# The Democratic Accountability of Central Banks

## A Comparative Study of the European Central Bank

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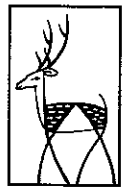

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Act 1998 does not include any provisions to formalise this *de facto* mechanism of accountability of the governor of the Bank to the executive government. In this context it would have been desirable to give it a concrete legal form which could then also have spelled out the consequences of such a deviation from the quantified monetary policy objective.

## III. THE RELATIONSHIP WITH THE EXECUTIVE BRANCH OF GOVERNMENT

When examining the relationship with the executive branch of government, generally a distinction can be drawn for the central banks included in this study on the basis of whether an explicit reference to the independence exists in the legal basis of the bank. Where such a provision exists it forms the basis for the relationship foremost, but not exclusively, with the executive government.

Under the EC Treaty and the ESCB Statute there is no formal mechanism which provides third parties with the possibility of influencing the final decision of a central bank; indeed there is an express prohibition on the ECB seeking or accepting instructions expressed in Article 107 EC and repeated in Article 7 of the ESCB Statute. Some of the central banks examined in this study include provisions allowing for members of government to participate in meetings of the monetary policy board of the central bank and, *vice versa*, for central bank representatives to participate in government meetings. In so far as these provisions do not go beyond what is foreseen in case of the ECB they do not appear to be in contradiction with primary Community law.[284]

### 1. Central bank statutes with an explicit reference to independence

Where the legal basis establishes explicitly the independence of the central bank the relationship between the former and the executive government is basically determined by such a provision, while additional provisions may allow for some level of co-operation between the two. This is the case for the Bundesbank, the Banque de France, and the ECB. Interestingly, the Bundesbank has been the blueprint for the respective provision for the ECB, and the new statutory independence of the Banque de France has been modelled against the background of Articles 107 and 108 EC on the independent status of the ECB and the national central banks.[285]

The relationship between the **Bundesbank** and the Federal government is characterised by the independence of the Bundesbank *vis-à-vis* the Federal government enshrined in its legal basis. The most prominent provision describing

[284] European Monetary Institute, n. 199 above, at 101: "The crucial issue is whether a national institution has any formal mechanism at its disposal to ensure that its views influence the final decision". Note, however, the changes at the Banque de France, Bundesbank and Nederlandsche Bank.
[285] Cf. Chap. 3 II.



the relationship between the Bundesbank and the Federal government is to be found in § 12, sentence 2 of the BBankG:

> "Without prejudice to the performance of its functions, the Deutsche Bundesbank shall be required to support the general economic policy of the Federal government. *In exercising the powers conferred upon it by this Act, it shall be independent of instructions from the government.*"[286]

The structure of § 12 of the BBankG is unusual since the independence of the Bundesbank, as introduced in the second sentence, appears to be an add-on to the obligation to support the economic policy of the Federal government introduced in the first sentence.[287] A closer look, however, reveals that the independence is already recognised to some extent in the first sentence, which restricts the obligation to support the Federal government to areas of general economic policy, which do not interfere with the performance of the Bundesbank's functions. Nevertheless, the second sentence of § 12 is at least of equivalent importance, as it guarantees the independence of the Bundesbank on a broader scale, that is to say with respect to *any* of its functions.

Since its establishment there has always been a discussion on the legitimisation and the limits of the special position of the Bundesbank as part of the executive power. For those who advocate the existence of a constitutional independence of the Bundesbank the legitimation derives directly from Article 88 of the Basic Law.[288] For those rejecting such constitutional recognition the question has long since been whether the independent position of the Bundesbank as stated in § 12, sentence 2 of the BBankG is constitutional.[289]

The basic argument presented against the constitutionality of this provision is the prohibition of so-called ministerial or government free areas which originates from the principle of democracy deriving from Articles 20(1) and 28(1) of the Basic Law[290]. Under the Basic Law any exercise of state power requires democratic legitimation. Thus, in principle any institution with executive powers has to be subject to the control and orders of the executive government, which in return is accountable to the Bundestag, in accordance with the parliamentary principle.[291] Sub-governments (*Nebenregierungen*) are considered to be incompatible with the principles of a parliamentary democracy. Yet, § 12, sentence 2 of the BBankG states that the Bundesbank is independent of instructions from the Federal government. Against the background of this provision,

[286] English translation as provided in Gormley/de Haan, n. 213 above.
[287] Cf. Chap. 4 II 1; Schmidt, n. 203 above, at 672, states that the structure of § 12 is faulty, as the two sentences should be in reverse order.
[288] Cf. references in Chap. 4 I 1.
[289] It should be noted in this context that the question of the constitutionality of the independent position of the Bundesbank, although undoubtedly linked, has to be separated from the issue, observed in Chap. 4 I 1.3., whether the independence of the Bundesbank is guaranteed by the Constitution.
[290] For an overview cf. W. Müller, "Ministerialfreie Räume", *JuS*, vol. 25 no. 7 (1985), 497–508.
[291] Maunz, n. 23 above, on Art. 88, side notation 18, with further references.

the Bundesbank has been characterised as something like a sub-government.[292] Besides, § 12, sentence 2 of the BBankG is not the only provision in the BBankG which safeguards independence. According to § 29 of the BBankG, the two main organs of the Bundesbank, the Central Bank Council and the Board of Directors, have the status of supreme federal authorities (*oberste Bundesbehörden*) with the consequence that these organs enjoy the highest ranking in the administrative structure, and as such are on an equal footing with the Federal ministries and cannot be subject to the instructions of a minister.[293] Finally, § 2 of the BBankG, according to which "the German Bundesbank is a legal person under public law, directly dependent on the Federation", has been interpreted as safeguarding the institutional independence of the Bundesbank, giving it a unique position within the German legal system.[294]

Ministerial or government-free areas are at the same time Parliament-free areas in as much as a minister cannot be held responsible by Parliament for an area in which he cannot give any instructions.[295] In this context von Bonin argues that the self-restraint of Parliament from control of *superior* executive tasks is not possible. Considering the management of monetary policy as one of the most central governmental tasks in connection with the economic policies, he draws the conclusion that a statutory provision which would give the Bundesbank *unrestrained* political autonomy *vis-à-vis* the executive government and Parliament is not compatible with the Basic Law.[296] Ehrenberg takes a clear stand on the position of the Bundesbank, arguing that anybody taking parliamentary democracy serious should have reservations against furnishing an independent "committee of state officials" such extensive and parliamentary uncontrolled powers.[297]

Despite these reservations against the constitutionality of the independent position of the Bundesbank, the majority of observers consider the current position of the Bundesbank to be constitutional. It is recognised that in a parliamentary democracy an institution exercising executive powers cannot be independent to the extent that it is not subject to direct or indirect parliamentary accountability, and thus institutions under public law which are not subject to the orders of the Federal government are considered to break through the parliamentary principle laid down in Articles 65, 67 and 68 of the Basic Law. It is, moreover, undisputed that the Bundesbank exercises executive functions.[298] However, according to the majority view this restriction of the parliamentary

[292] v. Arnim, n. 115 above, at 341.
[293] Samm, n. 33 above, at 149. The state central banks have only the status of Federal authorities.
[294] Werres, n. 217 above, at 4, with further references.
[295] Müller, n. 290 above, at 498; Schmidt, n. 203 above, at 678 is sceptical.
[296] v. Bonin, n. 40 above, at 170, also referring to BVerfGE 9, 268, 282 *et seq.*
[297] H. Ehrenberg, *Zwischen Marx und Markt* (Societäts-Verlag, Frankfurt a.M., 1973), at 33.
[298] E.g. Benda *et al*, n. 54 above, § 18, side notation 88, who refer to the Bundesbank as a sort of governmental organ without having the formal status of a constitutional organ.



principle is backed by a specific constitutional admissibility.[299] This admissibility is thought to be provided by Article 88 of the Basic Law itself.[300] It is argued that the drafters of Article 88 did not mean to exclude the establishment of an independent Bundesbank, and, moreover, that they and, thereafter, the drafters of the BBankG considered the stability of the currency as a doctrine of the highest priority from a national point of view. If this doctrine is interpreted as an order of constitutional magnitude, the legislator has discretion with regard to the establishment of an institution which best fulfils this prerogative.[301] However, it seems questionable when Maunz attempts constitutionally to justify the independence of the Bundesbank with a comparison with the independence of the Federal Audit Office (*Bundesrechnungshof*) or the right of self-regulation of the Communes in the Federal states, since the provisions on both of these institutions refer *explicitly* to independence and right of self-regulation respectively.[302] Such an explicit reference is missing in the case of Article 88 of the Basic Law and the Bundesbank. It has also been argued that the Bundesbank is not completely removed from Parliament, since the independence of the Bundesbank does not include Parliament in its function as legislator as, according to Article 20(3) of the Basic Law, the executive is bound by law and justice.[303] Indeed it is pointed out that at the time of the establishment of the Bundesbank the legislator did realise the dilemma between the desired independence of the Bundesbank from Federal government and the principle of parliamentary accountability, and that the intention was to solve the conflict, on the one hand, by removing the Bank from direct government influence in the form of the chancellor's power to decide on government policies (*Richtlinienkompetenz*) and the Federal ministers' supervisory power (*Fach- oder Dienstaufsicht*), while, on the other hand, giving Parliament the power to change the statute of the Bundesbank.[304] Ladeur observes that by means of the statutory independence of the Bundesbank parliamentary scrutiny is not meant to be excluded, but rather fixed on a long-term perspective, whereby frustration of expectations with regard to the successful conduct of monetary policy, as well as functioning self-controls by the Bundesbank, can lead to institutional changes.[305] Besides, it may be argued that

[299] Bauer n. 22 above, Art. 88, side notation no. 22, who refers to other examples of independent institutions, such as the Federal Insurance Institution for Salaried Employees (*Bundesversicherungsanstalt für Angestellte*) and the public broadcasting corporations (*Rundfunkanstalten*).
[300] E.g. Benda *et al.* (eds.), n. 54 above, § 18, side notation 86 *et seq.*, with further references.
[301] Coburger, n. 23 above, 33 *et seq.*
[302] E.g. Müller, n. 290 above, at 498, with further references, who argues that the indirect state administration (*mittelbare Selbstverwaltung*), such as the self-regulation of the Communes, falls outside the scope of the concept of ministerial-free areas.
[303] E.g. D. Studt, *Rechtsfragen der europäischen Zentralbank* (Dunker & Humblot, Berlin, 1993), at 89. In this context it is often emphasised that despite its independent position the Bundesbank is in principle not excluded from judicial review.
[304] Hahn, n. 36 above, at 35, who refers to the discussions in the parliamentary committee at the time, reprinted in BTDrucks. 2/3603, at 5.
[305] K.-H. Ladeur, "Die Autonomie der Bundesbank- ein Beispiel für die institutionelle Verarbeitung von Ungewißheitsentscheidungen", *Staatswissenschaften und Staatspraxis* 3 (1992), 486–508, at 500.

the Bundesbank is not even completely removed from the executive, since the relationship between the former and the Bundesbank is characterised by manifold dependencies, such as the appointment procedures and the co-operation procedures under § 13 of the BBankG.[306] Yet, it is questionable whether the democratic legitimation of the Bundesbank derives from the will of the democratically elected Parliament to establish the Bundesbank as an independent institution within the executive branch of government. Indeed, the independent position of the Bundesbank has been described as self-restraint by Parliament.[307] Generally, in the German constitutional order an Act of Parliament does not rank above the Constitution and thus has to be compatible with the same.[308] Thus, there are limits to the extent to which Parliament can exercise self-restraint through the creation of laws without violating basic democratic principles of the German constitution.

Several courts have considered the question of the constitutionality of the Bundesbank in passing, thereby implicitly accepting the independent position of the Bundesbank. It has been observed that the Federal Administrative Court has concluded that the Basic Law neither guaranteed nor excluded the independence of the Bundesbank, and the German Federal Constitutional Court has at least confirmed the constitutionality of the independent position of the Bundesbank *vis-à-vis* the executive by referring to "its constitutional independent position".[309] Finally, in its decision on the constitutionality of the Law of Accession to the TEU the German Federal Constitutional Court justifies the transfer of authority over monetary policy to the ECB by observing that an independent central bank is a better guarantor of currency.[310] Although at the time of the coming into existence of the ESCB, Parliament's right to change the BBankG is considerably restricted, the German Federal Constitutional Court seems to have accepted this restriction on the principle of democracy which goes further than what is already presently the case for the Bundesbank. To be sure, the independence of the Bundesbank is not limitless. In fact, according to the wording of § 12, sentence 2 of the BBankG the independence of the Bundesbank is limited to the competence conferred upon it by the BBankG (*Eigenzuständigkeit*). As an *argumentum e contrario* it can be concluded from this that the Bundesbank is subject to supervision by the Federal government for all other areas of its activities.[311] This includes in particular the exchange rate policy where determined

[306] v. Bonin, n. 40 above, who, despite his basic criticism, finds provisions which restrict the autonomy of the Bundesbank *vis-à-vis* the Federal government and the Bundestag.

[307] v. Arnim, n. 115 above, at 342; Samm, n. 33 above, 148 *et seq.*, with further references, is critical.

[308] This argument is applied by R.H. Kaiser, *Bundesbankautonomie—Möglichkeiten und Grenzen einer unabhängigen Politik* (Rita G. Fischer Verlag, Frankfurt a.M., 1980), at 66.

[309] BVerfGE 62, 169, at 183.

[310] Cf. Chap. 4 I 3.

[311] Cf. H.P. Bull, in R. Wasserman (principal editor), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, Vol. 2 (Reihe Alternativkommentare, Luchterhand, Neuwied, 1989), on Art. 86 Basic Law.



by the Federal government, but also such tasks which are established by other laws, such as the External Economic Relations Act (*Außenwirtschaftsgesetz*).[312]

As indicated earlier, although the BBankG explicitly refers to the independence of the Bundesbank from the Federal government, it is also characterised by a number of provisions governing the relationship between the two. The obligation to support the general economic policies of the Federal government, as stated in § 12, sentence 1 of the BBankG, has already been observed in the context of the monetary objective of the Bundesbank.[313] Moreover, § 13 of the BBankG provides for co-operation between the Bundesbank and the Federal government in order to enable co-ordination in the areas of economic and monetary policies.[314] According to § 13(1):

> "The Deutsche Bundesbank has to advise the Federal government on issues of essential interest for monetary policy, and to inform the Federal government upon request."

Generally, the Bundesbank is free to provide economic and legal advice on its own initiative but, upon request by the Federal government, the former is obliged to provide the relevant information which it has been asked for. Since the obligation to provide information is limited to issues of *substantial* monetary importance, the Bundesbank is not required to inform the Federal government on just any monetary issue. Exactly what issues have to be considered substantial remains unclear.[315] This provision has been identified as another element of the independent status of the Bundesbank since it functions as a restraining mechanism limiting the influence of the Federal government.[316] Neither § 13 nor any other provision of the BBankG includes rules in case of a conflict between the Bundesbank and Federal government.[317] Should the Bundesbank consider a certain issue to be outside the scope of co-operation, i.e. not of substantial monetary importance, the Federal government could hardly enforce its right to information. This, however, is believed to have been the intention of the legislator at the time of the drafting of the BBankG, in order to force the parties to solve any conflicts that may arise by means of co-operation rather than unilateral enforcement.[318] Ultimately only the legislator could solve such a conflict by amending the BBankG.

[312] In fact, the Bundesbank is sometimes characterised as being *partially* independent, since its independence is limited to the internal monetary policy; cf. Brandt, n. 50 above, 13 *et. seq.*

[313] Cf. Chap. 4 II.

[314] v.Spindler/Becker/Starke, n. 215 above, § 13, at 271.

[315] E.g. recently the Federal government asked the Bundesbank to comment on the fulfilment of the convergence criteria in accordance with Art. 109j EC: cf. Deutsche Bundesbank, *Stellungnahme des Zentralbankrates zur Konvergenzlage in der Europäischen Union im Hinblick auf die dritte Stufe der Wirtschafts- und Währungsunion*, Frankfurt a.M., 26 Mar. 1998.

[316] v.Spindler/Becker/Starke, n. 215 above, § 13, who fall short of explaining in what respects the obligation to supply information can have a negative influence on the level of independence of the Bundesbank.

[317] For Ehrenberg, n. 297 above, at 33, this is problematic from the point of view of parliamentary democracy.

[318] Kaiser, n. 308 above, at 45; § 13(2) sentence 2 BBankG, which, to some extent, represents an exception to this concept, will be discussed later.

On the one hand, the obligation to provide information may enhance the transparency of monetary policy which in turn could form an element of democratic accountability for the Bundesbank. However, the value of § 13(1) of the BBankG as an element of accountability is diminished by the fact that this provision creates a scheme of co-operation rather than providing for means of accountability *vis-à-vis* the Federal government. This is due to the fact that the obligation to inform may be considered vague and limited both with respect to its scope and its enforceability. Indeed, this observation may not only be limited to § 13(1), as an examination of § 13(2) of the BBankG reveals. That provision deals with the participation of the members of the Federal government in the deliberations of the Central Bank Council and states that:

> "The members of the Federal government have the right to attend meetings of the Central Bank Council. They have no voting rights but can make proposals."

Provisions on the procedures of Central Bank Council meetings which could reveal the actual level of influence cannot be found in the BBankG. Such provisions are included in the BBank charter. According to § 3 of the BBank charter, the Federal Ministers for Economics and Finances are invited to every meeting of the Central Bank Council generally by the process of receiving of the Central Bank Council's agenda for the meeting. In practice, the ministers will also receive the preparatory documents for the meeting.[319] Usually, one of the two ministers attends the meetings which determine the annual money growth rates. Other members of the Federal government are only invited if a specific subject on the agenda makes their appearance necessary.

Although the actual influence of the Federal government is difficult to assess, the legal framework puts clear limits on what is legally permissible, as the members of the Federal government can only make contributions which are not binding for the Central Bank Council and, moreover, as they have no voting right at all.[320] Indeed, it has been suggested that the ministers in practice will be reluctant to make formal proposals which could provoke undesired reactions by the central bankers, since the latter may interpret the ministers' action as an attempt to limit the independence of the Bundesbank.[321] The mere fact that the Federal government is represented in these meetings does not directly enhance either the accountability of the Bundesbank *vis-à-vis* Federal government nor the control of the Bundesbank by the Federal government. As the influence of the Federal government is limited in this respect so is Parliament's ability to hold the relevant member of the Federal government accountable for his/her conduct in these meetings. However, as will be seen in the course of the examination of override mechanisms, the Federal government may not be completely powerless.[322]

[319] Wahlig, n. 113 above, at 57.

[320] With regard to the right to ask for a deferral of a decision in accordance with § 13(2), sentence 3, BBankG, cf. Chap. 4 V.

[321] Werres, n. 217 above, at 7.

[322] Cf. Chap. 4 V 2.



With § 13(3) a further element of co-operation is incorporated into the BBankG:

> "The Federal government ought to [*soll*] invite the President of the Deutsche Bundesbank to its consultations on matters related to monetary policy."

Article 13(3) of the BBankG may be considered as the counterpart to § 13(1) of the BBankG and the Federal government's right to participate in meetings of the Central Bank Council. Whether § 13(3) of the BBankG constitutes an obligation cannot be determined from its wording. However, contrary to the obligation of the Bundesbank in § 13(1) of the BBankG, the obligation of the Federal government to consult the president of the Bundesbank is at least not limited to issues of *substantial* monetary importance. In any event, § 13(3) leaves the decision which issues are considered to be of monetary importance and thus, the decision on when the president of the Bundesbank may participate in meetings of the Federal government (so-called *Kabinettssitzungen*) at the discretion of the Federal government.[323] As is the case with § 13(1) of the BBankG, § 13(3) does not include rules applicable in case of a conflict. Apart from being invited to meetings of the Federal government, the Bundesbank takes part in meetings of Economic Policy Council (*Konjunkturrat*) and the Financial Planing Council (*Finanzplanungsrat*) of the Federal government.[324]

From the examination of § 13(1) and (3) it could be concluded that the relationship between the Bundesbank and the Federal government is best characterised by co-operation instead of confrontation. Yet, the regular contacts between the Minister of Finance and the members of the Board of Directors of the Bundesbank do not amount to any form of co-ordination of fiscal and monetary policy. Suggestions for the establishment of a co-ordinating organ have generally been rejected.[325] The lack of any provisions for the resolution of a conflict between the Federal government and the Bundesbank does not mean that such conflicts cannot arise, but rather that they do not necessarily become known to the general public, leaving transparency veiled. In fact, there seems to be a general understanding that differences are not dragged into the public arena.[326] In this respect the recent openly fought dispute between the executive government and the Bundesbank over the revaluation of the gold reserves may be viewed as exceptional. It also demonstrates that in cases where the interactions between the Federal government and the Bundesbank become public not only the behaviour of the Bundesbank, but also that of the Federal government,

[323] Siebelt, n. 202 above, at 181, states that ultimately the President would have to call upon an administrative court which would have to decide whether the participation of the President of the Bundesbank was necessary.

[324] Cf. § 18 Act of 1967 on stability and economic expansion (*Stabilitätsgesetz*), § 51 law on basic budgetary rules (*Haushaltsgrundsätzegesetz*).

[325] v.Spindler/Becker/Starke, n. 215 above, at 255; Kaiser, n. 308 above, 64 *et seq.*, with further references, is critical.

[326] Werres, n. 321 above, at 9 and 39 *et seq.*, who describes the conflicts between the Bundesbank and the Federal government in the early 1980s.

can become the subject of parliamentary debates and concrete criticism. Although it may be said that numerous contacts on different levels between the Bundesbank and the Federal government function as a mechanism which *de facto* restrains the independence of the Bundesbank, the lack of any provisions for the resolution of a conflict may result in such cases being fought out in the twilight of unofficial contacts, whereby it becomes difficult, if not impossible, to hold the parties concerned accountable.

As at 1 January 1999, a revised version of Article 12 of the BBankG applies. The unusual structure of Article 12, observed above, is revised, as the first sentence of Article 12 emphasises the independence of the Bundesbank of the Federal government in carrying out its tasks. Thereafter, the second sentence states that the Bundesbank supports the general economic policy of the Federal government to the extent to which this does not infringe the tasks of the Bank in the ESCB. The parts of Article 13 of the BBankG presently discussed remain unchanged.[327]

As with the legal basis of the Bundesbank, the Bank Act 1993 enshrines the independence of the **Banque de France** in the field of monetary policy. Basically three provisions are at the centre of the relationship between the Bank and the Government in the field of monetary policy. Article 1(2) of the Bank Act 1993 determines:

> "The Banque de France, represented by its Governor, Deputy Governors or any member of the Monetary Policy Council, shall neither seek nor accept instructions from the government or any other person in the performance of his duties."

Article 1(2) cements the independence of the Bank in the conduct of monetary policy. It rules out government interventions in the form of instructions either on its own initiative or upon request of the CPM itself. The provision supplies evidence of the ambitions of the creators of the Bank Act 1993 to anticipate the statutory requirements under the EC Treaty and the ESCB Statute. It resembles Article 107 EC on the prohibition of instructions from Community and/or government bodies in the context of the ESCB. Furthermore, it has been pointed out that the reference to the government's overall economic policy in Article 1(1), sentence 2 of the Bank Act 1993 does not restrict the Banque de France in pursuing the monetary objective of price stability independently nor does it furnish the executive government with a right to issue general guidelines for the conduct of monetary policy.[328]

As in the case of the Bundesbank, the independent position of the Banque de France has raised questions of constitutional magnitude. The occasion for these concerns to become public was the introduction of the Bank Act 1993. A group of senators and deputies of the National Assembly called upon the Constitutional Council to pronounce on the proposal, claiming the Bank Act

[327] Cf. Chap. 4 V 2, with regard to the limited override mechanism of the Bundesbank.
[328] Cf. Chap. 4 II 2.



1993 was incompatible with the Constitution of 1958.[329] The plaintiffs argued that the transfer of power to the Banque de France to formulate and implement monetary policy, and in particular Articles 1, 3, 7, 8, 9, 10 and 35 of the proposed law constituted an infringement of Article 20(1) of the Constitution of 1958 according to which:

> "[T]he Government shall determine and direct the policy of the nation."

It was also alleged to infringe Article 21(1) of the Constitution of 1958, according to which:

> "[T]he Prime Minister shall direct the operation of the government."

The plaintiffs were furthermore of the opinion that the proposed provisions did not respect the principle of national sovereignty and deprived Parliament of its competences. Reference was made *inter alia* to Article 34 of the Constitution of 1958 according to which Parliament passes laws on the rules concerning the issue of currency (fourth indent of Article 34).[330] The Constitutional Council considered the wording of Article 1(1) of the Bank Act 1993 to be unconstitutional in so far as it stated that the Banque de France was in charge of formulating monetary policy with the aim of ensuring price stability. The Council argued that the provision effectively deprived government of its competence to determine and conduct monetary policy as an "essential element" of the economic policies of the government.[331] Moreover, the transfer of power over monetary policy to the Banque de France was considered to deprive the Prime Minister to some extent of his constitutional function of directing the operation of the government.[332] The Constitutional Council did not consider the second sentence of Article 1(1) of the Bank Act 1993, which explicitly stated that the Bank is to "carry out these duties *within the framework of the Government's overall economic judgment*", to be an efficient provision to ensure the government's authority over monetary policy. It found evidence for this observation in Article 1(2) of the Bank Act 1993 which explicitly prohibited government instructions to the Bank. Consequently Article 1(2) was also ruled to be unconstitutional. Moreover, the same applied to Article 7(1) of the Bank Act of August 1993 in so far as it stated that the Monetary Policy Council would be "responsible for formulating monetary policy". Concerning the complaint of the deputies of the National Assembly, the Constitutional Council stated that it was within the

[329] Décision no. 93–324 DC, JORF 1993, at 11014. According to Art. 61(2) Constitution of 1958 the Constitutional Council can also review the constitutionality of Acts of Parliament upon request by the President of the Republic, the Prime Minister, the President of the National Assembly or 60 of its members, or the President of the Senate or 60 of its members. Art. 61(2) amounts to a preventive normative control, since provisions which are declared unconstitutional may be neither promulgated nor implemented.
[330] The plaintiff also relied on Art. 3 of the *Déclaration des droits de l'homme et du citoyen* and on Arts. 2 and 3 Constitution of 1958.
[331] The following words in Art. 1(1) were considered to be unconstitutional: "*defini et . . . dans le but d'assurer la stabilité des prix*".
[332] Décision no. 93–324 DC, at 11015.

competence of Parliament to decide to transfer to the Banque de France the functions referred to in the relevant provisions of the contested law.

The Council observed, contrary to the plaintiff's argument, that Article 88 of the Constitution of 1958 in principle did constitute a sufficient legal basis for the transfer of power necessary for the establishment of an EMU, and that the provisions of the new Bank Act 1993 were merely anticipating the amendments of the legal basis of the Banque de France necessary at the time of the establishment of the ESCB. Article 88(1) states:

> "The Republic shall participate in the European Communities and the European Union, constituted by States that have freely chosen, by virtue of the treaties that have instituted those bodies, to exercise some of their powers in common."

More explicitly, Article 88(2) states:

> "On the condition of reciprocity, and according to the procedure laid down in the Treaty on European Union signed on 7 February 1992, France shall agree to transfer powers necessary for the establishment of the European economic and monetary union. . . . "

Although, while recognising that Article 88(2) in principle justified a transfer of monetary authority to the extent foreseen by the Bank Act 1993, the Constitutional Council considered this provision to be inapplicable on grounds of a lack of *reciprocity* since the TEU had not yet been ratified by all Member States.[333] In doing so it followed another argument of the plaintiffs which had claimed that a constitutional review of the contested provisions would have to exclude Article 88(2). The Constitutional Council reviewed the Bank Act 1993 on the basis of the constitutional situation prior to the introduction of Article 88 and took up its line of argumentation developed in the first of its decisions on the TEU. It argued that the Constitution of 1958 without prior amendment did not permit the removal of power over monetary policy from the (national) government.[334] On 31 December 1993, after the coming into effect of the TEU, a second Bank Act reinstated the provisions which had been considered unconstitutional.[335] Still, it seems questionable whether the newly introduced Article 88 of the Constitution of 1958, which is considered to justify the independent status of the Banque de France actually solves the discrepancies between the independent conduct of monetary policy, as foreseen by the Bank Act 1993, and the overall responsibility of government for the policies of the nation, as foreseen by Article 20 of the Constitution of 1958, since the wording of Article 88(2) can also be interpreted to the effect that it only allows for the transfer of powers to a

[333] Décision no 92–308 DC, JORF at 11015.
[334] Cf. Chap. 4 I 3.
[335] Loi no. 93–1444 du 31 décembre 1993 portant diverses dispositions relatives à la Banque de France, à l'assurance, au crédit et aux marchés financiers, JORF 1994, 231 *et seq.*; also décret no. 93–1278 du 3 décembre 1993 sur la Banque de France, JORF 1993, 16854 *et seq.*, hereafter referred to as décret 1993.



European institution in the context of EMU.[336] Indeed, this inconsistency in the Constitution of 1958 has led to proposals to introduce a separate Article on the Banque de France into the Constitution, similar to the provisions on the Audit Office (*Cour des comptes*).[337]

While ensuring the independence of the Banque de France, the Bank Act 1993 also provides for co-operation with the executive government. Both the Prime Minister and the Minister of Economic Affairs and Finances have the right to attend the deliberations of the CPM. According to Article 9(3) of the Bank Act 1993:

> "The Prime Minister and the Minister of Economic Affairs and Finances may attend meetings of the Monetary Policy Council, but may not vote. They submit proposals for consideration by the Council."

According to Article 9(4) of the Bank Act 1993 the Minister of Economic Affairs and Finance may be represented by a person specifically nominated and especially empowered to do so, in case the minister is unable to attend. Currently, the minister is represented by the Head of the Treasury at the Ministry of Economic Affairs and Finances who, at the same time, is appointed as the Censor in the General Council. Thus the Censor is *de facto* present at the deliberations of the CPM, be it in the role of the representative of the minister. The Prime Minister and Minister of Economic Affairs and Finances do not have a voting right. The provision is similar to that applicable to the Bundesbank, but more definite in some respects, since it specifies the members of government which may attend the meetings. Unlike the situation in Germany, the governor and/or deputy governors of the Banque de France do not have the right to take part in the deliberations of the Council of Ministers on issues relating to monetary policy. Nevertheless, government participation has been viewed as a guarantee of a good relationship between the government and the monetary authority and has even been interpreted as one important element of democratic accountability.[338]

The role of the Censor is not limited to representing the government ministers. He is a permanent member of the Banque de France, and the Bank Act 1993 has preserved the historically developed role of the Censor to some extent. According to Article 12(5) of the Bank Act 1993:

> "A Censor, or his alternate, appointed by the Minister of Economic Affairs and Finance, shall attend the meetings of the General Council. He may submit proposed decisions for the consideration of the Council."[339]

Unlike the Bank Act 1973, Article 12(5) of the Bank Act 1993 outlines the functions of the Censor in the General Council to a greater extent. The Censor may

[336] Leroy, n. 13 above, *5 et seq.* is critical.
[337] Duprat, n. 231 above, at 10.
[338] Cf. e.g. remarks made by the Governor of the Banque de France J.C. Trichet, reported in "Trichet outlines vision of 'open and democratic' central bank", *Financial Times*, 8–9 Jan. 1994.
[339] Note that the Bank Act 1993 does not specify the term of office of the Censor.

submit proposed decisions for the consideration of the General Council. This correlates with the role of the Prime Minister and the Minister of Economic Affairs and Finance in meetings of the CPM. However, in contrast to the representatives of the government on the CPM the Censor also plays a decisive role in the decision-making process of the General Council. According to Article 12(6):

> "Decisions adopted by the General Council shall be final, *unless* any objection is lodged by the Censor or his alternate."[340]

It derives as an *argumentum e contrario* from this provision that despite the fact that the Censor does not have a formal right to vote, the General Council *de facto* cannot take an effective decision without his consent, since his veto stands in the way of a "final decision". The fate of a decision which has been objected to by the Censor is unclear. The previous statute of the Bank, which already included the Censor's right of veto, was more descriptive in this respect, as Article 16(3) of the Bank Act 1973 indicated:

> "The decision shall be final, unless any objection is lodged by the Censor. *In the latter case the governor brings about a new consideration in due course.*"[341]

Taking into consideration the similarities with regard to the role of the Censor between the Bank Act 1993 and the Bank Act 1973 it has to be assumed that decisions of the General Council do not formally come into effect until either the Censor has withdrawn his objection or a different decision is taken by the General Council, which is not being objected to by the Censor. Although the Censor cannot force a certain decision upon the General Council, the latter cannot bypass the former. In effect, the procedure calls for co-operation between the General Council and the Censor. As an appointee of the Minister of Economic Affairs and Finance, the Censor is at times referred to as an agent or representative of the Minister of Economic Affairs and Finance, thereby indicating the interdependence between the Censor and the government.[342] In contrast to the members of the CPM and the General Council, the Censor is not insulated from government influence. Article 1(2) of the Bank Act 1993 on the independence of the Banque de France does not apply to the position of the Censor, since he is a member neither of the CPM, nor of the General Council, whose meetings he "only" attends as an outsider. The government's choice of Censors may provide evidence for the close links between the Censor and the governor. Currently, the Head of the Treasury at the Ministry of Economic Affairs and Finances has been appointed Censor.[343] To be sure, the influence of the Censor and thus, ultimately, that of government is limited to the range of decisions which the General Council is authorised to take. This includes decisions on operational matters concerning the conduct of the Bank's activities. This does not include, however, decisions directly effecting the formulation and/or implementation of monetary policy.[344] Indeed, the existence of the Censor has been identified as one of the reasons for the maintenance of the General Council alongside the CPM, albeit that almost the same persons are present in both organs.[345] The separation of functions made it possible to limit the influence of the Censor to administrative matters, while retaining the conduct of monetary policy free from government influence.

[340] Emphasis added.
[341] Emphasis added.
[342] J.-P. Duprat, op. cit., Chap. 3, n. 62, at 144, refers to the Censor as "an emanation of the executive".
[343] As at 12 Oct. 1995, cf. Banque de France, *Annual Report 1995*, (Direction générale des Études, Banque de France, 1996), at 170.



In the revised statute of the Banque de France the provision referring to the independence of the CPM has been slightly amended, linking independence to the performance of the tasks arising from the participation of the Bank in the ESCB.[346] The role of the Censor is preserved. The revised statute of the Bank makes it clear that the General Council, in which the Censor takes part, decides on issues related to the conduct of the Banque de France's activities other than those deriving from the tasks of the ESCB.[347]

The third central bank for which an entire provision describes the independence is the ESCB and the ECB. According to Article 107 EC:

> "When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of its decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks."[348]

Neither the EC Treaty nor the ESCB Statute defines what actions are actually regarded as "influencing" the decision-making bodies. Article 157(2) EC on the composition of the Commission and the obligation of its members, which includes a similar provision on the independence of the members of the Commission, may provide some orientation in this respect.[349] The members of the Executive Board, as well as the national central bank governors, are neither allowed to seek instructions, nor do they have to act in accordance with any instructions from either Community institutions or any other bodies, e.g. the Council in the composition of the Ministers of Economics and Finance

[344] Cf. Art. 11(2), which expressly excludes the responsibilities set out in Art. 1 Bank Act 1993.
[345] Duprat, n. 231 above, at 7, according to whom the primary reason is the participation of a representative of the staff of the Bank in the General Council.
[346] Cf. Art. 1(3) Banque de France Act 1998.
[347] Ibid., Art. 11(2).
[348] Also Art. 7 ESCB Statute.
[349] Cf. J. Cloos/G. Reinesch/D. Vignes/J. Weyland, *Le Traité De Maastricht: genèse, analyse, commentaires* (2nd edn., Emile Bruylant, Brussels, 1994), at 259; H. Schmitt von Sydow, in H. v.d.Groeben/J. Thiesing/C.-D. Ehlermann, *Kommentar zum EWG-Vertrag* (4th edn., Nomos, Baden-Baden, 1991), vol. III, on Art. 157 EC.

(ECOFIN), or from any government of a Member State.[350] However, unlike Article 157(2) EC, Article 107 also prohibits the influencing of the members of the Governing Council and Executive Board of the ECB and the respective decision-making bodies in the national central banks by Community institutions as well as bodies and governments of the Member States. On the one end of the scale, this must include any action falling short of a formal instruction. However, according to the wording this should theoretically also include any attempts to convince central bank officials of certain positions.[351] Yet, this interpretation would be in contradiction to the participatory rights of the President of the Council and a representative of the Commission in the meetings of the Governing Council, and the reporting requirements of the ECB to the EP.[352] It has to be interpreted from the *ratio legis* of the provision granting participatory rights that they have the right not only to state their opinions, but also to try and convince the Governing Council of its view.[353] Anything else would not only be unrealistic in practice, but would also render the participation utterly meaningless.

As with the Bundesbank and the Banque de France, the EC Treaty foresees mechanisms for co-ordination between the ECB and the Council. According to Article 109b(1) EC, the President of the Council and one member of the Commission may participate in the meetings of the Governing Council without a right to vote. With regard to the President of the Council, the member of the ECOFIN Council representing the Member State which holds the Presidency will participate. Neither the EC Treaty, nor the ESCB Statute specifies the member of the Commission who is supposed to take part, but it seems likely that the representative of the Commission will be related to the Directorate-General entrusted with economic and monetary matters, while the President of the Commission may participate occasionally.[354] On the European level the participation of a representative of the Commission had its predecessor in the participation of a representative of the Commission in meetings of the Committee of Governors.[355] The fact that the President of the Council is also given a right to participate shows the importance which the Member States assembled in the Council assign to the Governing Council of the ECB, which takes decisions on monetary policy which are binding for all participating Member States.

[350] The words "Community . . . bodies" have been implemented notably with a view to the European Council; cf. Cloos/Reinesch/Vignes/Weyland, n. 349 above, at 259.

[351] On the contrary, since Art. 157(2) does not include any reference to outside influence, Member States may try to convince Commissioners of their particular views. Cf. Schmitt von Sydow, n. 349 above, on Art. 157, side notation 25.

[352] With regard to the reporting requirements cf. Chap. 4 VI 1.

[353] R. Stadler, *Der rechtliche Handlungsspielraum des Europäischen Systems der Zentralbanken* (Nomos, Baden-Baden, 1996), 123–4.

[354] Under the current organisational structure of the Commission this would be Directorate-General II on Economic and Financial Affairs.

[355] Council Decision 64/300 [1963–4] OJ Spec. Ed., amended by Council Decision 90/142 ([1990] OJ L78/25). According to Art. 2, subpara. 2, the Commission was invited to send a member as a representatives to meetings of the Committee. The Commission could even request an emergency meeting: Art. 4.



It has been suggested that the participation of the President of the Council and a member of the Commission enhances the transparency of the ECB.[356] Yet, while this may be the case from the point of view of the Council and the Commission this is not necessarily the case from the point of view of the general public.

The counterpart to the participation of the Council and the Commission in the meetings of the Governing Council is the right of the president of the ECB to take part in meetings of the EU Council, when the latter is discussing matters relating to the objectives and tasks of the ESCB.[357] However, his influence in the decision-making process of the Council can only be informal in nature, since the EC Treaty does not give him a voting right. A general right of the Council to ask the president and/or other members of the Executive Board of the ECB to report to the Council like that to the EP has not been included in the EC Treaty and the ESCB Statute.[358] However, the president of the ECB does have to present the Annual Report on the activities of the ESCB and the monetary policy of the past and current year to the Council.[359]

### 2. Central bank statutes without an explicit reference to independence

In the case of the Fed, the Nederlandsche Bank, the Reserve Bank of New Zealand and the Bank of England, the legal basis does not include a provision explicitly referring to the independence of the respective central bank. However, as will be seen later, it cannot be automatically concluded from this that such central banks are under the control of the executive government, or for that matter more accountable. Rather, the relationship between the central bank and the executive government emerges from a summary of different provisions and *de facto* arrangements which have to be observed in order to evaluate the democratic accountability of the central bank.

Although the Fed is commonly referred to as one of the more independent central banks, the Federal Reserve Act does not include a provision explicitly referring to the independence of the Fed *vis-à-vis* the executive government. Not least due to this lack of a clear rule, a large number of studies examine the relationship between the Fed and the executive branch. The relations between the US President and the Board of Governors, and in particular its chairman, predominate in the discussions. Here, the debate mostly boils down to the question whether and to what extent the President has any influence over the Fed or, as it is often put, can put pressure on monetary policy, and, on the contrary, how

[356] Committee of Governors of the Central Banks of the Member States of the European Economic Community, *Annual Report* (July 1990–Dec. 1991), Apr. 1992, at 52.

[357] Art. 109b(2) EC.

[358] This has been one of the suggestions in the Delors Report; cf. Committee for the Study of Economic and Monetary Union, op. cit., Chap. 3, n. 349, at 22.

[359] Art. 109b(3) EC.

much influence the Fed exercises over the President. A similar approach is also taken to study the relationship between the Treasury and the Fed.

The legal nature of the Fed and its relationship with the executive are not easily determined. On the one hand, the Fed relies on a network of 12 regional Federal Reserve Banks all of which constitute bodies corporate with separate legal personalities owned by commercial banks which hold shares in their capital. On the other hand, the Federal Reserve Banks can be clearly distinguished from (private) commercial banks since the former do not work on a profit-oriented basis. Therefore, the Fed combines public with private elements. On the one hand, the Fed has been created by Congress and is supervised by a Board of Governors. Despite its classification as an independent administrative agency,[360] the latter in effect belongs to the executive branch of government. Moreover, the salary of the Chairman of the Board of Governors of the Fed is linked to those of government employees and is listed—among others—together with the Deputy Secretary of the Treasury and the Chairman of the Council of Economic Advisors.[361] Besides, like government agencies, the Board of Governors has issued rules of organisation.[362] On the other hand, the budget of the Fed is excluded from the appropriation process in Congress, and the executive branch is not represented on the Board of Governors.[363] It becomes clear from this description that the Fed cannot be described as independent of government. Conversely, the Fed cannot be assigned to the executive branch either. It remains situated somewhere between these two branches of government.[364] In short, the Fed may be characterised as a regional system of Federal Reserve Banks which combines private with public elements and which is independent within rather than of government.

Despite the powerful position of the US President under the US Constitution as the holder of the executive power neither the Federal Reserve Act nor any other law makes the Board of Governors, FOMC or the board of directors of the Federal Reserve Banks directly accountable to the former. This may be highlighted by the fact that the objectives and plans of the Fed by law do not have to be in line with the economic goals of the President.[365] It is this detachment of the

[360] With regard to the main differences between executive department agencies and independent administrative agencies, cf. D.L. Carper *et al., Understanding the Law* (2nd edn., West Law Publishing Company, Minn./St. Paul, 1995), 194 *et seq.*

[361] Cf. 5 USC Sec. 5313.

[362] According to 5 USC Sec. 552 each "agency" has to make public information—among others—its rules of procedure. S. 551 of Title 5 of the United States Code defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency".

[363] Cf. Chap.s 4 IV and 4 VIII.

[364] "A pretty queer duck" was the description used by Wright Patman, member of the House of Representatives and the most famous critic of the Fed at his time. Recorded in W. Greider, op. cit., Chap. 2, n. 175, at 49–50. Outside the area of monetary policy and in particular with regard to its regulatory tasks the Fed can be classified as an Independent Regulatory Authority, see M. Englert, *Der Handlungsspielraum der amerikanischen Bundesbank im Regierungssytem* (Schäuble Verlag, Rheinfelden, 1988), 39 *et seq.*, with further references.

[365] With regard to the reporting requirements under s. 2A(1) Federal Reserve Act, cf. Chap. 4 II 1.



Fed from the head of the executive which forms an important cornerstone in the evaluation of the Fed as an independent central bank. However, it should not be concluded from this that the role of the President is confined to that of an observer on the side-lines. Rather, the relationship is defined by a number of formal and informal arrangements which provide anything but a clear picture. First, arguably the most direct impact that the President has on the Fed is his power to appoint the members of the Board of Governors, including the chairman and vice chairman, which also stands for a majority of the members in the FOMC.[366] Secondly, although not foreseen in the Federal Reserve Act, the chairman of the Fed and the President come together in occasional consultations and the former advises the latter on issues relating to economic and monetary policy.[367] The actual relationship between the President and the chairman of the Fed depends to a large degree on the personalities of the two principal actors. In some instances the chairman is reported to have had close relations to the President.[368] Finally, the Board of Governors has strong links with the US President's Council of Economic Advisors ("the President's men") with meetings taking place every two weeks at the Board of Governors.[369]

Some studies indicate that the US President exercises a considerable influence over monetary policy conducted by the Fed. [370] Others take a more sceptical view of the actual influence of the President. Newton, for instance, argues that the Fed in the end pursues the policies it favours, according to the motto "[t]he president proposes, the Fed disposes", and draws the conclusion that "the control of the Federal Reserve policy apparatus is vested in what is in fact a self-perpetuating oligarchy".[371] Closest to the truth may be the view that the relationship between the President and the chairman of the Board of Governors is determined by the interdependence of the two for the performance of their tasks in the area of economic policy. Kettl finds four reasons for this interdependence which has grown over time: the growing recognition of the interdependence of

[366] For details of the procedure and the limitations of this power, cf. Chap. 4 IV 1.

[367] J.M. Berry, op. cit., Chap. 3, n. 555, at 45: "there is a decided circumspection in the discussions of monetary policy and interest rates, some participants say. No one wants to be seen trying to tell the Fed what to do".

[368] One such example has been the relationship between President Nixon and chairman Burns who had previously advised the President on the Council of Economic Advisors. In contrast, the relations between President Reagan and chairman Volker are reported to have been poor: cf. Kettl, n. 183 above, 193 *et seq.*

[369] M. Feldstein, "The Council for Economic Advisors and Economic Advising in the United States", *The Economic Journal*, vol. 102 (1992), 1223–34, refers to an informal body, the so-called "Troika", for the discussion of economic issues consisting of the Secretary of the Treasury, the chairman of the Council of Economic Advisors, the Director of the Office for Management and Budget, and, occasionally, the chairman of the Board of Governors.

[370] M.C. Mung/B.E. Roberts, "The Federal Reserve and its Institutional Environment: A Review" in Th. Mayer (ed.), *The political economy of American monetary policy* (Cambridge University Press, Cambridge, 1990), 83–98; also J. de Haan/L.W. Gormley, "Independence and Accountability of the European Central Bank" in M. Andenas/L.W. Gormley/C. Hadjiemmanuil/I. Harden (eds.), op. cit., Chap. 1, n. 5, 331–53, 344 *et seq.*, with an overview ofr the different studies examining the presidential influence on the Fed.

[371] M. Newton, *The FED* (Times Books, New York, 1983), at 123 and 128 *et seq.*

monetary and fiscal policy; government spending had proven to be no longer pursuable as an economic policy tool; increased public awareness with regard to presidential performance with regard to the economy ("expect the president to deliver"), and the internationalisation of economic issues.[372] According to this view the President cannot pursue economic policy successfully without the support of the Fed, and the Fed cannot operate without credibility/public confidence. Pierce refers to an "unholy alliance" between the Fed and the elected politicians. Kane describes the monetary policy-making as a series of games between the Fed and politicians which, when carried into the open, includes what he refers to as "Fed-bashing", where elected politicians blame the monetary policy of the Fed for the state of the economy and distance themselves from unpopular monetary policies.[373] Suggestions have been made to strengthen the role of the President *vis-à-vis* the Fed. On a number of occasions legislative proposals were introduced in the Senate or the House of Representatives to strengthen his role *vis-à-vis* the Board of Governors by having the term of the chairman of the Board of Governors coincide with that of the President and, more generally, to shorten the terms of the members of the Board of Governors.[374] It has also been suggested that the Board of Governors should be enlarged by two members to include nine governors.

With regard to the relationship between the Fed and the Treasury the Federal Reserve Act does not foresee any formal relationship. Neither the chairman nor any other part of the Fed is in any way subordinated to the Treasury.[375] The only instance in which the Treasury may take precedence over the Board of Governors is the case of a conflict of jurisdiction between the Secretary of the Treasury and the Board of Governors or the federal reserve agent.[376] The Secretary of the Treasury and the chairman of the Fed meet regularly, usually once a week, to discuss monetary policy issues. On a lower level regular contacts exist between the under-secretary for monetary affairs of the Treasury and members of the Board of Governors, as well as other Fed and Treasury officials. With regard to the actual influence of the Treasury *vis-à-vis* the Fed Havrilesky observes what he refers to as politically-inspired monetary activism by the administration. He detects a statistically significant relationship between signalling from the Treasury and monetary policy pursued by the Fed. Similar influence of the President or the Council of Economic Advisors has not been found.[377] On the contrary, Newton is critical of the actual influence of the Treasury on the monetary policy pursued by the Fed. Observing that between

[372] Kettl, n. 183 above, at 194.

[373] J.L. Pierce, "The Federal Reserve as a Political Power", in Mayer (ed.), n. 370 above, 151–164, at 152; E.J. Kane, "Bureaucratic Self-interest as an Obstacle to Monetary Reform", in Mayer (ed.), n. 370 above, 283–98.

[374] Cf. Chap. 4 IV 1.

[375] Note, however, that in matters relating to external monetary policy the Fed only acts as an agent for the Treasury which is responsible for the exchange rate regime: cf. Chap. 3 VII 3.

[376] S. 10(6) Federal Reserve Act.

[377] Havrilesky, n. 131 above, at 16.



1945 and 1980 the important position of Under Secretary for Monetary Affairs in the Treasury was held by figures who had close links to the Federal Reserve Banks and, having worked for them previously, for its philosophies, he refers to a "happy little game of musical chairs".[378] With regard to the Department of the Treasury it has been recommended that the Secretary of the Treasury should be made an *ex officio* member of the Board of Governors again, or that the Secretary of the Treasury and/or the Chairman of the Council of Economic Advisors should be members of the FOMC.[379] Under the original Federal Reserve Act of 1913 the Secretary of the Treasury and the Comptroller of the Currency were *ex officio* members on the Board of Governors. A less stringent suggestion has been to introduce *formal* consultations in a forum consisting of the members of the FOMC on the one side and the Secretary of the Treasury, the Director of the Office of Management and Budget and the chairman of the Council of Economic Advisors.[380] The question which needs to be addressed with regard to all of these suggestions is whether the proposed changes would enhance the co-ordination between the President and the Fed to the advantage of the democratic accountability of the Fed or whether they would only provide the executive branch with more influence over monetary policy with all the attendant apparent dangers. The advantages for the democratic accountability of the Fed are at least not apparent. The reason for this is that the executive branch is more independent of Parliament, i.e. Congress, than is the case in some of the other countries examined in this study. The concept of ministerial accountability on which the British parliamentary system is based to a large extent, but which also exists in other countries, such as Germany or the Netherlands, does not exist as such in the US constitutional system. Therefore, enhanced power of the executive branch over the Fed also does not result in more influence of Congress.

Like the Federal Reserve Act, the Bank Act 1948 does not include a specific provision on the independence of the **Nederlandsche Bank**. Nevertheless, the Nederlandsche Bank is generally considered to incorporate a large degree of independence *vis-à-vis* government in the conduct of monetary policy. This *de facto* independence is the result of an addition of different provisions of the Bank Act 1948, in particular Section 9(1) of the Bank Act 1948 on the monetary objective of the Bank.[381]

Neither the Minister of Finance nor any other member of the government has the right to participate in the meetings of the Governing Board of the Bank. However, this is not to say that the government is not at all present in the Nederlandsche Bank. Although not a member of the executive government

[378] Newton, n. 371 above, 121 *et seq.*

[379] Over the years there have been numerous proposals in Congress: cf. Akhtar/Howe, n. 131 above, with an overview.

[380] H.R. 2917 (103rd Congress).

[381] Cf. Chap. 4 II 1.

himself, the Royal Commissioner oversees the affairs of the Bank on behalf of the government. As such he receives his instructions by a Royal decision.[382] The Royal Commissioner does not take part in any capacity in the meetings of the Governing Board of the Bank and thus in the monetary policy decisions of the Nederlandsche Bank. However, he has the right to request any information from the Governing Board "which he may deem necessary for the proper performance of his supervisory duties".[383] Whether this would in practice also include the otherwise confidential minutes of the meetings of the Governing Board remains unclear. The Royal Commissioner also plays an important role in the yearly discharging of the Governing Board, as he reviews the legality of the annual accounts.[384] He has the right to take part in the meetings of shareholders, i.e. the Council of Ministers representing executive government, and the joint meetings of the Governing Board and the Supervisory Board in an advisory capacity. The participatory rights of the Royal Commissioner are limited to the subject areas dealt with by the meeting of the shareholders and the joint meeting the Governing Council and the Supervisory Board. Accordingly, the Royal Commissioner can advise the Council of Ministers/Minister of Finance, representing the State as the sole shareholder, on the appointment of the Supervisory Board (section 27(2) of the Bank Act 1948), and can advise the joint meeting of the Governing Board and the Supervisory Board on the drafting of rules and regulations referred to in the Bank Act 1948 (sections 8, 18(2), 22(2), 29), the recommendation lists drawn up for the appointment of the members of the Governing Board and the Supervisory Board (section 23), the nomination of Alternate Directors (section 24) and, finally, the proposal for the suspension or dismissal of a member of the Governing Board (section 23(4)). The Royal Commissioner is also an *ex officio* member of the Bank Council and chairs its meetings.

The Bank Council may be considered as an important cornerstone in the relationship of the Nederlandsche Bank not only with the government, but also *vis-à-vis* trade and industry. This becomes evident from the mixed representation in the Bank Council resulting from a somewhat complex appointment procedure explained in detail in the section on appointment and dismissal procedures. This results in a representation of different, sometimes potentially contrary, interests on the Bank Council, such as for instance between representatives of employers and employees. The Bank Council is designed to offer a forum for discussion on the position and the tasks of the Nederlandsche Bank. The report on economic and financial developments and the monetary policy pursued by the Governing Board, which is presented by the president of the Bank at the beginning of each meeting, provides the Bank Council with first-hand information on the situation of the Bank.[385] Moreover, upon request of one or more of its members, the Bank

[382] Koninklijk besluit van 27 oktober 1972 (no. 82).
[383] S. 30(3) Bank Act 1948.
[384] For more details, cf. Chap. 4 VIII.
[385] S. 33(2) Bank Act 1948.



Council may discuss any subject related to the position and/or tasks of the Bank. In this respect its chequered composition, including the Governing Board, the Royal Commissioner, members of the Supervisory Board, representatives of trade and industry, the Treasurer-General and the Governing Board, can ensure a large platform for discussion of the role of the Bank. Indeed, the motive behind having a Bank Council was to strengthen the "community element" in the legal basis of the Nederlandsche Bank and to create what nowadays is commonly referred to as a think-tank.[386] Until recently, the Bank Council also had a role as an advisor to the Minister of Finance. It could be called upon by the Minister of Finance, after having consulted the Governing Board, to give advice on the principles of the Bank's policy. *Vice versa* the Bank Council itself could take the initiative to advise the Minister of Finance on such principles. It has been observed that these functions of the Bank Council have recently been terminated as part of an overhaul of the Government Advisory System.[387]

Within the narrow margins set by the Bank Act 1948, arguably the most crucial function of the Bank Council is related to the application of the override mechanism under section 26(1) of the Bank Act 1948. In order to issue instructions under that provision the Minister of Finance has to consult the Bank Council. This function has not been removed from the Bank Council. Since section 26 has never been put to use, no track record exists of the behaviour of the Bank Council in this context. A potential conflict of interest for some members of the Bank Council with regard to the advisory role under section 26 is anticipated by limiting the participatory rights of the Governing Board, the Treasurer-General and the three representatives, named by the Ministers of Economic Affairs, Agriculture, Food and Fisheries, and for Social Affairs respectively to an advisory capacity on the Bank Council.[388] This means that they could not take part in a formal decision on a recommendation given to the Minister of Finance, thereby possibly influencing the direction of the recommendation to the Minister of Finance in favour of the Bank or the Government. Although an explicit reference in the Bank Act 1948 is lacking, it becomes apparent from the explanatory statements to the draft law (*memorie van toelichting*) that the Bank Council is also supposed to advise the Governing Board itself. Until recently, due to the ambivalent division of labour, i.e. adviser to government *and* Governing Board of the Bank, the position of the Bank Council has been described as somewhere between the Minister of Finance and the Governing Board of the Nederlandsche Bank.[389]

Yet the relationship between the government and the Bank is not limited to the contact points in the Bank, i.e. presence or representation of the government

[386] de Jong, n. 192 above, 509 *et seq*.
[387] Cf. Chap. 3 IV.
[388] It should be noted that the Treasurer-General is a civil servant in the Ministry of Finance, rather than a member of the government.
[389] de Jong, n. 192 above, at 513–14, with references to parliamentary discussions during the drafting of the Bank Act 1948.

in the Nederlandsche Bank. Although the members of government are excluded from participation in the deliberations of the Governing Board, the president of the Nederlandsche Bank can attend the meetings of the Council of Economic Affairs, one of the sub-committees of the Council of Ministers. The sub-committees have the right to invite experts in an *advisory* capacity.[390] Consequently, the president of the Nederlandsche Bank does not take part in the decisions of the Council of Ministers or its sub-committees. Moreover, the president of the Nederlandsche Bank is a member of the government's main advisory board, the so-called Social and Economic Council (*Sociaal-economische raad*) which offers advice on all social and economic matters and under specific circumstances may have regulatory power conferred by law.[391] These somewhat formal contacts are rounded off by traditional weekly luncheons attended by the president of the Nederlandsche Bank, the Minister of Finance and the Treasurer-General. During these meetings current economic, financial and monetary topics are discussed.[392] Moreover, there are regular contacts between the staff of the Nederlandsche Bank and the Ministry of Finance.

Under the provisions of the Bank Act 1998, a reference to the independence of the Nederlandsche Bank in carrying out the tasks in the ESCB is included. According to this the Bank may only ask for or receive instructions from the ECB.[393] The institution of the Royal Commissioner is abolished.[394] The Bank Council is also restructured—among others—taking into account that the function of the Royal Commissioner and the override mechanism are abolished.[395] However, the president of the Bank will remain obliged to report to the Bank Council and to discuss the policies of the Nederlandsche Bank.[396]

The Reserve Bank Act 1989 does not formally recognise the independence of the **Reserve Bank of New Zealand** either. Rather, its independence derives from an overall assessment of the statutory provisions as implying that the Bank is independent from executive government in the implementation of monetary policy, and thus has instrument independence. At the centre of the relationship between the Reserve Bank and the executive government stands the PTA agreed upon between the governor of the Bank and the Minister of Finance, which, together with the monetary objective, defines the goals of monetary policy. In the light of the fact that in the absence of a monetary policy board the governor himself is in charge of monetary policy decisions it is not surprising that the Reserve Bank

[390] Art. 23 Reglement van orde voor de ministerraad.

[391] The Social and Economic Council has been established by law: Wet op de bedrijfsorganisatie, Stb. 1950, no. 22; for details cf. Prakke/De Reede/Van Wissen (eds.), n. 15 above, 682–3, with further references.

[392] Cf. A. Vondeling, *Nasmaak en voorproef* (Uitgeverij De Arbeiderspers, Amsterdam, 1968), at 164, recalling his time as a Minister of Finance.

[393] Cf. s. 3(3) Bank Act 1998.

[394] Cf. Memorie Van Toelichting, Tweede Kamer, Vergaderjaar 1997–8, 25 719, nr. 1–3, at 12.

[395] Cf. s. 15 Bank Act 1998. See also Chap. 4 V 3.

[396] S. 15(5) Bank Act 1998.



Act 1989 does not foresee participation of the Minister of Finance or other members of the executive government in the meetings of a monetary policy board which does not exist. In theory no provision of the Reserve Bank Act 1989 prohibits the government from influencing the governor in the conduct of his duties. It is the governor who is responsible for the conduct of monetary policy and ultimately he has to decide what policy decisions he can justify. Yet, the transfer of responsibility may prevent a governor from falling victim to extended influence from outside, since he may be reluctant to follow third-party preferences for which he is ultimately held accountable.

The Board of Directors takes a prominent role in the accountability of the Reserve Bank. Indeed, it has been referred to as "the eyes and ears of government".[397] It is positioned outside the executive structure of the Bank, in as much as it does not take part in the decision-making processes. It plays a dual role. First, it takes part in the appointment of the governor.[398] Apart from that, the primary function of the Board of Directors may be compared with that of an internal controller, charged with the review of the performance of the governor and the institution at large from within the Bank. Section 53 of the Reserve Bank Act 1989 explains the duties of the Board in some detail and obliges the Board to keep under constant review all aspects of the performance of the Bank. This includes its performance in carrying out its functions as such, the performance of the governor in discharging his responsibilities, and whether the governor secures the Bank's achievement of the policy targets fixed in the PTA.[399] Moreover, the Board reviews whether the policy statements of the Bank are consistent with the primary functions under section 8(1) of the Reserve Bank Act 1989, i.e. price stability, and the PTA.[400] The Board of Directors also acts as an adviser to the governor on any matter relating to the performance of the Bank's functions and the exercise of its powers.[401] In addition to identifying the areas of responsibilities which the Board of Directors reviews, section 53(3) of the Reserve Bank Act 1989 also defines in some detail the areas in which misconduct by the governor will result in further actions by the Board. These are mostly based upon the areas of review mentioned above, but also include reasons to be found in the person of the governor himself. The Board reviews whether a governor is unable to carry out the responsibilities of office or has been guilty of misconduct. The Board of Directors also considers whether a governor has contradicted the conditions of his employment while holding office by pursuing any (business) interests outside the Reserve Bank.[402] The Board does not have the authority to impose sanctions. It notes the breach of duties and thereafter offers its written advice to the Minister of Finance. More importantly, the Board can

[397] An expression which has surfaced during discussions during a visit to the Reserve Bank of New Zealand.

[398] For more details of the appointment and dismissal procedures, cf. Chap. 4 IV.

[399] S. 53(1)(a)–(c) Reserve Bank Act 1989.

[400] Ibid., s. 53(1)(d).

[401] Ibid., s. 53(2).

[402] Ibid., s. 53(3)(f)–(g).

recommend to the Minister of Finance that the governor be removed from office.[403] A decision of the Board to recommend a removal of the governor is taken by a simple majority vote. Since a quorum of five members, of whom three have to be non-executive directors, is needed, it should in principle be ensured that the governor cannot block a decision to recommend a removal with the help of his two deputy governors, thereby avoiding his responsibility. Even in case of a tie, the governor could not make use of his decisive vote to his advantage, since section 61(2) of the Reserve Bank Act 1989 states that a director, i.e. including governor and deputy governor(s), is not entitled to vote or be counted in a quorum present at a meeting in which the exercise or proposed exercise of a power is considered in which the respective director has an interest.[404] Moreover, section 60(9) of the Reserve Bank Act 1989 ensures that the governor and his two deputy governors cannot take advantage of a possible deadlock due to a tie in a situation in which only three non-executive directors are present at a meeting of the Board, since in such a case the deputy governor who is not Deputy Chief Executive is not entitled to vote. In practice questions concerning the performance of the governor or his remuneration will be discussed in the forum of the non-executive committee and, thus, without the participation of the governor and/or deputy governors.[405] The non-executive committee also meets the Minister of Finance for discussions twice a year.

Summing up, it is an important function of the Board of Directors to act as an agent of the Minister of Finance in keeping the governor's and Bank's performance under constant review. Although the Board does not have the power autonomously to sanction any actions of the governor it can issue recommendations to the Minister of Finance to remove the governor from office.

Until recently the **Bank of England** did not enjoy statutory independence from the executive government, since the Bank of England Act 1946 included no provision on the independence of the Bank and/or its officials. On the contrary, section 4(1)–(2) of the Bank of England Act 1946 stated:

> "(1) The Treasury may from time to time give such directions to the Bank as, after consulting with the Governor of the Bank, they think necessary in the public interest.
> (2) *Subject to any such directions*, the affairs of the Bank shall be managed by the court of directors . . . ".[406]

Nevertheless, in the view of some the Bank of England enjoyed a considerable degree of independence, albeit *within* rather than *from* government, inasmuch as it could freely express its views to the executive government.[407] Prior to the recent institutional changes a development towards more independence for the

[403] Reserve Bank Act 1989, s. 53(3)(g).
[404] The same applies where a contract or proposed contract is considered.
[405] On the committees of the Board of Directors, cf. Chap. 3 VI 2.2.
[406] Emphasis added.
[407] M. Moran, "Monetary Policy and the Machinery of Government", *PA*, vol. 59 (1981), 47–61.



Bank of England in the implementation of monetary policy could be detected. Initially, during monthly meetings with the governors of the Bank, the Chancellor of the Exchequer decided on the adjustments of interest rates and, moreover, on the timing of the implementation of any adjustments. The Bank of England was eventually given some room for discretion in so far as it could decide itself on the timing of the implementation of the changes to the interest rate, although the Bank could not postpone that decision endlessly, thereby subverting the Treasury's intentions behind the decisions to change the interest rate. The clear implication of this arrangement was that the Chancellor's decision had to be put into force before the next monthly meeting between Chancellor and governor. Despite this apparent domination of the executive government, the Bank nevertheless may have had an influence on interest rate decisions by the Chancellor of the Exchequer. A Chancellor who intended to change interest rates against the explicit advice of the Bank ran the risk of losing credibility because his action could be interpreted as evidence of a lack of commitment to the government's announced monetary policy. This arguably increased the pressure on the executive government at least seriously to take account of the views of the Bank.

The Bank of England Act 1998 does not include a provision explicitly granting the Bank independence of the executive government either. Instead, it is a combination of provisions which in effect give the Bank of England instrument independence with regard to monetary policy. To this end, monetary policy has been exempted from directions by the Treasury.[408] Within the framework set by the monetary policy objective, as quantified by the Treasury, the MPC has responsibility within the Bank for formulating monetary policy.[409]
Although close contacts between the Treasury and the Bank can be assumed to continue, the new legislation does not foresee any institutionalised contacts between the Bank and the executive government with regard to monetary policy decisions. The Act introduces a right for a representative of the Treasury to participate and speak at any meeting of the MPC. A voting right is not foreseen.[410] Equally, provisions introducing the participation of the governor or other representatives of the Bank in cabinet or other meetings of the executive government do not exist.

Like the Board of Directors at the Reserve Bank of New Zealand, the Court of Directors of the Bank of England takes on the function of keeping under review the Bank's performance in relation to its objectives and strategy. Thereafter, it also reviews the extent to which the Bank's financial management objectives have been met. Moreover it keeps under review the internal financial controls of the Bank. The MPC is required to submit a monthly report on its activities to the Court of Directors.[411] These functions have been delegated to

[408] S. 10 Bank of England Act 1998.
[409] Ibid., s. 13(1).
[410] Ibid., sched. 3, para. 13.
[411] Ibid., sched. 3, para. 14.

the sub-committee of the Court of Directors.[412] The Court of Directors has to report on the performance of these functions to the Chancellor of the Exchequer once a year.[413] The assessment that the court of directors functions as a check on the Bank on behalf of the executive government may also be highlighted by the fact that the members of the Court of Directors are appointed by the executive government.

## IV. APPOINTMENT AND DISMISSAL PROCEDURES

With regard to appointment procedures, a number of general observations emerge from the examination of the central banks included in this study. While in most instances the executive government is charged with the appointment of central bank officials, in a number of instances other institutions, including Parliament, take part in the procedures. In some instances this may be a reflection of the federal structures of a bank. In other instances it may reflect the strong position of Parliament. Thereafter, differences in the terms of office and, even more importantly, with regard to the possibility of reappointments can be detected. Generally, many differences emerge from the different institutional designs of the central banks. For dismissal procedures a general distinction between dismissal for misconduct and performance-based dismissal can be made.

### 1. Appointment and reappointment

In the case of all central banks examined in this study the (re-)appointment procedures are in the hands of the executive government. Nevertheless, a number of considerable differences exist, in particular with regard to the participation of Parliament. Another main difference which can be observed concerns the possibility of the reappointment of central bank officials.

According to Article 14.2 of the ESCB Statute, the statutes of the participating national central banks have to provide for a minimum term of office of five years for the governors. The national legislator is in principle not prohibited from providing for shorter terms for the other members of the monetary policy board or the managerial board of the central bank.[414]

[412] Bank of England Act 1998, s. 1(3).

[413] Ibid., s. 4. Cf. also Chap. 4 VIII 1.

[414] A different view is taken by the German federal government, which has made it clear in the explaining memorandum to the draft legislation for the amendment of the legal basis of the Bundesbank in the light of the ESCB that this must be the case for all members of the monetary policy board of the Bundesbank, i.e. Central Bank Council. Cf. BTDrucks. 13/7728 of 21 May 1997.



#### *1.1. Appointment procedures with parliamentary participation*

In the case of the Fed, the Banque de France, and the ECB, Parliament participates to a different degree in the appointment procedures.

Arguably the most extensive participation of a Parliament in the appointment procedures is to be found for the Fed with regard to the Board of Governors. The seven members of the Board of Governors are appointed by the President "by and with the advice and consent of" the Senate for a non-renewable term of 14 years.[415] From these seven members the President appoints the chairman and vice chairman of the Board of Governors for a renewable term of four years.[416] Since the Federal Reserve Reform Act of 1977 these appointments also require the consent of the Senate.[417] The consent of the Senate is more than just a rubber stamp, as it conducts its own screening of the candidates in hearings before the Committee on Banking, Housing, and Urban Affairs, where Presidential nominees are questioned in detail.[418] Due to his outstanding role on the Board of Governors the Senate takes special interest in the appointment of the chairman of the Board of Governors. After the Committee has reported its findings regarding a nominee the full Senate decides by simple majority.[419] Although the Senate has yet to reject a Presidential appointment to the Board of Governors it should not be concluded from this that Congress in all instances agrees with the presidential choices. Rather, disagreements between the President and the Senate over a nomination are communicated early on in the process and differences are resolved prior to a formal vote in the Senate. The delay in appointments caused by the "confirmation" process in the Senate is also utilised to test public perception of the candidates. It has been suggested that this power of the Senate to reject appointments to the Board of Governors makes the Fed more responsive to the Senate Banking Committee during the semi-annual hearings.[420]

[415] S. 10.1 Federal Reserve Act. Members who are appointed to serve for the unexpired portion of a term may be re-elected. Within the executive branch of government there is an established administrative procedure for the nominations to the Board of Governors and the Treasury usually takes the lead in these proposals.

[416] The term of office of the chairman and vice chairman is not linked to his 14-year term as a member of the Board of Governors. Nevertheless, when a new chairman is appointed by tradition his predecessor resigns from the Board of Governors to give the President the opportunity to appoint a new member to the Board of Governors; cf. Akhtar/Howe, n. 131 above, at 346.

[417] The participation of the Senate in the appointment procedure has its basis in Art. II, s. 2, cl. 2 US Constitution, according to which the US President nominates and, by and with the advice of the Senate, appoints ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States. For a critical assessment of the situation before 1977: *Making the Fed More Accountable*, opening statements by Henry S. Reuss, Chairman of the House Committee on Banking, Finance and Urban Affairs, for hearings on HR 8094, a bill to promote the accountability of the Fed, 10.00 a.m., Monday 18 July 1977.

[418] R.H. Hasse (ed.), op. cit., Chap. 2, n. 22, at 166, sees the President's right of nomination limited by "the need to obtain the Senate's consent".

[419] Cf. s. 10(5) Federal Reserve Act on the appointments during the recess of the Senate.

[420] Havrilesky, n. 131 above, at 238. Cf. Chap. 4 VI 1.

In order for such a resolution to pass through Parliament, approval by a simple majority in both House is required.[614] As such, the requirement of parliamentary approval may be interpreted as an extension of the principle of ministerial accountability, since the decision of the Chancellor of the Exchequer to apply the override mechanism becomes subject to parliamentary scrutiny. Nevertheless, parliamentary scrutiny and any criticism resulting from that are likely to be limited to the opposition and have little chance of resulting in a rejection of the order of the Treasury to the Bank of England, since the ruling party will usually hold a majority in Parliament. Yet, the procedure will provide for transparency, and the public perception is likely not to be completely disregarded by the executive government in its decision to make use of its "reserve power". This may in particular be the case for left-wing governments which have to fight off the reputation of being less inflation-adverse. But the proposed legislation will also put a limit to the period of application of the (approved) override mechanism, since it ceases to have effect after three months from the day of its application.[615] The legislation does not include any reference to a promulgation of the override mechanism, but it has to be assumed that in principle the Treasury is not excluded from issuing a new order, which once again has to be approved by Parliament. Moreover, this in principle does not exclude the Treasury issuing an order which is only intended to be in effect for a period below the threshold of 28 days.

Despite the fact that one of the reasons for the institutional changes of the Bank of England may have been to bring the Bank closer in line with the requirements under the EC Treaty and the ESCB Statute in case the UK eventually should decide to join EMU, the newly established override mechanism would have to be considered incompatible with primary Community law, like previously the provisions existing for the Bundesbank and Nederlandsche Bank.

## VI. RELATIONSHIP WITH PARLIAMENT

With regard to the relationship between the central bank and the legislative branch of government a pattern emerges from the examination of the central banks included in this study. A number of central bank statutes include an explicit reference to the relationship between the central bank and Parliament, or such a relationship has developed *de facto* over time. In the present context these central banks are referred to as central banks with an institutionalised relationship with Parliament. Arguably the most prominent example for such an institutionalised relationship between a central bank and Parliament is the Fed. To a somewhat more limited extent this is also the case for the Banque de France, the

[614] Generally, positive and negative resolutions exist, whereby in the case of the former an order does not come into force until it has been approved by Parliament, and, in the case of the latter, an order remains in force unless a resolution of Parliament to the contrary is adopted.

[615] S. 19(6) Bank of England Act 1998.



ECB, the Reserve Bank of New Zealand and the Bank of England, under the new arrangements. Other central bank statutes are characterised by the lack of any provisions relating to Parliament. Here, the relationship between the central bank and Parliament has to be determined with the help of general rules. This is generally the case for the Bundesbank and the Nederlandsche Bank.

With regard to the relationship between the national central banks and the national parliaments it has to be observed that any arrangements infringing the independent position of the national central banks as prescribed by Article 108 EC have to be considered incompatible with the EC Treaty and the ESCB Statute.

### 1. Institutionalised relationship between the central bank and Parliament

In a number of instances the legal basis of central banks provides for explicit provisions on the relationship between the central bank and Parliament. Provisions on reporting requirements prevail.

The **Fed** arguably constitutes the prime example of a central bank which has a close relationship with Parliament. The relationship between the Fed, and the Board of Governors, and Congress is usually to be found at the centre of any discussion of the democratic accountability, not only of the Fed. The relationship between the Fed and Congress can best be examined in three parts or stages, including the reporting requirements under the Federal Reserve Act, the legislative activities of Congress, and an assessment of the role of Congress in the democratic accountability of the Fed. It has already been observed in the context of the monetary objective of the Fed that the Board of Governors of the Fed is obliged to transmit to the Congress, not later than 20 February and 20 July of each year, independently written reports.[616]

The semi-annual report of the Board of Governors introduced by the Full Employment and Balanced Growth Act of 1978 consists of a statement prepared by the chairman of the Board of Governors and approved by the latter (sometimes referred to as testimony), and a separate report, prepared by the Board of Governors' staff, including analysis of recent financial and economic developments, as well as an outlook on monetary policy and the economy. The report is forwarded to the President of the Senate and the Speaker of the House of Representatives. In the House of Representatives the report is dealt with by the Committee on Banking and Financial Services or its sub-committee on domestic and international monetary policy respectively, and in the Senate by the Committee on Banking, Housing, and Urban Affairs. Both Committees have the task of evaluating both the testimony and the report and reporting back to its respective body on its findings as regards the intended policies of the Fed.

[616] 12 USC Sec. 225s. For the wording cf. Chap. 4 II 1.

Alternately, the chairman of the Board of Governors appears first before the Senate or the House Banking Committee followed shortly thereafter by the other Committee. Committee hearings will usually begin with a presentation of any statements which have been prepared by members of the Committee. Thereafter, the chairman of the Board of Governors presents a prepared statement. The remaining part of the hearing is reserved for questions by the members of the Committee. Usually, each member is granted five minutes in question time, with hearings usually lasting a total of between two and three hours. Since these hearings take place on a regular basis with the chairman of the Fed providing testimony on monetary policy and due to the TV coverage of the event, this so-called Humphrey-Hawkins-Procedure has gained publicity over the years. Members of Congress are eager to be seen acting in the interest of their constituencies.[617] This will especially be the case in periods before elections, and taking into account the short two-year terms of the members of the House of Representatives this is almost always the case. Besides, certain groups of the general public and in particular the financial market participants also show much interest in these hearings in anticipation of announcements of policy changes by the chairman of the Fed. However, this considerable interest in the appearances of the chairman of the Fed may also in some respects limit what can be expected from these public hearings in terms of insights into the monetary policy pursued by the Fed. The experience with turmoil in the financial markets subsequent to remarks by the chairman during such appearances have resulted in a cautious approach to these hearings. As one observer put it: "[h]e's got three hours to blow smoke".[618] Although the Humphrey-Hawkins-Procedure undoubtedly provides for the most important hearings, Fed officials have numerous other appearances before congressional committees in the course of a year on a whole range of subject-matters.[619]

As has been observed elsewhere, the Federal Reserve Act has undergone major changes with the Banking Acts of 1933 and 1935 and the Federal Reserve Reform Act of 1977. In particular the third of these three amendments has introduced provisions into the Federal Reserve Act which today form the central elements of the democratic accountability of the Fed. The actual number of amendments to the Federal Reserve Act in its more than 80-year history has been minor. Still, the number of proposals and the extent of overhaul of the Fed suggested by them is noteworthy. Indeed, considering some of the other central bank systems included in this study, the number of bills introduced into Congress, often with the express intention of enhancing its accountability, is remarkable. Since the late 1960s the number of bills introduced into Congress

[617] However, J.M. Berry, "Kid Gloves for Greenspan", *Central Banking*, vol. 7 no. 3 (1996–7), 30–5, finds that the members of Congress take a "kid glove approach" in the discussions with the chairman of the Fed.

[618] Cited in ibid., at 30.

[619] A current list of appearances can be found on the homepage of the Board of Governors: see App. 3.



has increased considerably. Akhtar and Howe have analysed the activities of Congress for the period of five consecutive Congresses between 1979 and 1990, thereby assembling 200 congressional proposals, which include more than 300 recommendations for changes of the institutional structure of the Fed.[620] The actual number of recommendations derives from the classification of the proposals which fall into five categories: policy targets or mandate; accountability to the political process; influencing of the president and the administration; democratising the Federal Reserve; and public and private elements in the FOMC. The findings are summarised in Table 2. To be sure, not every bill

*Table 2: Legislativ proposals to restructure the Fed 1979–90*[621]

| | Policy Targets or Mandate | Accountability to the Political Process | Influence of the President and the Administration | Democratising the Federal Reserve | Public and Private Elements in the FOMC | Total |
|---|---|---|---|---|---|---|
| Board of Governors (Chairman) | 25[622] | 46[623][624][625] (12) | 53[626] (32) | 27[627] | 2[628] | 153 (44) |
| Reserve Banks | 16[629] | 32[630] | | 16 | | 64 |
| FOMC | 76 | 36 | 14[631] | 11[632] | 17[633] | 154 |
| Total | 117 | 114 | 67 | 54 | 19 | 307[634] |

Source: Akhtar/Howe (1991)

[620] Akhtar/Howe, n. 131 above.

[621] Akhtar/Howe, n. 131 above. Since 1990 the number of proposals has dropped. An inquiry for the period covering the 102nd to the 104th Congress (1991–6) using the Library of Congress online database has produced 23 proposals in the form of bills originating in the Senate or the House of Representatives.

[622] 11 proposals to redeem US currency in gold in both places.

[623] 13 proposals to bring the Fed budget under congressional appropriations, 14 proposals to have the GAO audit Fed activities, and 4 proposals to repeal the Federal Reserve Act counted in both places.

[624] One proposal to add *ex officio* Governors counted in both places.

[625] Two proposals to expand the Board to 9 members counted in three places.

[626] Cf. n. 625.

[627] Cf. n. 624.

[628] Cf. n. 625.

[629] Cf. n. 622.

[630] Cf. n. 623.

[631] 14 proposals to add the Secretary of the Treasury and/or Chairman of the CEA to the FOMC counted in both places.

[632] Two proposals to include all Reserve Bank presidents on the FOMC and one proposal to remove Reserve Bank presidents from the FOMC counted in both places.

[633] Cf. nn. 631 and 632.

[634] Row and column totals add up to 307, exceeding the total number of proposals by the 60 proposals double counted and the two proposals triple counted.

introduced in Congress in the period covered was of equal importance. Thus, in order to measure their importance, Akhtar and Howe observe the number of sponsors that a bill had and the extent to which the bill has been dealt with in Congress. Another indicator of the seriousness of a bill may be the extent to which the bill reflected the public discussion at the time.

Apart from introducing bills and joint resolutions for the overhaul of the Fed, both in the Senate and the House of Representatives, concurrent and simple resolutions are introduced which either call for the amendment of the Federal Reserve Act or seek to direct the Fed, and in particular the FOMC, to pursue monetary policy in a certain direction. Such resolutions fall into a category of congressional activities which arguably do not amount to genuine legislative proposals.[635] Whereas bills and joint resolutions take on the character of legislation once adopted by both the Senate and the House, concurrent and simple resolutions generally do not.[636] Nevertheless, concurrent and simple resolutions have undoubtedly important implications as they may function as an indicator for the relationship between the Fed and Congress, and in particular any disagreements between the two, as was for example the case when two resolutions of the House of Representatives called for the impeachment of the chairman of the Board of Governors, at the time Paul Volker, and the members of the FOMC.[637] And although concurrent and simple resolutions cannot be considered as genuine legislative proposals they may indicate future actions of the Congress to restructure the Fed.

Two questions arise in connection with the legislative activities of Congress. First, how can the active involvement of Congress with monetary policy and the Fed be explained, taking into account the inactivity of other parliaments in relation to other central bank systems? Furthermore, why is it that the vast majority of proposals to restructure the Fed fails to gain the necessary support in Congress to be enacted?

The legislative activities of Congress with regard to the Fed cannot be attributed to a single factor only. One explanation may be found in the distinct political system of the United States. For one thing, the division between the executive and the legislature is larger than in parliamentary democracies in which the other central bank systems examined in this study are situated. It is not inherent in the US political system either that the executive branch of government governs with a majority in Congress, or that the majority in both

[635] See otherwise Akhtar/Howe, n. 131 above, 377 *et seq.*, who include concurrent and simple resolutions in their table on the legislative proposals to change the structure of the Fed. On the legislative procedure cf. also Chap. 4 I 2.

[636] Instead, concurrent resolutions agreed to by both the Senate and the House may be considered as a general expression of the will of the Congress, whereas simple resolutions passed by either the Senate or the House alone express the will of the respective institution.

[637] Cf. H.Res. 31 and 32 (98th Congress) sponsored by Representative Gonzales, resemble two unsuccessful attempts to initiate impeachment procedures against the chairman of the Fed and all members of the FOMC.



Houses is controlled by the same political party.[638] The reason for this is the fact that the US President, in whom all executive power is vested, is not elected or appointed by Congress, but through a system of State electors.[639] Consequently, the executive branch of government is somewhat more removed from the legislative branch than is the case in other parliamentary systems, where the executive usually holds a majority in Parliament. Yet another particularity of the US constitutional system, explaining the number of proposals to restructure the Fed, is the fact that individual members of the Senate or the House of Representatives can introduce legislative proposals in their respective body. An obligation for a minimum number of sponsors for the introduction of a Bill, as has been observed e.g. for Germany, thereby filtering out legislative proposals without a minimum consensus, does not exist. Indeed, in a large number of cases Bills introduced into the Senate or the House are sponsored by one member only.

In the past, the Banking Committees of both Houses of Congress have played a crucial role in the relationship between Congress and the Fed, having produced some of the best-known critics of the Fed. Representative Wright Patman, Democrat, who at some stage chaired the House Banking Committee, was known well beyond the insider circles of Capitol Hill to take a critical and sometimes even aggressive approach to the Fed, and is still cited today in connection with issues relating to the democratic accountability of the Fed. He himself introduced numerous proposals for the restructuring of the System. It may be considered symptomatic for the activities of members of Congress with regard to the Fed in general that none of them was ever enacted. He found worthy successors in members of Congress like Representative Henry B. Reuss, Democrat, who became chairman of the House Banking Committee, and, for the Senate William Proxmire, chairman of the Senate Banking Committee.[640] The regular appearances of members of the Board of Governors before the Banking Committees, first as a result of House Concurrent Resolution 133, and thereafter under the new provisions introduced by the Full Employment and Balanced Growth Act of 1978, has institutionalised and, as a result of that intensified, the congressional handling of the Fed. But the congressional activities cannot only be explained by the particularities of the United States constitutional/political system. At times it has also been a reaction to the Fed's approach to monetary policy. Kettl has observed the increase in congressional bills related to the Fed for the period of 1951 and 1983 and concludes that "congressional concern has been the greatest when interest rates have been highest", and that "there is nothing like a sudden increase in interest rates to bring the Fed sharply to the public—and thereby to the congressional—eye."[641] This congressional

[638] L.G. Sager, "The Sources and Limits of Legal Authority" in A.B. Morris, *Fundamentals of American Law* (Oxford University Press, Oxford, 1996), 27–56, at 43.

[639] Art. II, s. 1, US Constitution.

[640] In more recent years, Representative Gonzales has made himself a name for scrutinising the role of the Fed closely.

[641] Kettl, n. 183 above, at 162 *et seq.*

focusing on interest rates is confirmed by the numerous resolutions stating the concern either of the Senate or the House over the approach of the Fed to interest rates, or explicitly asking the FOMC to adopt and pursue certain monetary policies.[642]

Yet, despite these congressional activities, the actual number of amendments of the legal basis of the Fed has been minimal and none of the overhauls proposed since 1979 has passed Congress to be implemented in the Federal Reserve Act. The short answer to the question that results from this analysis is that none of the concrete proposals ever had the support of the majority of both Houses of Congress. In some instances the short legislative period of two years of the House of Representatives may have resulted in a certain discontinuity. A more precise explanation may be that despite the vast number of proposals the majority in Congress has never fundamentally disagreed with the monetary policy conducted by the Fed. This supposes a broad consensus in both Houses of Congress in favour of the present institutional structure of the Fed.[643] A less flattering conclusion may be that Congress has failed to hold the Fed effectively accountable. One explanation for this may be that Congress does not have the ability to conduct efficient supervision. Roberts argues that Congress does not take the oversight of monetary policy seriously as a result of a lack of knowledge and understanding of the issues involved.[644] While recognising that the Humphrey-Hawkins-Procedure has improved congressional oversight of monetary policy, he criticises the legislation for not enabling Congress to make an "objective, analytical evaluation of the Federal Reserve's monetary policy plans and objectives".[645] In the same context Weintraub calls into doubt the efficiency of congressional supervision on the basis of the monetary objective of the Fed provided for by section 2 A of the Federal Reserve Act, which provides for multiple objectives and which gives the Fed the freedom to set targets for a multiplicity of aggregates.[646] This is confirmed by the evaluation of the monetary objective of the Fed in this study.[647] The lack of a clear yardstick for the evaluation of the performance of the Fed in the area of monetary policy may not be the only obstacle which Congress faces in holding the Fed accountable for its conduct of monetary policy, since the allocation of decision-making powers within the Fed may well add to this problem. The formulation and implementation of monetary policy are shared by three organs within the Fed, namely the Board of Governors, the FOMC and the Federal Reserve Banks. Decisions on

[642] An inquiry of the Library of Congress online database for the period covering the 103rd and 104th Congress has revealed 5 such resolutions, including one House Joint Resolution, 2 Senate Resolutions, and two House Resolutions.

[643] Louis, n. 454 above, at 276. Berry, n. 367 above, at 46, refers to a "political acceptance" of the role which the Fed plays in stabilising the American economy.

[644] S.M. Roberts, "Congressional Oversight of Monetary Policy", *Journal of Monetary Economics*, vol. 4 (1978), 543–56.

[645] Ibid., 548.

[646] Weintraub, n. 178 above, 341–62.

[647] Cf. Chap. 4 II 1.



reserve requirements are the domain of the Board of Governors, whereas open-market operations are decided upon by the FOMC. However, the implementation is left to the Federal Reserve Banks and foremost to the Federal Reserve Bank of New York. Finally, interest rate changes are initiated by the Federal Reserve Banks but the final decision is taken by the Board of Governors. This complex intertwining of different organs in the decision-making process can make it rather difficult for an outsider to assign responsibilities for monetary policy decisions to a certain organ, let alone to specific individuals.[648]

More recent studies take a quite different approach to explaining the behaviour of Congress *vis-à-vis* the Fed. It is argued that Congress has little to gain from holding the Fed effectively accountable. Indeed, the weak spot in the democratic accountability of the Fed to Congress may have its basis in the very nature of Congress as a body consisting of *elected* representatives whose first concern is to be re-elected. Kane argues that "defects in control policy and reporting survive, not because of policy-makers' ignorance or ineptitude, but because these defects serve policy-makers' political and bureaucratic interests".[649] Politicians may have an interest in turning the Fed into a "scapegoat" for their own shortcomings by having the benefit of blaming the bad state of the economy on an institution whose decisions they arguably cannot influence.[650] Elected representatives also take the opportunity to leave difficult political choices which involve a trade-off between different economic aggregates, such as low inflation, economic growth and full employment, to the Fed.[651] Evidence for this argument may be found in the observation made above that much of the congressional attention to the Fed is focused on changes in the interest rates; an approach which may have its roots in the constitutional system of the United States itself.[652] It may be concluded from this that it would not seem to be in the self-interest of politicians to make the Fed more accountable because it would at the same time undermine their position *vis-à-vis* the electorate in claiming that the Fed pursues monetary policy insulated from elected politicians. But it may, moreover, also not be in the interest of the Fed which, to some extent, seems to accept the role of the "scapegoat", because more meaningful congressional oversight would decrease its independent position *vis-à-vis* the executive branch. When it is argued that the Fed is not being held effectively accountable,

[648] See also Clifford, n. 447 above, at 34. This problem is enhanced by the disclosure polices of the Board of Governors and the FOMC; cf. Chap. 4 VII.

[649] N. Beck, "Congress and the Fed: Why the Dog does not Bark in the Night", in Th. Mayer (ed.), n. 370 above, 131–50, 133 *et seq.*, with further references; J.L. Pierce, "The Myth of Congressional Supervision of Monetary Policy", *Journal of Monetary Economics* 4 (1978), 363–70, at 364, who argues that Congress "has salved its conscience" by passing Concurrent Resolution 133 and thereafter the Humphrey-Hawkins-Act "but it has showed little interest in providing meaningful oversight over monetary policy".

[650] Generally critical on the delegation practices of the Congress is D.Schoenbrod, *Power without Responsibility: How Congress Abuses the People Through Delegation* (Yale University Press, New Heaven and London, 1993).

[651] Kettl, n. 183 above, at 165.

[652] Ibid., at 197.

this assumption can only be made from the fact that Congress has failed to influence the Fed, notably in the way it conducts monetary policy, or because, since 1979, Congress has never gone further than passing concurrent and simple resolutions and thus has not made use of its power to amend the Federal Reserve Act. Whereas the latter observation is a matter of fact, the former is not entirely uncontested as some studies do find that congressional oversight influences the Fed in its conduct of monetary policy.[653] However, even where present, congressional influence does not necessarily result in the democratic accountability of the Fed. Indeed, it may be argued that it decreases democratic accountability to the extent to which this influence is part of the above observed relationship between Congress and the Fed. If this relationship is compared with a game, both players can only lose in the event of a strengthening of the mechanism of democratic accountability. Congress loses because it may appear less convincing in blaming the Fed, and the Fed loses because its ability in implementing monetary policy in accordance to its own preferences will be decreased.

On the contrary, it cannot be denied that the institutionalised dialogue between Congress and the Fed, together with Congress's power to amend the legal basis of the Fed, has provided Congress with the tools necessary for making the Fed democratically accountable. Whether Congress makes effective use of this tool may not always be ensured. However, this is a problem of the effectiveness of Congress rather than of a lack of a mechanism for congressional accountability of the Fed. Moreover, the institutionalised relationship enhances the transparency of the conduct of monetary policy by the Fed. This means, on the one hand, that Fed officials can provide the System with the kind of publicity it needs to secure support for its views. On the other hand, with monetary policy being dragged into the limelight, monetary policy formulation of the Fed becomes subject to closer public scrutiny. It is difficult to envisage the Fed pursuing a monetary policy for a long time which is unpopular with the President and/or Congress and the public at large.

While granting the **Banque de France** independence with regard to the formulation and implementation of monetary policy, Chapter IV of the Bank Act 1993, under the telling heading, "Report to the President of the Republic/ Accountability to Parliament", introduced a provision on the relationship between the Bank and parliament. According to Article 19 of the Bank Act 1993

> "(1) At least once a year, the Governor of the Banque de France addresses a report on the Bank's activities and on monetary policy and the prospects for it to the President of the Republic and to Parliament.
>
> (2) The Governor of the Banque de France is heard at the request of the Finance Committees of the two Chambers, and may request to be heard by them.

[653] Havrilesky, n. 131 above, at 20, who finds that the Humphrey-Hawkins-Procedure by the Senate Banking Committee has a statistically significant effect on the Federal Fund Rate. Cf. also K.B. Grier, "Congressional Influence on U.S. Monetary Policy", *Journal of Monetary Economics*, vol. 28 (1991), 201–20, who develops a model of congressional influence on the Fed.



> (3) The accounts of the Banque de France and the report of the statutory auditors shall be forwarded to the Finance Committees of the National Assembly and of the Senate."

The reporting requirements of the Banque de France *vis-à-vis* both chambers of Parliament may be viewed as the counterpart to the creation of the CPM and the fact that the Bank is formulating and implementing monetary policy independently. From the wording of Article 19(2) of the Bank Act 1993 it has to be concluded that the governor of the Bank is in fact obliged to appear upon request of one or both of the Finance Committees. In principle apart from the governor of the Bank no other member of the CPM is heard by the Finance Committees, and experience has shown that hitherto the governor has always appeared before the committees himself.[654] This corresponds with the view that the CPM constitutes a collegial organ in which the governor takes a predominant position as the representative of the Banque de France.[655] In practice it is not unusual for one of the Finance Committees to request the governor to appear before it. A more recent example from October 1997 was triggered by the raising of the interest rates by the Banque de France following similar adjustments by the Bundesbank.[656] Interestingly, this example also highlights differences of opinion between the Banque de France and Parliament on the nature of these appearances. Initially the Finance Committee had "summoned" the Bank to appear before it. Only after the committee had rephrased its request into an "invitation" did the governor agree.[657] What is remarkable is that the Banque de France itself does not seem to interpret the duties under Article 19 of the Bank Act 1993 as obligations *vis-à-vis* Parliament. In a recent questionnaire submitted to the British Treasury and Civil Service the Banque de France summarises Article 19 only to come to the conclusion: "*Ces trois éléments ne permettent pas d'établir une responsabilité de la Banque centrale devant Parlement. Toutefois, celui-ci ne peut ni déterminer, ni influencer la politique monétaire qu'elle entend suivre*".[658] While it seems that the wording of Article 19(2) of the Bank Act 1993 in the French language version suggests that the governor has to appear upon request,[659] the latter does not have an enforceable right to appear before one or both of the committees upon his or her own request. Proposals during the preparatory works for the Bank Act 1993 to institute a stricter parliamentary control of the CPM along the lines of the accountability of the FOMC of the Fed did not find their way into the Bank Act 1993. These strict reporting requirements were believed to be necessary in order to provide for a counterbalance to the appointment procedures of the CPM

[654] The respective committees are the *Commission des Finances* of the National Assembly, and the *Commission des Finances, du Contrôle Budgétaire et des Comptes Economique* of the Senate.

[655] Duprat, n. 231 above, n. 72.

[656] Reported in Financial Times, 5 Nov. 1997.

[657] Ibid.

[658] Memorandum submitted by the Banque de France, n. 87 above, at 138.

[659] On the other hand, the English language version of the recent Banque de France Act 1998 also suggests the lack of such an obligation.

which were considered anti-democratic.[660] According to this view, the governor of the Banque de France would have been heard by the Financial Committees of both chambers of the Parliament at least once a year. This would have institutionalised parliamentary control to a greater extent, as the appearance of the governor would not have been limited to requests by these Committees. On the contrary, it is interesting to note in this context that for some even the procedure finally adopted was considered too far reaching. Proposals were made to make an appearance of the governor before Parliament subject to the approval of the Minister for Economic Affairs and Finances.[661]

The revised statute of the Banque de France emphasises that the reporting requirements are subject to the provisions of Article 107 EC and the confidentiality rules of the ECB.[662]

The reporting requirements for the ECB differ from those applicable to the Banque de France foremost with regard to their stringency. According to Article 109b(3) EC:

> "The ECB shall address an annual report on the activities of the ESCB and on the monetary policies of both the previous and the current year to the European Parliament, the Council, the Commission, and also to the European Council. The president of the ECB shall present this report to the Council and the European Parliament which may hold a general debate on that basis.
>
> The President of the ECB and other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent Committees of the European Parliament."

Generally, Article 109b(3) concerns two different procedures. First, the president has to present an annual report to the EP, which has to include details on the monetary policy which has been pursued by the ECB. Although not explicitly stated it can be assumed that the nature of these presentations will be oral before the relevant Committee of the EP, but possibly also before the plenary session.[663] On the basis of the wording of Article 109b(3), sentence 1, EC it seems that in this context a general debate of the EP is limited to the contents of the annual report ("general debate *on that basis*"). However, it is difficult to envisage the EP restricting itself in this respect.

Additionally, the second sentence of Article 109b(3) EC introduces a procedure for members of the Executive Board to appear before the EP on their own initiative, or at the request of the EP. Contrary to the presentation of the annual report, it cannot be concluded from the wording of that provision ("*may* . . . be heard") that the additional appearances before the EP constitute an obligation.[664] Indeed, the wording of Article 109b(3) EC differs from the original proposal of the EP which had suggested that the president of the ECB should appear before relevant committees of the EP on a regular basis (at least) every six months.[665] The EP has confirmed its initial approach to these hearings in its rules of procedure. According to Rule 39 on statements by the European Central Bank:

> "The President of the European Central Bank and other Executive Board Members may be invited to attend a meeting of the committee responsible to make a statement and answer questions. The President of the Bank *shall attend such meetings twice a year*. He may be invited to attend additional meetings if circumstances justify it in the opinion of the committee responsible confirmed by the Conference of Presidents."[666]

It can be observed that the wording of this provision is more stringent than that of the corresponding provision in the EC Treaty. While the intention of the EP to hold the ECB accountable becomes clear from this provision, it does not introduce an obligation for the members of the Executive Board to appear before the committee, since the wording of the second sentence of Article 109b(3) EC may be considered decisive on this point. Against the background of these observations it seems problematic to draw a parallel to the Humphrey-Hawkins-Procedure of the Fed, where the governor is obliged to appear before the congressional Banking Committees on a regular basis.[667] According to Louis the reporting requirements should not be underestimated as means of an "institutionalised opportunity for dialogue" as they could help to avoid an isolation of the ECB and the development of exclusive relationships with the Executive.[668] Yet, much will depend on the approach taken by the EP in making use of appearances of the president and other members of the Executive Board as a means of holding the ECB accountable.[669] The relative inactivity of some national parliaments does not necessarily give rise to optimism, but the EP may be an exceptional case, as it is still eager to establish a distinct role for itself *vis-à-vis* the Council and the Commission. It has been observed in the context of the appointment procedures that in the past the EP has already shown a

[660] Cf. reference made by Iacono, n. 226 above, at 92.
[661] Duprat, n. 231 above, at 9
[662] Cf. Art. 19(2) Banque de France Act 1998.
[663] de Haan/Gormley, n. 370 above, at 343.

[664] I. Harden, "The European Central Bank and the national central banks in Economic and Monetary Union" in K. Gretschmann (ed.), *Economic and Monetary Union: Implications for National Policy-makers* (European Institute of Public Administration, Maastricht, 1993), 149–76, at 161, who points out rightly that the Executive Board of the ECB cannot insist on being heard and the EP cannot compel the former to appear.
[665] Resolution of the European Parliament on Economic and Monetary Union of 10 Oct. 1990 ([1990] OJ C284/62), Art. 13, 4th para., according to which the president should have been heard every six months *or* at the time when the EP considers it to be feasible.
[666] Emphasis added.
[667] E.g. J.-J. Rey, op. cit., Chap. 2, n. 42, at 157.
[668] Louis, n. 57 above, at 24; see also J.-V. Louis, *Economic and Monetary Union*, n. 483 above, at 252, who concludes that the institutional co-operation (Art. 109b EC) and the reporting requirements should not be modified.
[669] The limits of evidence by members of the Executive Board are described in Art. 10.4 ESCB Statute, and in any case exclude the disclosure of the proceedings of meetings of the Governing Council since the Governing Council can only decide to make the outcomes of its deliberations public.

considerable interest in the appointment of the presidents of the EMI, and, on a more general basis, in the institutional arrangements in the final stage of EMU.[670] Moreover, despite the lack of an obligation, it is difficult to envisage a situation in which members of the Executive Board would refuse to appear before the EP, as this would potentially damage their public reputation and may even raise doubts about the independent position of the ECB on a large scale. It seems that the ECB will put every effort into achieving the degree of public support that has saved the Bundesbank in the past from changes to its independent position.[671] However, the EP is likely to hold a weaker position than a national Parliament, in as much as the former does not hold the ultimate sanction, that is to change the legal basis of the ECB.

One important implication of the second sentence of Article 109(3) EC, which may easily be overlooked, is that the explicit reference to the members of the Executive Board implicitly excludes the appearance of the governors of the national central banks before the EP. Indeed, with 11 central bank governors—as of now—participating in the Governing Council of the ECB, a majority of the members of the monetary policy board of the ECB are excluded, or indeed exempt, from appearances before the EP. This is especially interesting, since the key monetary policy decisions are taken by a majority vote in the Governing Council. Although, given the efforts for consensus in monetary policy decisions on monetary policy boards of central banks, this will arguably seldom be the case, in principle a situation is foreseeable where the members of the Executive Board (six members) have been outvoted, e.g. on the issue of raising the interest rate, and nevertheless are the only ones that may be questioned by the EP on this decision. The reason for the exclusion of the national central bank governors from appearances before the EP may be that, unlike the members of the Executive Board, they are not appointed at the European level by the Council, but rather by the governments of the Member States. The accountability of the national governors is therefore left to the national sphere. However, it is questionable whether and to what extent the national central bank governors become subjected to similar procedures at the national level. Regardless of whether the national laws foresee parliamentary hearings in the first place, such hearings would effectively be limited to an exchange of information. First, the collegiate structure of the Governing Council poses a problem for the accountability of the national central bank governors at the national level similar to that in the relationship between a national Parliament and the representative of the national government participating in the Council. It becomes difficult to pinpoint responsibilities unless decisions are taken unanimously. In the case of the

[670] On the role of the EP in the appointment procedures of the presidents of the EMI, cf. Chap. 4 IV 1.

[671] D.G. Mayes, *Accountability for the Central Bank in Europe*, paper prepared for the 11th Lothian Conference (A Central Bank for Europe), 19 Nov. 1997, Whitehall Place, London, at 2, prognosticates that the ECB is likely to make the hearings "showpiece demonstrations of the care and professionalism it is using in achieving the goals set out for it". Cf. also Hearing at the European Parliament's Sub-Committee on Monetary Affairs on 18 January 1999, Introductory statement delivered by Dr. William F. Duisenberg, President of the European Central Bank.



Council of the European Union the number of areas where unanimous decisions are taken have decreased steadily, not least with the TEU. In the case of the Governing Council of the ECB unanimous decisions are only required exceptionally.[672] Holding the governor of a national central bank personally responsible for the collegiate decisions taken in the Governing Council of the ECB, and thus effectively holding him accountable also on behalf of all other members, is hardly possible. This is in particular the case if the proceedings of the meetings are not disclosed.[673] Besides, serious attempts to hold the governor accountable could be considered incompatible with the EC Treaty and the ESCB Statute to the extent that this could be interpreted as infringing the institutional independence of the national central bank. Monetary policy is no longer the responsibility of the national central banks, and any dealing with monetary policy by the national Parliament beyond the provision of information and the exchange of views could be interpreted as an "interference with the independence of the members of the decision-making bodies of the NCB's [national central banks]", or an infringement of "the ECB's competence and accountability at the Community level as well as the special status of a governor in his or her capacity as a member of the decision-making bodies".[674] This definitely excludes any form of sanctions at the national level. It has already been observed that primary Community law restricts the dismissal of the governors of the national central banks for reasons other than those applicable to the Executive Board, and moreover gives them a right to appeal to the ECJ.

Another instrument at the disposal of the EP, which may be applied in some cases, is the right to set up temporary Committees of Inquiry pursuant to the request of a quarter of the MEPs, in order to investigate alleged contraventions or maladministration in the implementation of Community law.[675] Although the EP cannot dismiss or address a vote of confidence against the members of the Executive Board of the ECB, the recently highly publicised rebuke by a majority of the EP of the Commission in the handling of the BSE crisis shows that EP could have some means of dealing with the conduct of the ECB.[676]

Finally, it should be observed that any role which a national Parliament may play in holding the executive government accountable for its behaviour *vis-à-vis* the central bank is basically ruled out for the EP. This is due not only to the fact that the Council and the Commission *de jure* have very limited means of influencing the conduct of monetary policy by the ECB, but moreover to the institutional structure of the EU as such, where the EP does not fulfil to the same extent

[672] Cf. Chap. 3V 2.

[673] Cf. Chap. 4 VII 2.

[674] European Monetary Institute, n. 199 above, at 101. Brackets added.

[675] Art. 138c EC.

[676] The role of the Commission became subject of an investigation by the *Temporary Committee instructed to monitor the action taken on the recommendations made concerning BSE (bovine spongiform encephalopathy) (Apr.–Nov. 1997)*, cf. *Final consolidated report to the temporary committee of the European Parliament on the follow-up of recommendations on BSE* (COM/97/509 Final).

the control functions *vis-à-vis* the executive branch commonly to be found in national States.

Under the Bank of England Act 1946 the role of Parliament in holding the Bank of England accountable was very limited.[677] Indeed, apart from the possibility of changing the legal basis of the Bank, Parliament did not have any formal means by which to hold the Bank accountable. Not surprisingly the Bank of England Act 1946 does not include any provisions in this respect, not least because monetary policy was effectively in the hands of the Treasury. Consequently, accountability for monetary policy was focused on the relationship between the executive government and Parliament. The Chancellor of the Exchequer was responsible *vis-à-vis* Parliament for the conduct of monetary policy as part of his general responsibility for the management of the economy. In this respect the old provisions on the powers of the Treasury over the Bank in the Bank of England Act 1946 not only functioned as a legal basis for the government to control the activities of the Bank, but they also enabled Parliament to hold the Treasury accountable for its conduct of monetary policy.[678] Yet, it has been observed that the overall responsibility for the economy blurred the accountability of the executive government for monetary policy. Despite the absence of any formal relationship between the Bank and Parliament, in the past the competent select committee of the House of Commons has monitored the role of the Bank of England *inter alia* with regard to monetary policy.[679] This may be best highlighted with the 1993 report by the Treasury Select Committee on *The Role of the Bank of England* which contained extensive evidence provided by specialists in the field both from inside and outside the UK, in particular on aspects of central bank independence and accountability.[680] A considerable number of the proposals which resulted from this report for institutional changes, together with the findings of the Roll Report, have since been adopted in the Bank of England Act 1998. Regardless of the lack of any corresponding provisions in the Bank of England Act 1946, it has been established practice for some time that the governor, together with other members of the Board of Directors and senior staff, appear before the competent standing committee to answer questions—*inter alia* monetary policy related matters, such as the development of interest rates.[681]

[677] D.E. Fair, op. cit., Chap. 2, n. 74, at 8.

[678] T. Daintith, "The Functions of Law in the Field of Short-Term Economic Policy", *LQR*, vol. 92 (1976), 62–78, at 69.

[679] On the role of select committees see e.g. Wade/Bradley, n. 1 above, at 221. The Bank of England fell within the scope of the Select Committee of Nationalised Industries until the latter was dismantled in 1979. Subsequently, the Treasury and Civil Service Committee became competent. Currently, the competent standing committee is the Treasury Select Committee.

[680] Treasury and Civil Service Committee, n. 73 above; a recent example outside the area of monetary policy where the Bank of England has been criticised for its role in banking supervision is the First Report from the Treasury Select Committee, *Barings and International Regulation*, Session 1996–7, HC 65, which investigates the collapse of the merchant bank Barings.

[681] For an account of one of those meetings cf. N. Courtis, "Mr. George goes to Westminster", *Central Banking*, vol. 7, no. 3 (1996–7), 24–9, at 24, who refers to an atmosphere during these hearings which "manages to combine inquisition with informality".



In his letter of May 1997 to the governor of the Bank of England, outlining the new monetary policy framework, the Chancellor of the Exchequer made it clear that the Bank of England is expected to give evidence to the Treasury Select Committee of the House of Commons "on an enhanced basis".[682] Interestingly in this respect, the Bank of England Act 1998 does not include any provision which would oblige members of the MPC, and in particular the governor, to appear before Parliament. The only reference to a reporting requirement included in the Act is an obligation of the court of directors to issue a report at the end of the financial year, which includes a review of the Bank's performance, including that in the field of monetary policy. This report has to be presented to the Chancellor of the Exchequer, who in return has to forward a copy to the House of Commons, which may hold a debate on the annual report.[683] To the extent that the governor and other officials of the Bank of England will continue to appear before the competent select committee of the House of Commons, it may be argued that *de facto* an institutional relationship exists. Under the new arrangements the importance of these hearings increases, since the Bank of England itself is in charge of implementing monetary policy in accordance with the monetary objective as defined by the inflation target. It emerges from the recently published report on the accountability of the Bank of England that the Treasury Select Committee envisages for itself, and Parliament in general, a strong role in the accountability of the Bank of England in the future.[684] The report examines in particular ways in which the committee should judge the performance of the Bank of England in achieving the monetary policy objective as defined by the inflation target. While considering that the committee should not only rely on the Bank's inflation projections set out in the quarterly inflation reports, but should also take into account outside forecasts, the report concludes:

> "Indeed we believe that the focus for our inquiries should not lie exclusively in using the Inflation Report to examine the Bank's recent and planned monetary stance but that a degree of *past accountability* is also called for. Once the arrangements are established, we will be examining the inflation outturn in relation to the inflation target. *If inflation deviates substantially from the target, we will seek a comprehensive explanation from the Bank.*"[685]

The report concludes that in particular two of the select committee's sessions should be dedicated to the inflation reports of the Bank, following each November and May publication. It is envisaged that the governor and two members of the MPC represent the bank on these occasions. It has been observed that under the new arrangements the governor of the Bank is expected to explain in a letter to the Chancellor any deviation of more than one percentage point above or

[682] Letter of the Chancellor of the Exchequer, Gordon Brown, n. 528 above, s. six.

[683] Cf. Chap. 4 VII 2.

[684] First Report from the Select Committee on Treasury, n. 524 above.

[685] *Supra*, n. 684, consideration 20. With regard to the quarterly inflation reports cf. Chap. 4 VII 2.

below the point target, and the Treasury Select Committee has made it clear that it expects to receive a copy of that letter from the governor, and that it would call upon the governor to explain the deviation from the target before the committee.[686] As has been the case before, the standing committee itself has no tools at its disposal to sanction the behaviour of the Bank, but its findings stated in a report to the House of Commons may become the subject of plenary debates, possibly resulting in actions by the House of Commons. Under the new arrangements the latter not only has the power to amend the legal basis of the Bank, but has a say in the application of the "reserve powers" of the Treasury. Therefore, officials at the Bank of England may have an incentive to ensure parliamentary support for their views.

Since responsibility for monetary policy has been divided between the Bank of England and the executive government, the latter also remains accountable to Parliament, namely for the setting of the monetary policy targets and its definition of monetary policy.[687] The House of Commons has different means of examining government activities. Its select committees can examine the whole range of government activities, in the course of which they may hear witnesses and appoint specialist advisers. In its recent report the Treasury Select Committee emphasised that it will continue to examine the broader aspects of monetary policy, and intends to ask the Chancellor to give evidence on the inflation target and in the case of an application of the override mechanism.[688] However, under existing rules a Minister in principle cannot be obliged to appear. Parliamentary questions, adjournment debates and regular debates in the House of Commons are the more basic ways of examining government activities. In principle, where Parliament out-votes the government on a major issue or where a majority of the House of Commons approves a vote of censure, the executive government is obliged to seek a dissolution of Parliament, since no government is supposed to remain in power without a majority in the House of Commons. However, there have been occasions where a government has "survived" such defeats in the House of Commons.[689] Moreover, the limits or, one may say, shortcomings of the system of ministerial accountability in the British context, in particular with regard to access to information, have only recently been highlighted by the Scott Report and the subsequent publications which have evoked a discussion on the effectiveness of ministerial accountability.[690]

Taking into account the common evaluation of the **Reserve Bank of New Zealand**, its legal basis includes surprisingly little on the relationship of the

[686] Ibid., considerations 32 *et seq.*

[687] Cf. Chap. 4 II 3.

[688] *Supra*, n. 684, consideration 62.

[689] Sometimes a government may be defeated on a major issue but still win a subsequent vote of confidence. Thus the members of the party may send a signal to the government without actually bringing it down.

[690] Sir R. Scott, "Ministerial Accountability", [1996] *PL*, 410–26; Ch. Foster, "Reflections on the True Significance of the Scott Report for Government Accountability", *PA*, vol. 74 (1996), 567–92.



Bank with Parliament. In fact, the Reserve Bank Act does not include any provision on the appearance of the governor or other officials of the Bank before Parliament, or any of its committees.[691]

In accordance with section 15 of the Reserve Bank Act the Bank is obliged to publish half-yearly policy statements for the purpose of reviewing the implementation of monetary policy in the preceding period and to reflect on the ways in which the goal of price stability can be achieved in the future, which have to be delivered to the Minister of Finance and moreover published.[692] These reports have to be tabled in the House of Representatives and before any parliamentary committee responsible for the overall review of financial management in government departments and other public bodies.[693] Despite the absence of any corresponding provision in the legal basis of the Reserve Bank in practice the routine has been established that the governor of the Bank is cross-examined on each of these policy statements by the Select Committee for Finance and Expenditure (SCFE). The SCFE holds formal hearings, usually four times a year, following the publication of a monetary policy statement or an economic forecast.[694] During these meetings the governor will usually present a prepared statement, and he and other officials of the Bank are questioned on the contents of the monetary policy statements by the members of the committee. It appears that these meetings have gained importance since the coming into existence of the Reserve Bank Act 1989 together with the higher profile of the Bank and increased public awareness. The discussions have been described as "intense".[695] Arguably the most powerful tool of Parliament for holding the Reserve Bank accountable exists with regard to the Bank's expenditure. It is based on an agreement between the Minister of Finance and the Bank which requires the ratification by the House of Representatives.[696] So far there is no reported case in which Parliament has refused to ratify such an agreement. However, it has been observed so far that the fact that a certain mechanism has not been applied does not necessarily mean that it does not function as a mechanism for holding the central bank accountable. Rather, a central bank which is aware of the existence of such a mechanism may have the incentive to ensure that the institution in charge of applying the mechanism is not provoked into doing so.

Apart from the policy statements the House of Representatives receives a copy of the Annual Report of the Reserve Bank and in the case of an application of the override mechanism by the Minister of Finance a copy of the Order in Council. On both occasions the performance of the Bank and/or the Minister of Finance may become the subject of parliamentary debates.

[691] As with the British system select committees may initiate inquiries and review government policies, as well as summon witnesses; cf. A. Mitchell, "The New Zealand Way of Committee Power", *Parliamentary Affairs*, vol. 46 no. 1 (1993), 91–100.

[692] For more details of these reports cf. Chap. 4 VII 2.

[693] S. 15(3)(a) Reserve Bank Act 1989.

[694] Cf. Chap. 4 VII.

[695] This has been the outcome of discussions during a visit to the Reserve Bank of New Zealand.

[696] For details cf. Chap. 4 VIII.

## 2. Central banks without an institutionalised relationship with Parliament

In the context of the central banks examined so far with regard to their relationship with Parliament the Bundesbank and the Nederlandsche Bank stand out from the rest. Both central bank systems are characterised by a lack of any statutory provisions in the legal bases describing the relationship with Parliament, and such things as regular appearances of central bank officials before Parliament.

The legal basis of the **Bundesbank** does not contain any provisions on the relationship between the Bundesbank and the Bundestag. Indeed, the Bundesbank is not obliged to forward any reports to the Bundestag, nor is the president or any other official of the Bundesbank obliged to appear before Parliament. Generally, the Bundestag can discuss Bundesbank matters in the course of its sessions and may make resolutions.[697] The Basic Law prescribes the existence of four standing committees, of which only the Committee on the affairs of the European Union may in practice deal with monetary and banking matters in connection with EMU.[698] These and other standing committees, set up for the term of a Parliament, deal with legislative proposals in their respective fields of competence, but may also on their own initiative deal with other matters falling within the scope of their jurisdiction.[699] The committees can ask the competent minister, but may also invite expert witnesses, and even representatives of interest groups, to appear before them. The president of the Bundesbank has been invited to attend committee meetings in the past to provide evidence on a whole range of subjects, but not on a regular basis, and not explicitly to review the performance of the Bundesbank with regard to monetary policy. Besides, committee meetings are usually not open to the public, which decreases the transparency which may be assigned to such hearings.[700] Under the current committee structure the Finance Committee is in principle competent for matters relating to monetary policy, but subjects relating to the Bundesbank may also be dealt with by a number of standing committees, such as the Legal Affairs Committee and the Committee of Economic Affairs. In principle the Bundesbank could also come under the scrutiny of a parliamentary investigating committee (*Untersuchungsausschuß*).[701] The right of investigation of such parliamentary committees is not unrestricted. They have no right to intervene in the current affairs of an organ of the executive, and thus, for example, may not issue recommendations on monetary policy to the Bundesbank, as is sometimes the case for the Fed.[702] Unlike for example in the US constitutional system, the establishment of a permanent investigating committee or standing banking committee in the Bundestag would actually have to be considered unconstitutional in the German context, as this would infringe the doctrine of the separation of powers.[703] In principle the Bundestag can also discuss matters related to monetary policy in plenary session (in connection with parliamentary debates on financial affairs, the budget and taxes), but such discussions do not take place on a regular basis. One such occasion has recently been the parliamentary debate on the legislative proposal by the executive government concerning the revaluation of the gold reserves of the Bundesbank, a plan which had been publicly opposed by the Bundesbank.[704] The Bundesbank was supported in this conflict by the opposition in the Bundestag, as well as large parts of the general public. The executive government was more or less left with no other choice but to abandon its plan.[705] In some ways this dispute may also serve as a good example of the powerful position which the Bundesbank has in Germany, having *de facto* influence on the type of legislative proposals which the executive government may introduce.

Taking into consideration that the legal basis of the Bundesbank does not provide for the case of a conflict between the Bundesbank and the Federal government, Parliament's right to amend the legal basis is often referred to as a last recourse for the settlement of conflicts.[706]

In principle the executive government, and in particular the Minister of Finance himself, could be held accountable before for its approach to the Bundesbank. Thus, for example, minor and major interpellations could be addressed to the Federal government both on the latter's relationship with the Bundesbank, and generally on matters related to monetary policy, to which the Federal government would be obliged to reply.[707] Yet, the Federal government can only be held accountable by Parliament to the extent to which it has an influence on the Bundesbank.[708] This could in principle be the case with regard to the Federal government's right to postpone a decision of the Central Bank Council.

[697] Art. 42 Basic Law, §§ 19 *et seq*. Rules of procedure of the German Bundestag (Geschäftsordnung des Deutschen Bundestages of 2 July 1980).

[698] The other prescribed committees are the Foreign Affairs Committee (*Ausschuß für auswärtige Angelegenheiten*), the Defence Committee (*Ausschuß für Verteidigung*), and the Committee on Public Petitions (*Petitionsausschuß*), cf. Arts. 45, 45a, and 45c Basic Law.

[699] Cf. P. Badura, *Staatsrecht-System. Erläuterungen des Grundgesetzes für die Bundesrepublik Deutschland* (2nd edn., C.H. Beck, Munich, 1996), 405 *et seq*.

[700] One example of a public hearing was the hearing on the Commission Green Paper on the practical arrangements for the introduction of the single currency (COM(95)333 final), staged by the Finance Committee. Both the president of the Bundesbank, Hans Tietmeyer, and the president of the EMI, Alexandre Lamfalussy, were invited. Cf. *Finanzen: Ist-Daten von 1997 sollen entscheidend sein. Waigel, Tietmeyer und Lamfalussy skizzierten ihre Vorstellungen zur Einführung der Europawährung*, Deutscher Bundestag WIB Heft 22/6.12.1995.

[701] Art. 44 Basic Law.

[702] C.Degenhart, *Staatsrecht I* (11th edn., C.F. Müller Verlag, Heidelberg, 1995), side notation 390 *et seq*.

[703] Siebelt, n. 202 above, at 187.

[704] Cf. Erklärung von Bundesbankpräsident Prof. Dr. Tietmeyer vom 1. Juni 1997.

[705] Cf. Protocol of the plenary session of the Bundestag (*BT-Plenarprotokoll*) 13/177 of 4 June 1997, 15893D–15897A; "Waigel Backs Down on Gold", *Financial Times*, 4 June 1997.

[706] Cf. above Chap. 4 I 2.

[707] §§ 105 and 110 GeschOBT; v.Bonin, n. 40 above, at 189, with reference to a concrete example of a minor interpellation by a number of MPs.

[708] Cf. also Chap. 4 III 1, on the relationship between the Bundesbank and the Federal government.

Where the Federal government does not make use of this power it may be assumed that it generally agrees with the monetary policy pursued by the Bundesbank, and Parliament could take this implied agreement as an opportunity to criticise the monetary policy of the Bundesbank and the lack of action by the Federal government. However, there is no evidence that Parliament made extensive use of this power to hold the executive government accountable for its approach to the Bundesbank. In general it may be observed that as long as the Bundesbank can meet the expectations of the German public to safeguard the stability of the Dmark, parliamentary criticism of the Bundesbank will remain the exception. The transfer of authority over monetary policy to the ECB will make such criticism of the Bundesbank even more unlikely in the future. However, this is not to say that the ECB could not become the subject of criticism in Germany, given that it does not meet the public expectations, not least defined by the past performance of the Bundesbank.

In the **Netherlands**, as with the legal basis of the Bundesbank, there is not a single reference to Parliament in the Bank Act 1948. The statute of the Bank does not include any obligation of the Governing Board or any other organ or representative of the Bank to appear before either chamber of Parliament or any parliamentary committees respectively. This lack of any *direct* accountability of the Nederlandsche Bank to Parliament has its origin in the government's overall responsibility for monetary policy which is reflected in the government's right to issue directions to the Bank under section 26 of the Bank Act 1948. Thus, an individual minister, such as the Minister of Finance and/or the government as a whole (individual and collective ministerial responsibility), rather than the Nederlandsche Bank, is answerable to Parliament. For this reason occasional proposals of members of Parliament to introduce regular meetings between the Finance Committee and the Governing Board of the Nederlandsche Bank have been rejected in the past.[709] Central bank officials do not appear before Parliament on any regular basis, although they might give evidence in their field of expertise in the course of a parliamentary inquiry.[710] In this context it has been observed that the Nederlandsche Bank has a less exposed position in the political system than a central bank which may be considered more independent, because its legal basis does not include a provision giving the executive government the right to issue directions.[711] Vondeling, a former Minister of Finance, recalls having put at one time the somewhat rhetorical question to the president of the Nederlandsche Bank:

[709] R.J. Schotsman, *De Parlementaire Behandeling van het Monetaire Beleid In Nederland Sinds 1863*, Doctorate thesis, University of Brabant, 1987, 340–1, who also refers to occasional informal discussions between the Finance Committee and the Governing Board of the Nederlandsche Bank.

[710] E. Nierop/J. van der Veer/R. Smits, "De Nederlandsche Bank" in *Vers un Système Européen de Banques Centrales*, Rapport du groupe présidé par Jean-Victor Louis (Editions de l'Université de Bruxelles, Brussels, 1989), 233–47, at 246; Memorandum submitted by the Netherlands Central Bank, n. 602 above, at 149.

[711] Schotsman, n. 709 above, at 349.



"do you now that a secret Constitutional provision exists, stating: The president of the Nederlandsche Bank is immune, the Minister of Finance is responsible?"[712]

However, officials of the Bank may be called upon in connection with a parliamentary inquiry in accordance with Article 70 of the Dutch constitution (*enquêterecht*), according to which the two chambers of Parliament jointly or separately have the right to initiate an inquiry into any subject through a select committee or an *ad hoc* committee.[713] The committee charged with the inquiry can oblige witnesses and expert witnesses to appear and testify. Thus, in principle the Nederlandsche Bank and its conduct of monetary policy could become the subject of such an inquiry and members of the Governing Board and/or other central bank officials could be called upon to appear before the committee. However, the practical value of the so-called *enquêterecht* as a parliamentary tool to hold the central bank accountable is very limited. First, the establishment of a parliamentary inquiry requires a majority vote in either chamber of Parliament or in a joint session, respectively, with at least half of the total number of members present in each case. Despite repeated efforts to amend the procedure a "minority right of inquiry" has never been introduced.[714] Therefore, since the political parties in power will usually command a majority in both Houses of Parliament, the certain co-operation of at least parts of the executive government, i.e. a coalition partner, will be required to stage an inquiry involving the Nederlandsche Bank. By supporting the initiation of an inquiry into the Nederlandsche Bank the government would effectively vote for an inquiry into its own conduct, since the latter is considered to be ultimately responsible for monetary policy. Besides, parliamentary practice shows that the *enquêterecht* is not a commonly used instrument. Since its establishment in 1850 fewer than 20 inquiries have taken place, and none was related to the Nederlandsche Bank.[715] Apart from the *enquêterecht*, Parliament's prospect of reviewing the conduct of monetary policy is somewhat limited. Both chambers of Parliament have standing committees for each ministerial department and thus—among others—for financial affairs (*vaste commissie voor Financiën*) and economic affairs (*vaste commissie voor Economische Zaken*). Moreover, *ad hoc* committees can be set up for special subjects.[716] Moreover, Parliament can request information (Article 68 of the Dutch Constitution) from, and make interpellations, pose questions orally, or in writing, and introduce motions to a minister. But in addition to the fact that Parliament's grip on the Nederlandsche Bank is somewhat limited, evidence exists to support the view that Parliament

[712] Author's translation cited in Vondeling, n. 392 above, at 150.

[713] The parliamentary inquiry is governed by a separate law: Wet Parlementaire Enquête, Stb. 1991, no. 416. Moreover, detailed provisions are included in the rules of procedure of both chambers of Parliament: Reglement van Orde van de Eerste Kamer der Staten-Generaal, ss. 128–138; Reglement van Orde van de Tweede Kamer der Staten-Generaal, ss. 140–150.

[714] On the efforts to introduce such a right cf. Prakke/De Reede/Van Wissen, n. 15 above, 549–50.

[715] For a list of the subjects of the inquiries cf. Prakke/De Reede/Van Wissen, n. 15 above, 547–8.

[716] Reglement van Orde van de Eerste Kamer der Staten-Generaal, s. 32; Reglement van Orde van de Tweede Kamer der Staten-Generaal, ss. 16 and 18.

takes rather limited interest in monetary policy in the first place. The reasons for this parliamentary abstinence may originate in the special position of the Nederlandsche Bank. Schotsman argues that the Nederlandsche Bank conducts monetary policy at some distance from the political arena due to the objective approach to monetary policy. Moreover, in his view the Bank holds a special position *vis-à-vis* the executive government and both chambers of Parliament in so far as it is "primarily responsible for the instruments of the monetary policy", whereas a conflict between the Governing Board of the Bank and Parliament would not be "in the interest of the country".[717] Finally, Schotsman refers to the discretion with which monetary matters are discussed in Parliament. He summarises the relationship between the Nederlandsche Bank and Parliament in as follows:

> "It is our conclusion that the relationship between the Staten-Generaal and the DNB [De Nederlandsche Bank] is characterised by remarkable continuity. In the 120 years covered by us, parliamentary activities in the field of monetary policy have been marked by calmness and harmony, that is to say that Parliament normally has not been directly involved with monetary policy. The behaviour of the Staten-Generaal towards the Bank was characterised by a great deal of self-restraint on the part of both chambers of the Staten-Generaal to discuss monetary policy with the Minister [of Finance]. The Staten-Generaal paid little attention to monetary policy."[718]

In some respects ministerial responsibility functions as a filter between Parliament and the central bank. Parliament is restricted to putting pressure on the government and the Minister of Finance in particular to issue directions to the Bank under section 26 of the Bank Act 1948, which forms the backbone of this relationship.

As has been observed, the override mechanism ceases to exist under the Bank Act 1998. Interestingly, the new statute of the Bank for the first time includes an explicit reference to Parliament.[719] According to this, while observing his independence, the president of the Nederlandsche Bank, upon request by the Parliament or upon his own initiative, may be heard by the competent committee of Parliament with regard to the tasks and actions relating to objective of the Nederlandsche Bank to maintain price stability. Against this background, the Staten-Generaal has made it clear that it expects the president of the Nederlandsche Bank to appear before Parliament upon request, as the president of the ECB appears before the EP. The difficulties with this approach have already been cited above. Nevertheless, this development is remarkable in as much as the role of a national parliament *vis-à-vis* a national central bank is increased at a time at which authority over monetary policy is transferred to the ESCB and the ECB.

[717] Schotsman, n. 709 above, at 349.
[718] Author's translation: ibid., at 349.
[719] Cf. s. 19 Bank Act 1998.



## VII. TRANSPARENCY

With regard to the transparency of the central banks examined in this study generally a differentiation can be made between transparency in the decision-making procedures of the central banks with regard to monetary policy and, moreover, any publications or other means to enhance the transparency of the conduct of monetary policy by the central bank.

### 1. Transparency in the decision-making procedures of the central banks

Considerable differences exist between the various central banks with regard to the publication of minutes of the meetings of the monetary policy board. The arrangements range from the absence of any form of disclosure of the meetings to the extensive publication of the decisions and minutes. With regard to the central banks participating in the ESCB any provisions which could infringe the tasks that are assigned to them in the framework of the ESCB have to be considered incompatible with the EC Treaty and the ESCB Statute. This includes an infringement of the confidentiality rule of the ECB, e.g. the publication of details of the meetings of the Governing Board of the ECB by national central banks which, under the EC Treaty or due to a decision of the Governing Board, are exempted from publication.

In the case of the Nederlandsche Bank, the Banque de France and the Reserve Bank of New Zealand no minutes of the proceedings of the monetary policy boards are published.

The meetings of the Governing Board of the **Nederlandsche Bank** are attended by its members, and are open to staff members. However, they are not open to the public. The Bank Act 1948 does not include any provisions on the publication of the minutes of the meetings of the Governing Board.[720] Nevertheless, minutes of the meetings of the Governing Board are kept, which reflect the views of the participants expressed during the meetings and the decisions. However, they are not published, nor are they made available to the public. Decisions on interest rate adjustments are published—among other places on the Internet.

The **Reserve Bank of New Zealand** likewise does not publish any minutes. However, the reason for this is to be found in the institutional structure of the Bank, according to which monetary policy decisions are effectively taken by the governor himself, rather than by a collegiate body. Consequently no minutes of the meetings of such a body can exist. Monetary policy decisions of the governor are made public—among other places on the Internet.

[720] The law on the public accessibility of government documents (Wet van 31 october 1991, Stb. 703, houdende regelen betreffende de openbaarheid van bestuur; as amended) does not apply.