

# THE EUROPEAN SYSTEM OF CENTRAL BANKS: QUO VADIS?

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## I. INTRODUCTION

After years of unsuccessful attempts to achieve monetary integration within the area of the European Union (EU),<sup>1</sup> the

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1. The attempts include the following: (1) the European Exchange Rate Agreement (Snake); (2) the Werner Report; and (3) the European Monetary

Economic and Monetary Union (EMU), as set forth under the newly designed *Treaty Establishing the European Community (EC Treaty)*,<sup>2</sup> entered the third and final stage of monetary integration on January 1, 1999.<sup>3</sup> There were two possible ways

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System (EMS). See JOHN B. GOODMAN, *MONETARY SOVEREIGNTY: THE POLITICS OF CENTRAL BANKING IN WESTERN EUROPE* 182–91 (1992); RALPH MEHNERT-MELAND, *CENTRAL BANK TO THE EUROPEAN UNION: EUROPEAN MONETARY INSTITUTE, EUROPEAN SYSTEM OF CENTRAL BANKS, EUROPEAN CENTRAL BANK, STRUCTURES, TASKS AND FUNCTIONS* 3–4 (1995).

2. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 [hereinafter EC TREATY], incorporating changes made by TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The TEU amended the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY], as amended by SINGLE EUROPEAN ACT, 1987 O.J. (L 169) 1, [1987] 2 C.M.L.R. 741 [hereinafter SEA TREATY]. The EC Treaty originated in the EEC Treaty that is also referred to as the *Treaty of Rome* because it was signed in the Italian capital. The TEU, signed in Maastricht on Feb. 7, 1992 and usually referred to as the *Maastricht Treaty*, amended and renamed the *Treaty of Rome* for two reasons. First, the *Treaty of Rome*'s designated name no longer reflected its actual task of creating an Economic and Monetary Union. See GOODMAN, *supra* note 1, at 202. The SEA Treaty, another revision to the EEC Treaty that came into force on July 1, 1987, changed the purpose of the *Treaty of Rome* by calling for the completion of a frontier-free market by the end of 1992. See *id.* The second reason is the "public's perception of the Community." *Intergovernmental Conferences: Contributions by the Commission*, 24 BULL. EC, no. 2, Supp., commentary at 49 (1991) [hereinafter *Commission Contribution*]. The TEU, in turn, is going to be amended by the *Treaty of Amsterdam*. See TREATY OF AMSTERDAM, Oct. 2, 1992, 1997 O.J. (C 340) 1 [hereinafter TREATY OF AMSTERDAM] (amending the TEU). The *Treaty of Amsterdam* was signed in Amsterdam on October 2, 1997 and is in the process of being ratified. See *id.* Ratification is expected to be completed early in 1999. See Charles Bremner, *New EU Treaty Planned to End National Veto on Taxation*, TIMES (London), Dec. 3, 1998, at 1. A descriptive summary and the text of the *Treaty of Amsterdam* can be viewed on the Internet at <<http://ue.eu.int/Amsterdam/en/treaty/treaty.htm>> (visited Feb. 11, 1999).

3. See EC TREATY art. 109j(4); PROTOCOL ON THE TRANSITION TO THE THIRD STAGE OF ECONOMIC AND MONETARY UNION, TEU; see also James H. Freis, Jr., *Continuity of Contracts after the Introduction of the Euro: The United States Response to European Economic and Monetary Union*, 53 BUS. LAW. 701, 702 (1998). Because of the uniqueness of this event a lot of speculation is taking place. See, e.g., William Waldegrave, *Memo: Money is Sovereign*, DAILY TELEGRAPH, May 23, 1997, at 26. William Waldegrave, then Chief Secretary to the Treasury of the U.K., evaluated the venture as an "extraordinary experiment" since no pre-democratic government has ever turned over its monetary policy authority to a central institution that will act separately from the authorities which remain responsible for conducting fiscal and other economic policies. *Id.* This skepticism is also partially shared in the United States. See MARTIN FELDSTEIN, *THE POLITICAL ECONOMY OF THE EUROPEAN ECONOMIC AND MONETARY UNION: POLITICAL SOURCES OF AN ECONOMIC LIABILITY* 4 (National Bureau of Econ. Research Working Paper No. 6150, 1997); see also William Safire, *Alice in Euroland*, N.Y. TIMES, Apr. 30, 1998, at A33 (taking the position that the euro is "bad for union" and "dangerous to democracy"). However, at least in the U.S. executive branch, there has been a change of view. Alan Greenspan and the Clinton Administration both appear to

for the EU to enter the third stage of monetary integration. The first possible entrance procedure required that “a majority of the Member States fulfil the necessary conditions for the adoption of a single currency.”<sup>4</sup> Unlike the first procedure, the second alternative does not call for a certain number of EU countries to comply with the crucial criteria, such as legal and economic requirements.<sup>5</sup> Under either procedure the national legislation of the member states, including the statutes of the national central banks (NCBs), must be in compliance with Articles 107 and 108 of the *EC Treaty* and the European System of Central Banks (ESCB) Statute.<sup>6</sup> The ESCB Statute is a protocol to the *EC Treaty*.<sup>7</sup> With respect to the economic requirements, the member states must provide a high degree of

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welcome the euro. See *ECB's Reputation is Key for Euro, Greenspan Says*, WALL ST. J. EUR., Nov. 23, 1998, at A26; Richard W. Stevenson, *In the Wings: Euro as Potential Rival to the Dollar*, N.Y. TIMES, Apr. 28, 1998, at D1. By contrast, Willem (Wim) Frederik Duisenberg, the former President of the European Monetary Institute (EMI) and the head of the ECB since June 1, 1998 describes it in more optimistic terms: “[W]e are entering uncharted waters. But that in itself does not preclude the rationality of the project. It only means that in such an environment great attention must be devoted to the preparatory work in order to avoid the ship running aground . . . .” Willem F. Duisenberg, *The Role of the Future European System of Central Banks*, Remarks at the World Economic Forum in Davos (Jan. 30, 1998) (transcript available at the office of the *Houston Journal of International Law*); see also Lionel Barber, *The Euro: Single Currency, Multiple Injuries*, FIN. TIMES (London), May 5, 1998, at 2 (recounting the political battle surrounding the election of the EMI and the ECB president). This outlook has been supported by recent evaluations of financial experts who expect the euro to have a huge impact on the supremacy of the U.S. market as well as whether the dollar will continue to be the world's leading currency. See Edmund L. Andrews, *11 Nations Taking Next Pivotal Step Toward the Euro*, N.Y. TIMES, Apr. 26, 1998, at A1.

4. EC TREATY art. 109j(2).

5. See *id.* art 109j(4); see also RENÉ SMITS, *THE EUROPEAN CENTRAL BANK: INSTITUTIONAL ASPECTS* 116–20 (1997) (providing a brief description of the two transition procedures). However, many argue that having only a small number of participating member states will weaken the process of integration and the strength of the euro. See Richard Portes, *The Strength in Numbers: Personal View. Richard Portes: The More Countries Take Part in Emu, the Stronger the Euro Will Be*, FIN. TIMES (London), Aug. 11, 1997, at 12.

6. See EC TREATY art. 109j(1).

7. See *PROTOCOL ON THE STATUTE OF THE EUROPEAN SYSTEM OF CENTRAL BANKS AND OF THE EUROPEAN CENTRAL BANK*, TEU [hereinafter *ESCB PROTOCOL*]. The ESCB was created under a two-fold structure with the tasks and main features of the ESCB in the *EC Treaty* itself and the operational aspects in the *ESCB Protocol* as an integral part of the *EC Treaty*. See EC TREATY arts. 105–108, 239; *ESCB PROTOCOL*. This structure follows the model chosen for the EU's financial institution, the European Investment Bank (EIB) which was set up under the *EC Treaty*. See EC TREATY art. 198e; *PROTOCOL ON THE STATUTE OF THE EUROPEAN INVESTMENT BANK*, TEU.

sustainable convergence, which applies to the following:<sup>8</sup> (1) stable prices and low inflation;<sup>9</sup> (2) public finances (comprised of public deficit and public debt);<sup>10</sup> (3) exchange rates;<sup>11</sup> (4) long-term interest rates;<sup>12</sup> and (5) other factors.<sup>13</sup> The uniqueness of this “road on which there is no turning back”<sup>14</sup> is demonstrated by the fact that never in history have democratic states transferred their monetary policy sovereignty and abandoned their currencies in favor of a centralized, “supranational institution”<sup>15</sup> such as the ESCB.<sup>16</sup> The ESCB

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8. See SMITS, *supra* note 5, at 121–27 (providing a good presentation of the convergence criteria).

9. The criterion on price stability has not been absolutely fixed, instead it requires each country’s inflation rate to not exceed the inflation rate of the three best performing countries more than 1.5%. See EC TREATY art. 109j(1); PROTOCOL ON THE CONVERGENCE CRITERIA REFERRED TO IN ARTICLE 109J OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, TEU art. 1 [hereinafter PROTOCOL ON THE CONVERGENCE CRITERIA].

10. To avoid excessive deficits, the deficit ratio has been fixed at the level of 3% of the Gross Domestic Product (GDP), and the maximum debt ratio is adjusted to 60% of the GDP. See EC TREATY arts. 104c(1)–(6), 109j(1); PROTOCOL ON THE EXCESSIVE DEFICIT PROCEDURE, TEU art. 1.

11. “EU leaders decided that from August 2, 1993 forward, the EU currencies could fluctuate 15% above or below their assigned levels (except for the mark and Dutch guilder, which would remain at 2.25%).” Christopher Young, Note, *The Ramification of the Exchange Rate Collapse in Europe: Implications for Monetary Union*, 13 B.U. INT’L L.J. 263, 278 (1995); see also EC TREATY art. 109j(1); PROTOCOL ON THE CONVERGENCE CRITERIA art. 3. The EMS was designed to establish closer monetary policy cooperation between the member states by creating a zone of monetary stability to be reflected in the maintenance of exchange rates within certain fluctuation margins to be determined by the Exchange Rate Mechanism. See GOODMAN, *supra* note 1, at 182, 192.

12. Similar to the concept of price stability, a country must bring its average long-term interest rate within two percent of the three member states with the lowest average rates during the previous one year period. See EC TREATY art. 109j(1); PROTOCOL ON THE CONVERGENCE CRITERIA art. 4.

13. See EC TREATY art. 109j(1) (noting that “unit labour costs and other price indices” will be considered).

14. Hans Tietmeyer, *The Challenge of the Euro for Europe*, Special Address Delivered at the Conference “The Challenge of the Euro for Emerging Markets” (Feb. 12, 1998) (German transcript available at the office of the *Houston Journal of International Law*).

15. C. Fred Bergsten, *Year of the Euro; A Real Rival will Generate Healthy Competition for the U.S.*, WASH. POST, Jan. 3, 1999, at C7; see also Waldegrave, *supra* note 3, at 26.

16. See ESCB PROTOCOL art. 14. The decentralized structure of the ESCB is based mainly on the assumption that the single monetary policy imposed by the ECB would be best executed locally. See Duisenberg, *supra* note 3. It is very similar to the Bank deutscher Länder, the forerunner of the Deutsche

consists of a two-tier scheme as a commitment to its federal structure.<sup>17</sup> The ESCB will be comprised of the NCBs of the participating countries with the European Central Bank (ECB) as its “decision-making centre.”<sup>18</sup> These tiers are integrated to handle the new currency called the “euro.”<sup>19</sup> Like its forerunner the European Monetary Institute (EMI), the ECB<sup>20</sup> is located in the financial center of Germany, Frankfurt, where the German Central Bank (Deutsche Bundesbank) is also centered.<sup>21</sup>

Rumors concerning the possible first wave of EMU participants never seemed to end,<sup>22</sup> since according to the EMI’s *Convergence Report 1996*<sup>23</sup> the majority of the member states did not meet the necessary conditions for the adoption of the single currency.<sup>24</sup> The rumors were primarily due to the poor fiscal situation and the budgetary deficits of the member states.<sup>25</sup> The mystery about the “ins” and “outs” was

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Bundesbank. See DEUTSCHE BUNDESBANK, THE MONETARY POLICY OF THE BUNDESBANK 12 (1995).

17. See Duisenberg, *supra* note 3.

18. *Id.*; see also EC TREATY art. 106(1); ESCB PROTOCOL art. 14.3.

19. The term “euro” as introduced in December 1995 at the Madrid Summit replaces the old term ECU (European Currency Unit). See *Madrid European Council of Dec. 15–16, 1995, Conclusions of the Presidency*, EU BULL. no. 12, at 10, 10 (1995); *id.* at 56; see also *Legal Contracts Safe and Sound?*, FIN. TIMES (London), Nov. 12, 1998, at 45.

20. The formal and ceremonial launch however first took place on June 30, 1998. See William Drozdiak, *Grand Opening For Europe’s Central Bank*, WASH. POST, July 1, 1998, at C13.

21. See Wolfgang Munchau, *ECB Acts to Cope with Rising Workload: Recruitment Drive Plans to Hire Several Hundred Staff*, FIN. TIMES (London), Nov. 13, 1998, at 2. The ECB started its operations on July 1, 1998. See *id.*

22. See Gavin Gray, *If at First You Don’t Succeed, Make It Up. . .*, EUROPEAN, Mar. 2, 1998, at 54. Hans Tietmeyer, President of the Deutsche Bundesbank, refused to join in the speculation by stating that he would not make any forecasts with respect to possible participants. See Tietmeyer, *supra* note 14.

23. EUROPEAN MONETARY INST., PROGRESS TOWARDS CONVERGENCE 1996 (1996) [hereinafter EMI CONVERGENCE REPORT 1996]. The legal basis for this report is provided by the *EC Treaty*. See EC TREATY art. 109j(1); PROTOCOL ON THE STATUTE OF THE EUROPEAN MONETARY INSTITUTE, TEU art. 7 [hereinafter EMI PROTOCOL]. The EMI is to examine and report on “the compatibility between each Member State’s national legislation, including the statutes of its national central bank, and Articles 107 and 108” of the *EC Treaty* to ensure smooth integration. EC TREATY art. 109j(1). The EMI lays “particular emphasis” on the independence of the NCBs. EMI CONVERGENCE REPORT 1996, *supra*, at II, 104; see also EC TREATY arts. 107, 109e(5).

24. EMI CONVERGENCE REPORT 1996, *supra* note 23, at II.

25. See *id.*, at III–VII. The EMI stressed the “high and persistent unemployment” rate in the EU as a main reason for the unsatisfactory situation in the area of public finance. *Id.*, at III, VIII, 7. By the end of 1996, the EU

ultimately revealed on March 25, 1998 when the EU Commission and the EMI simultaneously published their respective convergence reports as required under Article

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unemployment rate was estimated to be approximately 11%. See EUROPEAN MONETARY INST., ANNUAL REPORT 1996, at 2 (1997) [hereinafter EMI ANNUAL REPORT 1996]. Alexandre Lamfalussy, the former EMI President, commented, "Unemployment trends, however, are extremely worrisome; in my view, the recent record of the Union in terms of job creation is dismal." *Id.* at XIV. This outlook has been confirmed by the EMI's 1997 *Annual Report* that mentioned the "much higher levels of youth and long-term unemployment." EUROPEAN MONETARY INST., ANNUAL REPORT 1997 at 3, 24 (1998) [hereinafter EMI ANNUAL REPORT 1997]. In Germany, the average unemployment rate in 1997 was 11.4%. See *Bank's Internal Risk Management Models and Their Prudential Recognition*, DEUTSCHE BUNDESBANK MONTHLY REP., Oct. 1998, at 65. The crucial importance of securing budgetary discipline and the concerns over excessive deficits led to an agreement at the Dublin Summit in December 1996, based on the "Stability and Growth Pact." See Lionel Barber & Neil Buckley, *Germany Pushes EU into Tough Pact over Euro*, FIN. TIMES (London), Dec. 14, 1996, at 18. This pact was submitted at the meeting by the Economics and Finance Ministers' (ECOFIN) Council, which consists of the Economic and Finance Ministers of the respective member states. See Jane Suiter, *Agreeing Principles of Single Currency was the Summit Coup*, IRISH TIMES, Dec. 16, 1996, at 11. The German Finance Minister, Theo Waigel, initiated the pact in 1995 as a countermeasure to excessive budgetary deficits (government deficits exceeding three percent of GDP). See Barber & Buckley, *supra*, at 18. The pact was intended to strengthen the fiscal consolidation by providing for a sound budgetary policy among the member states. See *id.* The pact calls for budgetary discipline measures, including surveillance, coordination and certain types of sanctions. See *Dublin European Council: Conclusions of the Presidency*, BULL. EU, no. 12, at 9, 10 (1996) [hereinafter *Conclusions of the Presidency*]; Resolution of the European Council on the Stability and Growth Pact, 1997 O.J. (C 236) 1; Resolution of the European Council on Growth and Employment, 1997 O.J. (C 236) 2. Ultimately, the European Council adopted these findings in regulations that became effective on July 7, 1998. See Council Regulation No. 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 1997 O.J. (L 209) 1; Council Regulation No. 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 1997 O.J. (L 209) 6. Moreover, the *EC Treaty* itself contains several safeguards compelling fiscal discipline, such as the obligation of the member states "to avoid excessive government deficits" and the nonliability of the Community for debts of the member states. EC TREATY arts. 104b(1), 104c(1). Fortunately, in the Commission's prediction of future economic developments, the prospective unemployment figures improved considerably. See *The Commission's Autumn 1998 Forecasts for 1998-2000*, EUR. ECON., Oct. 1998, at 1 [hereinafter *Autumn Forecast*]. Specifically, the Commission expects unemployment to fall to 10% in 1998, 9.5% in 1999, and 9% in 2000. See *id.* In contrast, the Organisation for Economic and Cooperative Development's employment outlook in June of 1998 anticipated an unemployment rate over 10% for 1998 and 1999. *Minimum Wages Can Help Reduce Poverty, Wage Gaps: OECD*, Agence France-Presse, June 22, 1998. The Stability and Growth Pact has a U.S. counterpart, the Full Employment and Balanced Growth Act of 1978, which obliges the Federal Reserve (the Fed) "to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." Full Employment and Balanced Growth Act of 1978, 12 U.S.C. §225a (1994).

109j(1) of the *EC Treaty*.<sup>26</sup> The Commission recommended the countries that were eligible for EU admission to the European Council.<sup>27</sup> For 11 member states the dream of the expected paradise has come true—Germany, France, Italy, Spain, Netherlands, Belgium, Austria, Finland, Portugal, Ireland, and Luxembourg.<sup>28</sup> By contrast, Sweden failed to fulfill two<sup>29</sup> and Greece failed four<sup>30</sup> of the above-mentioned criteria. In accordance with their particular status,<sup>31</sup> Denmark<sup>32</sup> and the United Kingdom<sup>33</sup> have already notified the Council that they

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26. EC TREATY art. 109j(1); EUROPEAN MONETARY INST. CONVERGENCE REPORT: REPORT REQUIRED BY ARTICLE 109J OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY (1998) [hereinafter EMI CONVERGENCE REPORT 1998]; EUROPEAN COMM'N, CONVERGENCE REPORT (PREPARED IN ACCORDANCE WITH ARTICLE 109J(1) OF THE TREATY) (1998) [hereinafter EC CONVERGENCE REPORT]; see also *Forty and Fatter but it's Still Worth Celebrating*, FIN. TIMES (London), Mar. 25, 1997, at 3.

27. See EC TREATY arts. 109j(1)–(2).

28. See EUROPEAN COMM'N, COMMISSION RECOMMENDATION FOR A COUNCIL RECOMMENDATION IN ACCORDANCE WITH ARTICLE 109J(2) OF THE TREATY, COM(98)1999 final at 9 [hereinafter COMMISSION RECOMMENDATION].

29. The Commission noted that “Sweden has made insufficient progress in the fulfilment of its legal obligations regarding the achievement of economic and monetary union.” *Id.* at 9. Furthermore, the Swedish krona has never been part of the exchange rate mechanism (ERM) and has experienced fluctuations against the ERM currencies while under review. See *id.* at 8; see also EC CONVERGENCE REPORT, *supra* note 26, at 30, 57–59, 162.

30. See COMMISSION RECOMMENDATION, *supra* note 28, at 4; EC CONVERGENCE REPORT, *supra* note 26, at 20–21. Although the “timing of the [Greece Central] Bank’s integration in the ESCB is not fully satisfactory,” its legislation was deemed “compatible with the Treaty and the ESCB Statute.” *Id.* at 20.

31. See SMITS, *supra* note 5, at 134–39 (describing briefly Denmark’s and the U.K.’s position under the *EC Treaty*).

32. See PROTOCOL ON DENMARK, TEU; PROTOCOL ON CERTAIN PROVISIONS RELATING TO DENMARK, TEU. In response to the Danish referendum of June 2, 1992, Denmark notified the EU Council “that it [would] not participate in the third stage” even before the *EC Treaty* went into force in November 1993. See Denmark and the Treaty on European Union, 1992 O.J. (C 348) 2. Thus, its status was subject to the Edinburgh European Council of December 11–12, 1992 and resulted in a “Decision of the Heads of State and Government” with respect to the problems caused thereafter for its participation in the EMU. See *id.*

33. See PROTOCOL ON CERTAIN PROVISIONS RELATING TO THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, TEU. The “opt-out” notification of the United Kingdom on October 30, 1997 was commented on by then Commission President Jacques Santer and then Euro Commissioner Yves-Thibault de Silguy, who are responsible for the economic and financial affairs and monetary matters of the EU. See *Disappointment Over Entry Timetable*, FIN. TIMES (London), Oct. 28, 1997, at 10. They “welcomes the overall positive UK attitude towards the euro, and its determination to prepare intensively for the introduction of the single currency.” *Id.* However, the Commission also felt that the United Kingdom could

will voluntarily not participate in the third stage of the EMU. However, even with all the enthusiasm and the major improvements that have been made throughout the EU within the last two years, it can not be overlooked that the debt-to-GDP ratio is still among the Community's biggest worries.<sup>34</sup> It is by no means surprising that the EMI, regarding the top stars in this area, Belgium (122.2%)<sup>35</sup> and Italy (121.6%),<sup>36</sup> has unambiguously expressed its doubts "whether the ratio of government debt to GDP will be 'sufficiently diminishing and approaching the reference value at a satisfactory pace.'"<sup>37</sup> The language used by Professor Hans Tietmeyer, President of the Deutsche Bundesbank,<sup>38</sup> was more direct when presenting the Statement of the Central Bank Council on the state of convergence in the EU

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only benefit by joining as soon as possible. *See id.* Similarly, Duisenberg's comments at the Bankers' Club Annual Banquet in London on February 16, 1998 specifically addressed the issue of exchange rate stability and the demand for a "high degree of stability" to enter the EMU, which the United Kingdom would not meet. Phil Murphy, *Problems Ahead for Britain in EMU*, Press Ass'n Newsfile, Feb. 17, 1998, available in LEXIS, Europe Library, PANews File. Apparently, the United Kingdom has realized its isolation from EMU members. Willem Buiter, a member of the Bank of England's Monetary Policy Committee, in pressing for the quickest possible membership into the EU stated that "the costs of remaining outside the single currency will be too high." Helen Dunne, *U.K. 'Will Have to Join Emu'*, DAILY TELEGRAPH (London), July 3, 1998, at 31; *see also* SMITS, *supra* note 5, at 134-39 (describing briefly Denmark's and the United Kingdom's position under the *EC Treaty*).

34. Despite the one percent decline in debt/GDP in 1997, the public debt remains very high at 72.1% throughout the EU. *See* EMI CONVERGENCE REPORT 1998, *supra* note 26, at 4-5; *Autumn Forecast*, *supra* note 25, at 18, 22. The issue of fiscal consolidation was also emphasized by Duisenberg in his introductory remarks at the March 25, 1988 press conference where he presented the *EMI Convergence Report 1998*. Dr. Willem Frederik Duisenberg, Introductory Remarks to Present the EMI's Convergence Report 1998 (March 25, 1998) <<http://www.ecb.int/emi/key/in980325.htm>>. He stressed that "substantial and persistent overall fiscal surpluses" are necessary in some countries and called for a "forceful debt reduction." *Id.*

35. *See* EMI CONVERGENCE REPORT 1998, *supra* note 26, at 41.

36. *See id.* at 153.

37. *Id.* at 14, 19. However, the Commission noted that Belgium's debt ratio peaked at 135.2% of GDP in 1993 and has "substantially and continuously" decreased since that time. EC CONVERGENCE REPORT, *supra* note 26, at 18. Thus, the Commission's recommendation is primarily based on the expectation of a further declination "in 1998 and in future years," and the commitment of Belgium "to maintain the primary surplus at a high level over the medium term." *Id.* Similar considerations are made in the case of Italy, with the hope of a decline "at a faster pace in 1998 and in future years." *Id.* at 24; *see also* EC TREATY art. 104c(2)(b).

38. *See* Wolfgang Munchau, *Sorting Hawks from Doves: The New Executive Board Defies the Usual Classification*, FIN. TIMES (London), May 12, 1998, at 3.

before the German Federal Cabinet.<sup>39</sup> Tietmeyer noted that the continuously expressed commitment to construe and apply the convergence criteria strictly and narrowly<sup>40</sup> is deemed all the more important since economic and fiscal policy will remain a national responsibility. He also raised “substantial doubts” and “serious concern” about the sustainability of the governmental fiscal situation in Belgium and Italy.<sup>41</sup> Tietmeyer calculated that Belgium and Italy would have to achieve a surplus of at least 2.3% and 2.2% respectively to fulfill the reference value of 60% debt ratio within ten years.<sup>42</sup> This ratio is very unlikely to be achieved in the near future since further deficits are expected in these states.<sup>43</sup> Thus, the Deutsche Bundesbank consented with

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39. See DEUTSCHE BUNDESBANK, OPINION OF THE CENTRAL BANK COUNCIL CONCERNING CONVERGENCE IN THE EUROPEAN UNION IN VIEW OF STAGE THREE OF ECONOMIC AND MONETARY UNION (1998) [hereinafter OPINION OF THE CENTRAL BANK COUNCIL]. Several days later, on April 3, 1998, Tietmeyer expressed the same opinion before the German Parliament. *German Central Banker Still Worries About Euro Start With Italy, Belgium*, Xinhua News Agency, April 3, 1998, available in LEXIS, Europe Library, Allnews File. However, it should also be observed that Germany was the only country whose debt ratio increased from 1996 to 1997 to 61.3%, mainly reflecting the exorbitant costs of the reunification which by the end of 1995 were about 825 billion deutschmarks. See EMI CONVERGENCE REPORT 1998, *supra* note 26, at 15; Press and Information Office, Federal Government of Germany, *The Economic Unification of Germany* (visited Nov. 21, 1998) <<http://www.bundesregierung.de/english/02/0201/020116/index.html>>.

These “exceptional circumstances” were also recognized and accounted for by both the EMI and the European Commission convergence reports. EMI CONVERGENCE REPORT 1998, *supra* note 26, at 73–76; EC CONVERGENCE REPORT, *supra* note 26, at 119–20; Christopher Rhoads, *Bundesbank Clears EMU, With Caution*, WALL ST. J. EUR., Mar. 30, 1998, at 9.

40. *EMU Chances Best With Homogenous Group—Tietmeyer*, Reuters Fin. Service, Apr. 21, 1997, available in LEXIS, Europe News Library, Allnews File. The same view was also expressed in the resolution by the European Council. See *Conclusions of the Presidency*, *supra* note 25, at 10.

41. OPINION OF THE CENTRAL BANK COUNCIL, *supra* note 39, at 19–21. Nevertheless, in view of the recent progress in convergence made throughout all the member states, Tietmeyer also expressed his view that despite the remaining risks, entry into the EMU in 1999 “appears justifiable in stability policy terms.” *Id.* at 21.

42. See *id.* tbl.5. This model is based upon the assumption of a “close link” between the government deficit and the government debt. *Id.* at 16–17. The model suggests that the higher the level of government debt, the lower the budgetary deficit needs to be or the more surpluses have to be generated to reduce the debts to a specified reference value within a given period of time. See *id.*

43. See EMI CONVERGENCE REPORT 1998, *supra* note 26, at 14, 19 (expecting a 1998 deficit ratio of 1.7% in Belgium and 2.5% in Italy). This is even more probable since Belgium and Italy, like other member states, have taken “temporary” deficit-reducing measures. See *id.* at 7. While the impact of

reservations to the Commission's evaluation,<sup>44</sup> while the Federal Government expressed its concern more modestly by only insisting on the achievement and maintenance of the criteria.<sup>45</sup>

In contrast to the general consent about who should be in, there seems to be a never-ending fight about how the ESCB should be organized and structured with regard to its

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such measures in Belgium was relatively small with 0.3%, Italy leads with 1.0%. *See id.* at 41, 154. Moreover, it should also be noted that the change to the single currency will naturally create enormous costs for the respective countries which cannot rely on the takeover of debts by other states or even the Community. *See* EC TREATY art. 104b(1).

44. *See* Die Welt, *Wie fit sind die Euro-Kandidaten? (How Fit Are the Euro-Candidates?)* (Apr. 30, 1998) <<http://www.welt.de/archiv/1998/04/30/0430wi07.htm>>. The Bundesbank leveled even harsher criticism when the final list of countries joining the European Union were announced. *See id.* Professor Reimut Jochimsen, Member of the Central Bank Council of the Deutsche Bundesbank and President of the Central Bank of the State of North Rhine-Westfalia, only deemed five countries to be eligible for the last stage, namely Denmark and the U.K. (which have chosen to not take part), Finland, Ireland and Luxembourg. *See id.* His main complaint was that several member states, including Germany, only reached the goal because they used creative accounting, one-time actions and other balance sheet tricks. *See id.* Similarly, Tietmeyer confirmed that "Denmark, Finland, Ireland, Luxembourg, and the United Kingdom have achieved a fiscal position which can unreservedly be classified as being sustainable." OPINION OF THE CENTRAL BANK COUNCIL, *supra* note 39, at 19. He then called on the German government to continue its consolidation measures, including "further radical reforms of the social security systems . . . in order to achieve a sustainable fiscal position." *Id.* Nevertheless, he refrained from any interference in this highly political matter by stating that "[t]he selection of the participants ultimately remains a political decision." *Id.* at 23.

45. *See* *Government and Bundestag Endorse Currency Union Plan; Constitutional Court Dismisses Challenge*, WK. IN GERMANY, Apr. 3, 1998. The same position is true for the Council who recently met on May 1, 1998. *See* Econ. and Fin. Ministers' Council, *ECOFIN Press Release* (visited Feb. 18, 1999) <<http://ue.eu.int/Newsroom/LoadDoc.cfm?MAX=1&DOC=!!!&BID=93&DID=55314&GRP=1295&LANG=1>>. The Council also had to decide for each member state whether or not excessive public deficits still exist. *See id.* As expected in view of the Commission's convergence report recommendation, the Council shared this optimistic economic outlook and abrogated its decision on the existence of an excessive 1997 deficit for Belgium, Germany, Spain, France, Italy, Austria, Portugal, Sweden, and the United Kingdom. *See id.* In the meantime, due to the lack of progress in reducing budgetary deficits, Duisenberg showed the "yellow card" to the 11 EMU countries, followed by a warning from EU commissioner Yves-Thibault de Silguy that it is "[b]etter to be given a yellow card now than a red card later," which, as is well known, leads to the expulsion of a player in a soccer game. *European Central Bank Chief Warns "Euroland" States on Finances*, DEUTSCHE PRESSE-AGENTUR, July 8, 1998, available in LEXIS, Europe Library, DPA File; Barry James, *Euro Group is Warned to Rein in Spending; Finance Ministers Balk at Santer's Demand for Reduced Deficits*, INT'L HERALD TRIB. (Neuilly-sur-Seine, France), July 7, 1998, at 1.

independence and political accountability.<sup>46</sup> Recently these issues were highlighted during the nomination of the ECB President. Despite consensus among most member states that EMI President and former Governor of the Nederlandsche Bank, Willem (Wim) Frederick Duisenberg, should receive the nomination, France nominated Jean-Claude Trichet as a candidate for the position.<sup>47</sup> Trichet, as head of the Banque de France,<sup>48</sup> is known for his desire to make the ECB and its policies more politically accountable.<sup>49</sup> The battle for the ECB presidency is surprising since the ECB's stated policy is to be solely committed to the task of achieving price stability throughout the entire Community, regardless of the nationality and the interests of the member country whose citizen heads the ECB.<sup>50</sup> Hence, the cut and thrust that mainly took place between Bonn and The Hague on the one hand and Paris on the other did not only provide for tensions in the political relationships among the respective countries, but also endangered the credibility of the ECB and the prospective venture of the single currency.<sup>51</sup> France, faced with the

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46. See Edmund L. Andrews, *French-German Feud Dampens Euro Enthusiasm*, N.Y. TIMES, Apr. 29, 1998, at D1.

47. See *id.* Duisenberg was appointed by the Dublin Summit in December 1996 and was given a mandate to stay in office until the ECB was established. See *Conclusions of the Presidency*, *supra* note 25, at 10. He succeeded Baron Alexandre Lamfalussy, who was the president of the EMI since January 1, 1994. See *id.*

48. See Andrews, *supra* note 46, at D1.

49. See generally Lawrence J. Speer and Bengt Ljung, *Franco-German Summit Tackles Truck Strike, European Central Bank Choice*, Int'l Bus. & Fin. Daily (BNA) (Nov. 6, 1997) available in LEXIS, Fedsec Library, BANIBF File (providing background information on the dispute); see also Andrews, *supra* note 46, at D1. The Frenchman also enjoyed the support of the French President, Jacques Chirac. See Robert Graham, *French Reopens Split on Sovereignty*, FIN. TIMES (London), Nov. 25, 1998, at 3. Unlike the prime minister of the French socialist government, Lionel Jospin, Chirac supports the euro and is not afraid that France will lose its identity when the euro is introduced. See *id.*

50. See *Warning Over Franco-German Ties—Criticism of ECB Row by Herzog*, DEUTSCHE PRESSE-AGENTUR, June 4, 1998, available in LEXIS, Europe Library, DPA File (quoting Roman Herzog, the current president of Germany, as stating that "European personnel decisions should not be solely from a national point of view or instrumentalised for domestic purposes . . . . When a historic decision over something like . . . currency union is turned into political small change then nobody should be surprised when Euro-frustration does not go away but instead grows.").

51. See Jane Suiter, *It's Time to Employ a Captain on the Euro Ship: The European Central Bank will be the Loser in the Row Over Whether to Appoint Wim Duisenberg or Jean-Claude Trichet as its Head*, IRISH TIMES, Apr. 24, 1998, at 55. Duisenberg at a news conference in Frankfurt deemed the ongoing trouble "not helpful for the credibility of the future of the European central bank," but

deadlock over the ECB presidency, also blocked the appointment of a successor to the London-based European Bank for Reconstruction and Development (EBRD), which was headed by the Frenchman Jacques Larosiere until January 31 1998.<sup>52</sup> The publicity of this messy squabble, within the EU and the United States as well, caused many to question the supposedly harmonized union.<sup>53</sup> Observers were probably asking themselves how one of the biggest challenges of the 21st century could be achieved when there was trouble right from the start. Interestingly, a suggestion not provided for in the *Maastricht Treaty* or the *EMI Protocol* was made to settle the case simply by sharing the regular eight year term between the two competitors.<sup>54</sup> Naturally, as with every compromise there was resistance and support.<sup>55</sup> Everyone was curiously looking forward to the final round of the ongoing fight to take place in Brussels on May 2, 1998 when the Council of the European Union, composed of the heads of state and government, would make the ultimate decision on the countries that would participate in the last stage of EMU. The negotiations among the fifteen heads finally culminated in a political understanding and a unanimous nomination of Wim Duisenberg as the future

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conceded that "we can't do much about it." Edmund L. Andrews, *Official Stamps of Approval for the Euro Plan*, N.Y. TIMES, Mar. 26, 1998, at D4. Fortunately, despite this trouble, the response of the financial markets was quite positive after the announcement of the 11 countries and the appointment of Duisenberg. See Thomas Kamm, *Europe's Market Applaud Bank 'Dream Team'*, WALL ST. J., May 5, 1998, at A16.

52. See Jane Suiter, *French Agreement with Germany May Revolve Row over ECB Head*, IRISH TIMES, Mar. 2, 1998, at 16; *EBRD Chief Steps Down*, FIN. TIMES (London), June 28, 1997, at 3.

53. See, e.g., Andrews, *supra* note 3, at A1; see also Andrews, *supra* note 46, at D1; *Euro Banker*, FIN. TIMES (London), Jan. 9, 1998, at 15; see generally Thomas Kamm et al., *EMU is Born Amid Battle over Central Bank*, WALL ST. J., May 4, 1998, at A17 (evaluating the dispute and subsequent compromise).

54. See Kamm et al., *supra* note 53, at A17. An alternative would have been to set an age limit for the job of the president. See *id.*; see also *Blair Meets Dutch on ECB Row*, FIN. TIMES (London) May 1, 1998, at 2.

55. See, e.g., *Horse-Trading on ECB Presidency Criticized, but Overall Positive Reactions on Decision to Go Ahead with EMU*, INT'L MARKET INSIGHT REP., May 11, 1998 (noting the criticism and the support of the compromise). On April 30, 1998 when the EU adopted the Commission's recommendation concerning the 11 member states, it called on the European Council in a key amendment to adhere to its commitments and name a single candidate for the presidency of the ECB at its summit meeting scheduled for May 2. See European Parliament, *Legislative File A4-013D98* (visited Nov. 17, 1998) <<http://www.europarl.eu.int/r/dors/oeil/en/default.htm>>.

president of the ECB.<sup>56</sup> Unfortunately, this was not the end of the dispute, but the beginning of new debates, rumors, and misrepresentations that filled newspapers throughout the world.<sup>57</sup> In particular, German Chancellor Kohl was heavily criticized,<sup>58</sup> a fact that the opposing Social Democratic Party warmly welcomed in view of the forthcoming elections on September 27, 1998.<sup>59</sup> The stumbling block was that there had been “horse-trading”; France was allegedly given the right to take over the ECB presidency after four years.<sup>60</sup> At least the wording of Duisenberg’s response to his nomination did not give rise to such concern. He clarified the situation in public and during his hearing before the European Parliament’s Committee on Economic and Monetary Affairs on May 7, 1998.<sup>61</sup> In his statement, he announced that he does not want

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56. See Council Decision 98/345, art. 1, 1998 O.J. (L 154) 33; Council Recommendation of May 3, 1998 on the Appointments of the President, the Vice-President and the Other Members of the Executive Board of the European Central Bank, Council Recommendation 98/318, 1998 O.J. (L 139) 36 [hereinafter Council Recommendation of May 3, 1998]. Later the same day, the Council adopted the European Council’s recommendation and issued its opinion to appoint “Willem Frederik Duisenberg as President of the ECB, for a term of office of eight years.” Opinion of the Council of the European Monetary Institute under Article 109l(1) of the Treaty Establishing the European Community and Article 50 of the Statute of the European System of Central Banks and of the European Central Bank, on a Recommendation from the Council of the European Union for the Appointment of the President, the Vice-President and Other Members of the Executive Board of the European Central Bank, ¶ 1, 1998 O.J. (C 169) 14.

57. See, e.g., Edmund L. Andrews, *With Euro Accord in Place, Next Question is Credibility*, N.Y. TIMES, May 4, 1998, at D2; Kamm et al., *supra* note 53, at A17.

58. See Deborah Colcutt, *Waigel Says Euro Bank Row with French Damaged Kohl*, TIMES (London), May 6, 1998; Lucy Smy & Robert Graham, *Chirac and Kohl Under Fire for Bank Compromise*, FIN. TIMES (London), May 5, 1998, at 1. Chancellor Kohl, in turn, placed the blame on Prime Minister Tony Blair, who currently holds the Council Presidency, because he purportedly failed to provide an earlier solution. See Andrew Gimson, *Germans Blame Blair for Brussels Bank Debacle*, DAILY TELEGRAPH (London), May 7, 1998, at 18. This view was supported by Jean-Claude Juncker, Prime Minister of Luxembourg. See *id.*

59. See Smy & Graham, *supra* note 58, at 1; Edmund L. Andrews, *Euro Deal Adds to Kohl’s Political Woes*, N.Y. TIMES, May 6, 1998, at A6.

60. Gimson, *supra* note 58, at 18.

61. See European Parliament, *Hearing of Mr. Wim Duisenberg, President Designate of the ECB* (visited May 13, 1998) <<http://www.europarl.eu.int/dg7/hearings/en/ecb/01.htm>> [hereinafter *Parliament Hearing*] (speaking to the European Parliament); see also *Wim Duisenberg Confirms He May Not Serve His Eight-Year Term*, Eur. Rep., May 9, 1998, available in LEXIS, Europe Library, IDDEur File (providing a short summary). In response to several inquiries concerning his intended term of office, he repeatedly emphasized that

to serve the full term in view of his age.<sup>62</sup> He also made clear his intention to stay through the transitional arrangements for the introduction of the euro notes and coins in January 2002.<sup>63</sup> For the French, this wording was enough to celebrate their victory.<sup>64</sup> Presumably, they did not want to hear the final remarks of Duisenberg at the EU Summit that read as follows:

I wish to emphasize that this is my decision, and my decision alone, and it is entirely of my own free will, and mine alone, and not under pressure from anyone that I have decided not to serve the full term. . . . Also in the future the decision to resign will be my decision alone. This must be clearly understood.<sup>65</sup>

We will see if he keeps his promise.

In any event, this story shows that dynamite still exists in the supposedly regulated issues of independence and accountability, and the question simply remains: why? This article therefore intends to provide insight into the sensitive areas of these issues and will also explain the structure and functioning of the ESCB. Due to the developing nature of the EMU and the ESCB, the author will naturally refer to recent developments related to these matters. Moreover, because the

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he never said he would only serve for a certain period of time. See *Single Currency: Euro Launch Wins Applause from the Markets and American Optimism*, European Rep., May 9, 1998, available in LEXIS, Europe Library, IDDEur File. Instead, despite all the pressure put on him, he has consistently refused to announce a fixed date. See *id.* The mention of the euro's full introduction date was only meant to set a minimum date but by no means to fix a final deadline. See *id.*

62. See *Parliament Hearing*, supra note 61. Duisenberg was born on July 9, 1935 in Heerenveen, a city close to Amsterdam. See Anne Swardson, *Dutchman Plays Key Role in 'Euroland' Drama*, WASH. POST, Dec. 15, 1998, at D1. By contrast, his seven years younger contestant Jean-Claude Trichet was borne on December 20, 1942 in Lyons, France. See *President of the European Central Bank*, IRISH TIMES, Apr. 27, 1998, at 14.

63. See Andrews, supra note 57, at D2.

64. See Thomas Kamm, *France Goes After Presidency of EBRD Days After its Central-Bank Victory*, WALL ST. J., May 7, 1998, at A18.

65. *Of My Own Free Will, Not Under Pressure*, FIN. TIMES (London), May 4, 1998, at 2. On May 13, 1998 the European Parliament's vote on the prospective members of the ECB Executive Board confirms Duisenberg's interpretation of "free will" to leave his office. *European Central Bank: Parliament Asks Duisenberg to Stay on After Four Years*, Eur. Rep., May 16, 1998, available in LEXIS, Europe Library, Allnws File. The European Parliament adopted an amendment which stresses that there is no legal obligation to quit the job before the end of the eight year term. See *id.*

ECB is supposedly modeled after the Deutsche Bundesbank, the functioning of the two are closely linked.

## II. THE EUROPEAN SYSTEM OF CENTRAL BANKS (ESCB)

### A. *Historical Background: From Hanover to Maastricht*

The key elements of the ESCB blueprint were spelled out as early as April 1989 by a committee chaired by Jacques Delors, then President of the European Commission.<sup>66</sup> It included all twelve NCB governors,<sup>67</sup> entrusted by the European Council<sup>68</sup> with “the task of studying and proposing concrete stages leading towards this union.”<sup>69</sup> Having met in Hanover, Germany, in the summer of 1988, the committee released its report that recommended the realization of the EMU in three stages.<sup>70</sup> Stage one was scheduled to last from July 1, 1990 to December 31, 1993 and was aimed at dismantling all internal barriers to the free movement of capital within the EU. It also aimed to align the Community’s national economic and monetary policy more closely with the requirements of monetary stability and budget discipline

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66. See GEORGE ROSS, JACQUES DELORS AND EUROPEAN INTEGRATION 1 (1995). Jacques Delors was the most successful president of the European Commission. See *id.* at 14. He was first appointed President by the Council in January 1985. See *id.* at 29–30. It was mainly under his influence that the EMU was formed and pushed forward. See *id.* at 3–4 (providing a biographical history of Delors and his work in integrating Europe).

67. The Committee was further composed of Alexandre Lamfalussy (at that time the General Manager of the Bank for International Settlements (BIS) and Professor of Economics at the University of Louvain-la-Neuve), Niels Thygesen (Professor of Economics at the University of Copenhagen), and Miguel Boyer (then President of the Banco Exterior de España). See *Hanover European Council of June 27–28, 1988, Conclusions of the Presidency*, 21 BULL. EC, no. 6, at 164, 166 (1988) [hereinafter *Hanover European Council*].

68. The European Council is distinguished from the Council of the EU which is also referred to as the Council of Ministers due to its composition. See EC TREATY art. 146. By contrast, the European Council is not an institution of the European Union and is composed of the Heads of State from each member state. See EC TREATY art. 4; TEU art. D. Its purpose is to “provide the Union with the necessary impetus for its development” and to “define the general political guidelines thereof [sic].” TEU art. D.

69. *Hanover European Council*, *supra* note 67, at 166.

70. See COMM. FOR THE STUDY OF ECON. AND MONETARY UNION, REPORT ON ECONOMIC AND MONETARY UNION IN THE EUROPEAN COMMUNITY 31–39 (1989); *Report of the Committee for the Study of Economic and Monetary Union*, 22 BULL. EC, no. 4, at 9 (1989) [hereinafter *Report of the Committee*] (summarizing the Report on Economic and Monetary Union in the European Community); MEHNERT-MELAND, *supra* note 1, at 8 (surveying the different steps).

within the existing institutional framework.<sup>71</sup> Stage two, scheduled to commence on January 1, 1994, was deemed a transitional period to the final stage.<sup>72</sup> Most significantly it provided for the establishment of the ESCB, “which would be independent from instructions from national governments and Community authorities” and “would consist of a new Community institution and the existing national central banks coexisting within a federal structure.”<sup>73</sup> However, during this period the responsibility for policy decisions would stay with the member states.<sup>74</sup> Finally, in stage three the ESCB would replace the central banks and would be solely responsible for the formulation of the monetary policy.<sup>75</sup> Moreover, exchange rates would be irrevocably locked, and a single currency would eventually be introduced.<sup>76</sup>

At the Madrid European Council of June 1989, the Delors recommendations were eventually approved, and the date for the beginning of the first stage of the EMU was set for July 1, 1990.<sup>77</sup> Up to this point, there was no need to revise or amend the *Treaty of Rome* as the legal basis for the execution of the first stage. Attendees of the Madrid Summit set up a new framework and institutional structure for the second and third stages, including the ESCB provisions.<sup>78</sup> It consequently called for “the preparatory work for the organization of an Intergovernmental Conference”.<sup>79</sup> The

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71. See *Report of the Committee*, *supra* note 70, at 9; MEHNERT-MELAND, *supra* note 1, at 8.

72. See EC TREATY art. 109e; *Report of the Committee*, *supra* note 70, at 9.

73. *Report of the Committee*, *supra* note 70, at 8; EMI PROTOCOL art. 2.

74. See EMI PROTOCOL art. 4(1) (stating that the EMI should normally be consulted before the member states make economic policy decisions).

75. See MEHNERT-MELAND, *supra* note 1, at 8; *Report of the Committee*, *supra* note 70, at 9; EC TREATY art. 105(2); ESCB PROTOCOL art. 12(1).

76. See MEHNERT-MELAND, *supra* note 1, at 8; *Report of the Committee*, *supra* note 70, at 9.

77. See *Madrid European Council*, 22 BULL. EC, no. 6, at 11 (1989).

78. See REPORT ON ECONOMIC AND MONETARY UNION IN THE EC, *supra* note 70, at 34-37.

79. *Madrid European Council*, *supra* note 77, at 11. See also Christopher A. Whytock, *EUROFED: Toward a European System of Central Banks and a European Central Bank*, 23 *Law & Pol’y Int’l Bus.* 469, 481-82 (1992) (providing more details on the amendment of the Treaty of Rome, also known as the EEC Treaty). As indicated by the name, an Intergovernmental Conference is intended to bring together government heads of state. See European Parliament, *Intergovernmental Conferences: An Overview* (visited Jan. 8, 1999) <<http://europa.eu.int/en/agenda/igchome/general/overview.html>> “The IGC on economic and monetary union was comprised mainly of officials from national Treasuries and Finance Ministries” and was held to discuss and

introduction of an Intergovernmental Conference (IGC) to the Economic and Monetary Union was pushed forward in December 1989 at the European Council meeting in Strasbourg, France, where it was noted with satisfaction “that the necessary majority existed for convening such a conference under Article 236 of the *EC Treaty*.”<sup>80</sup> The IGC was scheduled to be introduced “before the end of 1990.”<sup>81</sup> Subsequently, in April 1990 a special meeting of the Dublin European Council was called in response to the political events in the Federal Republic of Germany and the German Democratic Republic caused by the fall of the Berlin Wall.<sup>82</sup> At this meeting, the idea was born to call for an additional IGC on a political union, which would run in parallel to the IGC on EMU.<sup>83</sup> Just two months after this declaration, the European Council, again meeting in the Irish capital, unanimously decided that the IGC on the EMU should open December 13, 1990 while the IGC on Political Union should open one day later.<sup>84</sup> At the Rome Summit in October 1990, all the member states, except the United Kingdom, agreed to a concept of the overall EMU structure and the ESCB in particular, which provided that the ESCB “as well as the

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negotiate changes with respect to the primary law of the Community. *See id.* Thus, the IGC can be described as the formal mechanism for revising treaties. *See id.*

80. *Strasbourg European Council of Dec. 8-9, 1989, Conclusions of the Presidency*, 22 BULL. EC, no. 12, at 11 (1989) [hereinafter *Strasbourg European Council*]; *see also* EEC TREATY art. 236. Although Article 236 of the Treaty of Rome was subsequently deleted by virtue of the *Maastricht Treaty*, it stipulated the following:

The Government of any Member State or the Commission may submit to the Council proposals for the revision of this Treaty. If the Council, after consulting the Assembly and, where appropriate, the Commission, expresses an opinion in favour of the calling of a conference of representatives of the Governments of Member States, such conference [shall] be convened by the President of the Council for the purpose of determining in common agreement the amendments to be made to this Treaty. Such amendments shall enter into force after being ratified by all Member States in accordance with their respective constitutional rules.

EEC TREATY art. 236.

81. *Strasbourg European Council*, *supra* note 80, at 11.

82. *See Dublin European Council of April 28, 1990, Conclusions of the Presidency*, 23 BULL. EC, no. 4, at 9, 9 (1990).

83. *See id.*

84. *See Dublin European Council of June 26-27, 1990, Conclusions of the Presidency*, 23 BULL. EC, no. 6, at 10, 10 (1990).

members of its council, will be independent of instructions.”<sup>85</sup> However, it also provided that the ESCB would “report to the institutions which are politically responsible.”<sup>86</sup> Moreover, the conferences were pushed forward and both scheduled for December 14, 1990.<sup>87</sup> Finally, at the second Rome Summit held two months later on December 14–15, 1990, the IGCs began their work.<sup>88</sup> Their negotiations finally culminated in an agreement on a draft *Treaty on European Union* at the Council Meeting in Maastricht in December 1991.<sup>89</sup> The draft is comprised of two kinds of treaties: one on economic and monetary union and the other on political union.<sup>90</sup> Insofar as it concerns the EMU, and more particularly the ESCB as the heart of the monetary union, it should be noted that the IGC largely followed the draft statutes on the ECSB and the ECB.<sup>91</sup> The draft statutes were prepared earlier by the committee of governors of the central banks of the member

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85. *Rome European Council of October 27–28, 1990, Conclusions of the Presidency*, 23 BULL. EC, no. 10, at 9, 9 (1990).

86. *Id.*

87. *See id.* at 9.

88. *See Rome European Council of December 14–15, 1990, Conclusions of the Presidency*, 23 BULL. EC, at 7–8. (1990).

89. *See Maastricht European Council, Conclusions of the Presidency*, 24 BULL. EC, no. 12, at 7, 8 (1991) [hereinafter *Maastricht European Council*].

90. *See id.* at 17–19. However, it should be observed that the political union is still in an embryonic stage even though the *Maastricht Treaty* took some qualitative steps forward. These steps included the introduction of EU citizenship, the inclusion of provisions for a common foreign and security policy, and the introduction of cooperation in the areas of justice and home affairs. *See* EC TREATY arts. 8–8e (citizenship); TEU arts. J–J.11 (foreign and security policy); TEU arts. K–K.9 (cooperation in justice and home affairs). However, there is neither a common fiscal nor a common economic or social policy embodied in the *Maastricht Treaty*. In the long term, it is necessary to deepen the political union. *See* Commission Opinion of the Committee of the Regions on ‘Economic and Monetary Union,’ art 2.15, 1997 O.J. (C 34) 3. The lack of political integration, particularly in the field of fiscal policy, was therefore one of Hans Tietmeyer’s two complaints against the *Maastricht Treaty*. *See Europe Will Get Only One Chance for a Common Currency, Tietmeyer Warns*, Int’l Bus. & Fin. Daily (BNA) (Nov. 21, 1994) available in LEXIS, Fedsec Library, BNAIBF File. The other key problem he foresaw was the missing training time to allow NCBs to get used to their independence. *See id.*; *see also* Safire, *supra* note 3, at A33 (noting that the “Eurocrats are putting the cart first, using a supranational bank to impose a political union” instead of putting the “political horse before the economic cart”). The issue of a political union in the sense of a “central government” has again been raised. Josef Joffe, *Europe’s Colossal Coin Toss*, N.Y. TIMES, May 1, 1998, at A27. Chancellor Kohl, however, has clearly stated that he absolutely rejects a “central state.” *Backing the Commission*, IRISH TIMES, June 15, 1998, at 15.

91. *See Maastricht European Council, supra* note 89, at 7.

states.<sup>92</sup> Ultimately, the draft *Treaty on European Union* was signed in Maastricht on February 7, 1992<sup>93</sup> and went into force on November 1, 1993.<sup>94</sup> Shortly after that, the EMU entered its second stage on January 1, 1994 with the establishment of the EMI.<sup>95</sup>

## B. The Establishment of the ESCB

### 1. The EMI

Like Rome, the ESCB will not be built in a day. A general outline of the mandatory procedures and the timetable for its introduction is stipulated in the *EC Treaty*.<sup>96</sup> The Executive Board is the decision-making body of the ECB.<sup>97</sup> The Executive's Board's first formal meeting on June 2, 1998<sup>98</sup> marked the final measure for the running of the ESCB. It is only natural that a lot of preparatory work had to be done.

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92. See *Member States Prepared to Sign EMU Treaty at End of Year*, Eur. Rep., Sept. 25, 1991, available in LEXIS, Europe Library, Allnws File. The drafts were signed on November 13, 1990. See Peter Norman, *EC Agrees Draft Statutes for a European Central Bank*, FIN. TIMES (London), Nov. 14, 1990, at 2; Will Hutton, *Drafts for New Euro Bank to be Signed Today*, GUARDIAN (London), Nov. 13, 1990, at 17; see also *Central Bank Draft Statute*, Agence Eur., Dec. 8, 1990, available in LEXIS, News Library, Allnws File (publishing a copy of the draft statute). This institution was formed in 1964 by a special Council decision for "the purpose of promoting co-operation between the Central Banks of the Member States." Council Decision 64/300, art. 1, 1964 O.J. Spec. Ed. 141. Its tasks are comprised of the holding of consultations, the exchange of information, and the formulation and expression of opinions. See *id.* As a consequence of the beginning of the first stage of the EMU, its responsibilities have been extended. See Council Decision 90/142, 1990 O.J. (L 78) 25 (amending Council Decision 64/300). At the beginning of stage two, the Committee of Governors was dissolved. See EC TREATY art. 109f(1). Its functions were replaced by the EMI. See *id.*

93. See *Follow-up to the Maastricht and European Council*, 25 BULL. EC, no. 1-2, at 11 (1992).

94. See MEHNERT-MELAND, *supra* note 1, at ix.

95. See EC TREATY arts. 109c(1), 109f(1).

96. See generally *id.* arts. 102a-109d.

A European System of Central Banks . . . and a European Central Bank . . . shall be established in accordance with the procedures laid down in this Treaty; they shall act within the limits of the powers conferred upon them by this Treaty and by the Statute of the ESCB and of the ECB . . . annexed thereto.

*Id.* art. 4a.

97. See *id.* art. 4a.

98. See Wolfgang Munchau, *Bank Must Define Its Target*, FIN. TIMES (London), June 2, 1998, at 3.

Therefore, the member states, by deviating from the Delors Report, created a temporary monetary institution, the EMI, under the *EC Treaty*<sup>99</sup> and entrusted it with various responsibilities including authority in the areas of monetary policy,<sup>100</sup> foreign exchange policy,<sup>101</sup> accountability,<sup>102</sup> payment systems,<sup>103</sup> banking supervision,<sup>104</sup> and the issuance of euro banknotes.<sup>105</sup> They were laying the

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99. EC TREATY art. 109f(1). It is clear from Article 4 of the *EC Treaty* that the EMI is not a real institution of the EU. However, it has a legal personality. *See id.*; *see also* EMI PROTOCOL art. 14.

100. *See* EC TREATY arts. 109f(2), (4).

101. *See id.* art. 109f(4).

102. *See id.* art. 109f(1).

103. *See id.* art. 109f(2).

104. *See id.* arts. 109f(2), (4).

105. *See id.* art. 109f(3). Although the EMI has responsibility for banking supervision, it should be observed that the task of prudential supervision will not be executed by the ECB, even though the *EC Treaty* provides for the allocation of "specific tasks" to the ECB in this area. *Id.* art. 105(6). Thus, the ECB, according to the opinion of the former European Regional Affairs Commissioner, Bruce Millan, is supposed to become involved in prudential supervision "only in exceptional circumstances." *Report Cites Shortcomings in EU Bank Supervision Rules*, Int'l Bus. & Fin. Daily (BNA) (May 11, 1994) available in LEXIS, Fedsec Library, BNAIBF File; *see also* *EP Calls for Study on Prudential Rule of ECB*, Reuters Euro. Community Rep., May 6, 1994, available in LEXIS, Europe Library, Alleur File. The general concept, however, as stipulated under Article 105(5) of the *EC Treaty*, is ensuring the competence of the national authorities. *See id.* arts. 105(5)–(6). Accordingly, the preparatory work of the EMI is in accordance with the prospective responsibilities of the ECB, mainly limited to its consulting function. *See id.* arts. 105(6), 109f(2); *see also* EMI PROTOCOL art. 25. This is accomplished by identifying possible ways in which the ESCB, particularly the ECB, can 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." *Id.* art. 105(5). For this purpose, the EMI set up a subcommittee on banking supervision. *See* EMI ANNUAL REPORT 1996, *supra* note 25, at 79. Duisenberg announced that the ECB will coordinate banking supervision through an ECB director and "a small team of six people" and that the ECB will not participate in the Basle Committee. *ECB's Duisenberg Says Banking Supervision to Rest With National Central Banks*, AFX News, July 6, 1998, available in LEXIS, Europe Library, Allnws File. The trend towards supervisory agencies operating independently from their respective central banks has been confirmed lately by the removal of supervisory responsibilities from the Bank of England. *See* Tess Read, *Who Should Oversee the Banks?*, EUROMONEY, Aug. 1997, at 56, 56. Similarly, in Germany prudential supervision is allocated to the Federal Banking Supervisory Office (FBSO) located in Berlin with a link to the Bundesbank, which supports the FBSO by collecting information. *See* HANS-HERMANN FRANCKE & MICHAEL HUDSON, *BANKING AND FINANCE IN WEST GERMANY* 66–67 (1984). As Tietmeyer has emphasized, it can only benefit a central bank and its credibility not to be involved in banking supervision. *See* Garth Hewitt, *Hans Tietmeyer: President of the Bundesbank*, BANKING WORLD, Sept. 1994, at 22, 27. An excellent paper about the issue of banking supervision has recently been

groundwork for the functioning of the ESCB in stage three and a smooth takeover by the ECB.<sup>106</sup> In particular, as stipulated under Article 109f(3) of the *EC Treaty* the EMI had to “specify the regulatory, organizational and logistical framework necessary for the ESCB” by December 31, 1996 at the latest.<sup>107</sup> The establishment of the EMI was the centerpiece of the second stage of the EMU. With regard to its authorities, it should be noted that the EMI, in contrast to the ECB, does not have any decision making powers in the field of monetary policy other than to coordinate the policies of the central banks of the member states.<sup>108</sup> It should be emphasized that there is only one provision, namely in the *EMI Protocol* rather than in the *EC Treaty*, that expressly deals with independence.<sup>109</sup> Article 8 stipulates in the first sentence that the members of the EMI Council shall perform their assigned tasks “according to their own responsibilities.”<sup>110</sup> In addition, they “may not seek or take

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published by Christos Hadjiemmanuil. See generally Christos Hadjiemmanuil, *The European Central Bank and Banking Supervision*, 3 ESSAYS IN INT'L FIN. & ECON. L. 1 (1996); see also Charles Goodhart and Dirk Schoenmaker, *Should the Functions of Monetary Policy and Banking Supervision Be Separated?*, 47 OXFORD ECON. PAPERS 539, 556 (1995) (concluding that “there are no overwhelming arguments for either model,” meaning that the questions regarding who should execute the supervision “need to be answered against the particular financial banking structure of each country”).

106. See EC TREATY arts. 109l(1)–(2). A description of the duties of the EMI can be found in EC TREATY arts. 109f(2)–(3) and EMI PROTOCOL arts. 2–7. See generally EUROPEAN MONETARY INST., THE EUROPEAN MONETARY INSTITUTE (1997). The EMI’s annual reports contain more details on the state of the preparatory work of the EMI. Compare EMI ANNUAL REPORT 1996, *supra* note 25, at 62, with EMI ANNUAL REPORT 1997, *supra* note 25, at 42. See also EC TREATY arts. 109f(2)–(3); EMI PROTOCOL arts. 2–7 (stating the duties of the EMI); MEHNERT-MELAND, *supra* note 1, at 53–68 (providing a comprehensive description of the EMI). The liquidation procedure of the EMI is enshrined under Article 23 of the *EMI Protocol*. EMI PROTOCOL art. 23.

107. EC TREATY art. 109f(3); see also EUROPEAN MONETARY INST., THE SINGLE MONETARY POLICY IN STAGE THREE: SPECIFICATION OF THE OPERATIONAL FRAMEWORK II (1997) (fulfilling its obligation, the EMI in January 1997 published this comprehensive 118 page paper).

108. However, the EMI had to prepare a “monetary policy strategy,” including developing monetary policy instruments, to ensure that the ESCB can successfully pursue its primary objective of price stability. EC TREATY arts. 109f(3), 105(1). The EMI has defined a set of rules that will be available for the ESCB. See EUROPEAN CENTRAL BANK, THE SINGLE MONETARY POLICY IN STAGE THREE: GENERAL DOCUMENTATION ON ESCB MONETARY POLICY INSTRUMENTS AND PROCEDURES 2–7 (1998) [hereinafter ESCB MONETARY POLICY PROCEDURES].

109. EMI PROTOCOL art. 8.

110. *Id.* This sentence reflects almost literally Article 3a of the Council Decision 64/300, as amended, concerning the Committee of the Central Bank Governors. See Council Decision 90/142, *supra* note 92, at 26. The Council

any instructions from Community institutions or bodies or governments of Member States,” which are obliged “to respect this principle and not to seek to influence the Council of the EMI in the performance of its tasks.”<sup>111</sup> As evident from a comparison of the numerous provisions dealing with independence of the ESCB and the ECB,<sup>112</sup> this issue is treated in a very limited manner for the EMI.<sup>113</sup> An explanation for this may be found in the restricted monetary policy powers of the EMI. The EMI is neither authorized to determine the final tools of monetary policy nor guide monetary policy itself.<sup>114</sup> Both tasks are assigned to the ESCB.<sup>115</sup> Moreover, the *EMI Protocol* mentions another significant feature, political accountability, that is usually discussed in connection with the issue of independence. Article 11 of the *EMI Protocol* calls for annual reports to be addressed by the EMI to the European Parliament, the Council, the Commission, and the European Council.<sup>116</sup> In addition, the EMI President may “at the request of the European Parliament or on his own initiative, be heard by the competent committees of the European Parliament.”<sup>117</sup> Finally, the European Court of Justice (ECJ) has the overall power to review or interpret the acts or omissions of the EMI.<sup>118</sup>

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consists of the governors of the NCBs and the President of the EMI. *See* EMI PROTOCOL art. 9.2.

111. *Id.* art. 8.

112. *See infra* notes 135–87 and accompanying text.

113. Additional provisions that should be mentioned in the context of independence include those dealing with the presidency of the EMI Council, financial resources, and operational functions. *See* EMI PROTOCOL arts. 9.3–9.4, 9.7; EC TREATY art. 109f(1) (presidency); EMI PROTOCOL art. 16 (financial resources); EMI PROTOCOL art. 6.4 (operational functions).

114. *See* EC TREATY art. 109f. Thus, the EMI only makes recommendations. *See id.* It favors monetary targeting and direct inflation targeting to achieve price stability. *See* ESCB MONETARY POLICY PROCEDURES, *supra* note 108, at 8. Other strategies the EMI examines include exchange rate targeting, interest rate pegging and nominal income targeting. *See id.*

115. *See* EC TREATY arts. 105(2), 108a(1).

116. EMI PROTOCOL art. 11.3. Furthermore, there is also an obligation to account for the EMI’s finances. These accounts are subject to examination by “independent external auditors.” EMI PROTOCOL art. 17; *see also* EC TREATY art. 188c. Like the independence provisions, the accounting rules are similar to those provided by the Committee of Central Bank Governors. *Compare* Council Decision 90/142, *supra* note 92, at 26, with EMI PROTOCOL art. 8.

117. EMI PROTOCOL art. 11.3.

118. *See id.* art. 19.

## 2. The Changeover Scenario

In order to ensure a rapid introduction of the euro and to minimize uncertainties, the Madrid European Council meeting in December 1995 adopted a three-phase scenario for the changeover to the single currency.<sup>119</sup> They based this decision upon the Commission's Green Paper<sup>120</sup> and the EMI's report called *The Changeover to the Single Currency*.<sup>121</sup> Phase A comprises the "launch of economic and monetary union" and is mainly characterized by the decision of the European Council to name the participating countries and the subsequent establishment of the ECB.<sup>122</sup> The "effective start" of the EMU's Phase B began on January 1, 1999 with the irrevocable fixing of the conversion rates and the replacement of the national currencies by the euro.<sup>123</sup> The third and final

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119. See *The Scenario for the Changeover to the Single Currency*, BULL. EU, no. 12, at 9, 10, 24-28 (1995); see also Annex 1 of the Conclusions of the Madrid European Council, 1996 O.J. (C 22) 2.

120. See Green Paper on the Practical Arrangements for the Introduction of the Single Currency, COM(95)333 final at 1 [hereinafter Green Paper]. The paper was thought to be a "discussion document" and called for reactions by the member governments, the EMI, the central banks within the EU, the financial and banking sector and the consumer. European Parliament, *Introducing the Single Currency: Commission Calls for Discussion and Action* (visited Nov. 20, 1998) <<http://europa.eu.int/en/agenda/emu/isc1.html>>.

121. EUROPEAN MONETARY INST., *THE CHANGEOVER TO THE SINGLE CURRENCY* (1995).

122. Green Paper, *supra* note 120, at 16.

123. *Id.* at 18; EC TREATY arts. 109i(4), 109j(4). To prepare for this event and to prevent speculation in the financial markets, the Council, the central bank governors, the European Commission, and the EMI agreed on the method for determining the irrevocable conversion rates at the end of the decisive Euro-Summit on May 2, 1998 and, thus, provisionally fixed the conversion rates. See European Monetary Inst., *Joint Communiqué on the Determination of Irrevocable Conversion Rates for the Euro* (visited Jan. 11, 1999) <[http://www.ecb.int/emi/press/htm\\_jcom.htm](http://www.ecb.int/emi/press/htm_jcom.htm)>. The ultimate and official calculation, however, took place on December 31, 1998 with the fixing of the ECU against the U.S. dollar. See Gwynne Dyer, *The Dawn of the Euro*, MINNEAPOLIS STAR TRIB., Dec. 28, 1998, at A15. Moreover, since there can no longer be any currency fluctuations between the participating member states, the old ERM will be replaced by a new exchange rate mechanism, the ERM II, which will link the currencies of non-EMU countries to the euro in order to pursue the process of convergence towards membership in the EMU. See *European Council Resolution on the Establishment of an Exchange-Rate Mechanism in the Third Stage of Economic and Monetary Union*, BULL. EU, no. 6, at 20 (1997); see also European Central Bank, *Conventions and Procedures for the New Exchange Rate Mechanism (ERM II)* (visited Jan. 11, 1999) <[http://www.ecb.int/press/pr980912\\_3.htm](http://www.ecb.int/press/pr980912_3.htm)>. However, it should be noted that the national currencies will still remain the legal tender since no coins and bills are available at this time. See John-Thor Dahlburg, *Switch to a Common Currency Is No Small Change*, L.A. TIMES, Mar. 28, 1998, at A2. Thus, the euro will be denominated in national currency units. See

phase, Phase C, marks the “definitive changeover” to the euro and is stipulated to begin on January 1, 2002 at the latest.<sup>124</sup> In that phase, which should not take longer than six months, euro coins and banknotes will be put in circulation, and the legal tender status of national money will be canceled.<sup>125</sup>

With respect to the ESCB, Phase A was of particular importance for the ECB since it became operational for the first time and took over the preparatory work of the EMI for the official start of Phase B.<sup>126</sup> The same is true for the NCBS—except Denmark and the United Kingdom due to their special status<sup>127</sup>—which will have to adjust their organizational

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*Everything You Ever Wanted to Know About the Euro . . .*, FIN. TIMES (London), Nov. 12, 1996, at 2. The TARGET (Trans-European Automated Real-time Gross settlement Express Transfer) System consists of the already existing national Real Time Gross Settlement (RTGS) systems that are to be interconnected through an Interlinking-System. See European Central Bank, *Conditions for the Participation of Non-euro Area EU National Central Banks and Credit Institutions in Target* (July 8, 1998) <[http://www.ecb.int/press/pr090708\\_3.htm](http://www.ecb.int/press/pr090708_3.htm)> (press release). The Target System will have to process euro payments to ensure same day cross border transfers throughout the EU and hence avoid interest differences that may otherwise occur. See *id.* It will be accessible for all banks within the EU, not only for the 11 participants of the EMU. See *id.*; see also European Monetary Inst., THE SINGLE MONETARY POLICY IN STAGE THREE: SPECIFICATION OF THE OPERATIONAL FRAMEWORK 34–39, 93–96 (1997) (providing detailed information about the TARGET System). The EMI has chosen the chosen the electronic communication system S.W.I.F.T. (Society for Worldwide Interbank Financial Telecommunication) as the communications network between the different RTGS systems. See *EMI Opts for Swift System*, FIN. TIMES (London), July 11, 1997, at 2.

124. Green Paper, *supra* note 120, at 20–21; *Welcome Baby Euro; New Currency: Invisible Now, Will Soon Rival Dollar on World Markets While Unifying Continent*, BALTIMORE SUN, Jan. 7, 1999, at A12 [hereinafter *Welcome Baby Euro*].

125. See *Welcome Baby Euro*, *supra* note 124, at A12.

126. See EMI PROTOCOL art. 23.1; Green Paper, *supra* note 120, at 16–17. The ECB “has to adopt a clear framework for the conduct of the common monetary policy, . . . test all systems and procedures in the context of this framework, . . . set up its own organisation and . . . ensure a smooth transition from the current national monetary policies to the future single monetary policy.” Dr. Willem F. Duisenberg, Address at the Ceremony on the Establishment of the European System of Central Banks (June 30, 1998) (transcript available at the office of the *Houston Journal of International Law*). In fulfillment of these tasks, on September 18, 1998 the ECB set the framework for its prospective operations by releasing its long-awaited report. See ESCB MONETARY POLICY PROCEDURES, *supra* note 108.

127. See PROTOCOL ON CERTAIN PROVISIONS RELATING TO DENMARK, TEU; PROTOCOL ON CERTAIN PROVISIONS RELATING TO THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, TEU [hereinafter UK PROTOCOL]; see also EMI CONVERGENCE REPORT 1996, *supra* note 23, at 99 n.6; EMI CONVERGENCE REPORT 1998, *supra* note 26, at 131. While the United Kingdom does not have to adjust its legislation at all, Denmark is under an obligation to comply with Article 107 of the *EC Treaty* and provide for the independence of its central bank. Compare UK PROTOCOL art. 5, with EMI CONVERGENCE REPORT 1998, *supra* note

structure and legal framework in accordance with the requirements of the *EC Treaty* and the *ESCB Protocol* (legal convergence).<sup>128</sup> However, as the EMI's *Convergence Report 1996* has already emphasized, the requirements do not call for uniform rules among the member countries.<sup>129</sup> Rather, inconsistencies with the *EC Treaty* and *EMI Protocol* have to be eliminated with the consequence that "national peculiarities may continue to exist."<sup>130</sup> On the other hand, the member countries are under an express duty to actually adapt their legislation and thus, are not discharged by the supremacy of Community law.<sup>131</sup> Moreover, there are two different points in time when national legislation has to be fully compatible and effective: (1) central bank independence must be enshrined in law by the date the ESCB is established, and (2) other adaptations concerning the integration of the NCBs in the ESCB may be postponed until the start of the third stage on January 1, 1999.<sup>132</sup>

### 3. Fundamental Principles of the ESCB

EMI President Wim Duisenberg confirmed in a speech in Paris that the core elements of the ESCB and ECB as stipulated in the *EC Treaty* are the following:

- (1) Article 105 states that the primary objective of the ESCB shall be to maintain price stability;
- (2) Articles 107, 108 and 109a deal with various aspects of the independence of the ESCB;

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26, at 131. The 1998 EMI Convergence Report stated that Denmark has met this criteria. See EMI CONVERGENCE REPORT 1998, *supra* note 26, at 151.

128. See EC TREATY arts. 107, 108, 109e(5); ESCB PROTOCOL arts. 7, 14. The EMI hereby divides the necessary provisions into three parts, namely those that concern the "independence of NCBs, the legal integration of NCBs in the ESCB" (including statutory objectives, financial provisions, tasks, instruments, and organizational issues), and finally "legislation other than statutes of NCBs" (comprising banknotes, coins, foreign reserve management, confidentiality, and exchange rate policy). EMI CONVERGENCE REPORT 1998, *supra* note 26, at 11–13, 128.

129. See EMI CONVERGENCE REPORT 1996, *supra* note 23, at 104–07.

130. EMI CONVERGENCE REPORT 1998, *supra* note 26, at 289; EMI CONVERGENCE REPORT 1996, *supra* note 23, at 98.

131. See EC TREATY art. 108. This opinion is confirmed by the EMI in its most recent convergence report. See EMI CONVERGENCE REPORT 1998, *supra* note 26, at 129–30.

132. See EMI CONVERGENCE REPORT 1996, *supra* note 23, at 99; EMI CONVERGENCE REPORT 1998, *supra* note 26, at 290.

(3) Article 109b(3) refers to the accountability of the ESCB.<sup>133</sup>

a. The Objective of Price Stability

There can be no doubt that the achievement and maintenance of price stability is the heart of the economic and monetary union, or in the words of the Commission, *sine qua non* for the EMU.<sup>134</sup> This objective of sustainable economic growth originated from the well-known Phillips curve<sup>135</sup> and is heavily supported by central bankers, such as Hans Tietmeyer,<sup>136</sup> and other financial and academic experts.<sup>137</sup> However, it should be noted that neither the *EC*

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133. Dr. W. F. Duisenberg, The European System of Central Banks: A Profile, Address at the Conference on "Economic Monetary Union: Prospects for European Financial Markets" (Oct. 22, 1997), (transcript available at the office of the *Houston Journal of International Law*). Right from the start, the European Commission took the same view. See *Commission Contribution*, *supra* note 2, at 15.

134. See *Commission Contribution*, *supra* note 2, at 17.

135. See A.W. Phillips, *The Relation Between Unemployment and the Rate of Change of Money Wage Rates in the United Kingdom, 1861-1957*, 25 *ECONOMICA* 283, 283-99 (1958); see also Stanley Fischer, *Modern Central Banking*, in *THE FUTURE OF CENTRAL BANKING: THE TERCENTENARY SYMPOSIUM OF THE BANK OF ENGLAND* 262, 266-67 (Forrest Capie et al. eds., 1994).

136. See Hewitt, *supra* note 105, at 24 (stating that he "personally believe[s] price stability is the best way of achieving growth and full employment").

137. See Fischer, *supra* note 135, at 302 (defining price stability as "a low (1-3 per cent) average rate of inflation"). As Lamfalussy pointed out in a keynote speech, the objective of price stability is based upon the widespread view "that in the long term monetary policy can only systematically control the price level" rather than the various real economic variables, including unemployment, and that the exploitation of the short-run tradeoff between prices and output is ultimately going to result in a "permanently higher and more variable rate of inflation." Alexandre Lamfalussy, *The European Central Bank: Independent and Accountable*, Address at the Österreichische Nationalbank in Vienna (May 13, 1997) (transcript available at the office of the *Houston Journal of International Law*) This view, that "lax monetary policy" can only stimulate employment in the short term in an artificial way that ultimately leads to higher inflation, has also been confirmed in speeches by Duisenberg. Dr. Willem F. Duisenberg, *The Euro and the Process of European Integration*, Address at the Seventh Bernard Mandeville Lecture in Rotterdam (March 5, 1998) (transcript available at the office of the *Houston Journal of International Law*). It should be clear that monetary policy can merely contribute to economic growth rather than achieve it. See Dr. Willem F. Duisenberg, *Monetary Policy in EMU*, Address at the Third International Finance and Economic Forum (Nov. 20, 1997) (transcript available at the office of the *Houston Journal of International Law*). This is due to the economy widely depending on the productivity and the supply factors of production, including labor and capital. See *id.* "Price stability is a means of promoting sustainable economic growth and job creation, and improving both productivity levels and levels of living." *Id.* By contrast, two professors of

*Treaty* nor the *EMI Protocols* call for preserving a specified level of future stability. The EMI recommends an annual inflation rate of two percent or less as appropriate.<sup>138</sup> From the very beginning, the overall aim of the ESCB caused trouble because of the permanently high unemployment rate in the EU. While it should have been clear that price stability would be the absolute priority,<sup>139</sup> governments of some member states expected the ESCB's monetary policy to be guided or at least strongly influenced by the most pressing current economic problem, unemployment, a hope that was shattered immediately.<sup>140</sup> The view that it is improper to use monetary policy to lower the unemployment in the short term is based on the assumption that using monetary tools to lower the unemployment rate below the level consistent with price stability, the natural rate of unemployment, will only lead to a higher inflation rate in the long term.<sup>141</sup> Nevertheless, it is undisputed that in conducting its policies the ECB will take into account secondary objectives.<sup>142</sup> The second sentence of Article 105(1) that refers to Article 2 of the *EC Treaty* also makes this apparent.<sup>143</sup>

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economics have recently criticized this objective and instead proposed to focus "on high levels of employment throughout the European Union." Philip Arestis & Malcolm Sawyer, *Unemployment and the Independent European System of Central Banks: Prospects and Some Alternative Arrangements*, 56 AM. J. ECON. & SOC. 353, 353 (1997) (rejecting the concept of an independent ESCB "on the grounds that it would worsen the performance of the real economy").

138. See EUROPEAN MONETARY INST., ANNUAL REPORT 1994, at 50 (1995); THE SINGLE MONETARY POLICY IN STAGE THREE: ELEMENTS OF THE MONETARY POLICY STRATEGY OF THE ESCB 12 (1997). Further details are provided by SMITS, *supra* note 5, at 185–86. The ultimate inflation target was defined by the ECB in October 1998. See European Central Bank, *A Stability-oriented Monetary Policy Strategy for the ESCB* (visited Jan. 13, 1999) <[http://www.ecb.int/press/pr981013\\_1.htm](http://www.ecb.int/press/pr981013_1.htm)>. They adopted the following definition of price stability: "Price stability shall be defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%." *Id.*

139. See EC TREATY arts. 3a(2), 105(1); see also ESCB PROTOCOL art. 2.

140. See Martin Walker, *Discord on Monetary Union: Brussels Mandarin Dampens Job Hopes*, GUARDIAN (London), Jan. 6, 1998, at 9.

141. See Lamfalussy, *supra* note 137.

142. See *id.*; see also Duisenberg, *supra* note 3.

143. EC TREATY art. 105(1).

## b. The Features of Independence

## (i) Issue

The idea to design an independent or autonomous ESCB, comprised of an independent ECB and independent NCBs, was based on the prevailing notion among current and former central bankers and other authorities in the financial area that the independence of central banks is a prerequisite to the achievement of stable prices.<sup>144</sup> The rationale behind this relatively new notion<sup>145</sup> is that only central banks, which enjoy protection from any influence that might collide with their allocated tasks, can act successfully and maintain price stability.<sup>146</sup> While geographic location may be a factor,<sup>147</sup>

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144. Other tools to win the confidence and the credibility of the general public are transparency and openness. See Duisenberg, *The Euro and the Process of European Integration*, *supra* note 137; see also Duisenberg, *supra* note 126 (emphasizing transparency); Professor Otmar Issing, *The European Central Bank as a New Institution and the Problem of Accountability*, Address at the Symposium on "Challenges for Highly Developed Countries in the Global Economy" (Mar. 20, 1998) (transcript available at the office of the *Houston Journal of International Law*). However, it is quite obvious that the new ECB cannot inspire confidence through an established track record. See *id.*; see also Graham Searjeant, *Central Banks Give Backing to Pöhl Hard Line*, *TIMES* (London), Sept. 4, 1990, at 21. Hans Tietmeyer expressed his view as follows:

There is not a direct link between independence and low inflation. I would like to underline the word 'direct.' But a number of empirical studies have shown that countries with independent central banks have the best anti-inflation record. There is at least a correlation. . . . [T]here is not only a positive correlation, but, to some extent, a causality too.

Hewitt, *supra* note 105, at 24. Similarly, Karl Otto Pöhl, former President of the Bundesbank and former chairman of the committee of the EC central bank governors, noted that "[t]he governors are of one mind on major issues. In particular, we are agreed that historical experience shows that monetary stability can best be expected of a system which is independent of political interference." Searjeant, *supra*, at 21.

145. See CARLO COTTARELLI, *LIMITING CENTRAL BANK CREDIT TO THE GOVERNMENT: THEORY AND PRACTICE 1* (Int'l Monetary Fund Occasional Paper No. 110, 1993).

146. See Lamfalussy, *supra* note 137; see also *Conduct of Monetary Policy: Hearing Before the Subcomm. on Domestic and International Monetary Policy of the House Comm. on Banking and Fin. Services*, 105th Cong. 96 (1997) (statement of Robert V. DiClemente, Director, U.S. Economic Research, Salomon Brothers, Inc.).

147. See Hewitt, *supra* note 105, at 24.

[T]he location of the central bank away from the capital [where the government is located] has had some positive effect.

political control has been cited as an influence to be avoided.<sup>148</sup> This is due mainly to the willingness of governments to interfere with the long-term policies of central banks by using them as tools to achieve short-term goals, which in turn are often determined by public pressure arising from dissatisfaction with economic conditions, including a high level of unemployment.<sup>149</sup> Unfortunately, sacrificing long-term policies to achieve short-term goals is precisely the problem at stake in the EU.

In addition, there is no centralized institution or authority responsible for determining an EU-wide economic policy. Article 102a of the *EC Treaty* makes it clear that the responsibility and authority to develop economic policies belongs to the member states.<sup>150</sup> So far, the *EC Treaty* has only identified the national economic policies that, as “a matter of common concern,” call for coordination.<sup>151</sup> The Council and the European Council are given limited powers to interfere. They can only formulate guidelines and make recommendations.<sup>152</sup> Thus, the danger of governmental intervention by member states to support their national economic policies is great.<sup>153</sup>

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The central bank council members are not involved in day-to-day political dialogue or discussions within the parties. Frankfurt is a long way from Bonn.

... The experience of the past 40 years has convinced our parliamentarians that it is better for the Bundesbank not to be situated in the capital.

*Id.*

148. See Lamfalussy, *supra* note 137.

149. See Duisenberg, *The Euro and the Process of European Integration*, *supra* note 137. Another danger may arise when the Government attempts to misuse the central bank as its house-bank, and takes advantage of its capacity to create money to plug its budgetary deficits. However, Article 104 of the *EC Treaty* prohibits the ESCB from financing government debt and bars it from giving privileged access to central governments. EC TREATY arts. 104–104b. The intent behind this concept, however, is not only to safeguard the bank’s independence and to remove a potential source of inflation, but also to strengthen budgetary discipline. See COTTARELLI, *supra* note 145, at 5 (outlining the limits placed on the ESCB).

150. EC TREATY art. 102a.

151. *Id.* art. 103(1).

152. See *id.* arts. 103(1)–(5).

153. Nevertheless, it should be emphasized that the Council as the “centre for the coordination of the Member States’ economic policies” is the key liaison to the ECB and is expected to maintain a “fruitful dialogue” with the ECB while “respecting all aspects of the independence of the ESCB.” Resolution of the European Council on Economic Policy Coordination in Stage 3 of EMU and on

Therefore, it is by no means surprising that the French idea of an economic government is currently circulating in order to avoid unlawful approaches from the very beginning and to achieve the necessary balance between tensions among monetary and economic policies.<sup>154</sup> While this idea is deemed to be an attack against independence and has led to “a certain amount of concern in Germany,”<sup>155</sup> it has found support from Jacques Delors.<sup>156</sup> Unquestionably, there is a great fear that the ECB and the NCBs will rigorously and recklessly pursue their given mandate of price stability.<sup>157</sup> Nevertheless, even in the conservative United Kingdom, after years of relentless battles,<sup>158</sup> the Bank of England has gained at least operational independence by acquiring control over the interest rate

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Treaty Articles 109 and 109b of the EC Treaty, 1998 O.J. (C 35) 3–4; *see also* EC TREATY art. 109b. In addition, the *EC Treaty* calls for another body of the EU, endowed with an advisory status, to “promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market.” EC TREATY art. 109c(1). This is the Economic and Financial Committee, which was set up at the beginning of the third stage and replaced the Monetary Committee. *Id.* art. 109c(2).

154. *EU: A Look Behind the News*, Agence Eur., Apr. 8, 1997 available in LEXIS, Europe Library, Alleur File; Kevin Muehring, *European Monetary Union on the Line*, INSTITUTIONAL INVESTOR, Oct. 1991, at 35. It was Philippe Lagayette, the deputy governor of the French Central Bank at that time, who called for a government économique, consisting of either finance ministers or heads of state, that would ensure some form of political and democratic accountability. *See* Muehring, *supra*. He explained his reasoning as follows: “It is not a way to control the central bank or to guide it in fulfilling its duty, . . . [b]ut no one would argue that monetary policy is the whole of macroeconomic policy.” *Id.* Similarly, Jacques Chirac, although recognizing the concept of independence as “an absolute necessity” inconsistently noted that “France believes . . . that there will have to be political power as a counterpart of the European Central Bank.” *European Central Bank Must Be Independent-Chirac*, Reuters Fin. Service, Dec. 9, 1996, available in LEXIS, Europe Library, Alleur File.

155. *Buba’s Schmidhuber Says Unsure of EU Partners’ Commitment to ECB Autonomy*, EXTEL EXAMINER, Jan. 31, 1997, available in LEXIS, Europe Library, Alleur File. In contrast to France, Germany calls for an extension of fiscal consolidation, which should not be accomplished by establishing a political counterweight to the ECB. *See Finance Ministers to Address Difficult Issues in EMU Talks Sept. 12–14*, Int’l Bus. & Fin. Daily (BNA) (Sept. 12, 1997) available in LEXIS, Fedsec Library, BNAIBF File.

156. *See EU: A Look Behind the News*, *supra* note 154.

157. *See Finance Ministers to Address Difficult Issues in EMU Talks Sept. 12–14*, *supra* note 155.

158. *See* Robert Woodward, *Bill for More Autonomous Bank of England Killed*, Reuters Eur. Bus. Rep., Jan. 28, 1994, available in LEXIS, Europe Library, Alleur File; Stephen Bates, *Former Chancellors Divide Over Independence for Bank of England*, GUARDIAN (London), July 8, 1993, at 14; Colin Narbrough, *Independent Banks Lose Shine*, TIMES (London), Apr. 15, 1991, at 23; Kenneth Fleet, *Central Bank Looms Larger on Horizon*, TIMES (London), Nov. 10, 1990, at 37.

policy.<sup>159</sup> However, the question remains: Are the aforementioned fears really justified? To answer this question, one must first look at the pertinent provisions.

(ii) The Regulation of Independence

The various provisions in the *EC Treaty* and the amended *ESCB Protocol* that deal with the assurance of an independent system of central banks can be classified as follows into four main groups according to their respective targets: (1) institutional independence, (2) personal independence, (3) functional independence, and (4) financial independence.<sup>160</sup>

(a) *The Institutional Independence*

Institutional independence addresses the position of the ECB and NCBs within the existing landscape of the EU and the member states respectively. This means its relationship to governmental bodies, private institutions, and Community organs as well. Unambiguously, the *EC Treaty* strictly prohibits any external influence from any sector that may seek or attempt to touch the statutory objectives of the ECB and NCBs.<sup>161</sup> In addition, the ECB is granted a separate legal personality.<sup>162</sup> The same is true for the NCBs although that is not specifically granted by the *EC Treaty*.<sup>163</sup>

Accordingly, it is apparent that the ESCB acts in a fully autonomous manner and holds a unique position in the framework of the EU.<sup>164</sup> While the extent of the institutional scope of protection is not defined precisely by the *EC Treaty*

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159. See Richard Adams, *Chancellor's Proposals Fall Short of Overseas Standards*, FIN. TIMES (London), May 7, 1997, at 11. It should be observed, however, that the Bank of England is not authorized to set its own monetary policy targets. See *id.* The government will still formulate the objectives to be pursued by the English central bank. See *id.*

160. See Duisenberg, *supra* note 133.

161. EC TREATY art. 107; ESCB PROTOCOL art. 7.

162. See EC TREATY art. 106(2); ESCB PROTOCOL art. 9.1.

163. A specific rule was not deemed necessary because the EU central banks had already gained legal capacity and thus, only had to "retain the legal personality conferred on them by their own national law." *Commission Contribution*, *supra* note 2, at 50, 55-56.

164. It should be noted that the ESCB does not enjoy its own legal personality since it merely describes the coexistence of the ECB and the NCBs. Nevertheless, it enjoys both political and administrative independence and will not be treated like the other institutions of the EU referred to in Article 4a of the *EC Treaty* because it is not integrated into the legal structure of the EU. See EC TREATY art. 4a; ESCB PROTOCOL arts. 9, 11, 12; see also EC CONVERGENCE REPORT, *supra* note 26, at 33.

or the *EMI Protocol*, the EMI has provided some guidance to the member states that are obliged to bring the legal framework of their NCBs in line with the *EC Treaty* requirements to ensure their full integration into the ESCB.<sup>165</sup> As stipulated in its *Convergence Report 1996*, the EMI objects to the following rights conferred to third parties as incompatible with the concept of institutional independence: (1) the right to give any instructions to the NCBs and their decision-making bodies; (2) the right to approve, suspend, annul, or defer any decisions of the NCBs; (3) the right to censor any decisions taken by the NCBs on legal grounds; (4) the right of participation by representatives of other organs in the decision-making process through the right to vote; and (5) the right conferring a formal mechanism for a mandatory *ex ante* consultation on matters of the NCBs.<sup>166</sup>

(b) *The Personal Independence*

The requirement of personal independence deals with the appointment of members of the ECB and the NCBs decision-making bodies.<sup>167</sup> Personal independence is stipulated in only one provision, which includes terms and conditions of employment, dismissal, and conflicts of interest, rather than being comprised of various regulations dealing with different aspects of personnel safeguard measures.<sup>168</sup> The focus on high personal standards is due to the role that personalities and politics play in making decisions.<sup>169</sup> Members of the

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165. See EC TREATY art. 108; see also ESCB PROTOCOL art. 14. Additionally, the member states only have to remove inconsistencies in their frameworks rather than achieve full convergence with the *EC Treaty*. See Lamfalussy, *supra* note 137. Nevertheless, this obligation applies to all member states regardless of their ability to enter that stage (the exceptions are Denmark and the United Kingdom). See *id.*

166. EMI CONVERGENCE REPORT 1996, *supra* note 23, at 100; see also EMI CONVERGENCE REPORT 1998, *supra* note 26, at 12. As to the final objectionable right, the EMI limits its opinion by emphasizing that a dialogue between the NCBs and their respective political bodies with respect to the exchange of information and opinions should not be prevented provided that the following conditions are met: 1) the observance of confidentiality requirements, 2) the acknowledgment of the competencies and accountability of the ECB, and 3) noninterference with the independent position of the NCBs. See EMI CONVERGENCE REPORT 1996, *supra* note 23, at 101.

167. See ESCB PROTOCOL art. 11; see also SMITS, *supra* note 5, at 156.

168. See ESCB PROTOCOL art. 11.

169. See Issing, *supra* note 144; see also JAMES M. BUCHANAN & RICHARD E. WAGNER, DEMOCRACY IN DEFICIT 117–18 (1977).

Executive Board of the ECB, one of the two<sup>170</sup> decision-making bodies<sup>171</sup> that will govern the ESCB,<sup>172</sup> are prohibited from engaging in any other occupation to ensure that they fully concentrate on the duties of their offices.<sup>173</sup> Moreover, it is stipulated that the members of the Board are appointed for a non-renewable eight year term<sup>174</sup> and are preferably chosen “from among persons of recognized standing and professional experience in monetary or banking matters.”<sup>175</sup> However, there is no regulation concerning their country of origin.<sup>176</sup>

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170. It should be noted that the General Council is a third decision-making body within the ESCB that exists only for a transitional period as long as member states with derogation exist. See ESCB PROTOCOL art. 45.1. The General Council consists of the president and vice president of the Executive Board and all NCB governors. See *id.* art. 45.2. Its responsibilities are stipulated under Article 47 of the *ESCB PROTOCOL*, and it mainly coordinates among euro and non-euro member states. ESCB PROTOCOL art. 47; see also SMITS, *supra* note 5, at 97–98.

171. See EC TREATY art. 106(3). The Executive Board consists of the president, vice president, and four other members. See *id.* art. 109a(2)(d). It is mainly in charge of the day-to-day business of the ECB. See *id.* art. 108a; see also Duisenberg, *supra* note 3.

172. See EC TREATY art. 106(3); see also ESCB PROTOCOL art. 8.

173. See ESCB PROTOCOL art. 11.1.

174. See *id.* art. 50. However, the *ESCB Protocol* has a special provision that deals with the initial appointment of the members of the Executive Board. See *id.* It only calls for the president to be appointed for eight years, whereas the vice president and the other members of the Executive Board are to be appointed for staggered terms of offices. See *id.* The rationale behind such “once and for all” schemes is to achieve continuity in the management of the ECB. *Maastricht European Council*, *supra* note 89, at 34. The members of the Executive Board will not be replaced all at one time because after the initial appointment the mandates will always be for eight year terms. See ESCB PROTOCOL art. 11.2. The terms of the respective “dream-team” members are as follows: Wim Duisenberg as president for 8 years; Christian Noyer as vice president for 4 years; Otmar Issing for 8 years; Tommaso Padoa-Schioppa for 7 years; Eugenio Domingo Solans, a member of the Executive Board of the Bank of Spain, for 6 years; and Sirkka Härmäläinen, the only woman, for 5 years. See Council Recommendation of May 3, 1998, *supra* note 56. These, like the governors of the central banks, are only conferred one vote per person. See ESCB PROTOCOL art. 11.5.

175. EC TREATY art. 109(a)(2)(b); see also ESCB PROTOCOL art. 11.2. The recent proposal of the Commission concerning the members of the Economic and Financial Committee contains a similar provision requiring selection of members to the committee “to be . . . from among experts possessing outstanding competence in the economic and financial field.” Proposal of the Commission for the Members of the Economic and Financial Committee, art. 2, 1998 O.J. (C 125) 11, 17.

176. See *European Central Bank: Member States Divided over Composition of Executive Board*, Eur. Rep., Jan. 17, 1998, available in LEXIS, News Library, Eurrrpt File. Thus, theoretically, all the members could come from a single member state. See *id.* However, it was agreed by the Heads of State at the May Summit that they would “give appropriate weight and appropriate

These features are aimed at keeping any external political or national influences to a minimum in order to commit the banker solely to a monetary policy that is beneficial to the EU.<sup>177</sup> In addition, the autonomous positions of the Executive Board members are assured by a specified procedure for “compulsory retirement” with few causes for dismissal, none of which are related to political obedience and which authorize only the ECJ to make such decisions.<sup>178</sup>

Neither the *EC Treaty* nor the *EMI Protocol* provide special regulations to ensure the personal independence of the members of the Governing Council.<sup>179</sup> Instead, the *EMI Protocol* contains provisions that apply to the governors of the NCBs. While the provisions are similar to those for the Executive Board insofar as they concern the procedure for dismissal, they differ significantly with regard to the term of the office<sup>180</sup> and the question of reappointment.<sup>181</sup> Accordingly, there is a danger that the NCB governors may

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consideration, according to a balanced principle of rotation, in their future decisions” to assure a certain mix of representation among the euro participants. Council of the European Union, 2088th Council Meeting—Council of the European Union, Meeting in the Composition of Heads of State or Government—Brussels, 2/3 May 1998, 1998 O.J. (C 124) 1.

177. See Searjeant, *supra* note 144. During the preparation of the *Maastricht Treaty*, Karl Otto Pöhl expressed his opinion with respect to the individual central bank governors as members of the ECB Council that “[n]ationality should take second place to the task with which these officials are entrusted.” *Id.* This naturally applies to the Executive Board members as well.

178. See ESCB PROTOCOL art. 11.4.

179. See ESCB PROTOCOL art. 12. The Governing Council is the second and “supreme” decision-making body entrusted with the responsibility of formulating the monetary policy. See ESCB PROTOCOL art. 10.1. It consists of the governors of the NCBs along with the Executive Board of the ECB. See *id.* As Lamfalussy pointed out, “The direction of monetary policy will be carried out in a way familiar from other federal central banks such as the Federal Reserve and the Deutsche Bundesbank.” Alexandre Lamfalussy, *The Operation of Monetary Policy in Stage Three of EMU*, Address Before the Euromoney Conference (Apr. 13, 1997) (transcript available at the office of the *Houston Journal of International Law*). The participation of the respective central bank governors in the Governing Council and their powerful positions in the ESCB decision-making process is based on the notion that the NCBs of those states that enter the final stage have successfully fought against inflation and have completed the necessary prerequisites to continue their monetary experience at a broader, euro-wide level. See Duisenberg, *supra* note 3. “The ECB as the focal point of best European central bank traditions can inherit the track record of the best performers entering the System.” *Id.* By contrast, Otmar Issing deemed it “an open question” as to “what extent the accumulated credibility of national central banks . . . can be transferred to the new institution.” Issing, *supra* note 144.

180. See ESCB PROTOCOL art. 14.2 (providing at least five years).

181. There is nothing in the *ESCB Protocol* limiting the term of a NCB governor.

give priority to the respective political wills of their member states to assure further terms in office.<sup>182</sup> In addition, the issue of conflicts of interest is not regulated in the *EMI Protocol*.<sup>183</sup> Again, the EMI provided some guidance, even if very vague, by clarifying that “[a]s a matter of principle, membership of a decision-making body involved in the performance of ESCB related tasks is incompatible with the exercise of other functions which might create a conflict of interest.”<sup>184</sup>

(c) *The Functional Independence*

The nature of independence in the functional sense comprises the authority and autonomy of the ESCB to choose its own policy and tools required to achieve the objectives set forth under the *EC Treaty* and the *EMI Protocol*.<sup>185</sup> While the primary goal is clearly fixed, the NCBs are given the authority to deviate in other objectives as long as the deviation is seen as independent from the ESCB as a whole.<sup>186</sup>

(d) *The Financial Independence*

All independence would be worthless if the ECB and NCBs were not granted the financial means to operate autonomously

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182. By contrast, it is rather questionable whether one should therefore pay attention to the reminder of the EMI in its convergence reports, which stipulated that it would “of course . . . not preclude longer terms of office.” EMI CONVERGENCE REPORT 1998, *supra* note 26, at 294; EMI CONVERGENCE REPORT 1996, *supra* note 23, at 101. Also, the EMI, in accord with the five year term of Article 14.2 of the *ESCB Protocol*, has recommended in its 1998 convergence report that “all statutes of NCBs ensure that each individual member of a decision-making body involved in the performance of ESCB-related tasks has a minimum term of office of five years.” *Id.* at 294; *see also* ESCB PROTOCOL art. 14.2.

183. Nevertheless, Peter M. Schmidhuber, a member of the Directorate of the Deutsche Bundesbank, concludes that personal independence would also naturally imply that the members of the NCBs are not allowed to pursue activities that may cause conflicts of interest. *See* Peter M. Schmidhuber, European Monetary Union and Credibility, Address at Pan European Conference on International Relations in Vienna (Sept. 18, 1998) (German transcript available at the *Office of the Houston Journal of International Law*).

184. EMI CONVERGENCE REPORT 1996, *supra* note 23, at 102; *see also* EC CONVERGENCE REPORT, *supra* note 26, at 135.

185. *See* Muehring, *supra* note 154, at 35. Independence was stressed by Helmut Schlesinger, the predecessor of Tietmeyer, when he said, “By independence, I mean our definition of independence . . . that is, to be free in the use of the monetary instruments on the basis of our judgment and our judgment alone.” *Id.*

186. *See* ESCB PROTOCOL art. 14.4.

to fulfill their mandate. Therefore, the *EMI Protocol* provides for an initial capital amount of ECU five billion.<sup>187</sup> However, the NCBs, rather than the ECB itself, will be the sole holders of the capital according to their exclusively granted subscription.<sup>188</sup> Because it concerns the central banks of the member states, neither the *EC Treaty* nor the *EMI Protocol* imposes specific conditions on their financial backing. However, according to the opinion of the EMI, the NCBs “should be in a position to avail themselves of the appropriate means to ensure that their ESCB-related tasks can be properly fulfilled.”<sup>189</sup> This does not mean that it is necessary to bar the government or the parliament from having any influence on the surveillance or the determination of NCBs’ budgets, as long as the statutes regulating the respective NCBs contain safeguard clauses that ensure their independent position and the proper performance of their assigned tasks.<sup>190</sup>

(e) *Preliminary Assessment*

With these considerations in mind, it is quite evident that the ESCB presents a unique institution in the history of the EU. The scope of independence conferred on the ECB and the NCBs has been justified by the objective of price stability. Not one of the various objectives in the *EC Treaty* has ever been deemed so important that the Community would try such an experiment.<sup>191</sup> As intended, the scope of independence is overwhelming, and as Wim Duisenberg acknowledged, it is “consistent with the desire of the political authorities that signed the Maastricht Treaty.”<sup>192</sup> Thus, the bankers have obtained what they wanted; an environment in which they can concentrate on their assignments without being interrupted by

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187. See *id.* art. 28.1.

188. See *id.* arts. 28.2, 29. The respective subscriptions to the initial capital of the ECB and the actual amount due, which in the total will be slightly under ECU 4 billion since the non-euro NCBs will only pay five percent of their subscribed capital, can be viewed on the Internet at European Central Bank, *Capital Subscription to the European Central Bank* (visited Jan. 14, 1999) <[http://www.ecb.int/press/pr980912\\_2.htm](http://www.ecb.int/press/pr980912_2.htm)>.

189. EMI CONVERGENCE REPORT 1996, *supra* note 23, at 102–03.

190. See *id.* at 103.

191. See Hadjiemmanuil, *supra* note 105, at 50–51.

192. Duisenberg, *supra* note 3.

bothersome interference from outsiders.<sup>193</sup> Now it is their turn to show that they can make the deal and run the business.<sup>194</sup>

c. Accountability

(i) Issue

Because there is a strong connection between the achievement and maintenance of price stability and the independence of the ESCB, the relationship between independence and accountability is intertwined.<sup>195</sup> When the Commission of the European Communities stated its opinion on the draft *EC Treaty*, it deemed the principle of democratic accountability as “the necessary corollary of its independence.”<sup>196</sup> The ECB’s chief, Duisenberg, stated that “in a democratic society there is clearly no room for a lack of accountability in public institutions, and the ESCB . . . must be accountable.”<sup>197</sup> The rationale supporting this statement is simply that only a politically accountable institution will be acknowledged by governments or political representatives and gain acceptance by the public as well. This acknowledgment will be all the more important and crucial in the event that the

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193. See, e.g., discussion *supra* note 185.

194. There has been some criticism that the independence granted to the ECB and ESCB is subject to possible political interference. Article 109 of the *EC Treaty* makes a reservation for “formal agreements on an exchange rate system . . . in relation to non-Community currencies” that can be concluded by the Council. EC TREATY art. 109(1). Alexandre Lamfalussy has stated that these fears are unjustified because of the ECB’s involvement and the required observance of the price stability objective. See Lamfalussy, *supra* note 137; see also Duisenberg, *supra* note 3.

195. See Duisenberg, *supra* note 3. There is also a nexus to credibility because a more accountable and transparent institution will naturally establish its credibility more quickly. See *id.*

196. *Commission Contribution*, *supra* note 2, at 20. Lamfalussy describes accountability as a “natural complement to the independent status of the ESCB.” Lamfalussy, *supra* note 137. The International Monetary Fund stated that “to bolster credibility, it is clear that central bank autonomy needs to be accompanied by effective monetary policy accountability.” MARK SWINEBURNE & MARTA CASTELLO-BRANCO, CENTRAL BANK INDEPENDENCE: ISSUES AND EXPERIENCE 49 (Int’l Monetary Fund Working Paper No. 91/58, 1991); see also Fischer, *supra* note 135, at 293. “A central bank that is not held accountable is more likely to behave in a dynamically inconsistent way than an accountable bank—indeed any organisation that is not accountable is likely to perform worse than one that is accountable.” *Id.*

197. See Willem F. Duisenberg, The ESCB: Independent, Transparent and Communicative, Address at the Bankers’ Club Annual Banquet in London (Feb. 16, 1998) (transcript available at the office of the *Houston Journal of International Law*).

ECB and NCBs make unpopular decisions to fulfill their given mandate. The *EC Treaty* and the *EMI Protocol*, therefore, provide several safeguards that are supposed to satisfy the need for democratic accountability.<sup>198</sup>

(ii) Accounting Provisions

The rules calling for accountability are primarily found in the areas of reporting, cross-participation procedures, and monitoring devices. The reporting rules state that “[i]n accordance with Article 109b(3) . . . the ECB shall address an annual report on the activities of the ESCB and on the monetary policy . . . to the European Parliament, the Council, and the Commission, and also to the European Council.”<sup>199</sup> This report “may” be subject to general debate by the Parliament.<sup>200</sup> Moreover, the ECB is obliged not only to “draw up and publish reports” on its activities at least every three months,<sup>201</sup> but also to publish weekly the consolidated financial statements of the ESCB.<sup>202</sup> In addition, all the aforementioned reports must be made available to the public free of charge.<sup>203</sup> Article 26 of the *EMI Protocol* lists other reporting requirements that relate to the finances of the ECB and ESCB.<sup>204</sup>

With respect to “participation rules,” the *EC Treaty* provides for some mutual attending procedures. However, they are all optional; the President of the Council as well as a member of the Commission “may” participate in the meetings of the ECB’s Governing Council.<sup>205</sup> By contrast, the President of the ECB “shall be invited to participate” in meetings of the Council when dealing with ESCB related subject-matters.<sup>206</sup> Moreover, two members of the ECB will participate in the prospective Economic and Financial Committee.<sup>207</sup> Finally,

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198. See *Commission Contribution*, *supra* note 2, at 37–38.

199. ESCB PROTOCOL art. 15.3.

200. See EC TREATY art. 109b(3).

201. ESCB PROTOCOL art. 15.1.

202. See *id.* art. 15.2.

203. See *id.* art. 15.4. The ECB must publish and make periodic reports on its activities freely available, while the Governing Council has no such obligation. Compare *id.*, with ESCB PROTOCOL art. 10.4.

204. ESCB PROTOCOL art. 26.

205. See EC TREATY art. 109b(1). However, due to the principle of independence, visitors do not have voting rights. See *id.*

206. *Id.* art. 109b(2).

207. See *id.* art. 109c(2).

the *EC Treaty* states that members of the Executive Board, including the ECB President, may be heard by the competent committees of the European Parliament, either because their appearance has been requested by the European Parliament or because they wished to appear on their own initiative.<sup>208</sup> By contrast, due to the transfer of monetary policy within the EU to the ECB, a centralized institution based on the Community level,<sup>209</sup> there are no provisions that call for the ECB to account to the national parliaments.

Another device for accountability concerns the appointment of the members of the Executive Board, who are to be selected “by common accord of the Governments of the Member States at the level of Heads of State or of Government” (i.e., the political authorities).<sup>210</sup>

Furthermore, the “[books and] accounts of the ECB and national central banks”<sup>211</sup> are subject to examination by “independent external auditors.”<sup>212</sup> However, the normal scope of the investigation powers of the Court of Auditors, as stipulated under Article 188c of the *EC Treaty*, is limited by virtue of Article 27.2 of the *EMI Protocol* “to an examination of the operational efficiency of the management of the ECB.”<sup>213</sup>

Finally, the ECJ is entrusted with the judicial authority over the “acts or omissions of the ECB,” which are subject not only to the Court’s review, but also to its interpretation.<sup>214</sup>

### (iii) Preliminary Assessment

Obviously, the *EC Treaty* and the *EMI Protocol* provide for a set of measures and procedures to ensure sufficient accountability of the ESCB. While the reporting requirements can be deemed quite clear,<sup>215</sup> the same cannot be said about

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208. *Id.* art. 109b(3).

209. “Accountability vis-à-vis the national parliaments would not, in my view, be consistent within the euro’s supranationality.” Hans Tietmeyer, *Financial and Monetary Integration: Benefits, Opportunities and Pitfalls*, 1998 Mais Lecture, delivered at the City University Business School in London (May 18, 1998) (transcript available at the office of the *Houston Journal of International Law*).

210. EC TREATY art. 109a(2)(b); *see also* ESCB PROTOCOL art. 11.2.

211. ESCB PROTOCOL art. 27.1.

212. *Id.*

213. *Id.* art. 27.2.

214. *Id.* art. 35.1; *see also* EC TREATY art. 177(b). For further jurisdiction of the European Court of Justice, *see* EC TREATY art. 173 and ESCB PROTOCOL arts. 35.2–35.6.

215. *See* Duisenberg, *supra* note 133; *see also* Duisenberg, *supra* note 3.

participation opportunities because they are mostly optional<sup>216</sup> and their actual impact is questionable. The scope of statutory accountability is minimal, particularly in the political arena, since the ECJ will focus on mere legal issues. In contrast to the restricted powers of the European Parliament, the national governments and parliaments are nearly barred from direct influence, and rightly so. They can only influence the appointment of the members that serve the pertinent Community institutions.<sup>217</sup>

However, didn't we forget something or somebody? Of course, there is also the common European citizen who will make the ultimate judgment and will punish the NCBs (and ultimately the ECB) for their failure to meet their monetary targets and for high inflation resulting from mismanagement. How will it work? According to the vision of Wim Duisenberg, unsatisfied savers will simply "reduce their holdings of money balances in euro and ask for higher returns to compensate for the depreciation of their currency."<sup>218</sup>

There is also another issue to be addressed: Is there really accountability in a democratic sense? We all know what democracy theoretically means. Tracing back to the Greek definition, the word means government of the people.<sup>219</sup> Clearly, in most countries these powers are not exercised directly on a day-to-day basis, but rather through elections of their respective representatives. One might assume that the parliaments of the respective member states, or at least the European Parliament,<sup>220</sup> play a significant role within the ESCB.

Initially the European Parliament was only allocated a consultative function, and its fight to be a democratic institution legitimated by the citizens of the EU lasted over twenty years until in 1979 the first election of its members

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216. See, e.g., *supra* note 205 and accompanying text.

217. See, e.g., ESCB PROTOCOL arts. 10.1, 11.2.

218. Duisenberg, *supra* note 3. But see Fischer, *supra* note 135, at 302-03 (deeming "public reprimand and loss of reputation" a "sufficient sanction," and calling for a governmental "procedure for overriding the Bank's decisions").

219. The word democracy comes from the Greek words *demos* (the people) and *kratein* (to rule). See Webster's New Universal Unabridged Dictionary 483 (2d ed. 1983).

220. The European Parliament is the only directly legitimized European institution and proudly describes itself as the "expression of the political will of the peoples of the European Union" and "the guardian of the European interest." See European Parliament, *The European Parliament* (visited Nov. 23, 1998) <<http://europa.eu.int/inst/en/ep.htm>>.

took place.<sup>221</sup> Its powers were gradually broadened, most recently by the *Maastricht Treaty*, which established the co-decision procedure under Article 189b of the *EC Treaty*.<sup>222</sup> With respect to the ESCB, however, the European Parliament is limited to the assent<sup>223</sup> or consultation<sup>224</sup> procedure whereas the real power, the political power, in the EMU is allocated to the Council, which is authorized to amend several provisions of the *EMI Protocol* in a simplified amendment procedure.<sup>225</sup> Moreover, the Council is given additional powers within the framework of the monetary union in which it can act either by qualified majority<sup>226</sup> or by

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221. See Decision of the Representatives of the Member States Meeting in the Council Relating to the Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, 1976 O.J. (L 278) 1.

222. EC TREATY art. 189b. According to this article, both the European Parliament and the Council must approve acts dealing with certain subject matters, as defined in the *EC Treaty*. *Id.* art 189b(1); see generally PHILIP MARC RAWORTH, *THE LEGISLATIVE PROCESS IN THE EUROPEAN COMMUNITY* 37-109 (1993) (detailing the various legislative competencies, which further comprise the consultation, co-operation, and assent procedures). The co-decision procedure was also a major subject at the Intergovernmental Conference held from March 1996 to June 1997. See European Parliament, *Intergovernmental Conference: Briefing No. 8: (First update: 14 March 1996): Codecision Procedure* (last modified July 1, 1997) <<http://www.europarl.eu.int/dg7/fiches/en/fiche8.htm>>. This resulted in specific provisions in the draft Treaty of Amsterdam intended to simplify all legislative procedures and to extend the powers of the European Parliament. See European Parliament, *The European Parliament as It Would Be Affected by the Draft Treaty of Amsterdam of 19 June 1997* (last modified June 26, 1997) <<http://www.europarl.eu.int/dg7/treaty/analysis/en/epchange.htm>>.

223. See EC TREATY arts. 105(6), 106(5). The Center for the Advancement and Study of the European Currency, headed by Professor Jean-Victor Louis, President of the Institute of European Studies at the Free University of Brussels, proposed that "all Community institutions should have the right to take part" with respect to the appointment of the members of the Executive Board and called for the assent of the European Parliament. *Report on the European System of Central Banks*, Agence Eur., Apr. 12, 1991, available in LEXIS, Europe Library, Alleur File. As we know now, the European Parliament is only to be consulted. See EC TREATY art. 109a(2)(b).

224. See EC TREATY arts. 106(6), 109(1), 109a(2)(b), 109f(1), 109f(6). It should be observed that the majority of member states at the IGC on EMU Draft Treaty preferred at most a consultative role for the European Parliament, but the President of the IGC at that time, the Dutch Minister of Finance Kok, shared the view of the minority "that a sufficient degree of democratic accountability requires a more substantial role of the European Parliament with respect to Council decisions of a legislative nature. Therefore, in those instances, the Presidency's proposal presents the cooperation procedure as an alternative to consultation." *Text of Letter from Dutch Presidency of IGC on EMU Draft Treaty*, Agence Eur., Oct. 30, 1991, available in LEXIS, Europe Library, Alleur File.

225. See EC TREATY art. 106(5); see also ESCB PROTOCOL art. 41.1.

226. See EC TREATY arts. 106(6), 109, 109c(3), 109f(6), 109h(2).

unanimity.<sup>227</sup> Accordingly, in the field of legislation the European Parliament has only minor influence.<sup>228</sup> By contrast, as indicated above, its authority is broader in the field of supervision and monitoring, including surveillance of the EU's policies conducted by the Commission and the Council.<sup>229</sup> The most drastic tool conferred to it, but not yet exercised, is stipulated under Article 144 of the *EC Treaty*, which authorizes the European Parliament to dismiss the Commission by passing a vote of censure on it.<sup>230</sup> In addition, the European Parliament is entitled to bring actions against the Council or the Commission for their failure to act in accordance with the *EC Treaty*.<sup>231</sup> In sum, the powers presently granted to the European Parliament resemble a rather toothless shark.<sup>232</sup>

The parliament's function as an observer is important, but to be effective as a direct representative of Europe's citizens there must be something more. The European Parliament must be given some means to respond to the actions or omissions of organs of the EU in an appropriate way. Accordingly, there can be no doubt that there is a democratic gap, and it is not surprising that this situation is

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227. See *id.* arts. 105(6), 109(1), 109f(7), 109l(4)–(5).

228. See *id.* arts. 138b, 189b–189c.

229. See *id.* arts. 138c, 138e.

230. *Id.* art. 144. It should also be mentioned that a key role of the European Parliament is the appointment of the President and the members of the Commission. See *id.* art. 158.

231. See *id.* art. 175. By contrast, it is implied from the wording in Article 173 of the *EC Treaty* that the European Parliament has no *locus standi* to challenge the legality of acts adopted by the Council or the Commission. *Id.* art. 173; see generally Case C-70/88, *Re Radioactive Food: European Parliament v. Council*, 1990 E.C.R. I-2041, [1992] 1 C.M.L.R. 91 (1990) (discussing the role of the European Parliament in relation to the Council).

232. Recently describing the situation, Graham Watson, a member of the European Parliament, said, “[The European Parliament does not] have enough oversight. . . . I think our role is somewhat over-estimated. . . . We don't have a huge influence. We can only do what the Maastricht Treaty allows us to do. If not, people take you to the European Court of Justice.” David Shirreff, *A Small Town in Alsace*, EUROMONEY, Aug. 1997, at 59, 60 (brackets in original). According to Duisenberg, the fact that the European Parliament cannot impose any sanctions on the ECB “is just an inevitable consequence of opting for independent decision-making.” Duisenberg, *The Euro and the Process of European Integration*, *supra* note 137. Whether the priority of the independence actually requires such a removal from the political arena is quite questionable since the possibility to confer sanctions could be limited to the observance of a proper monetary policy as enshrined in the *Maastricht Treaty*.

deemed unacceptable for European voters.<sup>233</sup> Therefore, it is by no means surprising that the European Parliament, being fully aware of its minor role within the monetary framework, has recently passed a *Resolution on Democratic Accountability in the Third Phase of EMU*.<sup>234</sup> This resolution was based mainly on a report adopted by the Committee on Economic and Monetary Affairs and Industrial Policy.<sup>235</sup>

The reporter, Mrs. Christa Randzio-Plath, made suggestions intended to strengthen the power of the European Parliament. First, she proposed a change in the appointment procedure for candidates of the ECB Executive Board.<sup>236</sup> Her second amendment proposed a right to file a “motion of censure” against the ECB President in extreme cases of persistent disregard of the tasks and competencies of the ECB.<sup>237</sup> Finally, she proposed the creation of an European Parliament Banking Committee similar to the Senate Banking Committee in the United States where the Governor of the Federal Reserve System, in accordance with

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233. See Bailey Morris, *The People Versus Eurofed*, INDEPENDENT (London), Sept. 27, 1992, at 8 (citing Richard Cooper, a Harvard professor, who stated, “No democrat in Europe should find the Maastricht agreement on EMU acceptable” and that the *EC Treaty* increases “the democratic gap in the Community beyond the point of tolerability”). As he suggested, the solution might be to make the Central Bank Council responsible to the European Council as the body of “politically responsible national representatives” who should be authorized to amend the ESCB decisions by qualified majority. *Id.*

234. European Parliament, Comm’n on Econ. and Monetary Affairs and Indus. Policy, *Resolution on Democratic Accountability in the Third Phase of the EMU*, 1998 O.J. (C 138) 177.

235. See Report on Democratic Accountability in the 3rd Phase of EMU, EUR. PARL. DOC. (A4-0110/98) 2 (1998) [hereinafter Report on Democratic Accountability].

236. See European Parliament, *Background Note: The European Parliament and the EURO* (Nov. 5, 1998) <<http://www.europarl.eu.int/dg3/sdp/backg/en/b980218.htm>> [hereinafter *Background Note*] (providing a brief analysis of her three proposed amendments). Ms. Randzio-Plath voted for the assent procedure, which would inevitably require an agreement between the European Parliament and the Council. See *id.* In contrast, the consultation procedure enshrined under Article 109a(2)(b) of the *EC Treaty* and Article 11.2 of the *ESCB Protocol* does not confer power to the European Parliament to prevent the appointment of an undesired candidate. EC TREATY art. 109a(2)(b); ESCB PROTOCOL art. 11.2. The European Parliament Rule of Procedure that applies, Rule 36, only empowers the European Parliament to either approve or reject the nomination. In the event of a negative decision, the Council may, but is not required to, withdraw its nomination and submit a new one. See European Parliament, Rules of Procedure, rule 36, 1995 O.J. (L 293) 1, 16. However, the Council may also disregard the parliamentary rejection. See Report on Democratic Accountability, *supra* note 235, point B(5)(a).

237. *Background Note*, *supra* note 236.

the Humphrey-Hawkins Act, has to account for its policy at least twice a year.<sup>238</sup> Several items remained besides the call for a monetary and economic dialogue between the European Parliament and the ECB. They included the following:

- (1) the notification of the parliament's intent to broaden existing communication means by convening "quarterly meetings on recent monetary and economic developments" with the President and other Executive Board members;
- (2) a request of what should be included in the annual reports as required under Article 109(b)3 of the Treaty;
- (3) the call to publish in a summarized form the minutes of the ECB Council thus, limiting the Council's discretion under Article 10.4 of the ESCB Protocol; and
- (4) the demand addressed to the heads of the governments or states "not to appoint candidates that do not have the approval of the European Parliament."<sup>239</sup>

This last item has been a significant concern that fortunately has not been realized since the Council approved all of the suggested candidates.<sup>240</sup> However, the committee, under the chair of Karl von Wogau, rejected some of the suggestions made by the paper's reporter.<sup>241</sup> The current

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238. *Id.*; see also Jim Power, *Duisenberg Pours Cold Water on Critics*, IRISH TIMES, Nov. 16, 1998, at 17. Because of the increased transparency and openness of the Fed it has been argued that the ECB should have been modeled on this institution rather than on the Deutsche Bundesbank. See David Mackie, *Beyond Independence*, FIN. TIMES (London), Aug. 8, 1997, at 14 (demonstrating the difference between the "transparent" U.S. system and a much less open and accountable German system of banking). However, it should also be born in mind that (as discussed by numerous commentators) the actions and the policy of the Fed are strongly influenced by the government and even "frequently" reflect its policy. See THOMAS F. CARGILL, CENTRAL BANK INDEPENDENCE AND REGULATORY RESPONSIBILITIES: THE BANK OF JAPAN AND THE FEDERAL RESERVE 38 (1989).

239. European Parliament, *Minutes of 02/04/98—Final Edition: Democratic Accountability in Third Stage of EMU*, Doc. A4-0110/98 (visited Jan. 28, 1998) <<http://www.europarl.eu.int/plenary/en>>.

240. See *supra* note 174 and accompanying text.

241. The committee rejected the proposal dealing with a new appointment procedure of ECB Board members. See European Parliament, *Legislative File: A4-0110/98*, (visited Jan. 28, 1998) <<http://www.europarl.eu.int/r/dors/oeil/en/default.htm>>. The committee also rejected the proposal that would create an European Parliament Banking Committee. See *id.*

president of the European Parliament, Mr. José Maria Gil-Robles Gil-Delgado and the Deutsche Bundesbank were in accord with the committee's view.<sup>242</sup>

Another idea brought up to provide for sufficient democratic legitimacy is based on the fact that the political authorities of the respective member states had to ratify and to approve the *EC Treaty*, including the annexed *EMI Protocol*.<sup>243</sup> However, this suggestion is not very convincing because the framework for the ESCB was set up in an incomplete manner by the *EC Treaty* and the *EMI Protocol* and partially lacked essential regulations. These regulations were to be developed by the EMI as preparatory measures and ultimately fixed by the ECB.<sup>244</sup> Thus, the ESCB can hardly claim democratic legitimacy for its conduct where its structure was relatively unclear. At least, it cannot legitimately justify having little or no accountability.

The question of democratic accountability has always been a major subject in Germany and was highlighted a second time by a constitutional complaint brought in January 1998 against the introduction of the euro before Germany's highest court, the Federal Constitutional Court (Bundesverfassungsgericht or BVerfG), in Karlsruhe.<sup>245</sup> The parties included, among others, Professor Karl Albrecht Schachtschneider,<sup>246</sup> an expert in constitutional affairs from

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242. According to President Gil-Delgado, the time for amending the *EC Treaty* is "not yet ripe," and amendments at this time could be "counterproductive" for the European Parliament and "might even benefit those who wanted Parliament to have less power." European Parliament, *President of EP on Democratic Accountability—EMU*, (Feb. 26, 1998) <<http://www.europarl.eu.int/dg3/sdp/newsrp/en/1998/index.htm>>. The ideas of Ms. Randzio-Plath in the report were criticized by Peter M. Schmidhuber, one of the members of the Directorate of the Deutsche Bundesbank. See Peter M. Schmidhuber, *Democratic Accountability of the ECB in the Third Stage of the EMU: A Contribution to the Discussion*, Address at the Kangaroo Group in Brussels (Mar. 18, 1998) (German transcript available at the office of the *Houston Journal of International Law*); *Background Note*, *supra* note 236.

243. See Power, *supra* note 238, at 17; see also *Europe Documents No. 1669/1670: Central Bank Draft Statute*, Agence Eur., Dec. 8, 1990, available in LEXIS, Europe Library, Alleur File.

244. See *EU/Monetary*, Agence Eur., Jan. 11, 1997, available in LEXIS, Europe Library, Alleur File.

245. See *German High Court Receives Complaint Against Euro*, DEUTSCHE PRESSE-AGENTUR, Jan. 12, 1998, available in LEXIS, Europe Library, Alleur File [hereinafter *German High Court*]; *Challenging the Euro*, WK. IN GERMANY, Jan. 16, 1998, available in LEXIS, Europe Library, Alleur File.

246. See *German High Court*, *supra* note 245; see also Vera Blei, *Kohl Faces Euro Showdown*, EUROPEAN, Jan. 8, 1998, at 8 (listing the three other parties as Wilhelm Nölling, a former member of the Bundesbank's decision making

the University of Nürnberg-Erlangen, who had already represented the “Euro-sceptic” Manfred Brunner in an earlier constitutional battle in 1993.<sup>247</sup> The parties invoked the infringement of Articles 38(1)<sup>248</sup> and 14(1)<sup>249</sup> of the Constitution of the Federal Republic of Germany.<sup>250</sup> However, as it did in the first wave of constitutional actions, the Second Chamber of the BVerfG dismissed the claims again as manifestly unfounded, and this time dismissed them with a simple unanimous ruling under section 24 of the Federal Constitutional Court Act.<sup>251</sup>

The decision was based primarily on the reasoning that the transfer of sovereign powers and authorities to the EU, as laid down under the *Maastricht Treaty*, was legitimated by Articles 23<sup>252</sup> and 88<sup>253</sup> of the German Constitution.

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council, and two economics professors, Wilhelm Hankel from the University of Frankfurt and Joachim Starbatty from the University of Tübingen).

247. See Blei, *supra* note 246, at 8; Clive Stanbrook, *The Maastricht Treaty: Maastricht's Double Jeopardy*, INT'L CORP. L., May 1993, at 12, 12. See generally Brunner v. European Union Treaty, 1 C.M.L.R. 57 (1994) for the opinion on the case.

248. Grundgesetz [Constitution] [GG] art. 38(1) (dealing with the principles for the election of the Deutsche Bundestag). “The deputies to the German House of Representatives are elected in general, direct, free, equal, and secret elections. They are representatives of the whole people, not bound by orders and instructions, and subject only to their conscience.” *Id.*

249. Grundgesetz [GG] art. 14(1) (stipulating that “[p]roperty and the right of inheritance are guaranteed. Their content and limits are determined by statute.”).

250. See *German High Court*, *supra* note 245.

251. See University of Saarland, *Complaints Against the Euro*, (visited Feb. 20, 1999) <<http://www.jura.uni-sb.de/Entscheidungen/abstracts/euro.html>>.

252. *Id.* Part of the German Constitution reads as follows:

(1) To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate, delegate sovereign powers. Article 79 (2) & (3) is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized.

(2) The House of Representatives and the States, by their representation in the Senate, participate in matters of the European Union. The Government has to thoroughly inform the House of Representatives and the Senate at the earliest possible time.

Grundgesetz [GG] art. 23.

253. Grundgesetz [GG] art. 88. “The Federation establishes a note-issuing and currency bank as the Bundesbank. Its tasks and powers can, in the context of

Article 23 assures the necessary and indispensable participation of political representatives in the European integration process,<sup>254</sup> and Article 88 sets a particular basis for the transfer of monetary authority. As the BVerfG emphasized in its first euro decision, it is precisely this involvement of national democratic authorities<sup>255</sup> that allows another organization to perform the tasks of nationals. Thus, as long as the vital support of the people of the states exists, (not directly, but through the national senate, the Bundestag) the impregnable core-principle of democracy<sup>256</sup> will not be violated. Accordingly, Germany has given a clear answer that the newly established ESCB does not violate the democratic principle as understood from its constitutional point of view.<sup>257</sup> Moreover, this decision can also be viewed in a broader context; accountability at the national level “would run counter to the exclusively European mandate of the European System of Central Banks.”<sup>258</sup> The national political authorities have irrevocably transferred their control over monetary policy to the Community level where it is now supposed to be exercised by the European Parliament. Thus, the ESCB will not have to report to national governments, who will be no longer the “natural addressee” for democratic accountability; instead, accountability will belong to the “European public.”<sup>259</sup> Nevertheless, despite this lack of accountability on the national level, it will benefit the ESCB for monetary policy to be “as transparent as possible.”<sup>260</sup> To this end, the ESCB must build up a high degree of confidence and communicate its decisions to the

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the European Union, be transferred to the European Central Bank which is independent and primarily bound by the purpose of securing stability of prices.”  
*Id.*

254. *Id.*

255. See *Final Green Light From Germany: Upper Chamber to Approve Euro*, DEUTSCHE PRESSE-AGENTUR, Apr. 24, 1998, available in LEXIS, Europe Library, Alleur File. On April 23, 1998 the Deutsche Bundestag gave its consent to enter the final stage by an overwhelming majority of 575 to 41 votes cast, and the Federal Council, the Deutsche Bundesrat, representing the German States (Länder), decided one day later in favor of the euro. See *id.*

256. See Grundgesetz [GG] arts. 79(3), 20(1), 20(2).

257. See *Brunner v. European Union Treaty*, 1 C.M.L.R. 57 (1994).

258. Issing, *supra* note 144.

259. Hans Tietmeyer, *Germany and Europe: On the Way Towards a Common Currency*, Address at the German Savings Bank Conference at Leipzig (Apr. 29, 1998) (German transcript available at the office of the *Houston Journal of International Law*).

260. Duisenberg, *supra* note 137.

governments and parliaments of the respective member countries.<sup>261</sup>

#### 4. The Tension Between Independence and Accountability

A certain tension or even contradiction exists between independence on the one hand and accountability on the other.<sup>262</sup> Inevitably, the solution must be found in a sound balance between both features. However, as evident from the *EC Treaty* and the *EMI Protocol*, the EU, with the consent of all the member states, has clearly decided to give more weight to the independence feature. Truly, this imbalance does not automatically and logically mean a democratic deficit or lack of accountability.<sup>263</sup> The communication measures, as stipulated above, are certainly appropriate to provide for the necessary transparency of the ESCB's work. Nevertheless, as indicated earlier, the tools of accountability are relatively blunt in that the policy and the ultimate decisions of the ESCB cannot be overridden by any other body or institution on whatever level (Community or national).<sup>264</sup>

The same dilemma is true for the steadily promoted cooperation between a decentralized fiscal, economic and structural policy and a centralized monetary policy.<sup>265</sup> This split in responsibility illustrates the main risk of the EMU.<sup>266</sup> Of course a high degree of independence should not serve to enclose the ESCB in an "ivory Eurotower."<sup>267</sup> In the long term, monetary policy cannot be pursued without or against the observance of pertinent and fundamental decisions made by

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261. *See id.*

262. This is the view of Peter Schmidhuber, one of the Bundesbank's central council members. *See Buba's Schmidhuber Says Unsure of EC Partners' Commitment to ECB Autonomy*, *supra* note 155.

263. *See* Duisenberg, *supra* note 133.

264. The only option available to the overseeing bodies is the removal of the ECB officers for misconduct. *See supra* note 178 and accompanying text.

265. *See* Helmut Schieber, The International Role of the Euro, Address at the Conference, "German Financial Markets—Life Under the Euro," in Frankfurt, (Sept. 21, 1998) (transcript available at the office of the *Houston Journal of International Law*).

266. *Id.* For a comprehensive discussion of the fiscal policy issue, see Christopher Allsopp & David Vines, *Fiscal Policy and EMU*, NAT'L INST. ECON. REV., Oct. 1996, at 91, 104 (supporting "in principle" a decentralized fiscal policy within the EMU because of the "obvious political advantages" and the "information available to the relevant authorities" and "absence of moral hazard").

267. Duisenberg, *supra* note 3.

the respective political authorities.<sup>268</sup> Thus, the call for a broader political union,<sup>269</sup> an “appropriate” or “balanced” overall “policy mix,”<sup>270</sup> or at least a “fruitful dialogue” between the Council and the ECB<sup>271</sup> is not surprising. Although these considerations seem to be virtually undisputed, neither the *EC Treaty* nor the *EMI Protocol* provide a clarifying provision that expressly calls for a mandatory euro-roundtable between monetary politicians and economic or fiscal politicians.<sup>272</sup>

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268. One author has expressed this relationship as follows:

My main conclusion is that monetary policy does not operate in a fiscal policy vacuum. The proposition that monetary policy can in the end achieve price stability is true. But it does not tell the whole story and the rest of the story is of quite some importance for economic growth. One cannot circumvent the need for an appropriate policy mix. Granting independence to central banks creates the condition for a balanced dialogue between monetary and fiscal authorities, but an optimum policy mix requires two correct decisions, not simply one.

Fischer, *supra* note 135, at 332–33.

269. Hans Tietmeyer has repeatedly demanded this. See Hewitt, *supra* note 105, at 31 (stating that “[i]n the long run [the monetary union] needs to be embedded in the political union because the currency and its values are more than merely a technical issue”); see also Hans Tietmeyer, Political Consequences of the Monetary Union for the European Union and Europe, Address for the Conference for Social Matters of the Commission of the Bishop-Conferences of the European Community in Brussels (Feb. 20, 1998) (transcript available from author) (describing the Maastricht concept of separation between monetary policy on the one hand, which is guided at the Community level, and the economic, fiscal, and social policy on the other hand, which is left to the national member states, as a “construction with two levels”). Tietmeyer recognized the two advantages of this concept, namely, the preservation of political competition and the direct responsibility for national politics. But he also pointed out the other side of the coin—the possible divergence of the monetary union in the event of an inappropriate policy in the respective member states that conflicts with the policy of the ECB and may endanger its ability to achieve an EU-wide stable monetary policy. Thus, he is quite confident that the monetary union will impact further political integration because the “monetary union is like a tight corset. It can support but it also can crush/overwhelm you.”). see also Duisenberg, The Euro and the Process of European Integration, *supra* note 137 (regretting the lack of a more comprehensive political union which would make the functioning of the monetary union “easier” but conceding that “in reality Europe is not at that stage, or has not yet reached that stage”).

270. Duisenberg, Monetary Policy in EMU, *supra* note 137; Willem F. Duisenberg, Conditions for the Success of EMU, Address delivered in Pamplona (Nov. 14, 1997) (transcript available at the office of the *Houston Journal of International Law*).

271. Duisenberg, *supra* note 3.

272. See *id.* (explaining that the finance ministers of the states participating in the euro will meet informally “to find the appropriate fiscal policy stance vis-à-vis a single monetary policy”); see also Duisenberg, *supra* note 197 (confirming the

Rather, the Resolution of the European Council calls for informal meetings of the finance ministers of the states participating in the euro area, also referred to as the “euro-x” or euro-11 Council<sup>273</sup> “to discuss issues connected with their shared specific responsibilities for the single currency.”<sup>274</sup> However, this seems to be the end of the line since “it is clear that there will not be any EU-wide decision making on fiscal policies.”<sup>275</sup> As the ECB’s recent conflicts with Ireland over fiscal policies has confirmed, it appears that the promulgated cooperation ultimately will be a question of spontaneity.<sup>276</sup>

Nevertheless, one should not forget that other factors will come into play and provide the necessary scrutiny of the actions of the ESCB. One factor that has already been mentioned is the scrutiny of the common citizen.<sup>277</sup> Others include scrutiny of the institutions of the EU itself. In particular, the Economic and Finance Ministers’ (ECOFIN) Council, comprised of the respective Finance Ministers of the member states, could easily establish a rocky path for the ESCB by responding with countermeasures that undermine or dilute its policies so that a compromise on crucial issues must

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importance of “effective communication”); Duisenberg, *supra* note 133 (stating that he sees “no reason why the ESCB should try to avoid contact with those responsible for the general economic policies in the Community” and urging “that an exchange of information and views” between the ECB and the Council “is very important”); Willem F. Duisenberg, *Monetary Policy in Europe—Quo Vadis*, Address Delivered in London (Nov. 27, 1997) (transcript available at the office of the *Houston Journal of International Law*) (deeming “[e]xpectations of market participants,” such as trade unions and employers, as important to achieving effective communication between the ESCB and the economy because industry will adjust its conduct upon the likely and foreseeable reaction of the central bank).

273. Duisenberg, *supra* note 133 (indicating the forum “is currently called euro-x, until the number of euro countries is known”). Apparently, this forum, which met for the first time on June 4, 1998 in Luxembourg, is particularly welcomed by Dominique Strauss-Kahn, the French Economic Affairs and Finance Minister, who may try to use this political body as a substitute for France’s desired political counterpart to the ECB. See Lionel Barber, *Call for More EU-ECB Dialogue*, FIN. TIMES (London), June 4, 1998, at 2.

274. Resolution of the European Council on Economic Policy Coordination in Stage 3 of EMU and on Treaty Articles 109 and 109b of the EC Treaty, *supra* note 153, at 3.

275. Lamfalussy, *supra* note 179.

276. See Lea Paterson, *Duisenberg Tells Banks to Lodge Assets with ECB*, INDEPENDENT (London), July 9, 1998, at 21. In response to Duisenberg’s warning to member state governments about overly relaxing fiscal policy, Irish Finance Minister McCreedy stated that the ECB chief’s opinion is “not in any way” binding on Ireland because budgetary policy is clearly a matter for the national governments. *Id.*

277. See *supra* text accompanying note 218.

be found. Moreover, the decision-making bodies of the ECB, in particular the Governing Council as the key institution, which naturally will not be free from political flavor, will serve as a forum for member states to bring in their own ideas. Clearly, the NCBs' governors themselves are also independent. However, some think it's likely rather likely that in the worst case they would act on behalf of their governments' interests.<sup>278</sup> Furthermore, one should not forget about the emergency exit; the member states can alter the ESCB by amending the *EC Treaty*—although this is a complex procedure involving the parliaments of the member states and the European Parliament.<sup>279</sup> From this prospective, it is quite unimaginable that the release of the ECB and NCBs from political pressures will give rise to a failure of their business. As a final point, one should also keep in mind that the ESCB is entrusted with specific, limited objectives, and it operates independently only in a restricted area.

### III. THE CASE OF THE DEUTSCHE BUNDESBANK

The relatively young central bank of the Federal Republic of Germany, the Deutsche Bundesbank,<sup>280</sup> is

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278. The federal structure of the Governing Council puts more weight on the NCBs, with 11 out of the 17 members. See *supra* note 179 and accompanying text. The fear that these members will demonstrate partisan decision making while determining the ECB's supranational policy has recently been responded to by Dieter Haferkamp, a member of the Directorate of the Deutsche Bundesbank. See Dieter Haferkamp, *The role of the ECB: Some Institutional Remarks*, Address at the Athens Summit '98 (Sept. 12, 1998) (German transcript available at the office of the *Houston Journal of International Law*); see also ESCB PROTOCOL art. 10.2 (notwithstanding certain exceptions concerning some financial decisions set forth under Articles 10.3 and 11.3 of the *ESCB Protocol*). He persistently called for a depoliticised esprit de corps, an obligation that in his view is already manifest in the Governing Council's decision making rule conferring only one vote for each person, irrespective of country size or economic importance. See *id.* Others even go further and see this voting as a demonstration of the federal tendency or as a "denial of national interests." Hugo J. Hahn, *The European Central Bank: Key to European Monetary Union or Target?*, 28 COMMON MKT. L. REV. 783, 801 (1991).

279. See TEU art. N.

280. The Deutsche Bundesbank was established on July 26, 1957. See *The Central Bank Council Fifty Years Ago*, DEUTSCHE BUNDESBANK MONTHLY REP., Mar. 1998, at 18. It succeeded the former two-tier central bank system, consisting of the Bank deutscher Länder and legally independent Land Central Banks (Landeszentralbanken), a system that was largely modeled on the federal pattern of the Fed. See FRANCKE & HUDSON, *supra* note 105, at 27–28. Thus, like its successor Bundesbank, the Bank deutscher Länder, which celebrated its 50th anniversary on March 1, 1998, also enjoyed independence from German political bodies, including the Federal Government. See *id.* at 28. The West German Constitution of 1949 provided for the establishment of the Bundesbank. See Fischer, *supra* note 135, at 157 (presenting a detailed and interesting history of

supposed to have served as a model for the ECB, and hence the Bundesbank's successful fight against inflation is seen as further proof of the importance of the principles of independence and accountability included in the *EC Treaty* and the *EMI Protocol*. The Deutsche Bundesbank is a "[f]ederal corporation under public law"<sup>281</sup> and an institution of the state or state organ.<sup>282</sup>

As stipulated in section 3 of the Federal Bank Act (Gesetz über die Deutsche Bundesbank or BBankG), which is completely effective from January 1, 1999,<sup>283</sup> the duties of the federal bank are defined as follows:

The Deutsche Bundesbank, being the central bank of the Federal Republic of Germany, is an integral part of the European System of Central Banks (ESCB). It shall participate in the performance of the ESCB's tasks with the primary objective of maintaining price stability, and shall arrange for the execution of domestic and international payments. In addition, it shall discharge the duties assigned to it under this Act or other legislation.<sup>284</sup>

Like the *EC Treaty* and the *EMI Protocol*, the BBankG makes express reference to price stability.<sup>285</sup> Because of this objective, the Bundesbank is usually called the "guardian of the currency."<sup>286</sup> The overwhelming importance and priority of objective price stability is further confirmed in section 12 of the

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the reorganization of the German central banking system after the Second World War).

281. See Gesetz über die Deutsche Bundesbank (BBankG) § 2, v. 22.12.1997 (BGBl. I S.3274).

282. See *id.* (observing that the Federal Government is the owner of the basic capital of the Bundesbank, which amounts to DM five billion).

283. It should be noted that the current BBankG in the wording of the announcement of October 22, 1992 published in the *Federal Law Gazette* (*Bundesgesetzblatt* or *BGBl*), has been amended by the *Sixth Act Amending the Federal Bank Act* of December 22, 1997 that partially went into force on December 31, 1997. Compare BGBl. I S.1782, with BGBl. I S.3274 (showing the act as it was on each respective date).

284. BBankG § 3.

285. Compare *id.*, with EC TREATY art. 105(1), and ESCB STATUTE art. 2; see also DEUTSCHE BUNDESBANK, *supra* note 16, at 23. It should be noted that to achieve this aim the Bundesbank has decided that the control of the money stock (Steuerung der Geldmenge) is its main monetary policy strategy. See *id.* at 66. To define its respective goals, the Bundesbank has been setting annual monetary targets since 1975. See *id.*

286. Hans-Peter Fröhlich, *Survey of the European Single Market*, FIN. TIMES (London), Jan. 19, 1993, at IV.

BBankG, which obligates the central bank to “support the general economic policy of the Federal Cabinet,” but only “[w]ithout prejudice to its tasks as part of the European System of Central Banks.”<sup>287</sup> Furthermore, it establishes the working environment of the Bundesbank by stipulating that the Bank “is independent of instructions from the Federal Cabinet.”<sup>288</sup> Similar to the ESCB provisions, the Federal Bank Act calls for mutual cooperation and consultation between the central bank and the responsible political decision-making body, the Federal Cabinet.<sup>289</sup> On the other hand, it is apparent that these rules are less comprehensive than those of the ESCB and do not subject the policy of the Bundesbank to the permanent surveillance and control of the parliament.<sup>290</sup> Thus, the accountability of the Bundesbank is clearly less than that

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287. BBankG § 12.

288. *Id.*

289. See BBankG § 13. The BBankG stipulates as follows:

(1) The Deutsche Bundesbank shall advise the Federal Cabinet on monetary policy issues of major importance, and shall furnish it with information on request.

(2) Members of the Federal Cabinet are entitled to attend the meetings of the Central Bank Council. They have no right to vote, but may propose motions.

(3) The Federal Cabinet should invite the President of the Deutsche Bundesbank to attend its deliberations on important monetary policy issues.

*Id.* Moreover, the Bundesbank works closely with the so-called “five wise men,” the Government’s independent council of economic advisers. *Ericsson, Akzo Down as Bourses Decline*, FIN. TIMES (London), Apr. 26, 1997, at 13. One recent example in which the advisory function under section 13(1) gained importance was on the release of the convergence reports of the EMI and the Commission. See OPINION OF THE CENTRAL BANK COUNCIL, *supra* note 39, at 2. Chancellor Kohl requested that the Deutsche Bundesbank deliver its expert opinion on convergence in the EU in view to the final stage of the EMU. See *id.* Also, the Bundesbank has made use of its authority under section 18 of BBankG to publish statistics in the fields of banking and the monetary systems through its monthly reports. See BBankG § 18; see also Peter Norman, *Germany Reports Record Trade Surplus*, FIN. TIMES (London), Feb. 19, 1998, at 2. Further accounting requirements include the filing of annual accounts (balance sheet and profit and loss accounts) which are ultimately subject to examination by the Federal Court of Auditors (Bundesrechnungshof). See BBankG § 26.

290. In particular, there are no annual or even monthly reports to be submitted to the parliament. The term “parliament” deserves particular attention. It is not identical with the Government or Cabinet, although it is almost naturally overlapping. See Yves-Thibault de Silguy, *The Euro and Global Financial Markets*, LIFFE City Lecture in London (Feb. 5, 1998) (transcript available at the office of the *Houston Journal of International Law*) (stating that the “relations between the U.S. Congress and the Federal Reserve could be a useful model to follow”).

of the ESCB,<sup>291</sup> a fact that has been questioned by Karl Otto Pöhl, the former Bundesbank chief.<sup>292</sup> Also, there is no dispute resolution provision for serious disagreements and tensions that may arise between the government and the central bank. However, the governmental position is still powerful, because it remains the monetary sovereign; the “currency, money and coinage” are subject to the exclusive legislation of the Federation.<sup>293</sup> In addition, one should keep in mind that the Federal Bank Act is a simple law, not subject to the Constitution, and can easily be changed or amended.<sup>294</sup> Astonishingly, although the Government under Chancellor Helmut Kohl did not always support the ideas and policies of the Bundesbank,<sup>295</sup> there has never been any discussion about changing the status of the bank. This lack of discussion leads back to the high reputation of the Bundesbank, both in Germany and worldwide, which resulted from its successful anti-inflationary policy.<sup>296</sup> Further similarities to the ESCB can be found by considering that fiscal policy is separated from

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291. However, it is noteworthy that “despite the absence of formal requirements” the Deutsche Bundesbank nevertheless “has always attached great importance to accountability” and “has practised [sic] continuous accountability particularly to the general public in Germany.” Issing, *supra* note 144. Even Jacques Delors once said that “not all Germans believe in God but all Germans believe in the Bundesbank.” Paul Volcker et al., *The Philosophy of Central Banking*, in *THE FUTURE OF CENTRAL BANKING: THE TERCENTENARY SYMPOSIUM OF THE BANK OF ENGLAND* 342, 359 (1994).

292. See Volcker et al., *supra* note 291, at 358.

293. Grundgesetz [GG] art. 73(4). Moreover, as stipulated under Article 109(2) of the German Constitution, “[t]he Federation and the States give due regard in their budget management to the requirements of overall economic equilibrium” thus, imposing further monetary responsibilities upon them. *Id.* art. 109(2).

294. See Wolfgang Munchau, *Fiercely Independent Institution: European Central Bank*, *FIN. TIMES* (London), Sept. 19, 1997, at 7.

295. See Gavyn Davies, *What the Bundesbank Can Learn From the Fed*, *INDEPENDENT* (London), July 22, 1996, at 17. One of the most severe issues that provided “commotion” even within the EU was the issue concerning the revaluation of the Bundesbank’s gold reserves. See *Revaluation of Gold and Foreign Exchange Reserves*, *DEUTSCHE BUNDESBANK MONTHLY REP.*, June 1997, at 5. In response to the proposed concept of the German Federal Minister of Finance to revalue the gold reserves distinctly higher and to distribute the resulting profits to the Federal Government in order to redeem its existing debts, the Central Bank Council unambiguously deemed this “concept of the Federal Minister of Finance . . . as constituting interference in the task of compiling and approving the balance sheet, which falls within the Bundesbank’s field of responsibility, and hence [is] an infringement of the Bundesbank’s independence.” *Id.*

296. See *Godfathers of Easy Money*, *FIN. TIMES* (London), Oct. 21, 1998, at 22; see also *Central Bankers*, *INDEPENDENT* (London), Jan. 20, 1999, at 17.

monetary policy and remains within the political authority.<sup>297</sup> Also, the Bundesbank is barred from extending credit to the government.<sup>298</sup> Finally, the organizational structure of the Bundesbank is similar to the ESCB pattern.<sup>299</sup> While the governing bodies of the central bank are comprised of three organs, the supreme decision-making body responsible for the monetary policy is the Zentralbankrat (Central Bank Council).<sup>300</sup> The implementation of these decisions is conferred to the Direktorium (Directorate), the central executive organ of the central bank.<sup>301</sup>

With these considerations in mind, it is quite clear that the ESCB is not a simple copy of the Bundesbank pattern. Although there are similarities in the low level of democratic accountability, the ESCB seems to be much more transparent.<sup>302</sup> However, there are significant differences in that the legal framework of the ESCB receives higher protections than those provided under the Federal Bank Act<sup>303</sup>

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297. See Gesetz über die Deutsche Bundesbank (BBankG) §§ 12–13, v. 22.12.1997 (BGBl. I S.3274).

298. However, this is only true since the central bank entered the second stage of the EMU. Before July 15, 1994 when the pertinent provision dealing with “Transactions with public authorities,” BBankG § 20(1), was revised, the central bank was permitted to grant credits to the government even though it was restricted qualitatively and quantitatively. See DEUTSCHE BUNDESBANK, *supra* note 16, at 35.

299. Compare BBankG §§ 6–9, with ESCB PROTOCOL arts. 9–11.

300. See BBankG §§ 5–6. The governing bodies of the Deutsche Bundesbank are comprised of the Central Bank Council, the Directorate, and the executive boards (Vorstände) of the Land Central Banks. See DEUTSCHE BUNDESBANK, *supra* note 16, at 19; see also BBankG § 6. Hence, this Council may be compared with the Governing Council of the ECB.

301. See BBankG §§ 5, 7. This body corresponds to the Executive Board of the ECB with the terms and protection of their offices being nearly identical. Compare BBankG § 7(3), with EC TREATY art. 109a(2)(b), and ESCB PROTOCOL art. 11.2. However, the influence of the Federal Cabinet is broader than that of the European Parliament since the Cabinet has to nominate the members of the Directorate rather than only be consulted. See *id.* Additionally, the Federal Cabinet must approve Directorate members’ contracts relating to their legal status, particularly their salaries and retirement pensions. Compare BBankG § 7(4), with ESCB PROTOCOL art. 11.3.

302. According to Otmar Issing, this difference is because the Bundesbank’s independence in reality is based upon its support by the general public. See Issing, *supra* note 144.

303. See Peter M. Schmidhuber, The European System of Central Banks (ESCB)—Guarantor for a Stable Euro?, Address to the International Media Seminar of the Press and Information Office of the Federal Government in Berlin (Oct. 24, 1997) (transcript available from author).

and the ESCB is conferred a higher degree of independence than the Bundesbank.<sup>304</sup>

As a consequence of the latter aspect, the EMI is responsible for the surveillance of the legal convergence under Article 109j(1) of the *EC Treaty*.<sup>305</sup> Under Article 7.1 of the *EMI Protocol*, the EMI revealed that the Bundesbank operates inconsistently with the *EC Treaty* and *EMI Protocol* and those inconsistencies would require adaptation and review.<sup>306</sup> With respect to institutional independence, the EMI objected to the Cabinet's right to defer a decision of the Central Bank Council as stipulated under the previous version of section 13(2) 3rd sentence BBankG.<sup>307</sup> Moreover, the EMI called for compliance with Article 14.2 of the *EMI Protocol*, particularly the guaranteed minimum five-year term for members of the central bank's decision-making bodies and the grounds for dismissal of the members of the governing bodies that were defined in their individual contracts.<sup>308</sup> Finally, the EMI criticized the fact that the Bank's statute ambiguously reflected the "primacy of maintaining price stability," rather than safeguarding the currency.<sup>309</sup>

Germany's response to these problems was quite prompt. By the Sixth Act Amending the Federal Bank Act,<sup>310</sup> Germany adopted the central banking legislation pursuant to the

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304. See Denis Staunton, *Nobody Allowed for the Appointment of Oskar*, IRISH TIMES, Dec. 30, 1998, at 56; see also Munchau, *supra* note 294, at 7. The decision of the ECB Governing Council at its second meeting on July 8, 1998 to introduce a minimum reserve system for commercial banks was deemed a further move towards the German model. See European Central Bank, *The Use of a Minimum Reserve System by the European System of Central Banks in Stage Three—Final Specification* (visited Feb. 20, 1999) <[http://www.ecb.int/press/pr981013\\_3.htm](http://www.ecb.int/press/pr981013_3.htm)>. This decision mandates that commercial banks deposit two percent of their funds with the ECB. See *id.*

305. EC TREATY art. 109j(1).

306. See EMI CONVERGENCE REPORT 1996, *supra* note 23, at 116.

307. See *id.* See also Gesetz über die Deutsche Bundesbank (BBankG), v. 22.10.1996 (BGBl. I S.1782)

308. *Id.*

309. See *id.*

310. See Gesetz über die Deutsche Bundesbank (BBankG), v. 22.12.1997 (BGBl. I S.3274); see also *Amendment of the Bundesbank Act for Stage Three of European Economic and Monetary Union*, DEUTSCHE BUNDESBANK MONTHLY REP., Jan. 1998, at 25, 25 [hereinafter *Amendment of the Bundesbank Act*]. "In connection with the preparations for the introduction of the euro, the Bundesbank Act has been amended. With the Sixth Act Amending the Deutsche Bundesbank Act, . . . German central banking legislation has been adapted to the requirements under Community law for the participation of the Federal Republic of Germany in Stage Three of monetary union." *Id.*

obligations of the member states under Article 108 of the *EC Treaty* and in consideration of the EMI recommendations.<sup>311</sup> It is now compatible with the *EC Treaty* and *EMI Protocol* as was confirmed in the 1998 convergence reports by the EMI and the Commission.<sup>312</sup> Naturally, changing the central bank statutes may not be sufficient to meet all the prerequisites for the final changeover to the single currency.<sup>313</sup> Thus, the Law for the Introduction of the Euro (Euro-Einführungsgesetz or EuroEG)<sup>314</sup> of June 9, 1998 was made effective on Jan. 1, 1999.<sup>315</sup> The law contains, among other things, legislative changes in the areas of corporate law, accounting law, the law regarding legal proceedings, stock exchange legislation, and the coinage law.<sup>316</sup>

#### IV. CONCLUSION

Viewing the internal structure of the ESCB, there can be no doubt that the ECB and the NCBs enjoy a high degree of independence, while their political accountability ranks at a low level. Unquestionably, this will promote the work of the central bankers in Frankfurt and in the other financial castles of the member countries. The given mandate is clear, and we should not be afraid that price stability is being achieved and maintained.

Moreover, the two lessons learned from the recent debate over the presidency of the ECB are (1) central bank independence will be all the more important because it seems

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311. EC TREATY art. 108; EMI CONVERGENCE REPORT 1998, *supra* note 26, at 299. "The EMI has been consulted on a draft of the new law, which has been amended, inter alia, in the light of the EMI's opinion." *Id.*

312. *Amendment of the Bundesbank Act*, *supra* note 310, at 25; EMI CONVERGENCE REPORT 1998, *supra* note 26, at 299, 311 (confirming that the statute is "compatible with Treaty and Statute requirements for Stage Three"); see also EC CONVERGENCE REPORT, *supra* note 26, at 40 (confirming that "[l]egislation in Germany is compatible with the requirements of the Treaty and the ESCB Statute").

313. See Hans Tietmeyer, The Euro: A Challenge to, and Opportunity for, the Financial Markets, Address at the 21st Colloquium of SUERF and CFS (Oct. 15, 1998) (German transcript available at the office of the *Houston Journal of International Law*) (describing the mechanical implementation of the changeover to the euro and discussing a few uncertainties).

314. See Gesetz zur Einführung des Euro (EUROEG), v. 9.6.1998 (BGBl. I S.1242); Council Regulation 1103/97, 1997 O.J. (L 162) 1.

315. See Commission Working Paper on Preparations for the Changeover of Public Administrations to the Euro, (SEC 97) 2384 (1997) (confirming that the "Council Regulation on certain provisions relating to the introduction of the euro' . . . has already been adopted").

316. See *id.*

to be in the nature of national governments to interfere with the conduct of a supranational institution that has been set up to serve the Community, and (2) the heads of state have shown that they were, in fact, able to find a compromise in a highly sensitive matter.<sup>317</sup> Moreover, Duisenberg's recent promise before the European Parliament on July 15, 1998 to publish the minutes of the board meetings, including explanations of interest rate decisions, and to appear before the European Parliament for regular cross-examinations<sup>318</sup> confirms how serious the ECB takes demands for transparency and openness. Accordingly, while there is hardly *de jure* accountability and political control, there will be a *de facto* need for a Round Table and an arrangement between political and monetary issues.

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317. See Stephen Bates, *Secret's Out for Bank Chief*, GUARDIAN (London), July 16, 1998, at 25 (stating that the Euro-MEPs' "powers of investigation into mal-administration and excessive secrecy extend to the bank as well as other EU institutions"); Toby Helm, *Euro Chief Bows to MP's Calls for Bank Frankness*, DAILY TEL. (London), July 16, 1998, at 22 (stating that Duisenberg "sensed that Parliament was in [an] uncompromising mood" and that "[t]he tensions demonstrate the sharply different preoccupations of central bankers and politicians over how the euro should be run"). As a result, Duisenberg agreed to publish reports of ECB board meetings. See *id.* "Alan Donnelly, leader of the 60 British Labour members, and one of the fiercest critics of bank secrecy, welcomed the change of heart." *Id.*

318. See Bates, *supra* note 317, at 25 (stating that Mr. Duisenberg "promised he would appear before the European Parliament for regular cross-examination on policy decisions but said he did not expect to have to go before national parliaments to explain himself"); Helm, *supra* note 317, at 22 (stating that Duisenberg "agreed to publish reports of board meetings, including explanations of interest-rate decisions," but he insisted that minutes "which would show how governors had voted on interest rates will not be published").