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Moving Forward, Never Backwards: Preventing Fraud In the European Union and Defining European Central Bank Independence

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Abstract

Part I of this Note will describe the need for anti-fraud measures within the Community. Part I will also detail the various legislative actions taken by the Commission, the Parliament and Council, and by the ECB and by the EIB to combat fraud. Part II will present the Commission's case against the ECB, the ECB's defense, the views expressed by Advocate General Jacobs and the ultimate judgment of the ECJ. Part II will focus primarily on the Commission v. ECB, but will note similarities and variances from the Commission's case against the EIB. Finally, Part III will discuss the leeway afforded to fraud prevention within the EC, the fundamental basis of ECB independence, and the impetus of the ECJ's decision regarding the nature of ECB independence and to some degree EIB independence.

NOTES

MOVING FORWARD, NEVER BACKWARDS: PREVENTING FRAUD IN THE EUROPEAN UNION AND DEFINING EUROPEAN CENTRAL BANK INDEPENDENCE

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INTRODUCTION

Lord Cockfield aptly stated that “the Community always goes forward; never backwards At times progress may be slow to the point where it appears almost to have stopped: but in due time progress will be resumed.”¹ Fraud and corruption acted as sand in the gears of European Union (“EU” or “the Community”) progress through most of the 1990s and threatened to halt its evolution towards a monetary alliance.² In response, the Community at Century’s close, prioritized fraud prevention to a degree that created a distinct tension with the vision of the framers of the Economic and Monetary Union fifty years before

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1. See Noni Vacondiou, *The Role of the European Central Bank Towards the European Monetary Union*, at <http://www.calavros.com/ecb.htm> (Jan. 11, 1999).

2. See House of Lords Select Committee on European Communities, *Fraud Against the Community*, H.L. 27, (Feb. 21, 1989) [hereinafter Select Committee Report] at ¶ 205 (recognizing that huge sums being lost due to fraud and irregularity against Community are all bore by taxpayers and traders of Europe). “This strikes at the roots of democratic societies, based as they are on the rule of law and its enforcement, and is a public scandal.” *Id.* See also Council Resolution, O.J. C 15/410 (1990) (reporting on progress towards European Union); Ann Sherlock & Christopher Harding, *Controlling Fraud Within the European Community*, 16(1) EUR. L. REV. 20 (1991) (discussing suspected sources of fraud and corruption within Community). See generally OLAF Supervisory Committee Progress Report No. 1/1999 from July 1999 to July 2000, O.J. C 360, at 1 in Chapter 2(c)(1) (2000) [hereinafter Report No. 1/1999] (discussing historical background of fraud in Community leading up to creation of UCLAF and eventually OLAF); Court of Auditors Special Report, O.J. C 215 (1985) [hereinafter Special Report] (noting types of transactions that may encourage fraud especially in payment of refunds on agricultural exports).

them.³ These framers inserted in the Treaty establishing the European Community ("EC Treaty")⁴ a high and precisely defined level of independence for the European System of Central Banks ("ESCB") and, likewise, for the ESCB's central body, the European Central Bank ("ECB").⁵ The tug-of-war between central-

3. See Commission Decision No. 1999/352/EC, O.J. L 136, at 20 (1999) [hereinafter Decision 1999/352] (establishing European Anti-Fraud Office ("OLAF")). See also Council Regulation No. 1073/1999, O.J. L 136, at 1 (1999) [hereinafter Regulation 1073/1999] (concerning investigations conducted by OLAF); Interinstitutional Agreement of Parliament, Council and Commission, O.J. L 136, at 15 (1999) [hereinafter Interinstitutional Agreement] (concerning internal investigations by European Anti-Fraud Office (OLAF) within Parliament, Council, and Commission); *Willi Rothley and Others v. Parliament*, Case T-17/00, [2000] E.C.R. II-2085 (ruling on Amendment to Rules of Procedure of Parliament and holding that neither Protocol on Privileges and Immunities nor Parliament's amended Rules of Procedure protected Parliament Members' rights of privacy regarding OLAF investigations); Parliament Decision concerning investigation conducted by OLAF, O.J. L 202, 1 (1999) [hereinafter EP amendment] (adding Article 9a to Parliament's Rules of Procedure concerning Internal investigations conducted by OLAF); *Opinion of Advocate General Jacobs, Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __, at ¶ 167 (summarizing *Decision de la Cour de Justice du 26 octobre 1999 relative aux conditions et modalités des enquetes internes en matiere de lutte contre la fraude, la corruption et toute activite illegale prejudiciable aux interets des Communautes* [Decision of ECJ] on October 26, 1999 relating to conditions and procedures of OLAF in investigating corruption and illegal activities detrimental to financial interests of Community]). This Decision is available only in French and has not been published in the Official Journal. *Id.*

4. Consolidated version of the Treaty establishing the European Community, O.J. C 325/33 (2002), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], incorporating changes made by EC Treaty of Nice amending the EC Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter EC Treaty of Nice] (amending EC Treaty on European Union ("TEU"), EC Treaty establishing the European Community ("EC Treaty"), EC Treaty establishing the European Coal and Steel Community ("ECSC EC Treaty"), and EC Treaty establishing the European Atomic Energy Community ("Euratom EC Treaty") and renumbering articles of TEU and Consolidated EC Treaty).

5. See Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies). See also Protocol on the Statute of the ESCB and the ECB, art. 7, O.J. C 191/68 (1992) [hereinafter ESCB/ECB Statute] (repeating Article 108 EC). In *Les Verts* judgment, the European Court of Justice ("ECJ") referred to EC Treaty and other constitutive treaties as "constitutional charter," leading commentators to acknowledge ECB independence as a "constitutional principle." *Parti écologiste Les Verts v. Parliament*, Case 294/83, [1986] E.C.R. 1339, 1365. It is important to note that the Monetary Union was not created as a separate structure under the overarching TEU such as Common Foreign and Security Policy, also created by the Treaty of Maastricht. Consolidated EC Treaty, *supra* note 4, tit. V, O.J. C 325/33, at 61 (2002), 37 I.L.M. at 92 (enumerating provisions on common foreign and security policy); *id.* art. 268, O.J. C 325/33, at 140 (2002), 37 I.L.M. at 149 (ex Article 199) (allowing expenditures relating to common foreign and security to be charged to EU budget); Terence Fokas, *Economic and Monetary Union in Europe: The*

ized fraud prevention and ECB independence culminated in a court battle that the European Court of Justice ("ECJ") ultimately resolved, delimiting ECB independence and solidifying the judiciary's own position as final arbiter of such disputes.⁶

By the 1990s, economists viewed independent central banks such as the German Bundesbank and the American Federal Reserve Board as having been highly successful in delivering stable and steady monetary growth.⁷ Thus, the ECB was created in May 1998 and commenced operations on January 1, 1999,⁸ with a

Legal Framework and Implications for Contractual Obligations, 36 FALL TEX. J. BUS. L. 2, 18 (1999) (Comparing structure of ECB and ESCB with U.S. Federal Reserve System and its system of Regional District Banks).

6. See *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. ___ (deciding whether ECB Anti-Fraud Decision could co-exist with Regulation 1073/1999). See also Consolidated EC Treaty, *supra* note 4, arts. 230, 232, 233, 234, and 237, O.J. C 325/33, at 126-28 (2002), 37 I.L.M. at 125-26 (stating that ECJ has jurisdiction over disputes between institutions, bodies, and governments of Community); Roger J. Goebel, *European Economic and Monetary Union: Will the EMU Ever Fly?*, 4 COL. J. EUR. L. 249, at 295 (discussing dual role of ECJ in European Monetary Union's ("EMU") operations).

7. See Laurence Gormley & Jakob De Haan, *The Democratic Deficit of the European Central Bank*, 21 EUR. L. REV. 95 (1996) (examining Central Bank autonomy and democratic accountability of European Central Bank ("ECB") by reference to German Bundesbank, Dutch Central Bank and Reserve Bank of New Zealand, and by reference to economic theory). See also LORENZO BINI SMAGHI & DANIEL GROS, OPEN ISSUES IN EUROPEAN CENTRAL BANKING 125-28 (St. Martin's Press, Inc., 2000) (testing effectiveness of central bank independence and formulation of monetary policy); Nigel Healey et al., *The Political Economy of a European Central Bank*, available at <http://www.ecsanet.org/conferences/ecsaeworld2/Healey.htm> (last visited Sept. 19, 2003) (discussing intent and wisdom of politically independent central bank); RENE SMITS, THE EUROPEAN CENTRAL BANK — INSTITUTIONAL ASPECTS, 152-54 (1997) (citing studies that correlate central bank independence in Germany, Netherlands, and Switzerland with low inflation rates and smaller national deficits); Goebel, *supra* note 6, at 288 (discussing reasons for strong statement of ECB independence); Rosa Lastra, *The Independence of the European System of Central Banks*, 33 HARV. INT'L L.J. 475, 477 (1992) (arguing that central bank independence combats manipulation of monetary policies by short-cited politicians, and that expertise and superior economic qualifications of central bankers provide more objective and faster decision-making process than if left to politicians); Piet-Jan Slot, *The Institutional Provisions of the EMU*, in 2 INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION 231 (Deirdre Curtin & Ton Henkels eds., 1995) (acknowledging impressive track-record of Bundesbank and Dutch Central Bank in maintaining price stability).

8. See Consolidated EC Treaty, *supra* note 4, art. 116(3), O.J. C 325/33, at 81 (2002), 37 I.L.M. at 103 (ex Article 109e) (listing provisions that shall apply from beginning of third stage including articles pertaining to ESCB and ECB). See also Consolidated EC Treaty, *supra* note 4, art. 121(4), O.J. C 325/33, at 85 (2002), 37 I.L.M. at 105 (ex Article 109j) (setting January 1, 1999 as date in which third stage of creating Monetary Union shall begin).

strong statement of independence.⁹ Although the EC Treaty does not specifically list the ECB among the political and judicial institutions of the Community,¹⁰ it is distinguished from other European Community (“EC”) agencies and bodies by a separate “legal personality.”¹¹ An Executive Board and Governing Council function as the ECB’s primary “decision-making bodies.”¹² The Executive Board is comprised of the President, the Vice President, and four other members, which deal primarily with the daily business of the ECB.¹³ The Governing Council consists

9. See Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies). See also ESCB/ECB Statute, *supra* note 5 (repeating Article 108 EC). In *Les Verts* judgment, ECJ referred to EC Treaty and other constitutive treaties as “constitutional charter” leading commentators to acknowledge ECB independence as “constitutional principle.” *Parti écologiste Les Verts v. Parliament*, Case 294/83, [1986] E.C.R. 1339, 1365. It is important to note that Monetary Union was not created as separate structure under overarching TEU such as Common Foreign and Security Policy, also created by Treaty of Maastricht. See Consolidated EC Treaty, *supra* note 4, tit. V, O.J. C 325/33, at 61 (2002), 37 I.L.M. at 192 (enumerating provisions on common foreign and security policy); Consolidated EC Treaty, *supra* note 4, art. 268, O.J. C 325/33, at 140 (2002), 37 I.L.M. at 149 (ex Article 199) (allowing expenditures relating to common foreign and security to be charged to EU budget).

10. See Consolidated EC Treaty, *supra* note 4, art. 7, O.J. C 325/33, at 42 (2002), 37 I.L.M. at 81 (ex Article 4) (listing Commission, Council, Parliament, Court of Justice and Court of Auditors as institutions entrusted with tasks of Community).

11. See Consolidated EC Treaty, *supra* note 4, art. 107(2) and (3), O.J. C 325/33, at 76 (2002), 37 I.L.M. at 100 (ex Article 106) (giving ECB legal personality). See also ESCB/ECB Statute, *supra* note 5, art. 9.1. See also European Parliament Report A5-0409 2001 Final on Legal Personality of EU, (2001/2021(INI)) (Nov. 2001) [hereinafter Report A5-0409] (stating that legal personality of EU implies that Community may, as legal person, conclude agreements with non-member countries and international organizations, be held liable under international law, and take action where their rights are infringed).

12. See Consolidated EC Treaty, *supra* note 4, art. 107(3), O.J. C 325/33, at 76 (2002), 37 I.L.M. at 100 (ex Article 106) (establishing Executive Board and Governing Council to act as ECB’s decision-making bodies). See also ESCB/ECB Statute, *supra* note 5, art. 9.1; Jonathan A.C. Wise, *Variable Geometry and the European Central Bank: How the ECB Can Assert Itself Against Attacks From Member States With Derogations*, 20 B.C. INT’L & COMP. L. REV. 407, 413 (1997) (discussing structure and function of ECB and ESCB governance); J. Alfred Broaddus, Jr., *EMU and the Role of the National Central Banks in the Eurosystem*, 1 RICH. J. GLOBAL L. & BUS. 61, 71 (2000) (suggesting that ECB Governing Council, with its National Central Bank (“NCB”) Governor majority, must act to strengthen ECB to create clear sense of leadership at center of monetary policy-making).

13. See Consolidated EC Treaty, *supra* note 4, art. 112(2), O.J. C 325/33, at 78 (2002), 37 I.L.M. at 101 (ex Article 109a) (specifying that designation of initial Executive Board be made by common accord of participating Member States only, and that they may decide to limit its initial membership to four or five, rather than six). See also

of the Executive Board and the Governors of the participating Member State central banks¹⁴ and functions as the regular decision-making body whose decisions are generally carried out by the National Central Banks (“NCBs”).¹⁵

The ECB’s primary objective is to maintain price stability;¹⁶ a term not defined in the EC Treaty, but commonly understood to mean keeping consumer prices from rising at a high inflation rate.¹⁷ The ECB also has the secondary tasks of designing the

ESCB/ECB Statute, *supra* note 5, arts. 11.1, 11.2, 12.1 (enumerating construct of Executive Board); Slot, *supra* note 7, at 235 (observing that “daily business” managed by Executive Board, often impacts monetary policy); Wise, *supra* note 12, at 414 (describing ECB Executive Board’s function as implementing monetary policy in accordance with decisions and guidelines laid down by ECB Governing Council).

14. See Consolidated EC Treaty, *supra* note 4, art. 112(1), O.J. C 325/33, at 78 (2002), 37 I.L.M. at 101 (ex Article 109a) (describing composition of Governing Council). See also ESCB/ECB Statute, *supra* note 5, art. 10.1 (laying out structure of ECB Governing Council). See also Broaddus, *supra* note 12, at 70 (recognizing that all NCB Governors being permanent voting members of Governing Council, creating voting majority, is unlike principal monetary policy-making body in Fed, Federal Open Market Committee (“FOMC”), where voting Reserve Bank presidents are in permanent minority).

15. See SMITS, *supra* note 7, at 92-115 (describing complex provision on structure and role of ESCB and ECB). See also Goebel, *supra* note 6, at 276 (discussing similarity of ECB structure to German Bundesbank and U.S. Federal Reserve); Wise, *supra* note 12, at 414 (noting that ECB Governing Council formulates Community monetary policy including decisions relating to intermediate monetary objectives, key interest rates and supply of reserves); Broaddus, *supra* note 12, at 64-66 (relating decision-making process and functions of U.S. Federal Reserve Board Chairman to Reserves success at maintaining price stability).

16. See Consolidated EC Treaty, *supra* note 4, art. 105(1), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (setting primary objective of ESCB as maintaining price stability while concurrently supporting Community objectives). See also ESCB/ECB Statute, *supra* note 5, art. 2 (restating ECB primary objective as maintaining price stability); Fokas, *supra* note 5, at 18 (noting that ECB Governing Council is responsible for formulating monetary policy within euro-zone, which includes setting monetary objectives and interest rates, adopting operational guidelines, formulating ECB’s internal structure and ensuring that participating NCBs comply with ECB guidelines).

17. See ECB Working Paper No. 273, *Definition of Price Stability, Range and Point Inflation Targets: The Anchoring of Long-Term Inflation Expectations* (Sept. 2003), available at www.ecb.int/pub/wp/ecbwp273.pdf (last visited Feb. 11, 2004) (correlating concept of maintaining price stability with sustaining low inflation rate, and defining low inflation rate as keeping Harmonized Index of Consumer Prices (“HICP”) below 2%). See also Sven-Olov Daunfeldt & Xavier de Luna, *Central Bank Independence and Price Stability*, available at <http://www.econ.umu.se/ues/ues589.pdf> (June 6, 2003) (defining price stability as period when inflation remains in specific range for five-year period); Niall Lenihan, *The Role and Framework of the European System of Central Banks*, 1090 PLI/CORP. 463, at 466 (1998) (noting that price stability has been defined by ECB as year-on-year increase in HICP of below 2% maintained over medium term).

Community monetary policy,¹⁸ conducting foreign exchange,¹⁹ managing the official foreign reserves of the Member States,²⁰ and promoting smooth operation of payment systems.²¹ In carrying out its operations, the ECB is restricted only by the fact that it must act within the limits of the EC Treaty and the Statute of the ESCB and of the ECB.²²

These broad limitations reflect the drafters' intent to insulate members of the ECB's Executive Board and Governing Council from potential political pressure.²³ Accordingly, Article 108 EC strongly prohibits members of these bodies from seeking or taking instructions from Community institutions or Member States.²⁴ Likewise, Community institutions and Member State

18. See Consolidated EC Treaty, *supra* note 4, art. 105(2), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (enumerating secondary (or basic) tasks of ESCB).

19. See Consolidated EC Treaty, *supra* note 4, art. 105(2), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (listing secondary tasks of ESCB and ECB). Note, however, that Council retained extensive authority over setting foreign exchange rate policy that is binding on ECB. See Consolidated EC Treaty, *supra* note 4, art. 111, O.J. C 325/33, at 78 (2002), 37 I.L.M. at 101 (ex Article 109) (retaining extensive authority over setting foreign exchange rate policy with Council). See also Slot, *supra* note 7, at 240 (describing ECB's position in setting foreign exchange rate policy as "somewhere between consultation and assent"); Goebel, *supra* note 6, at 285-86 (discussing powers retained by Council regarding foreign exchange rate policy).

20. See Consolidated EC Treaty, *supra* note 4, art. 105(2), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (specifying secondary tasks of ESCB and ECB).

21. See Consolidated EC Treaty, *supra* note 4, art. 105(2), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (enumerating secondary tasks of ESCB and ECB in addition to primary task of maintaining price stability).

22. See Consolidated EC Treaty, *supra* note 4, art. 8, O.J. C 325/33, at 42(2002), 37 I.L.M. at 81 (ex Article 4a) (stating that ECB must act within limits of EC Treaty).

23. See Alexandre Lamfalussy, The European Central Bank: Independent and Accountable, Keynote speech at Oesterreichische Nationalbank, Vienna, available at www.ecb.int/emi/key/key05.htm (May 13, 1997). Lamfalussy, former President of European Monetary Institute, noted that independence of ESCB marks its credibility and effectiveness in maintaining price stability in euro-zone. *Id.* See also Ian Harden, *The European Central Bank and the Role of National Central Banks in Economic and Monetary Union, in ECONOMIC AND MONETARY UNION: IMPLICATIONS FOR NATIONAL POLICY-MAKERS* 149, 159-61 (Klaus Gretschmann ed., 1993) (pointing out policy motivation for balancing independent central bank with removal from political pressures to enable extensive leeway in developing monetary policy); Karl Otto Pohl, *Basic Features of a European Monetary Order, in EUROPEAN MONETARY INTEGRATION* 79, 85 (P. Welfens ed., 2d ed. 1994) (describing central bank without independence from political considerations as "tiger without teeth"); SMITS, *supra* note 7, at 156 (describing motive for central bank independence to be freeing incumbents from political considerations concerning renewal of his or her term of office); Wise, *supra* note 12, at 415 (arguing that central bankers work more efficiently when not influenced by partisan political pressures).

24. See Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002),

governments are barred from seeking to influence the members of the ECB,²⁵ thus locking the door from both sides.²⁶ Further testament to the removal of the Executive Board and Governing Council from the popularity of monetary decisions, Board and Council members are limited to non-renewable eight-year terms.²⁷ Moreover, they may only be removed from office for incapacity or "serious misconduct" in a proceeding held before the ECJ²⁸ to ensure further that their removal is strictly judicial rather than political. Finally, the ECB has its own financial resources and does not depend on any EC institution for its budget.²⁹

Some economists have queried, however, whether such strong central bank independence in the EC Treaty would have been better left to secondary legislation³⁰ and have raised the

37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies). *See also* ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

25. *See* Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (prohibiting members of Community institutions and bodies and Member State governments from seeking to influence ECB decision-makers). *See also* ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

26. *See* Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (referring to fact that ECB decision-makers cannot seek nor take instructions from neither Member States nor from Community institutions and bodies; and, likewise, Member States and Community institutions and bodies cannot seek to influence ECB decision-makers). *See also* ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

27. *See* Consolidated EC Treaty, *supra* note 4, art. 112(2)(b), O.J. C 325/33, at 78 (2002), 37 I.L.M. at 101 (ex Article 109a) (setting term limits for Governing Council members). *See also* SMITS, *supra* note 7, at 156 (describing motive of central bank independence to be freeing incumbents from political considerations concerning renewal of his or her term of office).

28. *See* ESCB/ECB Statute, *supra* note 5, art 11.4 (stating methods of removing members of Governing Council or Executive Board from office). *See also* SMITS, *supra* note 7, at 163 (analyzing need to remove ECB from potential political pressures regarding decision-makers' job security); Goebel, *supra* note 6, at 288 (discussing notion of ECB decision-makers' freedom from political influence).

29. *See* ESCB/ECB Statute, *supra* note 5, arts. 28-30 (naming ECB's resources as shareholder contributions from NCBs and from income generated through ECB and NCB business)

30. *See* Goebel, *supra* note 6, at 292 (discussing varied views regarding ECB independence embodied in EC Treaty). *See also* Francis Snyder, *EMU-Metaphor for European Union-Institutions, Rules and Types of Regulation*, in *EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION?* 78 (Renaud Dehousse ed., 1994) (noting that while Bundesbank and U.S. Federal Reserve have been successful at delivering low inflation, neither enjoys as much independence as ECB); Lastra, *supra* note 7, at 495 (commenting on fact that Chancellor Kohl's government overruled Bundesbank in monetary policy for German

issue that the ECB's operational structure suffers from a democratic deficit.³¹ Thus, the EC Treaty secures the ECJ's role both in protecting ECB independence but also in providing a check on the ECB's power.³²

reunification in 1990); Gormley & de Haan, *supra* note 7, at 109-12 (noting that economic theory may justify political override of central bank decisions in rare instances of economic shocks). *But see* SMITS, *supra* note 7, at 176, 185 n.161 (conceding that ECB independence has been "written in stone" but noting that alternative is "unacceptable politically" because of high concern for price stability with managing new currency).

31. *See* Resolution on Economic and Monetary Union, O.J. C 304, 43, 45 (1989) (demanding procedures for democratic supervision of ESCB). *See also* Resolution on Economic and Monetary Union, O.J. C 149, at 66, 68 (1990) (urging "public accountability" of ESCB as appropriate "in a democratically ordered society"); Resolution on Economic and Monetary Union, O.J. C 284, at 62, 63-65 (1990) (urging that Parliament be given either power to assent, or share in codecision procedure in key decisions for creation of EMU and legal status of ECU, and give its assent to nomination of ECB board members); European Commission, Working Paper on Economic and Monetary Union: Economic Rationale and Design of the System, at 8 (Mar. 1990), summarized in E.C. BULL., no. 3, at 8-9 (1990) (recommending that ESCB have high level of independence but also remain accountable); Christa Randzio-Plath, *A New Political Culture in the EU: Democratic Accountability of the ECB*, available at <http://www.zei.de> (Mar. 8, 2000) (noting that ECB accountability must counterbalance its independence); Gormley & de Haan, *supra* note 7, at 112 (strongly voicing view that elected officials must control monetary policy, discussing lack of accountability in independent central bank); Snyder, *supra* note 30, at 77 (raising concern of public legitimacy of independent central bank); SMITS, *supra* note 7, at 169 (urging Parliament's use of its surveillance powers to achieve "democratic accountability" because ECB must be accountable to political institutions and also come under scrutiny of judiciary); Chiara Zilioli & Martin Selmayr, *The European Central Bank: An Independent Specialized Organization of Community Law*, 37 COMMON MKT. L. REV. 519 (2000) (recognizing that self-image of ECB as separate from rest of Community adds to attempts to maximize its autonomy and arguing that Member States did not transfer monetary control to Community but rather directly to ECB); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism*, 77 N.Y.U. L. REV. 1612, 1704-05 (2002) (drawing parallels with development of European Union ("EU") with early Federalism within United States and noting that like early United States, roles of institutions of EU will evolve and become more clearly defined over time); Barbara Dutzler, *OLAF or the Question of Secondary Community Law to the ECB*, at 14, available at <http://eiop.or.at/eiop/pdf/2001-001.pdf> (last visited Sept. 11, 2003) (arguing that title of EC Treaty is indication of drafters' intent to define all aspects of Community, including ECB as part of that Community). *But see* Ramon Torrent, *To Whom is the European Central Bank the central bank of: Reaction to Zilioli and Selmayr*, 36 COMMON MKT. L. REV. 1229, at 1233 (1999) (recognizing that ECB's legal personality does not place it "outside of the Community").

32. *See* Consolidated EC Treaty, *supra* note 4, arts. 230, 232-34, 237, O.J. C 325/33, at 126-28 (2002), 37 I.L.M. at 125-26 (stating that ECJ has jurisdiction over disputes between institutions, bodies, and governments of Community). *See also* ESCB/ECB Statute, *supra* note 5, art. 11.4 (allowing ECJ to compulsory retire, on application by Governing Council or Executive Board, member of Executive board for "serious misconduct"); Goebel, *supra* note 6, at 295 (discussing dual role of ECJ in European Monetary Union's ("EMU") operations); Slot, *supra* note 7, at 248 (acknowledging that TEU

The EC Treaty created another important bank, the European Investment Bank (“EIB”),³³ with a distinct legal identity similar to the ECB.³⁴ The EIB, established in 1958, provides substantial amounts of loans for projects and other investments.³⁵ The tasks of the EIB are broadly defined by the EC Treaty as contributing to the development of the common market in the interest of the Community.³⁶ Unlike the ECB, the EIB’s independence is not explicitly mentioned in the EC Treaty, but has been primarily derived from case law.³⁷ The EIB maintains its own budget from independent resources, usually borrowing long-term on the Euro-market and deriving interest from its own loans.³⁸ The Court of Auditors’ right to access of information into EIB activities is limited to those funded by Community ex-

provides greater judicial protection and control than exists in many Member States, which may counterbalance lack of Parliamentary control).

33. See Consolidated EC Treaty, *supra* note 4, art. 9, O.J. C 325/33, at 42 (2002), 37 I.L.M. at 81 (ex Article 4b) (creating EIB to act within limits conferred by EC Treaty).

34. See Consolidated EC Treaty, *supra* note 4, art. 266, O.J. C 325/33, at 139 (2002), 37 I.L.M. at 132 (ex Article 198d) (bestowing EIB with legal personality).

35. See Consolidated EC Treaty, *supra* note 4, art. 267, O.J. C 325/33, at 139-40 (2002), 37 I.L.M. at 132 (ex Article 198e) (giving power to grant loans and give guarantees facilitating financing of projects that develop less-developed regions, projects modernizing or developing progressive activities that are not otherwise financed by Member States, and projects that are in interest of several Member States). EIB contributes to 40% of European Investment Fund (“EIF”), set up in 1994 to provide long-term guarantees for financing Trans-European Networks (“TENs”) projects and for small and medium-sized enterprises (“SMEs”). Jozsef Feiler & Magda Stoczkiewicz, *The European Investment Bank: Accountability Only to the Market?*, A Report by the CEE Bankwatch Network (Dec. 1999), available at www.bankwatch.org/publications/studies/eib/eibl.html.

36. See Consolidated EC Treaty, *supra* note 4, art. 267, O.J. C 325/33, at 139-40 (2002), 37 I.L.M. at 132 (ex Article 198e) (defining tasks, function, and purpose of EIB within Community framework).

37. See *Commission v. Council of Governors of the EIB*, Case C-85/86, [1988] E.C.R. 1281 (ruling on legal status of EIB and rejecting idea that EIB was third party to Community). See also Opinion of Advocate General Mancini, Council of Governors of the EIB, [1988] E.C.R. 1281 (noting that EIB was meant only to be independent in its decision-making, stating there is no doubt of nature of Bank as being autonomous segment of “organizational machinery” of Community and that arguments to contrary have much lower profile than Bank maintains, and noting significance of title and preamble (if any) of piece of legislation for purposes of identifying its most characteristic subject-matter); *SGEEM and Roland Etroy v. EIB*, Case C-370/89, [1992] E.C.R. 6211, at ¶ 15 (holding Community responsible for non-contractual liability of EIB, noting that with regard to non-contractual liability term “institution” covers bodies such as EIB).

38. See Protocol on the Statute of the European Investment Bank, art. 4(1), O.J. L 173/14 (1993) [hereinafter EIB Statute] (providing that EIB shall derive capital from subscription of Member States). See also Parliament Report No. A5-0364/2002 Final on EIB Annual Report for 2001 (2001/2256(INI)) (outlining source and purpose of EIB

penditures in order to provide the EIB with greater credibility in the financial markets.³⁹

Tommaso Padoa-Schioppa, a member of the ECB Executive Board and a well-known international economist,⁴⁰ has pointed out that independence is not an absolute notion, but is rather tied to the task for which it has been granted.⁴¹ Consequently, if the Community Banks abuse their independence and act outside their stated area of expertise, then eventually the Community will act to restrict their independence.⁴² Padoa-Schioppa concluded that if the Central Banks want to protect their independence, they must “know how to behave.”⁴³

In October of 1999, the ECB, believing it was behaving appropriately, established the Directorate for Internal Audit (“D-

funds noting that by virtue of EIB’s top credit rating it is able to issue longer-term bonds denominated in currencies of several countries inside and outside of EU).

39. See Consolidated EC Treaty, *supra* note 4, art. 248(1), (3), O.J. C 325/33, at 131-32 (2002), 37 I.L.M. at 128 (ex Article 188c) (limiting Court of Auditors’ control over EIB’s management of revenue and subjecting it to conditions agreed to by Commission, Court of Auditors and EIB).

40. See *Euro Currency Room: Central Bank Profile*, available at http://www.dailyfx.com/currency_euro_central_bank.html (last visited Feb. 11, 2004). Tommaso Padoa-Schioppa, Italian economist and member of ECB Executive Board who received most of his professional experience at Banca d’Italia, is known as “intellectual impetus” behind euro and “founding father” of new currency. *Id.* His many publications have covered broader implications that Euro will have, both within and outside of euro-zone. *Id.* See also *The Members of the Decision-Making Bodies of the ECB*, available at <http://www.ecb.int> (last visited Feb. 11, 2004).

41. See Tommaso Padoa-Schioppa, *An Institutional Glossary of the Eurosystem*, available at www.ecb.int/key/00/sp000308_1.htm (Mar. 8, 2000) (discussing notion and extent of central bank independence).

42. See Padoa-Schioppa, *supra* note 41 (discussing notion and extent of central bank independence). See also Consolidated EC Treaty, *supra* note 4, arts. 230, 232-34, 237, O.J. C 325/33, at 126-28 (2002), 37 I.L.M. at 125-26 (stating that ECJ has jurisdiction over disputes between institutions, bodies and governments of Community).

43. See Padoa-Schioppa, *supra* note 41 (discussing notion and extent of central bank independence). See also Consolidated EC Treaty, *supra* note 4, art. 8, O.J. C 325/33, at 42 (2002), 37 I.L.M. at 81 (ex Article 4a) (stating that ECB must act within limits of EC Treaty). See e.g., *id.* art. 105, O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (enumerating primary and secondary tasks of ESCB and ECB); *id.* art. 2, O.J. C 325/33, at 40 (2002), 37 I.L.M. at 80 (ex Article 2) (stating objectives of Community as obtaining monetary union and non-inflationary growth); *id.* art. 4, O.J. C 325/33, at 41 (2002), 37 I.L.M. at 80 (ex Article 3a) (adding that Community’s activities also include fixing exchange rates aimed at greater price stability and explains that monetary policy conducted by ECB must support “general economic policies of the Community”); *id.* art. 111, O.J. C 325/33, at 78 (2002), 37 I.L.M. at 101 (ex Article 109) (retaining extensive authority over setting foreign exchange rate policy with Council); Slot, *supra* note 7, at 240 (describing ECB’s position in setting foreign exchange rate policy as “somewhere between consultation and assent”).

IA”) to help combat fraud and other illegal activities detrimental to the financial interests of the ECB.⁴⁴ The EIB President followed with a similar decision in November of 1999.⁴⁵ Both the ECB’s D-IA and the EIB’s Anti-Fraud Decision came less than seven months after the European Commission (“Commission”) established the European Anti-Fraud Office (“OLAF”), also for the purpose of fighting fraud in the Community.⁴⁶ In fact, the Council of Ministers (“Council”) and European Parliament (“Parliament”) had, in May 1999, jointly adopted Regulation 1073/1999 granting OLAF the authority to investigate fraud and other illegal activities within the institutions, bodies, offices and agencies of the EC.⁴⁷ Not coincidentally, Regulation 1073/1999 followed soon after the Treaty of Amsterdam,⁴⁸ which added paragraph 4 to Article 280 EC, granting the Council the necessary power to adopt anti-fraud measures.⁴⁹

The Commission believed both the ECB and EIB’s anti-fraud decisions to be incompatible with the objectives of OLAF and consequently sued both Banks for infringement of Regulation 1073/1999.⁵⁰ The resulting court battles would define

44. See European Central Bank Decision No. 1999/726/EC, O.J. L 291, at 36 (1999) [hereinafter ECB Decision] (creating Directorate for Internal Audit (“D-IA”) to combat fraud within ECB).

45. See *Commission v. European Investment Bank*, Case C-15/00, [2003] E.C.R. ___, at ¶ 42 [hereinafter EIB Decision] (communicating anti-fraud procedure to combat fraud within EIB and limiting OLAF’s authority in this regard). EIB’s Anti-Fraud Decision has not been published, but an English version of it was communicated to Presidents of Parliament, Council, and Commission by the President of the EIB on November 16, 1999. *Id.*

46. Decision 1999/352, *supra* note 3 (establishing OLAF).

47. Regulation 1073/1999, *supra* note 3 (concerning investigations conducted by OLAF within Community bodies and institutions).

48. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (amending TEU, EC Treaty, ECSC Treaty, and Euratom Treaty and renumbering articles of TEU and EC Treaty).

49. See Consolidated EC Treaty, *supra* note 4, art. 280(4), (3), O.J. C 325/33, at 146 (2002), 37 I.L.M. at 136 (ex Article 209a) (allowing Council to adopt, in accordance with codecision procedure outlined in Article 251 EC and after consulting Court of Auditors, necessary measures in fraud prevention that affects “financial interests of the Community”).

50. See *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __ (deciding whether ECB Anti-Fraud Decision could co-exist with Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. __ (deciding whether EIB Anti-Fraud Decision could co-exist with Regulation 1073/1999); Regulation 1073/1999, *supra* note 3 (establishing OLAF as Commission body to combat fraud within Community); ECB Decision, *supra* note 44 (creating D-IA to combat fraud within ECB); EIB

more clearly the role of the Banks within the Community and the scope of their independence.⁵¹ Not surprisingly, the ECJ seized this opportunity for two reasons: to build confidence in its role of judicial review and to enhance the overall confidence in the European Monetary Union ("EMU") by making clear the roles of its governing bodies.⁵²

Part I of this Note will describe the need for anti-fraud measures within the Community. Part I will also detail the various legislative actions taken by the Commission, the Parliament and Council, and by the ECB and by the EIB to combat fraud. Part II will present the Commission's case against the ECB, the ECB's defense, the views expressed by Advocate General Jacobs and the ultimate judgment of the ECJ. Part II will focus primarily on the *Commission v. ECB*⁵³ but will note similarities and variances from the Commission's case against the EIB.⁵⁴ Finally, Part III will discuss the leeway afforded to fraud prevention within the EC, the fundamental basis of ECB independence, and the impetus of the ECJ's decision regarding the nature of ECB independence and to some degree EIB independence.

Decision, *supra* note 45 (communicating anti-fraud procedure to combat fraud within EIB and limiting OLAF's authority in this regard).

51. See *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. ___ (deciding whether ECB Anti-Fraud Decision could co-exist with Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. ___ (deciding whether EIB Anti-Fraud Decision could co-exist with Regulation 1073/1999); Regulation 1073/1999, *supra* note 3 (establishing OLAF as Commission body to combat fraud within Community); ECB Decision, *supra* note 44 (creating D-IA to combat fraud within ECB); EIB Decision, *supra* note 45 (communicating anti-fraud procedure to combat fraud within EIB and limiting OLAF's authority in this regard).

52. See Consolidated EC Treaty, *supra* note 4, arts. 230, 232-34, 237, O.J. C 325/33, at 126-28 (2002), 37 I.L.M. at 125-26 (stating that ECJ has jurisdiction over disputes between institutions, bodies, and governments of Community). See also ESCB/ECB Statute, *supra* note 5, art. 11.4 (allowing ECJ to compulsory retire, on application by Governing Council or Executive Board, member of Executive board for "serious misconduct"); Goebel, *supra* note 6, at 295 (discussing dual role of ECJ in European Monetary Union's ("EMU") operations); Slot, *supra* note 7, at 248 (acknowledging that TEU provides greater judicial protection and control than exists in many Member States, which may counterbalance lack of Parliamentary control).

53. *European Central Bank*, [2003] E.C.R. ___ (deciding whether ECB Anti-Fraud Decision could co-exist with Regulation 1073/1999).

54. *European Investment Bank*, [2003] E.C.R. ___ (deciding whether EIB Anti-Fraud Decision could co-exist with Regulation 1073/1999).

I. LOOKING BACKWARDS: HISTORY OF FRAUD AND FRAUD PREVENTION

A. *Fraud within the Community*

Since the inception of the EU, fraud has consistently undermined EC programs, particularly subsidies to farming or fishing interests and regional aid, threatening citizen confidence.⁵⁵ In the early 1990s, the Commission estimated that fraud amounted to as much as 10% of the total Community budget, while the Community institutions had no mechanism for combating corruption or irregularities.⁵⁶ The Commission had responded in 1987 when it established the Unit for Coordination of Fraud Prevention (“UCLAF”),⁵⁷ an office of the Commission that, throughout most of the 1990s, wielded the Commission’s growing authority in protecting the Community’s financial interests.⁵⁸ In 1998, however, the Parliament adopted a resolution urging for a more independent, more effective UCLAF.⁵⁹

55. See Select Committee Report, *supra* note 2, at ¶ 205 (recognizing huge sums being lost to fraud and irregularity within Community which are being bore by taxpayers and traders of Europe). “This strikes at the roots of democratic societies, based as they are on the rule of law and its enforcement, and is a public scandal.” *Id.* See also Council Resolution, *supra* note 2 (reporting on progress towards European Union); Sherlock & Harding, *supra* note 2, at 20-36 (discussing suspected sources of fraud and corruption within Community). See generally Report No. 1/1999, *supra* note 2, at 1 in Chapter 2(c)(1) (discussing historical background of fraud in Community leading up to Regulation 1073/1999); Special Report, *supra* note 2 (noting types of transactions that may encourage fraud).

56. See Select Committee Report, *supra* note 2, at ¶¶ 10, 11 (estimating huge amounts of money surrendered to fraudulent activity). See also Parliament Questions to the Commission in cooperation to combat fraud in connection with the Community budget, O.J. C 155/12 (1992) (asking what could be done about proliferation of fraud estimated to be 10% of Community budget); Report No. 1/1999, *supra* note 2, at ¶ 1 in Chapter 2(c)(1) (discussing history of fraud and corruption in Community).

57. Commission Report, COM (1987) 572 Final (November 20, 1987) [hereinafter Commission Report on Fraud] (outlining need for ramping up fight against fraud and corruption within Community).

58. See Commission Report on Fraud, *supra* note 57, COM(1987) 572 Final (suggesting tougher measures to fight against fraud affecting Community budget). See also Council Regulation No. 2185/96, O.J. L 292, at 2-5 (1996) [hereinafter Regulation 2185/96] (allowing on-the-spot-checks and inspections to detect fraud and other irregularities); Council Regulation No. 2988/95, O.J. L 312, at 1 (1995) [hereinafter Regulation 2988/95] (referring to participation of Office officials in Commission’s on-the-spot-checks concerning protection of Community’s financial interests).

59. Parliament Resolution No. A4-0297/98, O.J. C 328/95 (1999) [hereinafter BOESCH Report] (calling for more far-reaching, independent role of Unit for Coordination of Fight Against Fraud (“UCLAF”).

Prior to the adoption of the Treaty of Amsterdam,⁶⁰ fraud prevention fell outside the Council of Ministers' enumerated powers.⁶¹ Regardless, the Council did pass fraud prevention legislation by virtue of Article 308 EC, the so-called elastic clause, enabling it to act to achieve the objectives of the common market by unanimous vote.⁶² Through the 1990s, the Council extended UCLAF's investigative authority, including coverage of on-the-spot-checks,⁶³ to fight against the growing cost of fraud within the Community.⁶⁴

The Commission, however, received a serious blow to its reputation in December 1998 when an assistant auditor in the Commission's financial control department, Paul van Buitenen, presented the Parliament with a thirty-page dossier and a "carload of evidence" indicating widespread corruption within the Commission.⁶⁵ Buitenen's evidence indicated cases of fraud,

60. See Treaty of Amsterdam, *supra* note 48, O.J. C 340/1 (amending TEU, EC Treaty, ECSC Treaty, and Euratom Treaty and renumbering articles of TEU and EC Treaty).

61. See Consolidated EC Treaty, *supra* note 4, Part One, O.J. C 325/33, at 40 (2002), 37 I.L.M. at 80 (setting prerogatives and principles to be followed by Community institutions).

62. See Consolidated EC Treaty, *supra* note 4, art. 308, O.J. C 325/33, at 153 (2002), 37 I.L.M. at 140 (ex Article 235) (allowing Council to take action necessary to achieve objectives of Community if not otherwise provided).

63. See Regulation 2185/96, *supra* note 58 (allowing on-the-spot-checks and inspections to detect fraud and other irregularities). See also Regulation 2988/95, *supra* note 58 (referring to participation of Office officials in Commission's on-the-spot-checks concerning protection of Community's financial interests). See, e.g., Commission Regulation No. 1681/94, O.J. L 178/43 (1994) (concerning irregularities and recovery of sums wrongly paid in connection with financing of structural policies and organization of information system in this field).

64. See Select Committee Report, *supra* note 2, at ¶¶ 10, 11 (indicating cost of fraud within Community as substantial portion of budget). See also Parliament Questions, *supra* note 56 (asking what could be done about proliferation of fraud estimated to be 10% of Community budget); Report No. 1/1999, *supra* note 2, at 1 in Chapter 2(c)(1) (discussing history of fraud and corruption within Community).

65. See Committee of Independent Experts ("CIE"), First Report on Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission, at 9.4.25, available at http://www.europarl.eu.int/experts/report1_en.html (Mar. 15, 1999) [hereinafter First Report]. See also Bill Tupman, *OLAF and the Wise Men: Investigating Fraud within the European Commission as opposed to Fraud against the European Budget*, available at http://www.ex.ac.uk/politics/pol_data/papers/Olaf.html (Dec. 2, 2003) (discussing fraud within Commission and steps to prevent further proliferation within Community); Kelly Li, *Recommendations for the Curbing of Corruption, Cronyism, Nepotism, and Fraud in the European Commission*, 24 B.C. INT'L & COMP. L. REV. 161, 164 (2000) (noting historical examples of fraud and measures taken to protect against fraud and corruption in future).

mismanagement, cronyism, and nepotism throughout the Commission.⁶⁶ Specific allegations included Commissioner Liikanen's employment of his wife,⁶⁷ and Commissioner Pinheiro's appointment of not only his wife but also his brother-in-law.⁶⁸

The Parliament quickly assembled a Committee of Independent Experts ("CIE"), the five "Wise Men," consisting of three auditors and two lawyers, to investigate specific allegations of corruption.⁶⁹ After just three months, the inquiry uncovered evidence that culminated in a 144-page "catalog of negligence and mismanagement."⁷⁰ Regarding the employment of Commissioner Liikanen's wife, the CIE found that she had a genuinely independent life to her husband and that they both had behaved properly in terms of their relationship with the Commission.⁷¹ Likewise, the CIE found the appointment of Mr. Pinheiro's wife and brother-in-law to be imprudent but not irregular.⁷² The CIE added that while it had not encountered cases

66. See First Report, *supra* note 65, at ¶ 1.1.2 (listing specific cases that arose through parliamentary discussions). See also *id.* at ¶¶ 9.2.1-9.2.3 (highlighting irregularities including allegations of favoritism, cronyism, and mismanagement by Commissioners Liikanen, Cresson, Marim, Pinheiro, Wulf-Mathies, and indicating that President Santer failed to take action and entire Commission failed to combat fraud effectively (¶ 8.6.4)).

67. See First Report, *supra* note 65, at ¶ 8.1.38 (discussing various cases of nepotism). See also Tupman, *supra* note 65 (noting CIE findings in regards to allegations).

68. See First Report, *supra* note 65, at ¶ 8.4.8 (discussing various cases of nepotism). See also Tupman, *supra* note 65 (noting CIE findings in regards to allegations).

69. See Parliament Resolution on Improving the Financial Management of the Commission, 1999, O.J. C 104/106 (creating committee of independent experts). The Committee appointed Andre Middelhoek as Chair. *Id.* Other members included Inga-Britt Ahlenius, Juan Antonio Carrillo Salcedo, Pierre Lelong, and Walter van Gerven. *Id.* See also Tupman, *supra* note 65 (noting CIE findings in regards to allegations); Li, *supra* note 65, at 164 (recounting allegations brought by Paul van Buitenen).

70. Peter Conradi & Stephen Grey, *Rudderless EU Faces Wholesale Shake Ups*, SUNDAY TIMES, Mar. 21, 1999, available at 1999 WL 14484566 (discussing allegations of fraud, mismanagement, nepotism and cronyism within Commission and resulting mass resignation). See First Report, *supra* note 65 (outlining CIE's findings based on van Buitenen's allegations). See also Li, *supra* note 65, at 165 (recounting allegations brought by Paul van Buitenen); Tupman, *supra* note 65 (noting CIE findings in regards to allegations).

71. See First Report, *supra* note 65, at ¶ 8.1.38 (discussing various cases of nepotism). See also Tupman, *supra* note 65 (noting CIE findings in regards to allegations).

72. See First Report, *supra* note 65, at ¶¶ 9.2.1-9.2.3 (investigating irregularities, especially allegations of favoritism, cronyism, and mismanagement by Commissioners Liikanen, Cresson, Marim, Pinheiro, and Wulf-Mathies, with ultimate criticism of Commissioners Cresson and Wulf-Mathies as well as President Santer for failure to take action, and of entire Commission for failure to combat fraud effectively (¶ 8.6.4)). See

where a Commissioner was directly and personally involved in fraudulent activities, it did find instances where Commissioners or the Commission had to accept responsibility for instances of fraud, irregularity or mismanagement in their areas of special responsibility.⁷³ Although the CIE found no proof that any Commissioner had gained financially from any of these instances, the CIE refused to permit ignorance as a defense.⁷⁴ The report notably concluded that it was difficult to find anyone at the Commission level who had the “slightest sense of responsibility” for combating these misdemeanors and fraud.⁷⁵ Within seven hours of the report’s release on March 16, 1999, the entire European Commission, under its President Jacques Santer (former Prime Minister of Luxembourg), took collective responsibility for the alleged inaction and announced its resignation *en masse*.⁷⁶

When Romano Prodi (former Prime Minister of Italy) replaced Jacques Santer as President of the Commission in September 1999, he attempted to quell fears of continued fraud by proclaiming “zero tolerance” for corruption in a “New Era of Change.”⁷⁷ On April 28, 1999, under the auspice of its powers to

also Tupman, *supra* note 65 (discussing CIE findings in regard to allegations); Li, *supra* note 65, at 166 (recounting allegations brought against Commission members).

73. *See* First Report, *supra* note 65, at ¶¶ 9.2.1-9.2.3 (commenting on overall findings of investigations into fraud, mismanagement, nepotism, and cronyism within Commission). *See also* Tupman, *supra* note 65 (noting CIE comments relating to its investigation); Li, *supra* note 65, at 166 (recounting CIE findings).

74. *See* First Report, *supra* note 65, at ¶¶ 9.2.1-9.2.3 (reporting conclusions of investigations and assessment of Commissioners’ involvement). *See also* Tupman, *supra* note 65 (noting CIE comments relating to its investigation); Li, *supra* note 65, at 166 (recounting CIE findings).

75. *See* First Report, *supra* note 65, at ¶¶ 9.2.1-9.2.3 (noting level of responsibility of individual Commissioners and performance of entire Commission). *See also* Tupman, *supra* note 65 (noting CIE comments relating to its investigation); Li, *supra* note 65, at 166 (recounting CIE findings).

76. *See* Conradi & Grey, *supra* note 70 (reporting on Commission’s mass resignation immediately following release of CIE’s report). *See also* Statement by President Jacques Santer day after resignation of members of Commission (Mar. 16 1999) *available at* http://www.lex.unict.it/cde/documenti/vari/98_99/statement-j-s-17-03.htm (Feb. 11, 2004); House of Commons Research Paper 99/32, *The Resignation of the European Commission*, at 7 *available at* <http://www.parliament.uk/commons/lib/research/rp99/rp99-032.pdf> (Mar. 16, 1999) (discussing unprecedented resignation of entire Commission).

77. *See* Conradi & Grey, *supra* note 70 (reporting on Commission’s mass resignation immediately following release of CIE’s report). *See also* Commission Report, Protecting the Communities’ Financial Interests and the Fight Against Fraud, COM (1999) 590 Final (Dec., 1999) [hereinafter OLAF Report] (recording measures taken by various

set its own internal procedure,⁷⁸ the Commission replaced UCLAF with OLAF – an anti-fraud office that wields greater authority and has been granted a stronger statement of independence than its predecessor.⁷⁹

B. *Decision 1999/352 Establishing OLAF*

On October 7, 1998, the Parliament had adopted a resolution urging a more independent status for the Unit for Coordination of UCLAF.⁸⁰ By December of that year the Commission had proposed legislation to create a completely independent Fraud Investigative Office that would supplant UCLAF's realm of responsibility.⁸¹ Internally, the Commission adopted Decision 1999/352 outlining the organization of OLAF, whose powers of investigation would expand to all institutions, bodies, offices and agencies of the Community by virtue of the Commission's December 1998 Proposal for a joint regulation of the Council and Parliament.⁸²

The Commission's proposal for a Regulation envisaged Europe's Fraud Investigation Office in a form slightly different than OLAF appears today.⁸³ The Commission initially proposed that the Regulation would create the Fraud Investigative Office

Commission General Directorates and services to protect Community financial interests and crack down on fraud); Commission White Paper on reformation of Community Financial Controls, COM(2000) 200 Final/2, at 23 (discussing ways to avoid instances of fraud and corruption in future).

78. See Consolidated EC Treaty, *supra* note 4, art. 218(2), O.J. C 325/33, at 122 (2002), 37 I.L.M. at 124 (ex Article 162) (giving Commission authority to adopt its Rules of Procedure in accordance with provisions of EC Treaty).

79. See Decision 1999/352, *supra* note 3. See also OLAF Report, *supra* note 77 (reporting on OLAF's first-year operations); OLAF Press Release, First Report of the European Anti-Fraud Office (OLAF) on Operational Activities *available at* http://europa.eu.int/comm/anti_fraud/press_room/pr/2000/04_2000_en.html (June 6, 2000) (representing intention to replace UCLAF with OLAF, more independent and far-reaching body).

80. See BOESCH Report, *supra* note 59 (recommending UCLAF be afforded more independence and further reach in carrying out fraud prevention measures).

81. See Commission Proposal for a Council Regulation establishing European Fraud Investigation Office, COM (98) 717 Final (Dec. 1998) [hereinafter Initial Proposal] (proposing creation of completely autonomous body to fight fraud within Community bodies and institutions). See also Decision 1999/352, *supra* note 3 (deciding to create body under Commission to oversee fraud prevention throughout Community bodies and institutions).

82. See Initial Proposal, *supra* note 81 (proposing creation of completely autonomous body to fight fraud within Community bodies and institutions).

83. Compare Initial Proposal, *supra* note 81 (proposing OLAF as separate entity

with total autonomy, its own legal personality and no subordination to the Commission whatsoever.⁸⁴ The Commission contended that OLAF must have absolute independence in order to ensure that its investigative operations would not be tainted politically.⁸⁵ The view that OLAF should exist outside of the Commission did not gain much support however, and in March 1999 the Commission modified its legislative proposal to keep OLAF as a Commission office but with the proviso of guaranteed independence in carrying out its investigative duties.⁸⁶

Thus, by April 1999 the Commission had created OLAF under Article 218 EC⁸⁷ as an internal body to succeed to the functions performed previously by UCLAF.⁸⁸ The Commission retained the power to appoint the Director for a term of five-years, which could be renewed only once.⁸⁹ When hiring the employees of OLAF, the Director would be required to conform to both the Staff Regulations of Officials of the European Communities and the Commission Decisions on its own internal organization.⁹⁰ To make sure that OLAF did not fall too squarely under the shadow of the Commission, Article 3 of Decision 1999/352 specifically states that OLAF shall exercise its investigative powers "in complete independence," that the Director may not seek or take instructions from the Commission or any other

with complete independence), *with* Decision 1999/352, *supra* note 3 (creating OLAF as entity operating under Commission).

84. *See* Initial Proposal, *supra* note 81, art. 8 (proposing OLAF as completely autonomous body).

85. Initial Proposal, *supra* note 81, at ¶ 3-4 (giving reasons for OLAF's complete independence).

86. Commission, Amended Proposal for a Council Regulation Concerning Investigations Conducted by the Fraud Prevention Office, COM (1999) 140 Final, at ¶ 2 (Mar. 17, 1999) [hereinafter Amended Proposal] (changing position of complete OLAF independence to OLAF as entity operating under Commission).

87. *See* Consolidated EC Treaty, *supra* note 4, art. 218, O.J. C 325/33, at 122 (2002), 37 I.L.M. at 124 (ex Article 162) (allowing Commission to adopt its internal Rules of Procedure to ensure its departments operate in accordance with EC Treaty).

88. *See* Decision 1999/352, *supra* note 3, at ¶ 3 (deciding to create body under Commission to oversee fraud prevention throughout Community bodies and institutions). *See also* Commission Report on Fraud, *supra* note 57 (suggesting tougher measures to fight against fraud affecting Community budget); OLAF Report, *supra* note 77 (recording measures taken by various Commission General Directorates and services to protect Community financial interests and crack down on fraud).

89. *See* Decision 1999/352, *supra* note 3, art. 5 (enumerating appointment and term limits of OLAF Director).

90. *See* Decision 1999/352, *supra* note 3, art. 6 (outlining authority and limitations of OLAF Director when hiring employees).

Community institution or body.⁹¹

In addition to complete independence, the Commission's December 1998 proposal had included a Board of Management to oversee and offer opinions to the Director, adopt rules of procedure and draft an annual report.⁹² Since OLAF did not become an independent body, however, it could not have a Board of Management.⁹³ Accordingly, the Commission created, first in its second proposal and finally in Decision 1999/352, an independent Surveillance Committee, consisting of experts in the field, to assist and monitor the discharge of OLAF's investigative functions.⁹⁴

As a final point, Article 7 of Decision 1999/352 states that the decision establishing OLAF will take effect only after the entry of a European Parliament and Council Regulation concerning the investigative functions of OLAF.⁹⁵ Although case law has allowed the Commission's internal measures to have legal effects on third parties,⁹⁶ the Commission's authority under Article 218 EC on its procedural rules only extends to its internal operations.⁹⁷ In other words, the Commission did not have the capacity to create an internal body to conduct investigations through-

91. See Decision 1999/352, *supra* note 3, art. 3 (modeling EC Treaty provision language for independence of Commission itself). See *e.g.*, Consolidated EC Treaty, *supra* note 4, art. 213(2), O.J. C 325/33, at 120 (2002), 37 I.L.M. at 123 (ex Article 157) (requiring Commission to neither seek nor take instruction from any other government or body).

92. See Initial Proposal, *supra* note 81, art. 9 (creating OLAF Board of Management).

93. See Amended Proposal, *supra* note 86, at ¶ 9 (commenting on changes required under Commission's new amended proposal keeping OLAF as Commission body).

94. See Amended Proposal, *supra* note 86, at ¶ 9 (establishing Surveillance Committee to act in lieu of initially proposed Board of Management). See also Decision 1999/352, *supra* note 3, art. 4 (outlining structure and function of OLAF Surveillance Committee).

95. See Amended Proposal, *supra* note 86, art. 7 (stating that entry into force would occur after Parliament and Council adopted regulation concerning OLAF's investigative authority). See also Decision 1999/352, *supra* note 3, art. 7 (stating that entry into force would occur after Parliament and Council adopted regulation concerning OLAF's investigative authority).

96. See *Nakajima v. Council*, Case C-69/89, [1991] E.C.R. I-2069, ¶¶ 49-50 (holding that purpose Community institution's rules of procedure is to organize internal operations for good administration while respecting prerogatives of other institutions). See also *Dutzler*, *supra* note 31 (discussing case law regarding internal decisions having effect on other Community institutions and bodies).

97. See Consolidated EC Treaty, *supra* note 4, art. 218, O.J. C 325/33, at 122 (2002), 37 I.L.M. at 124 (ex Article 162) (providing that Commission shall adopt its

out the wide sphere of the Community, and therefore needed a legal basis for granting OLAF such authority.⁹⁸ Without such authority, OLAF could not exercise oversight over other Community bodies and institutions, or Member State bodies acting as agents of EC programs.⁹⁹ Thus, the Commission submitted its proposal to the Council and Parliament for a wider-reaching regulation.¹⁰⁰

C. Regulation 1073/1999 Concerning OLAF Investigations

The Commission acting alone could not expand OLAF's investigative authority to the desired level.¹⁰¹ Additionally, at the time the Commission first proposed an independent central body to head all fraud investigative functions,¹⁰² the EC Treaty provided no specific legal basis on which to adopt such legislation.¹⁰³ As a result, the initial proposal was introduced on the

internal Rules of Procedure while ensuring that its departments operate in accordance with EC Treaty).

98. See Consolidated EC Treaty, *supra* note 4, art. 218, O.J. C 325/33, at 122 (2002), 37 I.L.M. at 124 (ex Article 162) (allowing Commission to adopt its internal Rules of Procedure to ensure its departments operate in accordance with EC Treaty). See also *Nakajima*, [1991] E.C.R. I-2069, ¶¶ 49-50 (holding that purpose of Community institution's rules of procedure is to organize internal operations for good administration while respecting prerogatives of other institutions); Dutzler, *supra* note 31, at 2 (discussing Commission's inability to adopt legislation directly effecting other Community institutions and bodies).

99. See Dutzler, *supra* note 31, at 2 (discussing limitations of Commission authority to create Commission agency to conduct fraud investigations in all Community institutions, bodies, offices, and agencies). See also *Nakajima*, [1991] E.C.R. I-2069, ¶¶ 49-50 (holding that purpose of Community institution's rules of procedure is to organize internal operations for good administration while respecting prerogatives of other institutions).

100. See Consolidated EC Treaty, *supra* note 4, art. 280(4), O.J. C 325/33, at 146 (2002), 37 I.L.M. at 136 (ex Article 209a) (allowing Council and Parliament to jointly pass fraud prevention measures within Community). See also Initial Proposal, *supra* note 81 (proposing creation of office to fight fraud within Community bodies and institutions); Regulation 1073/1999, *supra* note 3 (granting OLAF authority to conduct investigations throughout Community institutions, bodies, agencies, and offices).

101. See Consolidated EC Treaty, *supra* note 4, art. 218, O.J. C 325/33, at 122 (2002), 37 I.L.M. at 124 (ex Article 162) (granting Commission authority to adopt its internal Rules of Procedure in accordance with EC Treaty).

102. See Initial Proposal, *supra* note 81 (proposing creation of office to fight fraud within Community bodies and institutions).

103. See Consolidated EC Treaty, *supra* note 4, art. 308, O.J. C 325/33, at 153 (2002), 37 I.L.M. at 140 (ex Article 235) (allowing Council to take action, if taken unanimously on proposal from Commission and after consulting Parliament, in order to attain Community's objectives if necessary powers are not otherwise provided by EC Treaty).

basis of Article 308 EC, which gives the Council power to take appropriate action by unanimous vote, where no express power exists and such action is necessary to attain the objectives of the Community.¹⁰⁴ Fortunately, the Treaty of Amsterdam added paragraph four to Article 280 EC¹⁰⁵ on May 1, 1999, just prior to the final Commission proposal.¹⁰⁶ Once ratified, the Council and the Parliament were able to adopt necessary measures to prevent and fight fraud affecting the financial interests of the Community, through the codecision procedure.¹⁰⁷ The Commission's proposal, now having a specific legal basis, still faced the principle of each institution's organizational autonomy.¹⁰⁸

Short of amending the Staff Regulations of every institution and body inside the Community, the operational independence of OLAF depended on the adoption of internal decisions among these institutions and bodies.¹⁰⁹ In light of this, the Commission's initial December 1998 proposal provided that every institution or body *could* adopt a decision to allow OLAF to carry out

104. See Consolidated EC Treaty, *supra* note 4, art. 308, O.J. C 325/33, at 153 (2002), 37 I.L.M. at 140 (ex Article 235) (requiring Council to act unanimously on proposal from Commission, only after consulting Parliament).

105. See Consolidated EC Treaty, *supra* note 4, art. 280(4), O.J. C 325/33, at 146 (2002), 37 I.L.M. at 136 (ex Article 209a) (allowing Council and Parliament to jointly pass fraud prevention measures within Community).

106. See Amended Proposal, *supra* note 86 (incorporating changes and suggestions made to first proposal by Parliament, Council and Court of Auditors). See also Treaty of Amsterdam, *supra* note 48, O.J. C 340/1 (1997).

107. See Consolidated EC Treaty, *supra* note 4, art. 280(4), O.J. C 325/33, at 146 (2002), 37 I.L.M. at 136 (ex Article 209a) (referring to codecision procedure prescribed in Article 251 EC). In Codecision procedure, Commission submits legislative proposal to Parliament and Council for approval; Parliament proposes amendments or approves act; Council then approves Parliament's amendments (if any) or communicates reasons for otherwise adopting common position on proposed act; finally Parliament may adopt or again add amendments to common position. Consolidated EC Treaty, *supra* note 4, art. 251, O.J. C 325/33, at 133 (2002), 37 I.L.M. at 129 (ex Article 189b) (enumerating codecision procedure).

108. See Tupman, *supra* note 65 (pointing out that Commission's proposal implied lengthy process of amendments to staff regulations and conditions of employment of officials and other servants of Community bodies). See, e.g., ESCB/ECB Statute, *supra* note 5, art 12.3 (allowing ECB Governing Council to adopt Rules of Procedure determining ECB internal organization); Consolidated EC Treaty, *supra* note 4, art. 218(2), O.J. C 325/33, at 122 (2002), 37 I.L.M. at 124 (ex Article 162) (allowing Commission to adopt Rules of Procedure in accordance with EC Treaty).

109. See Court of Auditors Opinion No. 2/99, O.J. C 154/1, at ¶ 6 (1999) (commenting on amended proposal for Council Regulation concerning investigation conducted by OLAF).

internal investigations within it.¹¹⁰ The Commission's amended March 1999 proposal, however, made such rulemaking mandatory.¹¹¹ The Court of Auditors first voiced its concern that the amended proposal failed to clarify the precise content of each institution's required decisions.¹¹² Thus, in its final draft, Regulation 1073/1999 not only required each institution and body to adopt internal decisions, but also outlined certain provisions that the decisions must contain for OLAF to be effective.¹¹³

For instance, while Regulation 1073/1999 made clear that OLAF must conform to the rules of the Treaties, in particular the Protocol on privileges and immunities of the institutions of the Community,¹¹⁴ it granted OLAF considerable access to information and to the premises of any institution, body, office or agency being investigated.¹¹⁵ Although OLAF must generally inform the institution when it seeks such access¹¹⁶ and keep all information obtained confidential,¹¹⁷ the institution or body subject to the investigation must provide OLAF, "without delay,"

110. See Initial Proposal, *supra* note 81, at art. 3(2) (addressing issue of internal investigations conducted by OLAF).

111. See Amended Proposal, *supra* note 86, at art. 4(1) (requiring each Community institution, body, agency and office to adopt internal decisions providing necessary authority and special considerations during OLAF investigations). See also Regulation 1073/1999, *supra* note 3, art. 4(1) (making it mandatory for each Community institution, body, agency and office to adopt decisions allowing OLAF to conduct investigations within it).

112. See Court of Auditors Opinion No. 2/99, *supra* note 109, at ¶ 7 (voicing concern that proposal failed to specify necessary amendments of each institution's required decision allowing OLAF investigations).

113. See Regulation 1073/1999, *supra* note 3, art. 4 (outlining provisions each institution and body's internal decision must contain in allowing OLAF to conduct investigations).

114. See Regulation 1073/1999, *supra* note 3, art. 4(1) (stating requirements of OLAF's conduct during all investigations regardless of each institution and body's internal decision).

115. See Regulation 1073/1999, *supra* note 3, art. 4(2) (giving OLAF right of "immediate and unannounced access to any information").

116. See Regulation 1073/1999, *supra* note 3, art. 4(4) and (5) (requiring OLAF to inform institution or body of investigation prior to commencement of such investigation).

117. See Regulation 1073/1999, *supra* note 3, art. 8 (ensuring all information obtained during OLAF investigations is kept confidential). See also Consolidated EC Treaty, *supra* note 4, arts. 286-87, O.J. C 325/33, at 147 (2002), 37 I.L.M. at 136 (ex Articles 213b and 214) (protecting personal data and creating obligation of professional secrecy).

any document relating to the investigation.¹¹⁸ In its internal decision, each institution and body needs to make clear the duty of its members, managers, officials and other servants to cooperate and supply information to OLAF, while also specifying the observances OLAF's employees should take when conducting internal investigations.¹¹⁹

Testament to OLAF's independence from the Commission, only the Director of OLAF may initiate an internal investigation, acting on his own volition or upon a request from the body subject to the investigation.¹²⁰ The Director orchestrates the investigations, and is required to equip employees with written authorization showing their identity, their capacity, and the subject matter of the inquiry.¹²¹ Upon its conclusion, the Director of OLAF must provide a report indicating the facts established, any financial loss, and the findings of the investigation to the institution, body, office or agency that was subjected to the inquiry for corrective action.¹²² To ensure that OLAF does not abuse its considerable independence, a Supervisory Committee oversees its operations¹²³ and a procedure for filing complaints about adverse affects of investigations was provided.¹²⁴

To get the ball rolling on the adoption of the internal decisions granting OLAF investigative authority, the Parliament, the Council, and the Commission rapidly agreed on May 25, 1999, in an interinstitutional agreement,¹²⁵ to adopt a model decision for

118. See Regulation 1073/1999, *supra* note 3, art. 7 (requiring employees and officers of Community institutions and bodies to provide pertinent information to OLAF during investigations).

119. See Regulation 1073/1999, *supra* note 3, art. 4(6) (requiring each institutions internal decisions to specify duties of employees to provide OLAF information and remain helpful during investigations).

120. See Regulation 1073/1999, *supra* note 3, art. 5 (detailing circumstances in which investigation may be commenced by OLAF).

121. See Regulation 1073/1999, *supra* note 3, art. 6 (stating OLAF Director's duties of transparency when conducting investigations).

122. See Regulation 1073/1999, *supra* note 3, art. 9 (requiring report documenting findings and conduct of investigation to be generated at its conclusion).

123. See Regulation 1073/1999, *supra* note 3, arts. 11, 12 (outlining tasks of Supervisory Committee and oversight of tasks of Director).

124. See Regulation 1073/1999, *supra* note 3, arts. 14 (providing for complaint process relating to adverse affects of investigations).

125. See Commission Report, Evaluation of the activities of the European Anti-fraud Office (OLAF), COM (2003) 154 Final (Feb. 4, 2003) (discussing nature of Inter-institutional Agreement). Interinstitutional Agreement is political agreement between institutions on equal footing in relation to one another. *Id.* Such agreements are not

the operation of investigations conducted by OLAF within their institutions.¹²⁶ Under this interinstitutional agreement, each institution agreed not to deviate from the model agreement unless their particular requirements called for such a deviation as a technical necessity.¹²⁷ Taking note of this interinstitutional agreement, the ECJ, despite its complete independence from the political institutions, separately agreed to grant OLAF full access to all its documents and information except those related to a lawsuit.¹²⁸

Unlike the participants of the interinstitutional agreement or the ECJ, the ECB's Governing Council believed the ECB to be outside the reach of OLAF but saw the need for fraud prevention measures and thus adopted Decision No. 1999/726¹²⁹ by virtue of its powers of internal organization in October 1999.¹³⁰ The EIB Board of Governors adopted a similar anti-fraud mea-

"law" but rather create so-called "soft law" and expresses reciprocal duties of sincere cooperation and mutual trust between institutions concerned. *Id.* Here, it expresses wish for instrument to monitor reform and to support and regulate it pending appropriate provisions in Staff Regulations. *Id.* Politically, it officializes commitment of Commission, Council and Parliament and sets objective of extending it to other institutions and bodies, via political-level invitation. *Id.* Methodologically, it provides model for smooth operation of interinstitutional cooperation and coordination and makes for better legibility and transparency. *Id.*

126. See Interinstitutional Agreement, *supra* note 3, at 15 (concerning adoption of internal decisions allowing investigations by OLAF).

127. See Interinstitutional Agreement, *supra* note 3, at 15 (addressing implementation of internal decisions permitting investigations by OLAF). See generally *Willi Rothley and Others v. Parliament*, Case T-17/00, [2000] E.C.R. II 2085 (ruling on Amendment to Rules of Procedure of Parliament and holding that neither Protocol on Privileges and Immunities nor Parliament's amended Rules of Procedure protected Parliament Members' rights of privacy regarding OLAF investigations); EP amendment, *supra* note 3 (adding Article 9a to Parliament's Rules of Procedure concerning Internal investigations conducted by OLAF).

128. See Opinion of Advocate General Jacobs, *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __, at ¶ 167 (summarizing *Decision de la Cour de Justice du 26 octobre 1999 relative aux conditions et modalités des enquêtes internes en matière de lutte contre la fraude, la corruption et toute activité illégale préjudiciable aux intérêts des Communautés* [Decision of ECJ on October 26, 1999 relating to conditions and procedures of OLAF in investigating corruption and illegal activities detrimental to financial interests of Community]). This Decision is available only in French and has not been published in the Official Journal. *Id.* See also Dutzler, *supra* note 31, at 3 (discussing ECJ internal decision allowing OLAF investigations).

129. See ECB Decision, *supra* note 44 (establishing internal Anti-Fraud Committee to oversee D-IA in combating fraud within ECB).

130. See ESCB/ECB Statute, *supra* note 5, art. 12.3 (stating that ECB Governing Council adopts Rules of Procedure which determine ECB's internal organization).

sure in November of the same year.¹³¹

D. *The Contested Decisions*

The Council and Parliament adopted Regulation 1073/1999 in May 1999, and in October of the same year the ECB reacted by creating its own Anti-Fraud Committee within its D-IA responsible for carrying out fraud investigations.¹³² The composition of the ECB's Anti-Fraud Committee is modeled on that of OLAF's Surveillance Committee consisting of three (five in the OLAF Surveillance Committee) independent persons with outstanding qualifications in the area of fraud prevention,¹³³ for a once renewable three-year term.¹³⁴ Not surprisingly, the Anti-Fraud Committee and the entire D-IA have a sphere of responsibility with a remarkable resemblance to the authority reserved for OLAF.¹³⁵ For example, the rules applying to D-IA investigations mirror the responsibilities of OLAF: D-IA is required to inform the person who is the subject of its investigation,¹³⁶ conduct all their activities under the rules of the Treaties,¹³⁷ and observe the rules of professional secrecy with all information obtained.¹³⁸ Further, while the ECB Decision enumerated a duty of ECB staff to inform the Anti-Fraud Committee of fraud or

131. See EIB Decision, *supra* note 45 (communicating anti-fraud procedure to combat fraud within EIB and limiting OLAF's authority in this regard).

132. See ECB Decision, *supra* note 44 (creating Committee to reinforce independence of D-IA in combating fraud within ECB).

133. Compare ECB Decision, *supra* note 44, art. 1(3) (outlining qualifications of Anti-Fraud Committee members) with Regulation 1073/1999, *supra* note 3, art. 11(2) (outlining qualifications of OLAF Surveillance Committee members).

134. Compare ECB Decision, *supra* note 44, art. 1(4) (setting term-limits for Anti-Fraud Committee members to be non-renewable 3-year term) with Regulation 1073/1999, *supra* note 3, art. 11(3), (4) (setting term-limits for OLAF Surveillance Committee members to be non-renewable 3-year term).

135. Compare ECB Decision, *supra* note 44 (establishing D-IA to combat fraud within ECB and enumerating its sphere of responsibility) with Regulation 1073/1999, *supra* note 3 (establishing OLAF to combat fraud within all Community institutions and bodies and enumerating its sphere of responsibility).

136. Compare ECB Decision, *supra* note 44, art. 4 (discussing D-IA's duty to inform subject of investigation) with Regulation 1073/1999, *supra* note 3, art. 4(4) (discussing OLAF's duty to inform subject of investigation).

137. Compare ECB Decision, *supra* note 44, art. 5(1) (requiring D-IA to conduct its investigations in conformity with requirements of EC Treaty) with Regulation 1073/1999, *supra* note 3, art. 4(1) (requiring OLAF to conduct its investigations in conformity with requirements of EC Treaty).

138. Compare ECB Decision, *supra* note 44, art. 7 (requiring D-IA to observe rules of confidentiality when performing investigations) with Regulation 1073/1999, *supra*

illegal activities, no duty existed to inform OLAF.¹³⁹ In fact, the only mention of any interaction with OLAF refers to the ECB Anti-Fraud Committee's responsibility of the relationship with OLAF's Supervisory Committee.¹⁴⁰

Furthermore, the ECB Anti-Fraud Committee is clearly stated to be independent from ECB influence and responsible for monitoring the discharge of D-IA's activities.¹⁴¹ Like the Supervisory Committee overseeing OLAF, the Anti-Fraud Committee may, where appropriate, instruct the D-IA in the performance of its activities.¹⁴² The D-IA is required to report to the Anti-Fraud Committee on its investigations and actions taken,¹⁴³ and the Anti-Fraud Committee is, in turn, to report D-IA activities to the ECB Governing Council and its external auditors¹⁴⁴ and may inform the national judicial authority where there may have been a violation of a national criminal law.¹⁴⁵

The EIB passed a decision similar to that of the ECB.¹⁴⁶ The EIB's decision, however, did not create an internal OLAF-like entity, but rather limited OLAF's investigative authority to cover only the portion of the EIB's budget relating to Community finances.¹⁴⁷ If OLAF suspected fraud relating to funds outside of that portion of the EIB budget, it may report it to the EIB President where the matter would be forwarded to the EIB

note 3, art. 8 (requiring OLAF to observe rules of confidentiality when performing investigations).

139. See ECB Decision, *supra* note 44, art. 5 (requiring ECB employees and officers to report and cooperate fully with D-IA during investigations).

140. See ECB Decision, *supra* note 44, art. 1(9) (charging only ECB Anti-Fraud Committee with duty of interacting with OLAF).

141. See ECB Decision, *supra* note 44, art. 1(1)-(5) (stating that Anti-Fraud Committee consists of three outside independent persons for renewable three-year term, who may neither seek nor take instructions from other Community institutions or bodies).

142. See ECB Decision, *supra* note 44, art. 1(7) (providing authority in ECB Anti-Fraud Committee to monitor D-IA activities).

143. See ECB Decision, *supra* note 44, art. 3 (requiring D-IA to report to ECB Anti-Fraud Committee on investigations and actions taken).

144. See ECB Decision, *supra* note 44, art. 1(8) (requiring ECB Anti-Fraud Committee to report D-IA activities to ECB Executive Board and independent auditors).

145. See ECB Decision, *supra* note 44, art. 1(10) (allowing ECB Anti-Fraud Committee to report possible violations of law to appropriate judiciary).

146. See EIB Decision, *supra* note 45 (communicating anti-fraud procedure to combat fraud within EIB and limiting OLAF's authority in this regard).

147. See Commission v. European Investment Bank, Case C-15/00, [2003] E.C.R. —, at ¶¶ 45-46 (citing EIB Decision at ¶¶ 4-5 of Part I).

Audit Committee for further investigating and reporting.¹⁴⁸ While the EIB enjoys a different legal status and less technical independence than the ECB, the Commission nonetheless sought to annul the decisions of both bodies.¹⁴⁹

II. MUDDLING THROUGH PROGRESS: FRAUD PREVENTION V. EUROPEAN CENTRAL BANK INDEPENDENCE

The Commission considered both the ECB's anti-fraud decision and the EIB's anti-fraud decision to be in violation of the provisions of Regulation 1073/1999 and consequently sued both bodies in a proceeding before the ECJ.¹⁵⁰ The Commission, supported by the Council, the Parliament, and the Netherlands Government, requested the ECJ to annul the ECB and EIB's Contested Decisions as infringing upon Regulation 1073/1999.¹⁵¹

In response, the ECB and EIB denied that their Contested Decisions infringed Regulation 1073/1999, claiming that all of the acts pursued the same objectives, and in the alternative, the Banks claimed that Regulation 1073/1999 should be interpreted as inapplicable to them.¹⁵² Resolution of this dispute, then, be-

148. See *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 45-46 (citing EIB Decision at ¶¶ 4-5 of Part I).

149. See Consolidated EC Treaty, *supra* note 4, art. 230, O.J. C 325/33, at 126 (2002), 37 I.L.M. at 125 (ex Article 173) (allowing Commission to challenge action of ECB). See also Consolidated EC Treaty, *supra* note 4, art. 237, O.J. C 325/33, at 128 (2002), 37 I.L.M. at 126 (ex Article 180) (allowing Commission to challenge action of Board of Governors of EIB); *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __ (challenging ECB's anti fraud decision for infringement of Regulation 1073/1999); *European Investment Bank*, [2003] E.C.R. __ (challenging EIB's anti fraud decision for infringement of Regulation 1073/1999).

150. See *European Central Bank*, [2003] E.C.R. __ (challenging ECB's anti fraud decision for infringement of Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. __ (challenging EIB's anti fraud decision for infringement of Regulation 1073/1999); Consolidated EC Treaty, *supra* note 4, arts. 230, 241, O.J. C 325/33, at 126, 199 (2002), 37 I.L.M. at 125, 197 (ex Articles 173 and 184) (giving ECJ jurisdiction in cases concerning regulations adopted jointly by Council and Parliament or ECB relating to its application or misuse of powers); *id.* art. 237, O.J. C 325/33, at 128 (2002), 37 I.L.M. at 126 (ex Article 180) (giving ECJ jurisdiction over measures adopted by Board of Governors of EIB).

151. See *European Central Bank*, [2003] E.C.R. __, at ¶ 52 (challenging ECB anti-fraud measures on grounds of infringement of Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 53 (challenging EIB anti-fraud measures on grounds of infringement of Regulation 1073/1999).

152. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 56-57 (presenting ECB's contentions in defense of its anti-fraud measures). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 58 (presenting EIB's contentions in defense of its anti-fraud measures).

came a two-part analysis. First, was Regulation 1073/1999 applicable to the ECB and the EIB, and if so, could the Contested Decisions and Regulation 1073/1999 coexist.¹⁵³ Advocate General Jacobs's opinion in both cases held against the ECB and EIB on both issues.¹⁵⁴ The ECJ's judgment, likewise largely followed Jacobs's view as to both.¹⁵⁵

This Note will first discuss the questions of applicability and legality of Regulation 1073/1999 regarding the Banks, focusing, first, on the scope of the Council and Parliament's authority to adopt fraud prevention measures affecting the ECB and EIB.¹⁵⁶ Second, it will analyze the admissibility of the ECB's objection of illegality,¹⁵⁷ the duty to consult the ECB when passing such legislation,¹⁵⁸ the extent of the Banks' independence¹⁵⁹ and the requirements of the principle of proportionality when passing such legislation.¹⁶⁰ Finally this Note will look at the ECJ's findings regarding the infringement of Regulation 1073/1999 and

153. See *European Central Bank*, [2003] E.C.R. __, at ¶ 58 (breaking analysis of issue down for discussion). See also Opinion of Advocate General Jacobs, *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __, at ¶ 46 (identifying particular issues of case).

154. As is well known, ECJ's Advocate Generals provide influential advisory opinions prior to start of ECJ's own deliberations. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 195 (holding ECB's anti-fraud measures in violation of Regulation 1073/1999). See also Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 167 (holding EIB's anti-fraud measures in violation of Regulation 1073/1999);

155. See *European Central Bank*, [2003] E.C.R. __, at 186 (deciding ECB's anti-fraud measures where incompatible with Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 187 (sustaining EIB's anti-fraud measures violated Regulation 1073/1999).

156. See Consolidated EC Treaty, *supra* note 4, art. 280(4), O.J. C 325/33, at 146 (2002), 37 I.L.M. at 136 (ex Article 209a) (allowing Council and Parliament to adopt fraud prevention measures that affect Community's financial interests).

157. See Consolidated EC Treaty, *supra* note 4, art. 241, O.J. C 325/33, at 129 (2002), 37 I.L.M. at 127 (ex Article 184) (ensuring right of any party to bring action under Article 230 EC on grounds of infringement of essential procedural requirement if instituted within two months).

158. See Consolidated EC Treaty, *supra* note 4, art. 105(4), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (requiring ECB to be consulted on any proposed Community act falling within its "field of competence").

159. See Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies). See also ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC); *Commission v. Council of Governors of the EIB*, Case C-85/86, [1988] E.C.R. 1281 (ruling on legal status of EIB and rejecting idea that EIB was third party to Community).

160. See Consolidated EC Treaty, *supra* note 4, art. 5, O.J. C 325/33, at 41-42

whether the Banks' anti-fraud decisions could coexist with Regulation 1073/1999.¹⁶¹

A. *Applicability and Legality of Regulation 1073/1999*

Several questions concerning the applicability and the legality of Regulation 1073/1999 arose out of the Commission's cases against the two Banks.¹⁶² First, because the Council only had authority to pass measures combating fraud that affected the "financial interests of the Community,"¹⁶³ and because both the ECB and EIB arguably have their own budget and resources,¹⁶⁴ could the Council pass anti-fraud measures affecting the ECB or EIB?¹⁶⁵ If found so applicable, what were the essential procedural requirements for adopting such legislation?¹⁶⁶ Would the Regulation undermine the ECB's or EIB's independence as provided by the EC Treaty?¹⁶⁷ Would it violate the principle of pro-

(2002), 37 I.L.M. at 80 (ex Article 3b) (stating that action by Community must not go beyond what is "necessary" to achieve objectives of Community).

161. See ECB Decision, *supra* note 44 (creating D-IA to combat fraud within ECB). See also EIB Decision *supra* note 45 (communicating anti-fraud procedure to combat fraud within EIB and limiting OLAF's authority in this regard); Regulation 1073/1999 *supra* note 3 (conferring OLAF with authority to investigate allegations and suspicions of fraud in all Community institutions and bodies).

162. See *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __, at ¶ 57 (raising issues of illegality and inapplicability of Regulation 1073/1999 in regards to ECB). See also *Commission v. European Investment Bank*, Case C-15/00, [2003] E.C.R. __, at ¶¶ 53-55, 86, 87 (arguing illegality and inapplicability of Regulation 1073/1999 in regards to EIB).

163. See Consolidated EC Treaty, *supra* note 4, art. 280(4), O.J. C 325/33, at 146 (2002), 37 I.L.M. at 136 (ex Article 209a) (allowing Council and Parliament to jointly pass fraud prevention measures within Community).

164. See ESCB/ECB Statute, *supra* note 5, art. 28-30 (naming ECB's resources as shareholder contributions from NCBs and from income generated through ECB and NCB business). See also EIB Statute, *supra* note 38, at art. 4(1) (providing that EIB's capital shall be derived from subscription of Member States).

165. See *European Central Bank*, [2003] E.C.R. __, at ¶ 80 (arguing for strict reading of EC provision allowing Council to adopt measures to protect Community financial interests against fraud). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 87 (contending that EC Treaty provision allowing Council to adopt measures to protect Community financial interests against fraud does not include bodies with independent budgets); Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 102 (acknowledging that ECB does in fact have budget independent of Community).

166. See *European Central Bank*, [2003] E.C.R. __, at ¶ 69 (pointing out procedural requirements of passing legislation effecting ECB).

167. See *European Central Bank*, [2003] E.C.R. __, at ¶ 69 (submitting that EC Treaty requires ECB to remain independent of political considerations). See also *European In-*

portionality?¹⁶⁸

1. The Applicability of Regulation 1073/1999

Because Regulation 1073/1999 was adopted on the basis of Article 280 EC,¹⁶⁹ the ECB and EIB argued that the Council and Parliament intended the scope of the regulation to exclude bodies whose financial interests and budget were distinct from that of the Community.¹⁷⁰ The Banks both contended that the phrase “financial interests of the Community” in Article 280 EC must mean only expenditures and revenues coming from the EC budget, because that portion of the EC Treaty deals solely with various aspects of the Community budget and contains no reference to the ECB or the EIB.¹⁷¹ In support of their interpretation, the Banks pointed to Council Regulation 2988/95,¹⁷² which acknowledges the link between the Community budget and the expression “financial interests of the Community.”¹⁷³

vestment Bank, [2003] E.C.R. __, at ¶ 87 (submitting that EC Treaty and established case law provides high level of autonomy for EIB).

168. See *European Central Bank*, [2003] E.C.R. __, at ¶ 69 (arguing that OLAF investigation would be ineffectual within ECB because of high degree of secrecy required). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 87 (submitting that OLAF investigations would be superfluous within EIB because of EC Treaty provisions limiting its authority over EIB and because of measures already in place to combat fraud).

169. See Consolidated EC Treaty, *supra* note 4, art. 280(4), O.J. C 325/33, at 146 (2002), 37 I.L.M. at 136 (ex Article 209a) (allowing Council and Parliament to jointly pass fraud prevention measures within Community).

170. See *European Central Bank*, [2003] E.C.R. __, at ¶ 60 (arguing for strict reading of EC Treaty provision allowing Council to adopt measures to protect Community financial interests against fraud). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 111 (contending that EC Treaty provision allowing Council to adopt measures to protect Community financial interests against fraud does not include bodies with independent budgets); Regulation 1073/1999, *supra* note 3, at art. 1(3) (stating that OLAF shall conduct investigations within institutions, bodies, offices and agencies established by or on basis of EC Treaty).

171. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 80, 82 (noting that Article 280 EC is located in Title II of Part Five of Consolidated EC Treaty, entitled Financial Provisions). See also *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 112-13 (arguing that EC Treaty provision allowing Council to adopt measures to protect Community financial interests against fraud does not allow Council to adopt measures protecting bodies with budgets independent of Community budget).

172. See Regulation 2988/95, *supra* note 58, art. 1(2) (defining irregularity as infringement of provision of Community law that affects or prejudices general budget of Communities or budgets managed by them).

173. See *European Central Bank*, [2003] E.C.R. __, at ¶ 88 (contending that Community financial interests do not include budgets not relating to Community budget). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 117 (pointing out that Community financial interests are synonymous with Community budget).

There, "irregularity" is narrowly defined as an illegal act or omission that results in loss of revenue to the Community budget.¹⁷⁴

The ECB, therefore emphasized that its resources come from shareholder contributions and its own monetary operations, thus making it independent of the Community's budget and resources.¹⁷⁵ The only link between the Community budget and the ECB is the incidental Community tax on staff salaries representing less than 3% of the ECB's own budget.¹⁷⁶ In addition, the ECB sought to bolster its argument with the fact that the adoption of its budget and annual accounts fall exclusively within the prerogative of its managing bodies,¹⁷⁷ which the EC Treaty protects from possible influence from the political institutions of the Community.¹⁷⁸

The EIB likewise pointed to the fact that only 10% of its business bears any ties with Community revenues.¹⁷⁹ Moreover, Article 248(1) and (3) EC restrict the functions of the Court of Auditors to the revenues of the Community and bodies which manage such revenue.¹⁸⁰ Those provisions, the EIB argued, limits the Community's control over revenues or expenditures to those relating to the Community budget.¹⁸¹

174. See Regulation 2988/95, *supra* note 58, art. 1(2) (defining irregularity as infringement of provision of Community law that affects or prejudices general budget of Communities or budgets managed by them).

175. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 84-86 (noting that ECB financial resources come primarily through its own business). See also ESCB/ECB Statute, *supra* note 5, arts. 28-30 (naming ECB's resources as shareholder contributions from NCBs and from income generated through ECB and NCB business); Wise, *supra* note 12, at 415 (discussing derivation of ECB income).

176. See *European Central Bank*, [2003] E.C.R. __, at ¶ 87 (acknowledging negligible, incidental link between Community budget and ECB expenditure).

177. See *European Central Bank*, [2003] E.C.R. __, at ¶ 86 (noting that management of ECB budget falls with ECB decision-making bodies, which are to be free from political influence from outside bodies). See also ESCB/ECB Statute, *supra* note 5, art. 26.2 (stating with whom control over ECB budget lies).

178. See Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring ECB from seeking or taking instructions from Community institutions, and barring Community institutions from seeking to influence ECB decision-makers). See also ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

179. See *Commission v. European Investment Bank*, Case C-15/00, [2003] E.C.R. __, at ¶ 115 (noting EIB's negligible link with Community budget).

180. See Consolidated EC Treaty, *supra* note 4, art. 248(1), (3), O.J. C 325/33, at 131-32 (2002), 37 I.L.M. at 128 (ex Article 188c) (limiting Court of Auditors control to Community revenues and expenditures, and providing for on-the-spot audits only in cases involving any body that manages such revenue or expenditure).

181. See *European Investment Bank*, [2003] E.C.R. __, at ¶ 116 (conceding that negli-

Advocate General Jacobs disagreed with the Banks' interpretation and stated that the language in Regulation 1073/1999 is "entirely clear."¹⁸² He pointed out that the 7th recital in the regulation's preamble plainly declares that OLAF shall conduct internal investigations in *all* the institutions, bodies, offices and agencies established by the EC Treaty.¹⁸³ Jacobs concluded that although neither the ECB nor the EIB are specifically listed as institutions of the Community in Article 7 EC, they are established by Article 8 EC and 9 EC respectively and therefore fall within the natural interpretation of the language in Regulation 1073/1999.¹⁸⁴

Following the Advocate General, the ECJ rejected the Banks' argument by shifting the focus from "the financial interests of the Community" to simply "the Community," pointing out that both Banks are indeed part of the greater Community.¹⁸⁵ Any body owing its existence to the EC Treaty lives within the Community framework, it reasoned, and thus its resources exhibit a financial interest of the Community.¹⁸⁶ The ECB, in par-

gible amount of EIB budget relates to Community budget, but rest of EIB budget is outside of OLAF's reach).

182. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 49 (responding to ECB's contention that it remains outside of Regulation 1073/1999's scope). See also Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 90 (refuting EIB's contention that it remains outside of Regulation 1073/1999's scope).

183. Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 50 (citing language found in Regulation 1073/1999 that indicates ECB was intended to fall under OLAF's authority). See also Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 90 (noting that Regulation 1073/1999 intended to include EIB under OLAF's investigative authority); Regulation 1073/1999, *supra* note 3, recital 7 (allowing OLAF power to conduct investigations within "all institutions, bodies, offices and agencies" of Community (emphasis added)); Regulation 1073/1999, *supra* note 3, arts. 1(3), 4(1), (6), 5, 6(6), 7(1)-(3), 9(4), 10(3), 14 (referring to regulations that apply to institutions, bodies, offices and agencies established by, or on basis of EC Treaty).

184. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 51 (referring to language in Regulation 1073/1999 that indicates ECB was intended to fall under OLAF's investigative authority). See also Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 90 (citing his own opinion in *European Central Bank*, [2003] E.C.R. __).

185. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 64, 90-91 (stating relationship ECB has with Community and its financial interests). See also *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 97, 99, 119 (determining EIB's place within Community framework and its relationship with Community financial interests).

186. See *European Central Bank*, [2003] E.C.R. __, at ¶ 91 (deciding that ECB falls within scope of Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R.

ticular, as the central body in charge of setting monetary policy, represents a fundamental player in furthering the Community's financial objectives.¹⁸⁷ The ECJ interpreted the phrase "financial interests of the Community" broadly to express the financial interests of all participants in the Community, thus including the resources and expenditures of the ECB and EIB as well.¹⁸⁸

Even if the expression "financial interests of the Community" should include bodies with independent budgets and resources, the Banks' argued that Article 280 EC only allows the Council to adopt measures combating fraud at the level of Member States.¹⁸⁹ Also on this point, both the Advocate General and the ECJ refused to restrict Article 280(4) EC to measures applying only to Member States as in 280(1) and (2) EC,¹⁹⁰ concluding that such a reading would be incompatible with the objectives sought by that article.¹⁹¹ The ECJ found that the legislature

___, at ¶¶ 122-23 (holding that EIB falls within scope of Regulation 1073/1999). *See, e.g.* Consolidated EC Treaty, *supra* note 4, art. 8, O.J. C 325/33, at 42 (2002), 37 I.L.M. at 81 (ex Article 4a) (establishing ECB and ESCB and stating that ECB must act within limits of EC Treaty); *id.* art. 9, O.J. C 325/33, at 42 (2002), 37 I.L.M. at 81 (ex Article 4b) (establishing EIB); *id.* art. 105(1), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (requiring ECB to support Community's objectives); *id.* art. 2, O.J. C 325/33, at 40 (2002), 37 I.L.M. at 80 (ex Article 2) (stating objectives of Community as obtaining monetary union and non-inflationary growth); *id.* art. 4, O.J. C 325/33, at 41 (2002), 37 I.L.M. at 80 (ex Article 3a) (adding that Community's activities also include fixing exchange rates aimed at greater price stability and explains that monetary policy conducted by ECB must support "general economic policies of the Community"); *id.* art. 267, O.J. C 325/33, at 139-40 (2002), 37 I.L.M. at 132 (ex Article 198e) (requiring EIB to contribute to interest of Community).

187. *See European Central Bank*, [2003] E.C.R. ___, at ¶ 92 (deciding that ECB falls within scope of Regulation 1073/1999). *See also* Consolidated EC Treaty, *supra* note 4, art. 2, O.J. C 325/33, at 40 (2002), 37 I.L.M. at 80 (ex Article 2) (stating objectives of Community as obtaining monetary union and non-inflationary growth).

188. *See European Central Bank*, [2003] E.C.R. ___, at ¶ 95 (concluding that scope of Regulation 1073/1999 includes ECB). *See also European Investment Bank*, [2003] E.C.R. ___, at ¶ 125 (sustaining that EIB falls within scope of Regulation 1073/1999).

189. *See European Central Bank*, [2003] E.C.R. ___, at ¶ 98 (claiming that Article 280(4) EC must be read in relation to other provisions of that section). *See also European Investment Bank*, [2003] E.C.R. ___, at ¶ 129 (submitting that Article 280(4) EC intended only to allow Community to adopt measures combating fraud within Member States).

190. *See* Consolidated EC Treaty, *supra* note 4, art. 280(1) and (2), O.J. C 325/33, at 145-46 (2002), 37 I.L.M. 79 (ex Article 209a) (allowing Member States to take measures combating fraud).

191. *See European Central Bank*, [2003] E.C.R. ___, at ¶¶ 100-05 (rebutting contention that Council is only able to adopt fraud prevention measures effecting Member States). *See also* Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. ___, at ¶¶ 106-112 (discussing wording, structure and history of Article 280 EC

intended to extend OLAF's investigative authority to *all* the institutions, bodies, offices and agencies of the Community.¹⁹² Having determined that the scope of Regulation 1073/1999 applied to the Banks, the ECJ then turned to the arguments of illegality.

2. Admissibility of the Objection of Illegality

The ECB argued for the illegality of Regulation 1073/1999 based on its right to challenge any legislation that effects it.¹⁹³ As a preliminary point, the Commission pointed out that, under that article, the ECB would be precluded from raising the objection of illegality because it did not do so within the two-month period prescribed by Article 230 EC.¹⁹⁴ When analyzing this provision of Article 230 EC, the ECJ has consistently held that if the addressee of a decision adopted by the Community institutions does not challenge the decision within the two-month time limit, the decision becomes definitive against that person.¹⁹⁵ Advocate

and concluding that Community may adopt measures concerning fraud prevention within its institutions and bodies); *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 131-35 (refuting contention that Council is only able to adopt fraud prevention measures effecting Member States); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 131 (concluding that Article 280(4) EC allows Community to adopt fraud prevention measures in all Community institutions, bodies, agencies and offices).

192. See *European Central Bank*, [2003] E.C.R. __, at ¶ 67 (deciding ECB to be within Scope of Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 136 (holding EIB to be within Scope of Regulation 1073/1999); Regulation 1073/1999, *supra* note 3, recital 7 (extending OLAF's investigative functions to "all the institutions, bodies, offices and agencies" (emphasis added)); Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 54 (concluding ECB to be within Scope of Regulation 1073/1999).

193. See Consolidated EC Treaty, *supra* note 4, art. 241, O.J. C 325/33, at 129 (2002), 37 I.L.M. at 127 (ex Article 184) (ensuring right of any party to bring action under Article 230 EC on grounds of infringement of essential procedural requirement if instituted within two months).

194. See Consolidated EC Treaty, *supra* note 4, art. 230, O.J. C 325/33, at 126 (2002), 37 I.L.M. at 125 (ex Article 173) (allowing challenge to be brought within two months from time Plaintiff is notified, or when Plaintiff gained knowledge of challenge). See also *European Central Bank*, [2003] E.C.R. __, at ¶ 72 (objecting to availability of challenge of illegality of Regulation 1073/1999 based on statute of limitations of bringing such action).

195. See *National Farmers' Union v. Secretariat general du gouvernement*, Case C-241/01, [2002] E.C.R. I-9079, ¶ 34 (citing *Commission v Belgium*, Case 156/77, [1978] E.C.R. 1881, ¶¶ 20-24; *Commission v Greece*, Case C-183/91, [1993] E.C.R. I-3131, ¶¶ 9 and 10; *Textilwerke Deggendorf GmbH v. Commission and Germany*, Case C-188/92, [1994] ECR I-833, ¶ 13; *Nachi Europe GmbH v. Hauptzollamt Krefeld*, Case C-239/99, [2001] ECR I-1197, ¶ 29).

General Jacobs pointed out that these judgments aimed to protect legal certainty by disallowing Community measures to be challenged indefinitely and individuals to avoid the time-limit as a delay tactic.¹⁹⁶ Despite the settled case law on this point, however, Jacobs tentatively concluded that the ECB's contention was admissible.¹⁹⁷

The ECJ took a more definitive stance than the Advocate General and drew a subtle distinction between, on the one hand, a decision not being challenged by the clear addressee of the decision, and on the other, a decision not being challenged by a party not known to be the addressee.¹⁹⁸ Because the ECB did not believe itself to be the addressee, it did not have the opportunity to challenge Regulation 1073/1999, and thus, the ECJ held that the ECB might still bring a plea of illegality under Article 241 EC.¹⁹⁹

The EIB took an offensive rather than defensive approach on the issue of admissibility and argued that the Commission could not challenge the EIB Anti-Fraud Decision under Article 237 EC, which provides that measures adopted by the EIB Board of Governors may be challenged for annulment.²⁰⁰ The EIB

196. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. ___, at ¶ 191 (citing Opinion of Advocate General Darmon, *Commission v Spain*, Case C-258/89, [1991] ECR I-3977, at ¶¶ 15-21; Opinion of Advocate General Roemer, *Italy v Council and Commission*, Case 32/65, [1966] ECR 389, at ¶ 414; Opinion of Advocate General Slynn, *France v. Commission*, Case 181/85, [1987] ECR 689, at ¶¶ 702-04; Opinion of Advocate General Mancini, *Greece v Council*, Case 204/86, [1988] ECR 5323, at ¶ 6; Ami Barav, *The Exception of Illegality in Community Law: A Critical Analysis*, COMMON MKT. L. REV. 1974, 366; PIERRE DUBOIS, *L'EXCEPTION D'ILLEGALITE DEVANT LA COUR DE JUSTICE DES COMMUNAUTES EUROPEENNES* 411 (Cahiers de Droit Europeen 1978); HENRY G. SCHERMERS & DENIS F. WAELBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 467, 531 (5th ed. 1992); KOEN LENAERTS & DIRK ARTS, *PROCEDURAL LAW OF THE EUROPEAN UNION* 223 (1999).

197. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. ___, at ¶ 194 (allowing ECB to bring challenge of illegality even after running of statute of limitations to bring such action).

198. See *European Central Bank*, [2003] E.C.R. ___, at ¶¶ 74-77 (deciding ECB's contention of illegality of Regulation 1073/1999 was permissible within intention of statute of limitations).

199. See *European Central Bank*, [2003] E.C.R. ___, at ¶ 78 (clarifying time requirements of party challenging illegality of Community legislation).

200. See *Commission v. European Investment Bank*, Case C-15/00, [2003] E.C.R. ___, at ¶¶ 56, 60 (arguing that EC Treaty did not allow Commission to challenge EIB anti-fraud decision). See also Consolidated EC Treaty, *supra* note 4, art. 237(b), O.J. C 325/33, at 128 (2002), 37 I.L.M. at 126 (ex Article 180) (allowing Commission to challenge measures adopted by EIB Board of Management, but not mentioning measures adopted by EIB Management Committee).

maintained that its Management Committee (which is not mentioned in Article 237 EC), not its Board of Governors, properly adopted the decision.²⁰¹ The Advocate General and the ECJ, however, attributed Management Committee decisions that have legal effect to the Board of Governors and thus subjected such decisions to review under Article 237 EC.²⁰²

3. Duty to Consult the ECB

Arguing the illegality of Regulation 1073/1999, the ECB first claimed that the Council and Parliament did not adopt the regulation in a proper legal manner because neither institution fulfilled its duty to consult the ECB before adopting such legislation.²⁰³ Article 105(4) EC requires the ECB to be consulted on any proposed legislation falling within its “field of competence.”²⁰⁴ Although, fraud prevention is not listed as a primary or even a secondary task of the ECB,²⁰⁵ the right to organize its internal affairs may arguably be considered in its fields of com-

201. See *European Investment Bank*, [2003] E.C.R. __, at ¶ 60 (arguing that EC Treaty did not allow Commission to challenge EIB anti-fraud decision because it was adopted by EIB Management Committee). See also EIB Statute, *supra* note 38, art. 13, ¶¶ 3-8 (stating that EIB Management Committee, under authority of EIB President and supervision of Board of Directors is responsible for current business of EIB).

202. See Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 74 (clarifying ability to challenge EIB decisions not made by EIB Board of Management). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 67 (explaining ability to contest EIB decisions not made by EIB Board of Management); EIB Statute, *supra* note 38, art. 9.3(h) (making it EIB’s Board of Governors’ responsibility to approve EIB’s rules and procedures); Consolidated EC Treaty, *supra* note 4, art. 237(b), O.J. C 325/33, at 128 (2002), 37 I.L.M. at 126 (ex Article 180) (allowing Commission to challenge measures adopted by EIB Board of Management, but not mentioning measures adopted by EIB Management Committee). See generally *Commission v. Council*, Case C-25/94, [1996] E.C.R. I-1469, at ¶ 27 (concerning decisions of Committee of Permanent Representatives).

203. See *European Central Bank*, [2003] E.C.R. __, at ¶ 106 (arguing that Council did not follow proper procedures in adopting Regulation 1073/1999 because they failed to consult ECB). See also Consolidated EC Treaty, *supra* note 4, art. 105(4), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (setting consultation requirements when proposed legislation falls within ECB’s “field of competence”).

204. See Consolidated EC Treaty, *supra* note 4, art. 105(4), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (requiring ECB to be consulted on any proposed Community act falling within its “field of competence”).

205. See Consolidated EC Treaty, *supra* note 4, art. 105(1), (2), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (listing ECB’s primary objective as maintaining price stability, and secondary (or basic) tasks as designing Community Monetary policy, conducting foreign exchange operations, managing foreign reserves, and promoting smooth payment systems).

petence.²⁰⁶ Therefore, the ECB maintained that when the Council and the Parliament passed a regulation effecting the internal organization of the ECB, it was not valid because the ECB was not consulted.²⁰⁷

The ECJ agreed with Advocate General Jacobs on the purpose of the consultation provision in Article 105(4) EC.²⁰⁸ Because the ECB, by virtue of its specific function in the Community, exhibits a high degree of expertise regarding monetary and economic affairs, the duty to consult only ensures that the ECB is utilized in passing such legislation.²⁰⁹ Thus, the ECJ looked to the role and the function of the ECB rather than its status to determine when consultation is required by the EC Treaty and concluded that, in this instance, the ECB's opinion is not required since the prevention of fraud does not fall inside its specific expertise.²¹⁰

4. Extent of ECB and EIB Independence

The Banks maintained as their second plea of illegality that Regulation 1073/1999 violated their respective guarantees of independence.²¹¹ This particular argument marked a crucial

206. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 108-09 (citing ESCB/ECB statute, *supra* note 5, art. 12.3, 36 (granting Governing Council power to adopt Rules of Procedure and lay down conditions of employment)). See also *Wise*, *supra* note 12, at 416 (noting that ECB's field of competence is generally considered to include only monetary, prudential, banking, and financial matters).

207. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 108-09 (arguing that EC Treaty requires consultation in ECB's field of competence and pointing out ESCB/ECB statute, *supra* note 5, art. 12.3, 36 (granting Governing Council power to adopt Rules of Procedure and lay down conditions of employment)).

208. See *European Central Bank*, [2003] E.C.R. __, at ¶ 110 (reading consultation provision embodied in Article 105(4) EC as requirement to consult ECB only in areas concerning monetary policy). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 140 (imputing intent of consultation provision in Article 105(4) EC as only to utilize ECB's expertise in adopting legislation affecting economic and monetary policies).

209. See *European Central Bank*, [2003] E.C.R. __, at ¶ 110 (highlighting that consultation provision in Article 105(4) meant to ensure ECB was utilized in passing legislation in its "field of competence," and defining "field of competence" as solely issues regarding monetary policy).

210. See *European Central Bank*, [2003] E.C.R. __, at ¶ 110 (concluding that EC Treaty only requires ECB to be consulted when adopting legislation concerning monetary policy).

211. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 114, 118 (arguing that ECB's guarantee of independence provided by EC Treaty does not allow OLAF to conduct internal investigations); *Commission v. European Investment Bank*, Case C-15/00,

shaping point in EMU history regarding the ECB, because the ECJ was given the opportunity to rule on the extent of ECB independence as provided by the EC Treaty,²¹² whereas EIB autonomy has been developed in Community law in other contexts.²¹³

To make analysis regarding the ECB easier, Advocate General Jacobs clarified the notion of ECB independence by dividing it into three main areas: institutional, personal, and financial.²¹⁴ The institutional aspect of the ECB's independence is embodied in its distinct legal personality,²¹⁵ its decision-making freedom,²¹⁶ its legislative ability²¹⁷ and its power over its internal

[2003] E.C.R. __, at ¶ 88 (arguing EIB's autonomous status put it beyond reach of OLAF). See also Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies); ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

212. See Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (protecting ECB decision-makers from potential political pressures when designing monetary policy and performing tasks set out in Article 105 EC). See also ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

213. See *Commission v. Council of Governors of the EIB*, Case C-85/86, [1988] E.C.R. 1281 (ruling on legal status of EIB and rejecting idea that EIB was third party to Community). See also Opinion of Advocate General Mancini, *Council of Governors of the EIB*, [1988] E.C.R. 1281 (noting that EIB was meant only to be independent in its decision-making, stating there is no doubt of nature of Bank as being autonomous segment of "organizational machinery" of Community and that arguments to contrary have much lower profile than Bank maintains, and noting significance of title and preamble (if any) of piece of legislation for purposes of identifying its most characteristic subject-matter); *SGEEM and Roland Etroy v. EIB*, Case C-370/89, [1992] E.C.R. 6211, at ¶ 15 (holding Community responsible for non-contractual liability of EIB, noting that with regard to non-contractual liability term "institution" covers bodies such as EIB).

214. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶¶ 151-75 (discussing notion of ECB independence). See also Smits, *supra* note 7, at 155-58 (using similar terminology); BINISMAGHI, *supra* note 7, at 119, 125-28 (distinguishing between Statutory, Functional, Economic and Personal Independence of ECB).

215. See Consolidated EC Treaty, *supra* note 4, art. 107(2), O.J. C 325/33, at 76 (2002), 37 I.L.M. at 100 (ex Article 106) (giving ECB legal personality). See also ESCB/ECB Statute, *supra* note 5, at art. 9.1 (reiterating legal personality provided for ECB).

216. See Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies). See also ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

217. See Consolidated EC Treaty, *supra* note 4, art. 110, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100-01 (ex Article 108a) (stating that ECB can adopt regulations, decisions, recommendations and opinions considered necessary to carry out certain tasks).

organization.²¹⁸ The ECB's personal independence is derived from the rules governing the appointment of the members of the Executive Board and Governing Council,²¹⁹ the security of tenure of these members²²⁰ and the restriction barring these members from engaging in external activities.²²¹ Finally, the ECB enjoys financial independence in that it has control over its own budget,²²² which is audited by independent external auditors²²³ who are limited to examining only the operational efficiency of the ECB management.²²⁴

Under this reasoning, the ECB rightfully pointed out that the EC Treaty and the ESCB/ECB Statute grant the ECB a considerable amount of freedom in carrying out its operations.²²⁵

218. See ESCB/ECB Statute, *supra* note 5, art. 12.3 (allowing ECB Governing Council to adopt Rules of Procedure regarding internal organization of ECB). See also *id.* art. 36.1 (providing that ECB Governing Council sets conditions of employment of ECB staff).

219. See Consolidated EC Treaty, *supra* note 4, art. 112(2), O.J. C 325/33, at 78 (2002), 37 I.L.M. at 101 (ex Article 109a) (providing that members of ECB Executive Board and Governing Council are appointed by common accord of Member States for non-renewable eight-year term).

220. See ESCB/ECB Statute, *supra* note 5, art. 11.4 (stating that members of ECB Executive Board may only be removed from office for incapacity or "serious misconduct" in proceeding before ECJ).

221. See ESCB/ECB Statute, *supra* note 5, art. 11.1 (requiring members of ECB Executive Board to perform their duties on full-time basis, precluding them from engaging in any other occupation).

222. See ESCB/ECB Statute, *supra* note 5, arts. 26-33 (enumerating where ECB's assets come from, how its assets are allocated and who controls its assets).

223. See ESCB/ECB Statute, *supra* note 5, art. 27.1 (stating that ECB's accounts shall be audited by independent external auditors appointed by ECB Governing Council).

224. See ESCB/ECB Statute, *supra* note 5, art. 27.2 (outlining limitations of audits performed by independent auditors).

225. See *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __, at ¶¶ 114, 118 (highlighting ECB's strong statement of independence). See, e.g., Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring ECB from seeking or taking instructions from Community institutions, and barring Community institutions from seeking to influence ECB decision-makers); *id.*, art. 105, O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (setting ECB's primary and secondary objectives); ESCB/ECB Statute, *supra* note 5, art. 11.4 (stating that members of ECB Executive Board may only be removed from office for incapacity or "serious misconduct" in proceeding before ECJ); ESCB/ECB Statute, *supra* note 5, art. 12.3 (allowing ECB Governing Council to adopt Rules of Procedure regarding internal organization of ECB); SMITS, *supra* note 7, at 92-115 (describing complex provision on structure and role of ESCB and ECB). See also Goebel, *supra* note 6, at 276 (discussing similarity of ECB structure to German Bundesbank and U.S. Federal Reserve); Pohl, *supra* note 23, at 79, 85 (describing central bank without strong independence is like "tiger without teeth").

First, the ECB may determine its internal organization²²⁶ and the employment conditions of its staff,²²⁷ which, the ECB argued, extends to the adoption of anti-fraud measures.²²⁸ Secondly, the ECB highlighted its strict guarantee of freedom from political influence²²⁹ and submitted that the mere threat of potential investigations within the ECB had the potential to exert pressure on the members of the Governing Council or the Executive Board when making decisions.²³⁰ Furthermore, because OLAF's staff relies on the Commission for professional advancement and budget constraints, their investigative authority might be used to threaten the political independence of the ECB.²³¹ The ECB acknowledged that the likelihood of OLAF exerting pressure on the ECB decision-makers was extremely small, yet the mere appearance of potential political pressure would shake the confidence in the ECB's ability to maintain economic stability in unstable financial markets.²³² Therefore, the ECB submitted that

226. See ESCB/ECB Statute, *supra* note 5, art. 11.4 (stating that members of ECB Executive Board may only be removed from office for incapacity or "serious misconduct" in proceeding before ECJ).

227. See ESCB/ECB Statute, *supra* note 5, art. 36.1 (providing that ECB Governing Council sets conditions of employment of ECB staff).

228. See *European Central Bank*, [2003] E.C.R. __, at ¶ 114 (arguing that adoption of anti-fraud measures is part of adopting internal organization).

229. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 113-21 (pointing out that ECB decision-makers are barred from being influenced politically). See also Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies); ESCB/ECB Statute, *supra* note 5 (repeating Article 108 EC).

230. See *European Central Bank*, [2003] E.C.R. __, at ¶ 118 (suggesting potential for political influence to be exerted on ECB decision-makers through OLAF investigations). See generally Harden, *supra* note 23, at 159-61 (pointing out policy motivation for balancing independent central bank with removal from political pressures to enable extensive leeway in developing monetary policy); Pohl, *supra* note 23, at 79, 85 (describing central bank without independence from political considerations as "tiger without teeth"); SMITS, *supra* note 7, at 156 (describing motive for central bank independence to be freeing incumbents from political considerations concerning renewal of his or her term of office); Wise, *supra* note 12, at 415 (arguing that central bankers work more efficiently when not influenced by partisan political pressures).

231. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 120-21 (suggesting potential for political influence to be exerted on ECB decision-makers through OLAF investigations). See also Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (protecting ECB decision-makers from being influenced by political pressures); ESCB/ECB Statute, *supra* note 5, art. 7 (repeating Article 108 EC).

232. See *European Central Bank*, [2003] E.C.R. __, at ¶ 119 (pointing out potential for political influence to be exerted on ECB decision-makers through OLAF investiga-

observance of its freedom from political pressure as provided by the EC Treaty required that OLAF be prohibited from conducting internal investigations within the ECB.²³³

Although the EIB's autonomy is not as firmly embedded in the EC Treaty as that of the ECB, the EIB nonetheless pointed out that it enjoys a distinct legal personality²³⁴ with its own administrative bodies²³⁵ and its own resources²³⁶ thus leaving it out of the reach of OLAF's investigative functions.²³⁷ The EIB also highlighted that the drafters of the EC Treaty recognized the need for EIB autonomy and limited the control of the Court of Auditors to the EIB's management over Community revenue and expenditures, and left the EIB Audit Committee to manage the other EIB activities.²³⁸ As a policy consideration, the EIB maintained that it is imperative that the EIB maintain its own anti-fraud system in order to ensure investors that it is operating in complete independence.²³⁹

tions although unlikely is still threat). *See also* Harden, *supra* note 23, at 159-61 (pointing out policy motivation for balancing independent central bank with removal from political pressures to enable extensive leeway in developing monetary policy).

233. *See European Central Bank*, [2003] E.C.R. __, at ¶ 118 (suggesting OLAF investigations may be used as vehicle for exerting pressure on ECB decision-makers by political interests). *See also* Consolidated EC Treaty, *supra* note 4, art. 108, O.J. C 325/33, at 77 (2002), 37 I.L.M. at 100 (ex Article 107) (barring members of ECB decision-making bodies from seeking or taking instructions from Community institutions or bodies). *See also* ESCB/ECB Statute, *supra* note 5 (repeating Article 108 EC)

234. *See* Consolidated EC Treaty, *supra* note 4, art. 266, O.J. C 325/33, at 139 (2002), 37 I.L.M. at 132 (ex Article 198d) (stating that EIB shall have legal personality). *See also* Report A5-0409, *supra* note 11 (stating that legal personality of EU implies that Community may, as legal person, conclude agreements with non-member countries and international organizations, be held liable under international law, and take action where their rights are infringed).

235. *See* EIB Statute, *supra* note 38, art. 12 (providing administrative structure of EIB).

236. *See id.* art. 4(1) (providing that EIB's capital shall be derived from subscription of Member States).

237. *See* *Commission v. European Investment Bank*, Case C-15/00, [2003] E.C.R. __, at ¶ 89 (arguing that EIB autonomous status places it outside of OLAF's reach).

238. *See* Consolidated EC Treaty, *supra* note 4, art. 248(1),(3), O.J. C 325/33, at 131-32 (2002), 37 I.L.M. at 128 (ex Article 188(c)) (limiting Court of Auditors control to Community revenues and expenditures, and providing for on-the-spot audits only in cases involving any body that manages such revenue or expenditure). *See also* EIB Statute, *supra* note 38, art. 14 (allowing Court of Auditors management authority over EIB operations); *European Investment Bank*, [2003] E.C.R. __, at ¶ 90.

239. *See European Investment Bank*, [2003] E.C.R. __, at ¶ 92 (arguing that EIB autonomous status and reliance on consumer confidence demands EIB to be outside of OLAF's reach).

Advocate General Jacobs noted that, despite such far-reaching declarations of independence for the Banks, neither Bank is completely removed from interacting and cooperating with the institutions and other bodies of the Community.²⁴⁰ The ECJ agreed with the Advocate General in that the Banks' independence, albeit extensive, does not remove them from the European Community and exempt them from every rule of law.²⁴¹ For example, both Banks must submit to judicial review by the ECJ and the Court of Auditors.²⁴² The Court also pointed out that the operations of both Banks must support and contribute to the objectives of the Community whenever possible.²⁴³

240. See Opinion of Advocate General Jacobs, *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. __, at ¶ 155 (holding ECB independence not to be threatened by OLAF investigations). See also Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 117-18 (holding EIB autonomy or consumer confidence not to be threatened by OLAF investigations). EC Treaty enumerates several examples in which ECB must coordinate with Community institutions. See, e.g., Consolidated EC Treaty, *supra* note 4, art. 111, O.J. C 325/33, at 78 (2002), 37 I.L.M. at 101 (ex Article 109) (retaining in Council extensive authority in setting foreign exchange rate policy); *id.*, art. 113, O.J. C 325/33, at 79 (2002), 37 I.L.M. at 101-02 (ex Article 109b) (allowing President of Council and member of Commission to participate (without vote) in ECB's Governing Council meetings); Gormley & de Haan, *supra* note 7, at 98 (noting Article 113 EC's similarity with status of Bundesbank, whose basic law permits government ministers to attend Bundesbank meetings); SMRTS, *supra* note 7, at 171 (remarking that President of Council and member of Commission may "freely opine on the right course of monetary policy."); Harden, *supra* note 23, at 153 (describing President of Council and member of Commission's role as contributing "to the formulation of monetary policy by discussion."); Goebel, *supra* note 6, at 285-86 (discussing Article 113 EC).

241. See *European Central Bank*, [2003] E.C.R. __, at ¶ 135 (holding ECB independence not to be threatened by OLAF investigations). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 102 (sustaining EIB autonomy does not remove bank from every rule of law).

242. See Consolidated EC Treaty, *supra* note 4, arts. 230, 232-34, 237, O.J. C 325/33, at 126-28 (2002), 37 I.L.M. at 125-26 (stating that ECJ has jurisdiction over disputes between Community institutions, bodies and governments). See also ESCB/ECB Statute, *supra* note 5, art. 11.4 (allowing ECJ to compulsory retire, on application by ECB Governing Council or Executive Board, member of Executive Board for "serious misconduct"); EIB Statute, *supra* note 38, art. 14 (allowing Court of Auditors management authority over EIB operations).

243. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 124-25, and 135 (holding ECB independence not to preclude its duty to support Community objectives). See, e.g., Consolidated EC Treaty, *supra* note 4, art. 105(1), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (providing that ECB must, when price stability is not at issue, support Community's objectives); *id.* art. 107(5), O.J. C 325/33, at 76 (2002), 37 I.L.M. at 100 (ex Article 106) (providing that certain articles of ESCB/ECB Statute may be amended by Council), *id.* art. 267, O.J. C 325/33, at 139-40 (2002), 37 I.L.M. at 132 (ex Article 198e) (providing that EIB must contribute towards Community's objectives);

With a clearer image of the status of the ECB and EIB's independence, both the Advocate General and the ECJ agreed that measures adopted by the Community legislature in the area of fraud prevention such as Regulation 1073/1999 do not undermine the level of autonomy afforded to the Banks in carrying out their assigned tasks.²⁴⁴ Although OLAF is not an entirely free body far removed from the Commission, it is also not directly subordinate or dependent on the Commission either.²⁴⁵ Specifically, OLAF is completely independent from the Commission in carrying out its investigative functions,²⁴⁶ and must observe the rules of Community law, including the Protocol on the privileges and immunities of the European Community.²⁴⁷ Furthermore, the director of OLAF may only open an investigation where there are "serious suspicions" and must equip inspectors with written authority indicating the subject matter of the investigation.²⁴⁸

A final point on the question of political independence, the

ESCB/ECB Statute, *supra* note 5, art 12.3 (allowing ECB Governing Council to adopt Rules of Procedure determining ECB's internal organization); Commission v. Council of Governors of the EIB, Case C-85/86, [1988] E.C.R. 1281 at ¶ 29 (stating that EIB is intended to contribute towards attainment of Community's objectives and thus forms part of Community framework).

244. See *European Central Bank*, [2003] E.C.R. __, at ¶ 137 (holding ECB independence not to be threatened by OLAF investigations). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 160 (deciding OLAF investigative authority does not compromise ECB independence from political considerations); *European Investment Bank*, [2003] E.C.R. __, at ¶ 104 (concluding EIB autonomy and reliance on consumer confidence not to be threatened by OLAF investigations); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 120 (sustaining that OLAF investigative authority does not usurp EIB autonomy or threaten its consumer confidence).

245. See *European Central Bank*, [2003] E.C.R. __, at ¶ 139 (looking primarily to 4th, 10th, 12th, and 18th recitals of preamble, as well as Articles 3, 4, 5, 6, 11, and 12 of Regulation 1073/1999). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶¶ 161-64 (noting OLAF's considerable independence from Commission in carrying out investigations); *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 106-09 (pointing out extensive independence OLAF enjoys from Commission when carrying out investigations); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 120-21 (highlighting OLAF's independence from Commission influence when conducting investigations).

246. See Decision 1999/352, *supra* note 3, art. 3 (modeling OLAF independence on EC Treaty language conferring independence to Commission itself).

247. See Regulation 1073/1999, *supra* note 3, art. 4(1) (requiring OLAF to conduct its investigations in conformity with requirements of EC Treaty).

248. See Regulation 1073/1999, *supra* note 3, art. 6(3) (specifying process of OLAF commencing investigations).

Advocate General and the ECJ both noted that OLAF's investigations must be carried out under the conditions of procedures adopted by each institution.²⁴⁹ Thus it is left to the Banks to establish any restrictions they feel necessary in that regard by using the internal decision required by Regulation 1073/1999.²⁵⁰

5. The Principle of Proportionality

As a final contention of illegality, the EIB and ECB submitted that the application of Regulation 1073/1999 violated the principle of proportionality.²⁵¹ The principle of proportionality is embodied in Article 5 EC²⁵² and has been well-established

249. See *European Central Bank*, [2003] E.C.R. __, at ¶ 143 (noting that each Community institution and body is responsible for indicating specific requirements in regards to OLAF investigations). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 109 (highlighting that EIB is responsible for setting requirements regarding OLAF investigations); Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 167 (pointing out that Regulation 1073/1999 requires each Community institution and body to determine specific requirements for internal OLAF investigations); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 122 (emphasizing requirement that each Community institution and body indicate specific requirements of internal OLAF investigations); Regulation 1073/1999, *supra* note 3, art. 4(6) (requiring each Community institution, body and agency to adopt internal decisions allowing OLAF investigations).

250. See *European Central Bank*, [2003] E.C.R. __, at ¶ 143 (concluding that it is each Community institution and body's responsibility to determine specific requirements regarding internal OLAF investigations). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 109 (emphasizing the requirement of each Community institution and body to set individual requirements regarding internal OLAF investigations); Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 167 (reading requirement of each Community institution and body to draft internal decision allowing internal OLAF investigations as opportunity for Banks to specify any special requirements regarding such investigations); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 122 (noting that Regulation 1073/1999 specifically allows each Community institution and body to provide for any specific requirements regarding internal OLAF investigations); Regulation 1073/1999, *supra* note 3, art. 4(6) (providing opportunity for each Community institution, body and agency to specify particular requirements regarding OLAF investigations in internal decisions adopted by each institution, body and agency).

251. See *European Central Bank*, [2003] E.C.R. __, at ¶ 146 (arguing that OLAF goes beyond what is necessary to combat fraud within ECB because there are already adequate measures combating fraud within ECB). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 150 (discussing measures already in place within EIB to combat fraud, and noting that OLAF's presence is unnecessary because of these pre-existing measures).

252. See Consolidated EC Treaty, *supra* note 4, art. 5, O.J. C 325/33, at 41-42 (2002), 37 I.L.M. at 80 (ex Article 3b) (stating that Community action must not go beyond what is "necessary" to achieve objectives of Community).

through Community law.²⁵³ The principle requires that Community measures must be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.²⁵⁴ The ECJ carefully pointed out that in areas such as this, the legislature's assessment of what constitutes appropriate measures will only be overruled when the measure is "manifestly inappropriate."²⁵⁵

The Banks claimed, first, that OLAF's application would be superfluous since there are already adequate controls for de-

253. See *European Central Bank*, [2003] E.C.R. __, at ¶ 156 (pointing out that principle of proportionality is firmly embedded in Community law). See also *European Central Bank*, [2003] E.C.R. __, at ¶ 161 (recognizing that principle of proportionality is common notion within Community law); *Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)*, Case 137/85, [1987] E.C.R. 4587, at ¶ 15 (describing principle of proportionality as requiring government action to not go beyond what is necessary to achieve objectives); *Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco*, Case C-491/01, [2002] E.C.R. I-0000, at ¶ 122 (acknowledging that principle of proportionality is general principle of Community law); *ADM Oelmuehlen GmbH, Oelwerke Spyk v. Bundesanstalt für landwirtschaftliche Marktordnung*, Case C-339/92, [1993] ECR I-6473, at ¶ 15 (using principle of proportionality to decide if government action went beyond what was necessary to achieve its objective); *Kaserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*, Case C-210/00, [2002] ECR I-0000, at ¶ 59 (referring to principle of proportionality as basic principle embedded in Community law).

254. See Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U.P.A.J.CONST.L. 581, at 638 n.285 (2001). In most legal systems that recognize principle of proportionality, challenge under principle is subject to three-prong test. *Id.* First prong asks whether there is compatibility between purpose and means; means must lead in rational manner to realization of purpose. *Id.* Second prong asks if means injures individual to least possible extent. *Id.* Third prong asks whether means is proper, if injury to individual is disproportionate to benefit, which it achieves. *Id.* See also Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 INLJ 567, at 582 (2003); Consolidated EC Treaty, *supra* note 4, art. 5, O.J. C 325/33, at 41-42 (2002), 37 I.L.M. at 80 (ex Article 3b) (stating that Community action must not go beyond what is "necessary" to achieve objectives of Community).

255. See *European Central Bank*, [2003] E.C.R. __, at ¶ 157 (indicating great deference given to governmental intent when passing legislation). See also *British American Tobacco (Investments) and Imperial Tobacco* [2002] E.C.R. I-0000, at ¶ 123 (stating that Community legislature must be allowed broad discretion when undertaking complex assessments); *United Kingdom v Council*, Case C-84/94, [1996] ECR I-5755 at ¶ 58 (deferring to legislature's intent in determining if action was necessary to achieve objective); *Germany v Parliament and Council*, Case C-233/94, [1997] ECR I-2405 at ¶¶ 55 and 56 (allowing legislature to assess if action was necessary to achieve objective); Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 183 (adding that it is not for ECJ to overrule Community legislature when reviewing lawfulness of general measures).

tecting and preventing fraud within the Banks.²⁵⁶ The ECB specifically pointed out that a team of independent auditors, nominated by the ECB's Governing Council and approved by the European Council, examines all the ECB's books and accounts.²⁵⁷ Additionally, the ECB's Governing Council already created an internal and independent Anti-Fraud Committee to perform essentially the same functions as OLAF and its Supervisory Committee.²⁵⁸ The EIB, likewise, claimed that the EIB's Audit Committee has access to the books, vouchers and other relevant documents for auditing the EIB's accounts and investigating fraud and is thus already adequately protected from corruption in that regard.²⁵⁹

On this point, the Advocate General and the ECJ gave great deference to the legislature's view that it was necessary to set up a centralized, specialized, uniform and independent entity to conduct all fraud investigations throughout the Community institutions.²⁶⁰ With this deference in mind, Jacobs and the ECJ acknowledged the difference between the general control tasks performed by the Court of Auditors and independent auditors from the investigations conducted by OLAF: the latter are

256. See *European Central Bank*, [2003] E.C.R. __, at ¶ 147 (arguing that given high degree of ECB independence and financial controls already provided, ECB should remain outside of OLAF's reach). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 155 (pointing out measures already in place for monitoring EIB operations).

257. See *European Central Bank*, [2003] E.C.R. __, at ¶ 148 (highlighting Court of Auditor's role in examining ECB's operational efficiency). See also ESCB/ECB Statute, *supra* note 5, art. 27 (stating that ECB's accounts shall be audited by independent external auditors appointed by ECB Governing Council).

258. See *European Central Bank*, [2003] E.C.R. __, at ¶ 149 (referring to ECB Decision, *supra* note 44).

259. See *European Investment Bank*, [2003] E.C.R. __, at ¶ 156-58 (pointing out Court of Auditor's function of managing Community revenue and expenditure that would be similar to OLAF investigations). See also EIB Statute, *supra* note 38, art. 14 (allowing Court of Auditors management authority over EIB operations).

260. See *European Central Bank*, [2003] E.C.R. __, at ¶ 158 (deferring to Community legislature's view over what is necessary to effectively combat fraud within Community). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 184 (pointing out that because ECB's Contested Decision was adopted after Regulation 1073/1999, former cannot render latter disproportionate); *European Investment Bank*, [2003] E.C.R. __, at ¶ 166 (giving great deference to Community legislature's view of what is necessary to effectively combat fraud within Community); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 156 (allowing Community legislatures to determine what is necessary to effectively combat fraud within Community).

aimed specifically at combating fraud and corruption.²⁶¹ Furthermore, the legislature is entitled to, and justified in its view that internal control mechanisms such as the ECB Anti-Fraud Committee, the EIB Audit Commit, and the Court of Auditors, would not pursue fraud prevention with the same fervor or effectiveness as a centralized, independent body such as OLAF.²⁶²

The ECB also claimed that OLAF's investigations would be stymied by the high degree of confidentiality required by ECB operations and decisions, specifically in the areas of setting interest and exchange rates and determining monetary policy.²⁶³ In fact, the ECB contended that it should defer any investigation pertaining to the tasks set out in Article 105 EC²⁶⁴ to the D-IA alone, making OLAF virtually ineffectual.²⁶⁵ Additionally, the ECB highlighted that since OLAF's investigative authority does not extend to the National Central Banks ("NCB"), where much of the ECB's policies are carried out, it cannot combat fraud as successfully as internal measures allowing joint audits between these bodies.²⁶⁶

261. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 141, 159 (pointing out that OLAF's functions, aimed specifically at fighting fraud and corruption, are in no way similar to control tasks of Court of Auditors and independent auditors which follow more rigid pattern). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 184 (stating that task of auditing differs fundamentally in nature from OLAF's tasks and controls); *European Investment Bank*, [2003] E.C.R. __, at ¶ 167 (highlighting that OLAF's functions are different than those of Court of Auditors and EIB Audit Committee); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 157 (recognizing difference in Court of Auditor's role and that of OLAF in regards to combating fraud within EIB).

262. See *European Central Bank*, [2003] E.C.R. __, at ¶ 160 (pointing out that OLAF has authority to conduct internal investigations within Commission, but also external investigations in Community bodies). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 168 (noting that OLAF may well be more effective in combating fraud than regular auditing functions of Court of Auditors and EIB Audit Committee).

263. See *European Central Bank*, [2003] E.C.R. __, at ¶ 152 (pointing out difficulty of OLAF being effective given ECB's required level of secrecy in operations).

264. See Consolidated EC Treaty, *supra* note 4, art. 105(1),(2), O.J. C 325/33, at 75 (2002), 37 I.L.M. at 99 (ex Article 105) (listing ECB's primary objective as maintaining price stability, and secondary (or basic) tasks as designing Community's Monetary policy, conducting foreign exchange operations, managing foreign reserves, and promoting smooth payment systems).

265. See *European Central Bank*, [2003] E.C.R. __, at ¶ 153 (emphasizing importance of confidentiality in setting monetary policy and that high degree of secrecy would render OLAF virtually useless).

266. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 154 and 155 (pointing out that ECB's internal anti-fraud measures would be better equipped than OLAF to adapt to ECB's unique role within Community).

Neither the Advocate General nor the ECJ disputed the fact that the ECB must maintain a high level of confidentiality in order not to compromise its specific tasks under the EC Treaty, but rejected the idea that this would make OLAF ineffectual.²⁶⁷ First, OLAF's investigations are restricted to the procedures adopted by each institution,²⁶⁸ thus it is the ECB's responsibility to establish any restrictions it feels necessary within that decision.²⁶⁹ Additionally, as Advocate General Jacobs pointed out, Article 8 of Regulation 1073/1999 and Article 287 EC stipulate strict professional secrecy by OLAF in its use and communication of any material obtained.²⁷⁰ Thus, the objectives sought by the creation of OLAF and their attainability justified Regulation 1073/1999 under the principle of proportionality.²⁷¹ Having exhausted all of the Banks' claims of illegality, the ECJ then examined whether the Contested Decisions infringed the provisions of Regulation 1073/1999.

B. *Infringement of Regulation 1073/1999*

Regulation 1073/1999, while requiring all Community institutions and bodies to consult each other and to adopt an inter-

267. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 162-63 (pointing out that any special consideration that OLAF must make in regards to ECB investigations should be specified in decision ECB adopts allowing OLAF to conduct such investigations). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 186 (stating that ECB internal decision will cover ECB unique situation during OLAF investigations).

268. See Regulation 1073/1999, *supra* note 3, at art. 4(6) (referring to internal decisions each Community institution, body and agency must adopt).

269. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 143 and 162 (explaining each Community body's ability to adopt specialized requirements regarding OLAF's investigations through internal decision). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 188 (noting that required internal decisions allow for any particular operational consideration regarding OLAF investigations).

270. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 186 (noting level of secrecy required during OLAF investigations). See also *European Central Bank*, [2003] E.C.R. __, at ¶ 163 (explaining OLAF's obligation of secrecy); Regulation 1073/1999, *supra* note 3 (requiring OLAF to observe rules of professional secrecy); Consolidated EC Treaty, *supra* note 4, art. 287, O.J. C 325/33, at 147 (2002), 37 I.L.M. at 136 (ex Article 214) (requiring all Community servants not to disclose internal Community information).

271. See *European Central Bank*, [2003] E.C.R. __, at ¶ 164 (holding Regulation 1073/1999 to meet requirements under principle of proportionality). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 189 (finding OLAF's investigative authority to be within principle of proportionality).

nal decision allowing OLAF to carry out internal investigations, does not set a time limit for adopting such a decision.²⁷² Therefore, the question remained whether a Community body could unilaterally adopt a separate decision conferring fraud investigation authority to an internal entity in lieu of granting such authority to OLAF.²⁷³ If so, would such a decision infringe upon Regulation 1073/1999?²⁷⁴ Since nothing in Regulation 1073/1999 prevented the Banks from adopting their own mechanism for combating fraud, and nothing in either Contested Decision prevented OLAF from playing its role, the ECJ refined the question as whether the Banks' Contested Decisions could co-exist with the prerogatives of Regulation 1073/1999.²⁷⁵

Advocate General Jacobs stated that neither Contested Decision was "per se contrary to Regulation 1073/1999,"²⁷⁶ but added that the institutions and bodies of the Community had a duty not to undermine OLAF's effectiveness.²⁷⁷ He concluded that, although the Contested Decisions did not explicitly preclude Regulation 1073/1999, their application would render it very difficult for OLAF to effectively perform its function.²⁷⁸ On

272. See Regulation 1073/1999, *supra* note 3, at art. 4(1) and (6) (referring to internal decisions each Community institution, body and agency must adopt but not setting specific time limit to adopt such decision).

273. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 166-86 (examining requirements of each institution and body in adopted internal decision allowing OLAF investigations). See also *Commission v. European Investment Bank*, Case C-15/00, [2003] E.C.R. __, at ¶¶ 178-87 (defining specific requirements of Regulation 1073/1999 for each institution and body adopting internal decision to allow OLAF investigations).

274. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 166-86 (analyzing whether ECB Anti-Fraud Decision infringes duty described in Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 178-87 (discussing infringement of Regulation 1073/1999 by EIB Anti-Fraud Decision).

275. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 166-68 (asking if ECB Anti-Fraud Decision precluded objective sought by Regulation 1073/1999). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 179 (arguing that EIB Anti-Fraud Decision did not infringe Regulation 1073/1999).

276. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 73 (looking to whether ECB Anti-Fraud Decision rendered Regulation 1073/1999 ineffectual).

277. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 75 (clarifying ECB's duty to contribute to Community objectives by not undermining intent of Regulation 1073/1999).

278. See Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶¶ 76, 88 (answering question whether ECB Anti-Fraud Decision is liable to undermine effectiveness of Regulation 1073/1999). See also Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 100 (discussing whether EIB Anti-Fraud Decision undermines effectiveness of Regulation 1073/1999).

this point, the Commission directed attention to the intent of both of the Contested Decisions.²⁷⁹ The EIB and the ECB specifically intended, the Commission claimed, to create an internal system of fraud prevention in place of its obligation to adopt a decision allowing OLAF to perform such functions.²⁸⁰

Both the Advocate General and the ECJ agreed with the Commission, noting that in the case of the ECB's Decision, the similarity of the recitals and provisions to those of Regulation 1073/1999 indicated that D-IA acted in place of OLAF.²⁸¹ Further, the ECB Decision required all staff to report any fraud or illegal activity directly to D-IA,²⁸² not OLAF, and charged D-IA with investigating all issues related to fraud,²⁸³ thereby giving D-IA a monopoly over fraud prevention within the ECB.²⁸⁴ Finally, the responsibility of a liaison with OLAF's Supervisory Committee rested with the ECB Anti-Fraud Committee,²⁸⁵ suggesting a deliberate intention not to adopt the internal decision required by Article 4(6) of Regulation 1073/1999.²⁸⁶

279. See *European Central Bank*, [2003] E.C.R. __, at ¶ 173 (pointing to intent of ECB Anti-Fraud Decision to take place of OLAF). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 183 (arguing that EIB Anti-Fraud decision intended to act in place of OLAF).

280. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 174-75 (citing ECB Decision, *supra* note 44, at recitals 1, 3-8). See also *European Investment Bank*, [2003] E.C.R. __, at ¶¶ 183-85 (noting that Part II of EIB Decision, *supra* note 45, expressly denies OLAF investigative authority and preamble reflects EIB's intention to assume sole responsibility for fraud prevention).

281. See *European Central Bank*, [2003] E.C.R. __, at ¶ 177 (deciding ECB Anti-Fraud Decision intended to act in lieu of Regulation 1073/1999). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 87 (recognizing that ECB Decision mirrors to great extent Regulation 1073/1999, in form and function).

282. See ECB Decision, *supra* note 44, art. 5 (requiring ECB employees and officers to report cases of fraud and turn over pertinent information to D-IA).

283. See ECB Decision, *supra* note 44, art. 2 (requiring D-IA to investigate all suspicions and incidences of fraud).

284. See *European Central Bank*, [2003] E.C.R. __, at ¶ 179-80 (concluding that ECB D-IA had primary duty of fraud prevention within ECB). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 77 (stating that ECB intended D-IA to be only control against fraud and to act in lieu of OLAF).

285. See ECB Decision, *supra* note 44, at art. 1(9) (charging only ECB Anti-Fraud Committee with duty of interacting with OLAF).

286. See *European Central Bank*, [2003] E.C.R. __, at ¶ 178 (concluding that ECB adopted its anti-fraud decision in lieu of adopting decision allowing OLAF to conduct internal investigations). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 86 (interpreting ECB's adoption of its anti-fraud decision as precluding adoption of internal decision allowing OLAF to conduct internal investigations as required by Regulation 1073/1999).

The ECJ followed Advocate General Jacobs and concluded that the failure of Regulation 1073/1999 to set a time limit for the adoption of the decisions referred to in Article 4(6)²⁸⁷ did not negate the requirement to adopt such decision altogether and that both the EIB and ECB passed their respective Contested Decisions in order to forgo this obligation thereby infringing Regulation 1073/1999.²⁸⁸ With that, the ECJ had rejected all claims of illegality of Regulation 1073/1999 submitted by either Bank, found both Contested Decisions to have infringed upon the Regulation 1073/1999, and thus annulled both of the Banks' Contested Decisions.²⁸⁹

III. CLEARING THE ROAD: CRITICAL OVERVIEW OF JUDGMENT IN COMMISSION V. ECB

The depth of the fraud problem in the late 1980s and early 1990s called for far-reaching measures to combat irregularities in the revenues and expenditures that affected the Community's financial interests.²⁹⁰ Thus, in 1999, OLAF was designed to fight fraud, corruption and any other illegal activity throughout the EC to protect the Community's financial interests.²⁹¹ The necessity of fighting fraud in the Community was paramount to the continued success of the Monetary Union and thus it was inevitable that OLAF would be given incredible leeway in pursuit of its objectives.²⁹²

287. See Regulation 1073/1999, *supra* note 3, at art. 4(6) (referring to internal decisions each Community institution, body and agency must adopt).

288. See *European Central Bank*, [2003] E.C.R. __, at ¶¶ 181-82 (concluding that ECB Anti-Fraud Decision infringed upon Regulation 1073/1999). See also Opinion of Advocate General Jacobs, *European Central Bank*, [2003] E.C.R. __, at ¶ 88 (finding that ECB Anti-Fraud Decision infringed Regulation 1073/1999); *Commission v. European Investment Bank*, Case C-15/00, [2003] E.C.R. __, at ¶ 186 (concluding that EIB Anti-Fraud Decision infringed upon Regulation 1073/1999); Opinion of Advocate General Jacobs, *European Investment Bank*, [2003] E.C.R. __, at ¶ 100 (finding that EIB Anti-Fraud Decision infringed upon Regulation 1073/1999).

289. See *European Central Bank*, [2003] E.C.R. __, at ¶ 186 (annulling ECB Anti-Fraud Decision). See also *European Investment Bank*, [2003] E.C.R. __, at ¶ 187 (annulling EIB Anti-Fraud Decision).

290. See *supra* note 2, 56, 63 and accompanying text (discussing level of fraud within Community and citing specific examples of measures taken by Community Institutions to combat fraud).

291. See *supra* note 3 and accompanying text (describing Decision 1999/352 establishing OLAF).

292. See *supra* notes 3, 126-28 and accompanying text (discussing measures taken to combat fraud including Interinstitutional Agreement between Commission, Council

A. *Giving Fraud Prevention The Right-of-Way*

The Court of First Instance yielded to fraud prevention when it had the opportunity to rule on the extent of OLAF's investigative authority with respect to members of the European Parliament ("MEPs").²⁹³ The Parliament, following the inter-institutional agreement of May 25, 1999,²⁹⁴ amended its Rules of Procedure to allow OLAF to conduct internal investigations.²⁹⁵ Certain MEPs feared that the amendment did not adequately protect their privacy and worried that OLAF could request and gain access to their offices in their absence and without their consent in order to gather information.²⁹⁶ On this claim, the Court of First Instance affirmed that neither the Protocol on the Privileges and Immunities nor the Parliament's amended Rules of Procedure provided any specific guarantee of the rights of MEPs, and therefore denied the MEPs' claim to annul the amendment.²⁹⁷

Additionally, the ECJ afforded OLAF tremendous latitude when it did not reserve any special immunity for itself regarding its internal decision allowing OLAF investigations.²⁹⁸ On October 26, 1999, the ECJ adopted a decision to allow OLAF full access to all documents and information, except those related to a lawsuit.²⁹⁹ The only requirement under that decision is that the

and Parliament as well as ECJ Decision allowing OLAF to conduct internal investigations and ruling of Court of First Instance regarding Parliament's internal decision and Parliament Members' privacy).

293. *See supra* notes 3, 127 and accompanying text (discussing case brought by members of Parliament challenging OLAF's ability to conduct internal investigations without Parliament Members' permission).

294. *See supra* notes 125-26 and accompanying text (discussing nature of inter-institutional agreements, and Interinstitutional Agreement between Commission, Council and Parliament to adopt internal decision allowing OLAF to conduct investigations within each institution).

295. *See supra* notes 3, 127 and accompanying text (discussing case brought by members of Parliament challenging OLAF's ability to conduct internal investigations without Parliament Members' permission).

296. *See supra* notes 3, 127 and accompanying text (discussing case brought by members of Parliament challenging OLAF's ability to conduct internal investigations without Parliament Members' permission).

297. *See supra* notes 3, 127 and accompanying text (discussing case brought by members of Parliament challenging OLAF's ability to conduct internal investigations without Parliament Members' permission).

298. *See supra* note 128 and accompanying text (discussing ECJ's adoption of internal decision allowing OLAF authority to conduct internal investigations).

299. *See supra* note 128 and accompanying text (discussing ECJ's adoption of internal decision allowing OLAF authority to conduct internal investigations).

registrar of the ECJ must serve as the intermediary to OLAF, but the duty to cooperate with OLAF is binding on all ECJ employees.³⁰⁰

Despite the ECJ's willingness to adopt a decision allowing OLAF to conduct internal investigations and not reserve any particular privileges for itself in that regard, the ECB and the EIB still felt that they were outside the scope of Regulation 1073/1999.³⁰¹ In one of the leading studies on the nature and operations of the ECB, Chiara Zilioli and Martin Selmayr (both ECB staff-members) have contended that the self-image of the ECB as completely separate from the rest of the Community fuels attempts to maximize their own autonomy.³⁰² For the ECB, this self-image is substantiated by the strong language in the EC Treaty providing its independence.³⁰³

B. *ECB Independence: Roadblock Or Bump In The Road*

A successful Monetary Union between disparate Member States hinged on a strong independent central bank at the core of policy development and implementation.³⁰⁴ Although modeled on the operational independence of the Federal Reserve Board of the United States and the German Bundesbank, the ECB's independence is unique because it is embodied in the EC Treaty as a "constitutional principle."³⁰⁵ This constitutional level of independence reflects the view that the strength of the ECB largely depended on its removal from potential political pressures both from Member States and from political institu-

300. See *supra* note 128 and accompanying text (discussing ECJ's adoption of internal decision allowing OLAF authority to conduct internal investigations).

301. See *supra* notes 44, 45, 128 and accompanying text (mentioning ECJ Decision allowing OLAF to conduct internal investigations, and ECB and EIB Decisions for anti-fraud decisions not granting OLAF same authority).

302. See *supra* note 31 and accompanying text (discussing concerns of central bank with extensive independence and recognizing that self-image of ECB as separate from rest of Community adds to attempts to maximize its autonomy).

303. See *supra* notes 12-29, 31 and accompanying text (discussing so-called constitutional independence of ECB afforded by EC Treaty, concerns of extensive central bank independence and recognizing that self-image of ECB as separate from Community adds to attempts to maximize its autonomy).

304. See *supra* note 7 and accompanying text (discussing impressive track-record of Bundesbank and U.S. Federal Reserve in maintaining price stability and pointing out policy considerations for central bank with strong statement of independence).

305. See *supra* notes 5, 30 and accompanying text (noting that ECB's so-called constitutional independence gives it greater independence than either U.S. Federal Reserve or Bundesbank).

tions.³⁰⁶

Germany advocated a central bank with considerable independence because of the undeniable success of the Bundesbank in delivering a stable and solid currency coupled with low inflation.³⁰⁷ Former Bundesbank President Pohl argued that strong independence afforded central banks the freedom to follow a rigid monetary policy without persuasion from fickle public opinion.³⁰⁸ Economists Lorenzo BiniSmaghi and Daniel Gros supported this view with empirical research, showing that independent central banks on average have enjoyed more success at maintaining price stability than those with less independence from political influence.³⁰⁹ Thus, the specific wording of Article 105 EC states that the ECB shall control the monetary policy *of* the Community, not *for* the Community,³¹⁰ indicating that the Community is not liable for ECB actions and that the ECB is the master of its domain.³¹¹ Further, the ECB is absent in the list of community institutions,³¹² it enjoys a distinct legal personality,³¹³ it maintains legislative authority,³¹⁴ it has an independent budget,³¹⁵ and it is “constitutionally” protected from outside in-

306. See *supra* note 23, 30 and accompanying text (pointing out policy motivation for ECB independence and freedom from political influence as enabling required leeway in developing successful monetary policy and conceding that ECB has greater independence than either U.S. Federal Reserve or Bundesbank).

307. See *supra* note 7 and accompanying text (discussing impressive track-record of Bundesbank and U.S. Federal Reserve in maintaining price stability and pointing out policy considerations for central bank with strong statement of independence).

308. See *supra* note 23 and accompanying text (noting benefits of independent central bank)

309. See *supra* note 7, 23 and accompanying (citing studies that correlate central bank independence in Germany, Netherlands, and Switzerland with low inflation rates and smaller national deficits and noting that central bankers work more efficiently when not influenced by partisan political pressures).

310. See *supra* notes 16, 18 and accompanying text (discussing Article 105 EC, which enumerates primary and secondary tasks of ECB).

311. See *supra* note 31 and accompanying text (discussing varying views of extent of ECB independence).

312. See *supra* note 10 and accompanying text (listing institutions of Community).

313. See *supra* note 12 and accompanying text (noting significance of having legal personality).

314. See *supra* note 217 and accompanying text (stating that ECB can adopt regulations, take decisions, make recommendations, and deliver opinions considered necessary to carry out certain tasks).

315. See *supra* note 29 and accompanying text (describing source of ECB revenues).

fluence in its decision-making.³¹⁶

The former President of the European Monetary Institute, Alexandre Lamfalussy, himself concluded that ECB independence underpins the credibility and effectiveness of a successful monetary union and is paramount for the maintenance of price stability in the euro-zone.³¹⁷ Lamfalussy did add, however, that the ECB's concurrent objective to support the general economic policies of the Community must still be observed.³¹⁸ Others opposed to the idea of total ECB autonomy argued that the EC Treaty's strong advocacy of independence did not describe the ECB's status but rather represented simply a "technical consideration" aimed solely at the objective of maintaining price stability.³¹⁹

They argued that the ECB is not an absolutely autonomous body outside the reach of the rest of the Community, but rather its independence is restricted to its specific enumerated tasks.³²⁰ Article 105 EC supports this because it states that the ECB, while not sacrificing its objective of price stability, must concurrently support the objectives of the Community.³²¹ In any action outside of the ECB's primary objective – maintaining price stability – the ECB's involvement and support within the Community is at least as important as its primary objective.³²² The EC Treaty provides further evidence that the ECB resides within the Community framework by requiring its interaction with other Community institutions and bodies.³²³

316. See *supra* note 5 and accompanying text (discussing ECB independence as "constitutional principle" and ECB decision-maker's removal from political influence).

317. See *supra* note 23 and accompanying text (discussing policy considerations of drafters of EC Treaty).

318. See *supra* notes 23, 30 and accompanying text (observing that this aim of price stability as constitutional principle represents more unambiguous ranking of aims of monetary policy than is found even in Germany).

319. See *supra* notes 31 and accompanying text (discussing varying views of extent of ECB independence).

320. See *supra* note 31 and accompanying text (stating that ECB must be accountable to political institutions and come under scrutiny of judiciary).

321. See *supra* note 16 and accompanying text (noting provisions enumerated in Article 105 EC).

322. See *supra* notes 23, 31 and accompanying text (discussing motivation for ECB independence and varying views regarding extent of ECB independence).

323. See *supra* notes 184, 186-87, 240 and accompanying text (concluding that ECB, as central body charged with designing Community's monetary policy, in particular, plays unique role within Community framework, and discussing provisions that require ECB to coordinate with other institutions of Community and those that state

First, many of the ECB's objectives are shared by the whole Community and necessarily require close cooperation.³²⁴ For example, Article 2 EC specifically enumerates the tasks of the Community and includes establishing an economic and monetary union, implementing policies to achieve certain economic goals and sustaining low-inflationary growth.³²⁵ Article 4 EC adds that the Community's activities also include fixing exchange rates aimed at greater price stability.³²⁶ Article 4 EC describes the monetary policy that is conducted by the ECB and notes that it also must support the Community's general economic policies.³²⁷

Second, it must not be overlooked that EC Treaty of Maastricht, in which the role of the ECB was set forth, comprises a series of amendments to the initial "EC Treaty Establishing the European Community."³²⁸ The Monetary Union was not created as a separate structure under the overarching EC Treaty on European Union such as the Common Foreign and Security Policy, also created by the EC Treaty of Maastricht.³²⁹ Rather the formation of a Monetary Union, with the ECB as its hub, was explicitly mentioned as one of the objectives of the Community.³³⁰ It is important not to give this fact too much weight,³³¹ but it has been argued that the ECB's connection with the EC is more than

objectives of Community, including obtaining monetary union and non-inflationary growth and those adding that Community's activities include fixing exchange rates aimed at greater price stability and that monetary policy conducted by ECB must support general economic policies of Community).

324. *See supra* note 186 and accompanying text (discussing provisions that require coordination between ECB and Community institutions and bodies).

325. *See supra* note 186 and accompanying text (discussing provision that states Community objectives, including obtaining monetary union and non-inflationary growth).

326. *See supra* note 186 and accompanying text (noting that Community's activities include fixing exchange rates aimed at greater price stability and that monetary policy conducted by ECB must support general economic policies of Community).

327. *See supra* note 186 and accompanying text (noting that Community's activities include fixing exchange rates aimed at greater price stability and that monetary policy conducted by ECB must support general economic policies of Community).

328. *See supra* note 4 and accompanying text (indicating title of EC Treaty).

329. *See supra* note 5 and accompanying text (enumerating provisions on common foreign and security policy).

330. *See supra* note 186 and accompanying text (discussing Community objectives, including obtaining monetary union and non-inflationary growth).

331. *See supra* note 37 and accompanying text (discussing Advocate General Mancini's view of importance of title (if any) of piece of legislation for purposes of identifying its most characteristic subject-matter).

just a functional proximity.³³²

Third, close cooperation is not just suggested but is actually required in certain situations. For example, Article 111 EC preserves in the Council extensive authority over setting foreign exchange rate policy that is binding on the ECB.³³³ Additionally, Article 113 EC allows the President of the Council and a member of the Commission to “participate” (without a vote) in the ECB’s Governing Council meetings.³³⁴ The term “participate” implies the ability to speak and offer opinions, not just to attend in silence.³³⁵ Taken together, the measures that confer the ECB with a high level of independence and those restricting its ability to act alone outside of the Community reflect the desire to protect the ECB’s primary objective from short-sighted political agendas while also allowing for a certain degree of accountability to the Community and to the Member States.³³⁶

Fourth, in 1990, the Commission acknowledged the importance of ensuring democratic accountability of the ECB in order to make monetary policies more palatable to the public.³³⁷ Ten years later, Christa Randzio-Plath, then Chair of the Committee on Monetary and Economic Affairs in the European Parliament, professed that the ECB’s unprecedented level of independence must be counterbalanced by an equally high level of accountability.³³⁸ Holding the ECB to the same standard of transparency as other Community institutions and bodies in the field of fraud prevention strengthens its accountability and, accordingly, its

332. See *supra* note 31 and accompanying text (pointing to title of EC Treaty as indication of drafters’ intent to define all aspects of Community, including ECB as part of Community).

333. See *supra* notes 18, 240 and accompanying text (describing ECB’s position in setting foreign exchange rate policy “somewhere between consultation and assent”).

334. See *supra* note 240 and accompanying text (discussing examples of EC Treaty drafters’ intent of including ECB within Community framework).

335. See *supra* note 240 and accompanying text (noting this provision’s similarity with status of Bundesbank, whose basic law permits government ministers to attend Bundesbank meetings and that President of Council and member of Commission may offer opinions on right course of monetary policy in order to contribute to formulation of monetary policy through discussion).

336. See *supra* note 31 and accompanying text (describing various views of ECB independence and problem of accountability and democratic deficit).

337. See *supra* note 31 and accompanying text (mentioning several concerns regarding ECB independence and potential for democratic deficit and describing possible considerations when granting such strong statement of independence).

338. See *supra* note 31 and accompanying text (highlighting debates around ECB independence versus ECB democratic accountability).

credibility.³³⁹

The exact status of the ECB within the Community was largely debated and the ECJ, by virtue of the EC Treaty, had the authority to definitively define ECB independence.³⁴⁰ Fortunately, the urgency of combating fraud combined with the ECB's efforts to confirm its autonomy provided the conflict necessary for the ECJ to clarify the status of the ECB and the extent of its independence.³⁴¹ This crucial point in EMU development also marked the authority vested in the ECJ to answer this question.³⁴² Not surprisingly, the ECJ seized this opportunity for two reasons: to build confidence in its role of judicial review and to enhance the overall confidence in the EMU by making clear the roles of its governing bodies.³⁴³

C. *The ECJ: Forging A Path For Progress*

As a check on the ECB's considerable independence the EC Treaty vested the ECJ with the power of judicial review.³⁴⁴ The necessity of fraud prevention set the stage for the ECJ to exercise its judicial review authority by ruling on the extent of ECB independence and solidifying its position to resolve such disputes.³⁴⁵ Conceding the interpretation that the Banks exist within the Community framework and given the Community Judiciary's willingness to support fraud prevention within the Community, it is not surprising that the ECJ found the Banks to be within OLAF's investigative reach.³⁴⁶ Consistent with this finding, it

339. *See supra* note 31 and accompanying text (discussing potential for democratic deficit regarding ECB accountability).

340. *See supra* notes 6, 32, 42 and accompanying text (stating that ECJ has jurisdiction over disputes between Community institutions, bodies and governments).

341. *See supra* note 50 and accompanying text (citing Commission's respective cases against ECB and EIB for failing to adopt decision allowing OLAF to conduct internal investigations).

342. *See supra* notes 31, 32 and accompanying text (discussing potential for democratic deficit regarding ECB accountability and power vested in ECJ to resolve such issues).

343. *See supra* note 32 and accompanying text (noting ECJ's authority to resolve issues between Community institutions and bodies).

344. *See supra* notes 6, 32 and accompanying text (citing *Commission v. ECB* and ECJ's authority to resolve issues between Community institutions and bodies and discussing importance of its authority of judicial review).

345. *See supra* notes 6, 32, 42 and accompanying text (highlighting ECJ's authority to resolve issues between Community institutions and bodies and discussing importance of its authority of judicial review).

346. *See supra* notes 183-88, 240-41, 243 and accompanying text (explaining ECB's

also is not surprising that the ECJ found that the duty to consult the ECB was restricted only to legislation in its field of expertise and thus the Council and Parliament did not violate this duty by adopting anti-fraud measures that affect the ECB.³⁴⁷ Although the ECJ's decisions in this regard were perhaps not surprising, the future of the EMU will benefit by having an authoritative answer to the question of the extent of ECB and EIB independence and the Banks' respective roles within the Community.

Furthermore, the ECJ demonstrated the extensive leeway the Community is willing to grant fraud prevention by adopting its own internal decision allowing OLAF investigations and narrowly defining ECB independence in favor of the fight against fraud.³⁴⁸ By clarifying the Banks' status and OLAF's reach, the ECJ increased Member State confidence in the EMU and by exercising its authority to resolve conflicts among EMU institutions the ECJ added credit to its role in the judicial review process.

CONCLUSION

As Lord Acton succinctly stated, "power corrupts, and absolute power corrupts absolutely." With this mantra in mind, the ECJ rightly concluded that ECB independence should be restricted to its stated area of expertise: designing and implementing monetary policy. Likewise, EIB autonomy should extend only to its role within the Community framework: contributing to the balanced and steady development of the common market of the Community. The roles, privileges and checks on power of the central institutions and bodies created under the EC Treaty will evolve and become more clearly defined over time. There is no doubt that the recent decisions in *Commission v. European Central Bank* and *Commission v. European Investment Bank* are part of the evolution of the European Community framework. The ECJ has added an important limit to the ECB's constitutional inde-

existence within Community framework and concluding that scope of Regulation 1073/1999 extends over all institutions and bodies within that framework).

347. See *supra* notes 16, 18, 208-10, 240-41, 243 and accompanying text (pointing out duties of ECB provided by EC Treaty, defining ECB's "field of competence" and holding fraud prevention not part of ECB's area of expertise).

348. See *supra* notes 3, 126-28 and accompanying text (discussing measures taken to combat fraud including Interinstitutional Agreement between Commission, Council and Parliament as well as ECJ Decision allowing OLAF to conduct internal investigations and ruling of Court of First Instance regarding Parliament's internal decision and Parliament Members' privacy)

pendence and also added credibility to its authority of judicial review. The Community is moving forward and progress has resumed.