coordination among Euro Area representatives at the IMF is the current approach. Unified Eurozone representation may contribute to a redistribution of power in the IMF, where western dominance is more reflective of the state of affairs at the end of World War II than the present importance of global economic players.

A third element of discussion in my book also continues to attract attention these days: the level of transparency at the ECB. At that time, the injunction against publishing minutes of the ECB's Governing Council meetings<sup>16</sup> was introduced. Confidentiality of these minutes must prevent individual central bank governors – who sit together with the ECB's Executive Board as the ultimate decision-making body on monetary policy – from being scrutinised for the extent to which they defend interests perceived as 'national'. The text of Article 10.4 ESCB Statute adopted in Maastricht reflects the secrecy surrounding central banking which reigned at that time. Nowadays, much more openness is expected from the guardians of the currency mandated to protect the public good of price stability, allowing for more scrutiny. Under President Mario Draghi, the ECB has opened up quite a bit. Notably, 'accounts' of the parts of the meetings devoted to monetary policy<sup>17</sup> have been published since 2015. Discord among the members of the policy-setting organ had already seeped outside when unconventional monetary policy measures began to be adopted, notably pitting the Governor of the Bundesbank against his colleagues. It even came to a deposition in court against a measure adopted by the Governing Council: in testimony before the German Constitutional Court, Jens Weidmann of the German central bank openly criticised the announcement of 'Outright Monetary Transactions'<sup>18</sup> (OMT) in 2012. This level of open dissent, even acrimony, could not have been foreseen. There

has recently even been an 'open revolt' by national central bank governors against decisions of the ECB,<sup>19</sup> a new phenomenon that invites the new ECB President, Christine Lagarde, to reunite and reconcile her colleagues.

## The turmoil on the financial markets, followed by a sovereign debt crisis which saw market participants openly preparing for the demise of the single currency and a relapse into national currencies were so unforeseen that non-standard responses were called for

### 4 Matters not at all foreseen

This brings me to other totally unexpected developments and measures ten years after my thesis.

The liquidity shortage on money markets in 2007 and the global financial crisis of 2008 elicited responses by the ECB that were unprecedented and almost reached the boundaries of its mandate. Discussing the history of these measures and their legal technicalities is not suitable for these reflections.<sup>20</sup> Yet, surprise about the scope and breadth of the unconventional responses adopted may be noted. The turmoil on the financial markets, the deepest recession since the 1930s, followed by a sovereign debt crisis which saw market participants openly preparing for the demise of the single currency and a relapse into national currencies were so unforeseen that non-standard responses were called for. In the sphere of 'economic union' (one 'leg' of the EMU construct), we witnessed a strengthening of economic governance, the adoption of debt brakes and the emergence of so-called 'bail-out' funds for financial assistance to governments shut out from the financial markets, currently the European Stability Mechanism (ESM)<sup>21</sup>. The ECB gained its own role herein,

15 See: Legislative Train Schedule, Deeper and Fairer Economic and Monetary Union, at [www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-economic-and-monetary-union/file-external-representation-of-the-emu](http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-economic-and-monetary-union/file-external-representation-of-the-emu) (last consulted on 5 December 2019).

16 Art. 10.4 ESCB Statute: 'The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public.'

17 These accounts are available a month after the meeting. They can be accessed at the ECB's website under 'Monetary policy accounts'; see: ECB, [www.ecb.europa.eu/press/accounts/2018/html/index.en.html](http://www.ecb.europa.eu/press/accounts/2018/html/index.en.html) (last consulted on 5 December 2019).

18 See the ECB's press release of 12 September 2012, *Technical features of Outright Monetary Transactions*, at: [www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html) (last consulted on 5 December 2019). These OMT were potential purchases of bonds issued by the government of a Member State where the interest rates had become so high and disconnected with the ECB's lending rates that monetary policy decisions taken in Frankfurt could no longer 'translate' in interest rates prevailing in that State's markets. The lack of effectiveness of monetary policy across the single currency union was invoked to justify the OMT programme. The mere announcement of the OMT was already enough to lower the interest rates, therefore no such transactions have been effected.

19 Recent examples are the press release of 13 September 2019 by Klaas Knot, President of DNB, speaking out against the resumption of the ECB's 'asset purchase programme' ('quantitative easing'), available at: [www.dnb.nl/en/news/news-and-archive/Persberichten2019/dnb385535.jsp](http://www.dnb.nl/en/news/news-and-archive/Persberichten2019/dnb385535.jsp), and the Memorandum on ECB Monetary Policy issued by former central bankers, including DNB's Nout Wellink, on 4 October 2019, available at: [www.bloomberg.com/news/articles/2019-10-04/memorandum-on-ecb-monetary-policy-by-issuing-stark-schlesinger](http://www.bloomberg.com/news/articles/2019-10-04/memorandum-on-ecb-monetary-policy-by-issuing-stark-schlesinger). After the September 2019 Governing Council meeting, discord on monetary policy was brought into the open by the Dutch, German and Austrian central bank governors (both websites last consulted on 5 December 2019).

20 See R. Smits, 'A central bank in times of crisis: the ECB's developing role in the EU's currency union', in: P. Conti-Brown & R.M. Lastra (eds.), *Research Handbook on Central Banking*, Cheltenham (UK)/Northampton (MA): Edward Elgar 2018, p. 184-207.

21 See: [www.esm.europa.eu](http://www.esm.europa.eu).

as the most federal of institutions in the Euro Area. A role which became controversial notably in the debtor States, when the ECB as part of the so-called *troika* (Commission, ECB and IMF) became deeply engaged with the prescriptive policies imposed<sup>22</sup> as loan conditions on the governments of Greece, Portugal, Ireland, Spain and Cyprus.

**On the ‘monetary union’ side of EMU, the novelties were no less remarkable: long-term commitments to fund banks, reductions of interest rates to below zero, a widening of the collateral requirements, ‘targeted’ lending to the banks and, finally, the big bazooka of ‘quantitative easing’**

On the ‘monetary union’ side of EMU, the novelties were no less remarkable: long-term commitments to fund banks, reductions of interest rates to below zero, a widening of the collateral requirements,<sup>23</sup> ‘targeted’ lending to the banks (that is, providing loans which are meant to be on-lent to companies and citizens, with an *ex post* reporting resulting in penalty interest if the target is not met) and, finally, the big bazooka of ‘quantitative easing’ (QE). The term QE denotes buying of bonds, of governments, international institutions and corporations, from the Eurosystem’s counterparties with the intention to drive investors to restart lending to the ‘real economy’, as opposed to keeping funds in financial assets. The scale of these purchasing programmes, also undertaken by central banks in Japan, the United States and the United Kingdom, is so immense that the central banks may hold assets worth 40% the size of the national (regional) economy and may double their balance sheets.<sup>24</sup> The effects of such bond buying are disputed: do they influence the distribution of wealth in the economy<sup>25</sup> and do they

incentivise governments to borrow as they are secure that their bonds will ultimately end up on the balance sheet of the central bank, after initial sales to private parties?<sup>26</sup>

The controversial nature of these measures has led to litigation. On the economic side, there have been numerous cases contesting the conditionality for the financial support of State governments. The European Courts have thus far found that the ECB cannot be held responsible for any damage resulting from ‘conditionality’ (say, reduced pensions, or forfeited investments in failing banks). Yet, the ECJ, in the *Ledra* judgment,<sup>27</sup> did recognise that the Commission (and, by implication, the other EU institution involved, the ECB) needs to ensure that a ‘memorandum of understanding’ that is agreed between the ESM and a debtor State is consistent with the EU’s Charter of Fundamental Freedoms. On the monetary union side, opposition to the non-standard policy measures led to questioning their validity before the German constitutional court. The same court that already had been called upon to rule whether the Maastricht Treaty was compatible with the German constitution, was addressed by claimants who sought declarations that the Outright Monetary Transactions mentioned before were outside the mandate of the ECB (*Gauweiler* case)<sup>28</sup> and, later, in the *Weiss* case,<sup>29</sup> that the programme of purchasing public bonds (the PSPP<sup>30</sup>) was, likewise, *ultra vires*. Should the ECB have been held to act outside its mandate, this would have violated the limits set on European integration by the German *Grundgesetz* and the Bundesbank might have to cease cooperating with these transactions.

In both proceedings, the constitutional court in Karlsruhe requested a preliminary ruling from the ECJ. After the ECJ’s OMT judgment, the Bundesverfassungsgericht held, in conformity with the view of the Luxembourg judges, that the announced transactions did not violate European law (and, by implication, stayed within the limits of the German attribution of sovereignty to the EU level). In the

22 The official perspective is that such conditionality is voluntarily ‘agreed by’ these governments.

23 Commercial banks can borrow from the central bank against ‘adequate collateral’ only: the range of financial instruments which qualify as security for the repayment of loans to the Eurosystem was drawn much wider.

24 See: Annual consolidated balance sheet of Eurosystem, at [www.ecb.europa.eu/pub/annual/balance/html/index.en.html](http://www.ecb.europa.eu/pub/annual/balance/html/index.en.html) (last consulted on 5 December 2019).

25 The asset purchases push up the price of (and push down the yield on) these financial instruments, thus making its holders richer. QE is intended to infuse liquidity into the markets which, some allege, may lead to ‘bubbles’. Very low interest rates, the product of decades of developments but stimulated by the central bank’s operations, lead to low or no return on savings and very cheap lending conditions, and have effects on the housing market.

26 This ‘detour’ is required since central banks may not directly fund governments, so any government bonds issued must be placed with private parties who may then sell these bonds, after a waiting period, to the Eurosystem.

27 CJEU 20 September 2016, Joined Cases C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701 (*Ledra Advertising Ltd and Others v European Commission and ECB*).

28 CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Peter Gauweiler and Others v Deutscher Bundestag*).

29 CJEU 11 December 2018, C-493/17, ECLI:EU:C:2018:1000 (*Heinrich Weiss and Others*).

30 Public Sector Purchasing Programme; see [www.ecb.europa.eu/mopo/implement/omt/html/pspp-qa.en.html](http://www.ecb.europa.eu/mopo/implement/omt/html/pspp-qa.en.html) (last accessed 6 December 2019). The PSPP is based on Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), as lastly amended by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2017/1).

31 After this contribution was written, the date for the decision of the German Constitutional Court in the *Weiss* case has been set for 24 March 2020; see: [www.bundesverfassungsgericht.de/DE/Presse/presse\\_node.html](http://www.bundesverfassungsgericht.de/DE/Presse/presse_node.html) (accessed, 30 January 2020).

32 Banking union stands for the Single Supervisory Mechanism (SSM), the joint supervision of the banks in the Euro Area by the ECB and national competent authorities and the Single Resolution Mechanism (SRM), with the Single Resolution Board as the Union agency deciding on the resolution of significant banks. This is laid down in the SSM Regulation (Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions) and the SRM Regulation (Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and

PSPP case, such a national sequel to the European judicial decision is still pending.<sup>31</sup>

Similar issues of compatibility of measures adopted during the crisis were brought before the courts: again, the German constitutional court was asked whether the ‘banking union’<sup>32</sup> is compatible with the constitution of the EU’s largest Member State. In a recent judgment, the German constitutional court so held,<sup>33</sup> after ‘re-interpreting’ a judgment<sup>34</sup> of its Luxembourg peers on the allocation of competences in the single system of banking supervision established in 2014. Banking union stands for the attribution of powers of supervision and resolution of banks to the European level. For the ECB, this meant the activation of a clause in the Treaty (Art. 127(6) TFEU) which had been slumbering since Maastricht and was applied to give the Frankfurt-based institution a central role in overseeing credit institutions in the currency union.

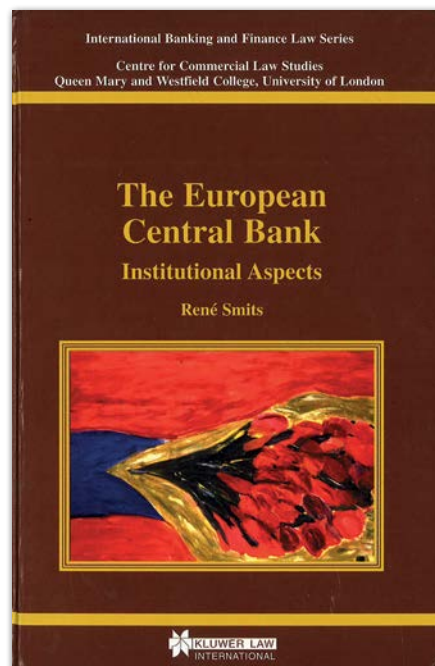
Issues of mandate have been central in the legal reverberations of the crisis. The term ‘mandate’ was also key to the statement by ECB President Mario Draghi about the euro which, perhaps more than anything else, ended the speculation on the demise of the single currency and brought speculative interest rates down. In London, in July 2012, he said: ‘*Within our mandate*, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.’ (emphasis added by author)<sup>35</sup>

## 5 Personal matters

Writing a thesis brings with it all kinds of experiences that regular academic contributions don’t. First of all, there is the close connection to one’s *Doktorvater*, as the German expression goes. The supervisor of a PhD acts as midwife to the candidate’s labours: he or she not only oversees progress and criticises submitted texts but, also, encourages, supports and facilitates the process of attaining one’s PhD title. I had the luck to be supervised by Professor Van Empel, who excelled in each of these roles. He

convened a doctoral examination committee of renown, which included Professor Louis and the then-president of the Dutch central bank, Nout Wellink, and two EU law specialists, Professors Jan Jans and the late Kamiel Mortelmans.

I was also fortunate to have a wonderful publisher: Selma Hoedt, then at Kluwer’s, now at Eleven international publishing,<sup>36</sup> was, and still is, an open and enthusiastic person who believed in the project. During a light-hearted exchange, she mentioned that some authors wish to see a child’s drawing on the cover of their books. This led to a colourful painting by Anneke de Blicke, my wife, to whom the thesis is dedicated, on the cover of my thesis.



Another personal experience is the feedback I still receive from readers of my book: many recall learning about the ECB first from my thesis; some recall more personal stories such as the occasion when a law professor lent my book to a student who later became the mother of his son.

## 6 Vindicated but not cited: direct appeal at the ECJ against a State measure

Looking back at my thesis writing, there is an element that I wrote about which recently materialised. Tucked away in the Statute of the Euro-

a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010).

33 Bundesverfassungsgericht 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14, ECLI:DE:BVerfG:2019:rs20190730.2bvr168514, see also, Press Release 52/2019 of 30 July 2019, at: [www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-052.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-052.html) (last consulted on 5 December 2019).

34 The General Court in its judgment of 16 May 2017 in T-122/15, ECLI:EU:T:2017:337 (*Landeskreditbank Baden-Württemberg – Förderbank/ECB*), held that the SSM Regulation confers exclusive powers on the ECB with the national competent authorities implementing their tasks as derived, delegated powers under a decentralised system of operation of the SSM; confirmed by the ECJ’s judgment of 8 May 2019 in C-450/17 P, ECLI:EU:C:2019:372.

35 M. Draghi, speech at the Global Investment Conference, London, 26 July 2012, at: [www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html](http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html) (last consulted on 6 December 2019).

36 An imprint of Boom uitgevers Den Haag.

37 The Protocol attached to the TFEU setting out the organisation and operations of the Eurosystem.

38 See the ECJ’s judgment of 26 February 2019 in C-202/18, ECLI:EU:C:2019:139 (*Ilmārs Rimšēvičs/Republic of Latvia*) and C-238/18 (*European Central Bank/Republic of Latvia*) and the earlier Order of the Vice-President of the Court of 23 July 2018, ECLI:EU:C:2018:581.

39 In the context of allegations of corruption, the Latvia’s Anti-Corruption Office arrested, interrogated and then released Mr. Rimšēvičs, the governor of Latvia’s central bank and, then, prohibited him from remaining in his post as governor and forbade him to leave Latvia without prior authorisation.

40 See D. Sarmiento, *Crossing the Baltic Rubicon*, 4 March 2019, at: <https://verfassungsblog.de/crossing-the-baltic-rubicon/>; my own blogpost R. Smits, ‘ECJ annuls a national measure against an independent central banker’, *European Law Blog* 5 March 2019, at: <http://europeanlawblog.eu/2019/03/05/ecj-annuls-a-national-measure-against-an-independent-central-banker/>, and my annotation of the case, R. Smits, ‘A national measure annulled by the ECJ, or: high-level judicial protection for independent central bankers’, *European Constitutional Law Review* (forthcoming).

41 As expressed by Mario Draghi in his farewell address as ECB President. Draghi added that this facility for joint governmental budgetary action should be ‘large enough to stabilise the monetary union, but designed not to create excessive moral hazard’. See M. Draghi, *Farewell remarks*, Frankfurt am Main, 28 October 2019, at: [www.ecb.europa.eu/press/key/date/2019/html/ecb.sp191028-7e8b444d6f.en.html](http://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp191028-7e8b444d6f.en.html) (last consulted on 6 December 2019).

42 This budgetary capacity would be way beyond the budgetary instrument for convergence and competitiveness (BICC), agreed in October 2019; see: [www.consilium.europa.eu/en/press/press-releases/2019/10/10/term-sheet-on-the-budgetary-instrument-for-convergence-and-competitiveness-bicc/](http://www.consilium.europa.eu/en/press/press-releases/2019/10/10/term-sheet-on-the-budgetary-instrument-for-convergence-and-competitiveness-bicc/). The BICC is explained at: [www.consilium.europa.eu/en/policies/emu-deepening/bicc-faq/](http://www.consilium.europa.eu/en/policies/emu-deepening/bicc-faq/) (both websites last consulted on 6 December 2019).

43 Which may also focus the minds on an adequate Euro Area budget, as Mario Draghi remarked in his words of farewell: 'The road towards a fiscal capacity will most likely be a long one. History shows that budgets have rarely been created for the general purpose of stabilisation, but rather to deliver specific goals in the public interest. In the US, it was the need to overcome the Great Depression that led to the expansion of the federal budget in the 1930s. Perhaps, for Europe, it will require an urgent cause such as mitigating climate change to bring about such collective focus.'

44 In Art. 127(1) TFEU and Art. 2 ESCB Statute: 'Without prejudice to the objective of price stability, it 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 of the Treaty on European Union'.

45 Art. 3 TEU includes references to 'sustainable development' and 'a high level of protection and improvement of the quality of the environment' and 'the sustainable development of the Earth' among the various objectives of the European Union.

46 Notably, Art. 7 ('The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.') and Art. 11 TFEU ('Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.')

47 See J. Solana, 'The Power of the Eurosystem to Promote Environmental Protection', *European Business Law Review*, p. 547-576.

48 Art. 127(6) TFEU states: 'The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.' Art. 119 TFEU mentions the principle of an open market economy with free competition and indicates stable prices, sound public finances and monetary conditions and a sustainable balance of payments as 'guiding principles' in the establishment of EMU.

49 The Network for Greening the Financial System (NGFS), chaired by DNB executive director Frank Elderson, is a major player in the contributions by central banks and supervisory authorities towards a greener planet. See: [www.banque-france.fr/en/financial-stability/international-role/network-greening-financial-system](http://www.banque-france.fr/en/financial-stability/international-role/network-greening-financial-system) (last accessed 6 December 2019).

pean System of Central Banks<sup>37</sup> is a provision which seeks to guarantee the tenure of national central bank governors. Upholding their independence against dismissal on spurious grounds, Article 14.2 provides the governor and the ECB a direct route to the European Court of Justice to challenge dismissal. I called '[a] direct appeal to the European Court against a national decision [...] a novelty which crept into Community law through the backdoor of EMU provisions'. The first time this provision was tested,<sup>38</sup> the applicant and the ECB did not dare propose that it provided a direct appeal, allowing the ECJ to annul a national measure (in this case a set of measures which, although not constituting an outright dismissal, did 'relieve from office' the Latvian central bank governor).<sup>39</sup> Nor did the Advocate General accept that this was the purport of the provision. The ECJ, however, clearly sided with my early interpretation (although my thesis was not cited in this case). Measures which effectively hinder the independent exercise by a national central bank governor from his functions, also in the Governing Council of the ECB, can be challenged before the ECJ with the latter potentially quashing the national measure, as the Court did in this case. The outcome of the *Rimšēvičs* case may be of limited effect, namely restricted to the area of central banking as it is based on a unique provision of primary EU law, but it nevertheless marks a crossing into untrodden territory, namely the direct annulment of a national measure by a Union court.<sup>40</sup>

## Looking ahead, I see major challenges, legal and societal, for the ECB

### 7 Looking ahead

Looking back, there is gratitude for the opportunity of writing the first legal 'handbook' on the ECB. Looking ahead, I see major challenges, legal and societal, for the ECB. Brexit and the further development of EMU are continuous issues. The introduction of 'a euro area fiscal capacity of adequate size and design'<sup>41</sup> is a major theme: a monetary union needs a joint budget.<sup>42</sup> Climate change,<sup>43</sup> and the role for central banks in addressing it, will be on the agenda prominently as well. In its supervisory role, the ECB is confronted with increased risks in the financial sector resulting from climate change. As a monetary authority, the question whether its policies and operations should be climate-neutral or, even, climate-friendly, is squarely on the table. Legal issues, including the relevance of the secondary objectives of the Eurosystem,<sup>44</sup> the prominence of the environment in the EU's objectives,<sup>45</sup> the incidence of the 'integration clauses'<sup>46</sup> of the TFEU<sup>47</sup> and the relevance of the principle of an open market economy,<sup>48</sup> will co-determine to what extent monetary policy and prudential supervision can, or must, be 'greened'.<sup>49</sup> The area of research that I launched by writing my thesis will continue to raise issues of law and institutions, and of society and habitat, as the ECB is here to serve the people of Europe.