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Court of Justice Oversight Over the European Central Bank: Delimiting the ECB's Constitutional Autonomy and Independence in the OLAF Judgment

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Abstract

An article devoted to the European Court of Justice's ("ECJ" or the "Court") judicial review of the European Central Bank's ("ECB") level of constitutional autonomy and independence may seem a bit arcane in a book dedicated to honor Advocate General Francis Jacobs upon his retirement from the Court. The topic is, however, eminently suitable, because it highlights his influence in a case remote from the many fields of law in which his impact has been so marked—e.g., free movement of goods, competition law, trademarks and other intellectual property rights, free movement of services and establishment rights, human rights protection, and taxation. This Article will first discuss the high importance of the principle of independence for the ECB in its control of monetary policy and the European currency, noting some aspects of the academic debate concerning the appropriate level of such independence. The first section also observes that a debate about the constitutional nature and autonomy of the ECB has become intertwined with the appraisal of its level of independence. The Article then reviews the EC Treaty's attribution to the Court of jurisdiction within Monetary Union, including a power of judicial review of the ECB's status, measures and decisions. The following section sets out the conflict between the Commission and the ECB in the OLAF case. The Article concentrates upon the text in Advocate General Jacob's opinion and the Court's judgment concerning the constitutional status of the ECB as an organ or body structured within the Community framework and concerning the scope of the ECB's independence. The final section provides several reflections upon the ultimate impact of the judgment and opinion. The reflections stress the importance of the Court's rejection of the ECB's claim to virtual autonomy in constitutional terms and the related subjection of the ECB to the rule of law within the EC. The final commentary also considers the Court's and especially Advocate General Jacobs' demarcation of the functional nature of the ECB's independence. Advocate General Jacobs' discussion of the value and extent of democratic accountability of the ECB is also highlighted.

ARTICLES

COURT OF JUSTICE OVERSIGHT OVER THE EUROPEAN CENTRAL BANK: DELIMITING THE ECB'S CONSTITUTIONAL AUTONOMY AND INDEPENDENCE IN THE *OLAF* JUDGMENT

Roger J. Goebel*

INTRODUCTION

An article devoted to the European Court of Justice's ("ECJ" or the "Court") judicial review of the European Central Bank's ("ECB") level of constitutional autonomy and independence may seem a bit arcane in a book dedicated to honor Advocate General Francis Jacobs upon his retirement from the Court. The topic is, however, eminently suitable, because it highlights his influence in a case remote from the many fields of law in which his impact has been so marked—e.g., free movement of goods, competition law, trademarks and other intellectual property rights, free movement of services and establishment rights, human rights protection, and taxation.

Francis Jacobs wrote the Advocate General's opinion in the *Commission v. European Central Bank* ("*OLAF*") case, a dispute between the Commission and the ECB.¹ The ECJ's judgment is an important precedent in the constitutional law of Monetary Union, and thus to some degree that of the European Community ("EC" or the "Community"), because it clarifies the status of the ECB as a Community institution, rejects an expansive ECB claim of autonomy from the Community framework, and sets the

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1. See *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. I-7147 [hereinafter *OLAF*]. The judgment has been analyzed in Nikolaos Lavranos, *The Limited, Functional Independence of the ECB*, 29 EUR. L. REV. 115 (2004), Okeoghene Odudu, *Commission v. European Central Bank*, 41 COMMON MKT. L. REV. 1073 (2004), and in Shaun A. Reader, Note, *Moving Forward, Never Backwards: Preventing Fraud in the European Union and Defining European Central Bank Independence*, 27 FORDHAM INT'L L.J. 1509 (2004).

parameters of the ECB's independence. As so often happens in other fields, in this significant conflict the Court's judgment agreed in all essential respects with the views enunciated by Advocate General Jacobs. As the eminent English authority, Professor Trevor Hartley, has well said, an Advocate General's opinion can be regarded as the "starting point from which [the Judges] begin their deliberations. In many cases they follow the advocate general fully; in others they deviate from his opinion in whole or in part. But always his views will be of great value."²

It is impossible for an outsider to evaluate the precise degree of influence a salient analysis by an Advocate General may have upon the ECJ during its deliberations. One can speculate with reasonable certainty, however, that the Court is apt to weigh more heavily a respected Advocate General's analytic probing of the issues in a case that breaks new ground, that must be decided without any significant recourse to precedent, and that does not have the advantage of an initial Court of First Instance ("CFI") judgment on the same issues. In the *OLAF* case, all three of these factors existed.

When the drafters of the Treaty of Maastricht³ set out the structure and operations of the ECB, they did not formally add it to the list of Community institutions in Article 7 of the Treaty establishing the European Community ("EC Treaty")⁴ along with the European Parliament, Council, Commission, ECJ, and Court of Auditors. Nonetheless, the ECB may well be regarded as so functionally vital to the Community in the monetary field as

2. TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 57 (5th ed. 2003). Judge Nial Fennelly of the Supreme Court of Ireland, formerly a colleague of Advocate General Jacobs, well describes the influence and the independence of Advocates General in Nial Fennelly, *Reflections of an Irish Advocate General*, 5 *IRISH J. EUR. L.* 1509 (1996).

3. The Treaty of Maastricht, signed on Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 both created the European Union and substantially amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], changing its name to the European Community Treaty ("EC Treaty"). Economic and Monetary Union became a component part of the European Community ("EC" or the "Community") by virtue of the Treaty of Maastricht. See DESMOND DINAN, *EUROPE RECAST—A HISTORY OF THE EUROPEAN UNION* 233-64 (2004); see also GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 1205-13 (2d ed. 2002).

4. Consolidated Version of the Treaty Establishing the European Community art. 7, O.J. C 325/33, at 42 (2002) [hereinafter EC Treaty], as amended by the Treaty of Nice, Feb. 1, 2003, O.J. C 80/1 (Mar. 10, 2001).

to merit description as relatively comparable in importance to the listed Community institutions (indeed, the draft Treaty establishing a Constitution for Europe⁵ rather pragmatically designates the ECB as a Union “institution” in Article I-30, even though it is not included in the traditional “institutional framework” of the political institutions and the ECJ in Article I-19). Certainly, the ECB’s operational role and powers far exceed those of any agency or body within the European Community, other than the formally listed institutions. The twelve Member States currently in the Euro-zone⁶ have made an extraordinary cession of sovereignty to the ECB. The ECB’s Governing Council⁷ totally controls the monetary policy of those States and regulates the use of the single currency, the Euro, within those States. Moreover, the ECB’s General Council,⁸ which includes national central bank governors from all the Member States of the Union, helps coordinate monetary policy throughout all these States. In that context, the conflict between the Commission and the ECB in the *OLAF* case may well be considered to be almost as significant as an inter-institutional struggle between two of the Community political institutions. Advocate General Jacob’s opinion and the Court’s ultimate judgment accordingly have constitutional dimensions as well as important operational consequences for the ECB.

This Article will first discuss the high importance of the principle of independence for the ECB in its control of monetary policy and the European currency, noting some aspects of

5. Draft Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1 (2004) (not yet ratified) [hereinafter Draft Treaty].

6. The Euro-zone (sometimes alternatively called the “Euro-area”) is the common term used to describe the Member States that have entered the final stage of Monetary Union and transferred control of their monetary policy to the European Central Bank (“ECB”). The twelve Member States are Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain.

7. The ECB’s Governing Council is comprised of six Executive Board members, including the ECB President, chosen for eight-year terms by common accord of the governments of the Member States in the Euro-zone, together with the Governor of the central bank of each State participating in the Euro-zone. *See* EC Treaty, *supra* note 4, art. 112, O.J. C 325/33, at 78-79 (2002).

8. The ECB’s General Council is composed of the President and Vice-President of the ECB together with the Governors of the central banks of all the Member States, both within and outside the Euro-zone. *See* Protocol on the Statute of the European System of Central Banks and the European Central Bank art. 45, O.J. C 191/68 (1992) [hereinafter ECB Protocol], *reprinted in* annex to Treaty of Maastricht, *supra* note 3, O.J. C 224/1 (1992).

the academic debate concerning the appropriate level of such independence. The first section also observes that a debate about the constitutional nature and autonomy of the ECB has become intertwined with the appraisal of its level of independence. The Article then reviews the EC Treaty's attribution to the Court of jurisdiction within Monetary Union, including a power of judicial review of the ECB's status, measures and decisions. The following section sets out the conflict between the Commission and the ECB in the *OLAF* case. The Article concentrates upon the text in Advocate General Jacob's opinion and the Court's judgment concerning the constitutional status of the ECB as an organ or body structured within the Community framework and concerning the scope of the ECB's independence. The final section provides several reflections upon the ultimate impact of the judgment and opinion. The reflections stress the importance of the Court's rejection of the ECB's claim to virtual autonomy in constitutional terms and the related subjection of the ECB to the rule of law within the EC. The final commentary also considers the Court's and especially Advocate General Jacobs' demarcation of the functional nature of the ECB's independence. Advocate General Jacobs' discussion of the value and extent of democratic accountability of the ECB is also highlighted.

I. *THE CONSTITUTIONAL NATURE OF THE EUROPEAN CENTRAL BANK ("ECB") AND ITS INDEPENDENCE*

In an article dealing with the judicial delineation of the constitutional nature of the ECB, with particular attention to an analysis of its independence, one must regrettably assume that the reader has some degree of familiarity with the nature of the Monetary Union and the role of the ECB in controlling monetary policy. Fortunately, many valuable books and articles describe and evaluate Monetary Union and the European Central Bank.⁹ Certainly, the capital importance of Monetary Union is

9. Rene Smits, formerly the General Counsel to the Bank of the Netherlands, provides the best analysis of the ECB and Monetary Union before Monetary Union began. See RENE SMITS, *THE EUROPEAN CENTRAL BANK* (1997). The late Jorn Pipkorn, a monetary specialist in the Commission Legal Service, gives an initial review in *Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union*, 31 COMMON MKT. L. REV. 263 (1994). For an American overview as Monetary Union commenced, see Roger J. Goebel, *European Economic and Monetary Union: Will the EMU Ever*

signaled by the Treaty of Maastricht's insertion of "the economic and monetary union" immediately following "a common market" in the list of the Community's tasks in EC Treaty Article 2.¹⁰ Ever since 1999, when Commission President Jacques Delors, together with the governors of all the national central banks, presented the Delors Report,¹¹ which proposed the essential nature and structure of Monetary Union, Monetary Union has been viewed as an essential complement to the internal market,¹² providing major economic benefits to those States that join in the final stage of Monetary Union.

Title VII of the EC Treaty sets out in considerable detail the structure and goals of the Monetary Union in Articles 98-124. EC Treaty Articles 107 and 112, supplemented by a Protocol, describe the structure of the ECB itself and its central role in the conduct of monetary policy within the European System of Cen-

Fly?, 4 COLUM. J. EUR. L. 249 (1998). Other valuable books include FABIAN AMTENBRINK, *THE DEMOCRATIC ACCOUNTABILITY OF CENTRAL BANKS* (1999); EMU: *ASSESSING THE IMPACT OF THE EURO* (Richard Baldwin et al. eds., 2003); EUROPEAN ECONOMIC AND MONETARY UNION: *THE INSTITUTIONAL FRAMEWORK* (Mads Andenas ed., 1997) [hereinafter EUROPEAN EMU]; LORENZO BINI SMAGHI & DANIEL GROS, *OPEN ISSUES IN EUROPEAN CENTRAL BANKING* (2000); *CENTRAL BANK INDEPENDENCE* (Jan Kleineman ed., 2001), EUROPEAN STATES AND THE EURO (Kenneth Dyson, ed., 2002); MALCOLM LEVITT & CHRISTOPHER LORD, *THE POLITICAL ECONOMY OF MONETARY UNION* (2000); CHIARA ZILIOLI & MARTIN SELMAYR, *THE LAW OF THE EUROPEAN CENTRAL BANK* (2001).

10. Article 2 of the EC Treaty is the fundamental provision in the Title on Treaty Principles, which lists all of the goals of the EC. See EC Treaty, *supra* note 4, art. 2, O.J. C 325/33, at 40 (2002).

11. In June 1998, the European Council requested Commission President Jacques Delors and a high committee composed of the Governors of all the central banks and several eminent economists to propose a plan for a monetary union. The Delors Report, delivered on April 17, 1989, set out virtually all of the essential features of Economic and Monetary Union and a progressive mode of achieving it. The Delors Report was specially published as the Report on Economic and Monetary Union in the European Community. See COMM. FOR THE STUDY OF ECONOMIC AND MONETARY UNION, *REPORT ON ECONOMIC AND MONETARY UNION IN THE EUROPEAN COMMUNITY* (1989) [hereinafter DELORS REPORT]. On the Delors Report's influence, see DINAN, *supra* note 3, at 237-38; Goebel, *supra* note 9, at 264-65; LEVITT & LORD, *supra* note 9, at 47-50.

12. The program to achieve the internal market was launched by the Commission's June 1985 White Paper on Completing the Internal Market. See Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 Final (June 1985) [hereinafter White Paper]. It was given Treaty effect on July 1, 1987, through the insertion of the EC Treaty Article 14 (initially Article 8a) in the EC Treaty amendments known as the Single European Act. The program transformed the EC in the late 1980s and paved the way for the further modifications introduced by the Treaty of Maastricht, including Monetary Union. See DINAN, *supra* note 3, at 205-31; see also BERMAN ET AL., *supra* note 3, at 540-48.

tral Banks (“ESCB”), comprised of all of the national central banks.¹³ Article 110 sets out the scope of the ECB’s regulatory powers in its control of monetary policy. In what is termed the final stage of Monetary Union, those Member States which have satisfied several Treaty-defined economic conditions (the well-known “convergence criteria”)¹⁴ join in transferring total control of their monetary policy to the ECB. In May 1998, eleven Member States joined in the creation of this so-called Euro-zone,¹⁵ transferring control of their monetary policy to the Governing Council of the Central Bank, which commenced this role on January 1, 1999.¹⁶ Although Denmark, Sweden and the United Kingdom opted to remain outside of the Euro-zone,¹⁷ all of the ten Central European and Mediterranean States that acceded on May 1, 2004, intend ultimately to join it.¹⁸ On January 1, 2002,

13. For an analysis, see SMITS, *supra* note 9, at 92-102, and ZILIOLO & SELMAYR, *supra* note 9, at 53-90. See also Goebel, *supra* note 9, at 276-85.

14. The “convergence criteria” are the key economic and monetary conditions that any Member State must fulfill, and which must be appraised as fulfilled by the Council (in a special composition of the Heads of State or Government) before the State can join the Euro-zone. These are set out in EC Treaty Article 121, supplemented by Protocols. See SMITS, *supra* note 9, at 300-08. The well-known American economist, Peter Kenen, appraises the “convergence criteria” in Peter Kenen, *The Transition to EMU: Issues and Implications*, 4 COLUM. J. EUR. L. 359 (1998).

15. Following evaluation reports by the Commission and the European Monetary Institute, on May 3, 1998, the Council, acting in the composition of Heads of State or Government, decided that all of the eligible Member States other than Greece and Sweden qualified to join the final stage of Monetary Union under Article 121. See Council Decision, O.J. L 139/30 (1998). Greece subsequently qualified and joined on January 1, 2001. See BERMANN ET AL., *supra* note 3, at 1919-20.

16. As mandated by EC Treaty, *supra* note 4, art. 122, O.J. C 325/33, at 86-87 (2002). For a review of the ECB’s initial operations by one of its most prominent Executive Board Members, see Otmar Issing, *The ECB’s Monetary Policy: Experience after the First Year*, 22 J. POL’Y MODELING 325 (2000).

17. Denmark and the United Kingdom chose to remain outside the final stage of the Monetary Union in virtue of Protocols annexed to the Treaty of Maastricht. The Council concluded that Sweden did not fulfill the convergence criteria at the time of its appraisal in May 1998, cited *supra* note 15. For a description of the legal status of Denmark, Sweden, and the United Kingdom as States remaining outside of the Euro-zone, see BERMANN ET AL., *supra* note 3, at 1220-22.

18. When the ten new Member States acceded to the EC and the European Union on May 1, 2005, the Treaty of Athens and its Act of Accession of April 16, 2003, O.J. L 236/17 (Sept. 23, 2003), did not provide for any of them to opt out of Monetary Union. For a general review of the status of the new Member States, see Andrej Fatur, *What Challenges Do the Central European and Mediterranean States Face in Trying to Join the Third Stage of European Monetary Union?*, 28 FORDHAM INT’L L.J. 145, 158-59 (2004), and Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 LOYOLA U. CHI. INT’L L. REV. 15, at 47-50 (2003-04).

the common currency, the Euro, supplanted the national currencies of the twelve Euro-zone States.¹⁹ EC Treaty Articles 105 and 106 list the specific powers exercised by the ECB in its control of monetary policy and in the supervision of the Euro.²⁰

With regard to the constitutional status of the ECB, two initial comments merit highlighting. The first is that the 1990-91 Intergovernmental Conference (IGC)²¹ that drafted the Treaty of Maastricht decided to insert the Economic and Monetary Union provisions in the EC Treaty, rather than creating Economic and Monetary Union as a distinct separate structure, or pillar, within the European Union, along with the Common Foreign and Security Policy (“CFSP”) and Cooperation in Justice and Home Affairs (“CJHA”).²² Hence Monetary Union does not share the fundamental intergovernmental features of the CFSP and the CJHA.

The second comment is that, despite the unusual length and detail of the EC Treaty provisions concerning Monetary Union, which suggests a highly autonomous character for the Monetary Union, it is linked by the EC Treaty to the institutional framework of the Community. Thus, the EC Treaty authorizes

19. The Euro commenced circulation in the Euro-zone States on January 1, 1999, pursuant to the terms of Council Regulation 974/98 on the introduction of the Euro. *See* Council Regulation No. 974/98, O.J. L 139/1 (1998). A Commission report provides a valuable overview of the successful introduction of the Euro. *See* Commission of the European Communities, *The Introduction of Euro Banknotes and Coins—One Year After*, COM (2002) 747 Final (Dec. 2002).

20. Pursuant to EC Treaty Article 105, the ECB conducts foreign exchange operations, manages the official reserves, and promotes payment systems in addition to the power to “define and implement the monetary policy of the Community” (the Community for this purpose is limited to the Euro-zone States by EC Treaty Article 132). *See* EC Treaty, *supra* note 4, art. 105, O.J. C 325/33, at 75 (2002). The ECB also controls the issuance of Euro banknotes under Article 106(1). *See* SMITS, *supra* note 9, at 223-83.

21. Pursuant to Article 48 of the Treaty on European Union (“TEU”), only an intergovernmental conference of representatives of the Member States can propose amendments to the treaties. *See* Consolidated Version of the Treaty on European Union art. 48, O.J. C 325/5, at 31 (2002) [hereinafter TEU]. The European Council meeting at Madrid in June 1989 endorsed the Delors Report, and decided in its December 1989 meeting at Strasbourg to hold an intergovernmental conference to draft the necessary Treaty provisions. *See* 12 E.C. BULL., No. 1, at 11-12 (1989); *see also* DINAN, *supra* note 3, at 239-41; Goebel, *supra* note 9, at 265.

22. Distinct from the European Community, the Treaty on European Union (consolidated at O.J. C 325/5 (2002)), provides in Title V for modes of inter-governmental action in Common Foreign and Security Policy and in Title VI for Police and Judicial Cooperation in Criminal Matters. Only the Council has the power to act in those two fields through special modes of Member State consensus or majority votes.

the Council to legislate in certain sectors of Monetary Union, especially to set both procedural and substantive ground rules for certain aspects of ECB operations and for the creation and use of the Euro as a currency.²³ As we shall see, the Court's jurisdiction was also expanded to encompass issues arising in or out of Monetary Union. Both of these observations are quite pertinent to our later consideration of the constitutional status of the ECB. (The reference to the ECB's constitutional status is appropriate, because its nature, role and powers are set out in the EC Treaty itself, which can only be modified by a Treaty amendment ratified by all the Member States).

Turning to the topic of ECB independence, EC Treaty Article 108 states the important principle that the ECB and the ESCB shall have total independence in its monetary policy operations. The ECB and its individual members are categorically forbidden to take instructions either from Community institutions or from Member States. The national central banks which join with the ECB in implementing monetary policy within the ESCB are likewise to enjoy full independence from their respective governments.

At one stage during the IGC that drafted the Monetary Union provisions in the Maastricht Treaty, France proposed that the European Council should have the power to provide guidelines to the ECB, just as it does to the political institutions.²⁴ The proposal was not adopted. Article 108 makes crystal clear that no Community political institution may provide any policy guidelines to the ECB or exercise any control over its conduct of monetary policy.

23. Thus, the Council may adopt legislation concerning the ECB's imposition of penalties on enterprises under EC treaty Article 110(3), provide the ECB with powers concerning the prudential supervision of financial institutions under Article 105(6), determine the denominations and specifications of coins under Article 106(2), and set guidelines for exchange rate policies under Article 111(2). Probably the Council's most crucial legislative act within the context of Monetary Union was the Council Regulation No. 9764/98 on the Introduction of the Euro, *supra* note 19. See also Council Regulation No. 2532/98 concerning the powers of the European Central Bank to impose sanctions, O.J. L 318/4 (Nov. 11, 1998).

24. Alexander Italianer, a monetary consultant in the cabinet of Commission President Delors, wrote a useful survey of the IGC's drafting of the Monetary Union provisions. See Alexander Italianer, *Mastering Maastricht: EMU Issues and How They Were Settled*, in *ECONOMIC AND MONETARY UNION: IMPLICATIONS FOR NATIONAL POLICY-MAKERS* 51 (Klaus Gretschmann ed., Inst. of Pub. Admin., Maastricht 1993). For Italianer's discussion of the French proposal, see *id.* at 69.

No one questions that Article 108 was inserted into the Treaty in order to ensure that the ECB had total autonomy in its control of monetary policy in order to attain its “primary objective,” stipulated in Article 105 to be the maintenance of “price stability.”²⁵ The Treaty does not define the term, “price stability,” but it is commonly understood to mean economic conditions in which consumer price inflation remains at tolerably low levels.²⁶ On October 13, 1998, just before the ECB commenced its control of monetary policy in the Euro-zone on January 1, 1999, the ECB Governing Council set its own price stability target as consumer price inflation of below two percent within the Euro-zone.²⁷

The IGC’s insertion of the principle of ECB independence into the EC Treaty itself represented a major policy decision, because most national central banks had never been completely independent of their governments, even if many enjoyed substantial operational autonomy, and because some Member States were reluctant to allow the ECB and ESCB to enjoy total independence from the Community’s political institutions. The principle of independence was strongly advocated by Germany, whose Bundesbank traditionally enjoyed a high degree of independence from its government, as critical in order to ensure that the ECB and the ESCB would have the freedom to follow strict, and hence sometimes unpopular, monetary policies.²⁸ As former Bundesbank President Pohl asserted in justifying central bank independence: “Only an independent institution is in a position to resist the ever-recurring wishes of politicians to prescribe monetary policy targets which are often inconsistent with the objective of stability, such as the stabilization of exchange rates or the promotion of growth and employment or the bal-

25. EC Treaty, *supra* note 4, art. 105, O.J. C 325/33, at 75 (2002). Article 105 then sets out the ECB’s secondary objective, namely, to “support the general economic policies in the Community,” which, of course, are determined by the European Council and the Community political institutions.

26. See SMITS, *supra* note 9, at 184-87; see also Goebel, *supra* note 9, at 279.

27. See Press Release, ECB, A Stability-Oriented Monetary Policy Strategy for the ESCB (Oct. 13, 1998), available at http://www.ecb.int/press/pr/date/1998/html/pr981013_1.en.html (asserting that the Governing Council adopted this definition: “Price Stability shall be defined as a year-on-year increase in the Harmonized Index of Consumer Prices (HICP) for the euro area of below 2%.”).

28. See LEVITT & LORD, *supra* note 9, at 120-21.

ancing of regional disequilibria.”²⁹

Accessory to the principle of independence of the ECB is that of the independence of the national central banks and their members, because the national central banks represent the usual operational arm of the ESCB. Article 116(5) required Member States to take action to ensure the independence of their central banks during the second stage of evolution toward Monetary Union, from January 1, 1994 to the end of 1998.³⁰ All the Member States, except Sweden, took the necessary action to make their central banks independent by the end of 1997.³¹ Not only is the principle of independence for the ECB and all national central banks participating in the ESCB given Treaty (or constitutional) status in the EC Treaty, that status is stated in very strong terms: Article 108 declares that members of these bodies shall neither “seek or take instructions from Community institutions or bodies, from any government of a Member State, or from any other body.”³² Moreover, the Community institutions and Member State governments pledge to “respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks”³³ (the text is modeled upon that in EC Treaty Article 213³⁴ concerning the independence of the Commission and its members—a provision of the initial Treaty of Rome of March 25, 1957 that has never been amended).

The decision to give the Executive Board members a non-renewable, but relatively long eight year term, is generally believed to be intended to foster their independence.³⁵ The IGC apparently considered that any possibility of reappointment

29. Karl Otto Pohl, *Basic Features of a European Monetary Order*, in EUROPEAN MONETARY INTEGRATION 83 (Paul J.J. Welfens ed., 2d. ed. 1994).

30. EC Treaty, *supra* note 4, art. 116(5), O.J. C 325/33, at 81-82 (2002).

31. The Council Decision of May 3, 1998, so concluded in its review of the eligibility of each Member State. *See* Council Decision, *supra* note 15, O.J. L 139/30, at 34 (1998).

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

33. *See id.*

34. *See* EC Treaty, *supra* note 4, art. 213, O.J. C 325/33, at 120 (2002). The original European Economic Community Treaty text may be found in 298 U.N.T.S. 11. The current EC Treaty Article 213 was initially numbered as Article 157.

35. *See* SMITS, *supra* note 9, at 156 (suggesting that a bar to renewal “would free the incumbent from political considerations concerning renewal of his or her term of office”). *Cf.* Pohl, *supra* note 29, at 84.

might open the way for undue influence by Member State governments on Executive Board members interested in being reappointed.³⁶ In contrast, German Bundesbank members serve eight year terms and can be reappointed, but presumably the EC Treaty authors considered that the Federal Reserve, whose members serve fourteen year terms without the possibility of reappointment, provided a better model.

Moreover, Article 11.4 of the Protocol on the Statute of the ESCB and ECB provides that Executive Board members can only be removed from office for incapacity or "serious misconduct" through a proceeding before the Court of Justice, ensuring a judicial rather than a political decision.³⁷ That article also provides that only the Governing Council or the Executive Board can commence this judicial proceeding, further insulating Executive Board members from political influence, because no Community political body has the power to commence a removal proceeding.

Another factor promoting the independence of the ECB is that only the national central banks subscribe to its capital, pursuant to Article 28 of the above-referenced Protocol, and the ECB derives its revenues solely through its own monetary operations, or through those of the national central banks operating within the ESCB. The ECB is accordingly not in any way financially dependent on the Community's political institutions.

As noted above, Article 108's strong declaration of independence for the ECB was presumably motivated by the EC Treaty drafters' belief that the manifest success of the Bundesbank in achieving a virtually continuous state of stable monetary conditions, low inflation, and a solid currency was largely due to its operational independence. Ludwig Erhard, the well known German Economy and Finance Minister in the 1950s, later Konrad Adenauer's successor as Chancellor, advocated a strong, independent central bank. The Delors Report and initial Commission planning reports proposed that the ECB must be accorded operational independence, and the IGC adopted this position early on.³⁸ Leading commentators applauded this decision.³⁹

36. See SMITS, *supra* note 9, at 163.

37. See ECB Protocol, *supra* note 8, art. 11.4.

38. See DELORS REPORT, *supra* note 11, at 26. The Report stipulated that the "ESCB Council should be independent of instructions from national governments and Community authorities." *Id.* A Commission report of August 21, 1990 endorsed this view. See

A legitimate question may, however, nonetheless be raised as to the wisdom of incorporating the principle of independence into the EC Treaty as a constitutional principle. As Professor Francis Snyder and other commentators have observed,⁴⁰ this gives the ECB greater independence than the U.S. Federal Reserve Board and virtually all central banks prior to Monetary Union. On a comparative note, the US Federal Reserve Board obviously does not enjoy constitutional status and, although it enjoys great independence by custom, nothing prevents the Congress from adopting legislation mandating certain goals or policies, a power that the Congress has on rare occasion exercised.⁴¹ In the European context, the Bank of England and the Netherlands Central Bank enjoyed a high reputation for their efficacy in monetary control, even though each one's functional independence was largely based on custom and each could be subjected to binding instructions from the Chancellor of the Exchequer or the Ministry of Finance, respectively.⁴²

Moreover, not all economists or academic commentators agree with the view that a central bank must have total operational independence in order to be effective in controlling mon-

COMMISSION OF THE EUROPEAN COMMUNITIES, XXIVTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1990, at 30, ¶ 2 (1991). Note that the IGC commenced its work on the basis of a draft text proposed by the Commission on December 10, 1990 and that the provision on independence was the subject of early agreement. *See id.* at 31, ¶ 4; *see also* Italianer, *supra* note 24, at 65-68, 80; SMITS, *supra* note 9, at 160.

39. *See, e.g.*, SMITS, *supra* note 9, at 152-60; Rosa María Lastra, *The Independence of the European System of Central Banks*, 33 HARV. INT'L L.J. 475 (1992). For a more nuanced view, expressing some concern over the total political independence of the ECB, see Philip Brentford, *Constitutional Aspects of the Independence of the European Central Bank*, 47 INTL & COMP. L.Q. 75, at 105-09 (1998).

40. *See* Frances Snyder, *EMU—Metaphor for European Union? Institutions, Rules and Types of Regulation*, in EUROPE AFTER MAASTRICHT 63, 78 (Renaud Dehousse ed., 1994); *see also* Goebel, *supra* note 9, at 291; Matthias J. Herdegen, *Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 9, at 23 (1998).

41. The best known example is the Full Employment and Balanced Growth Act of 1978 (popularly known as the "Humphrey-Hawkins Act"), which required the Federal Reserve to consider a variety of factors in setting its policies, notably "full employment and production." *See* Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, Sec. 2(c), 92 Stat. 1887, 1889 (codified at 15 U.S.C. § 3101(c) (2000)). For an account of the Federal Reserve's Congressionally mandated monetary policy goals in contrast to the ECB's price stability objective, see Goebel, *supra* note 9, at 298-99.

42. The traditionally high regard accorded to the Bank of England's operational control of monetary policy is well-known, but the Netherlands Central Bank also merits high respect. *See* Laurence Gormley & Jakob De Haan, *The Democratic Deficit of the European Central Bank*, 21 EUR. L. REV. 95, at 98-99 (1996).

etary policy. Some commentators have contended that the political institutions of government should have the power to set the monetary policy goals for the central bank (as the U.S. Congress has done for the U.S. Federal Reserve Board), or that in times of political or economic crises, the political leadership should have the capacity to overrule central bank decisions. Thus, Professors Jakob de Haan and Lawrence Gormley have argued for functional autonomy rather than strict independence, and approved the New Zealand model in which the government joins with the central bank in setting medium-term monetary policy goals.⁴³

One of the leading academic commentators, Professor Rosa Lastra, represents the more dominant view in support of a high level of ECB independence, but in a nuanced manner. She contends that central bank independence promotes price stability, but that such independence must be balanced by democratic accountability. Professor Lastra states the case for independence as based upon

[T]he belief that central bankers, because of their specialisation and relative insulation from political pressures, are more prepared than politicians to pursue the objective of price stability. The skills, expertise and superior qualifications of central bankers compared to politicians recommend an independent central bank, better able to guarantee a more objective, more 'neutral' and faster decision-making process. This 'technical' argument assumes that the slow and heavy machinery of the government lacks the necessary flexibility and swiftness to adapt to changing circumstances.⁴⁴

Professor Lastra notes, however, that tax policy is firmly in the hands of political leaders, even though a similar argument could be made that tax policy should better be set by independent technocratic experts.⁴⁵

Moreover, Professor Lastra has subsequently endorsed the view that at the time of an extraordinary political or economic crisis, the political institutions of government should be able to make the final determination of fundamental monetary policy, pointing particularly to the Kohl government's decision to im-

43. See Jakob de Haan & Laurence Gormley, *Independence and Accountability of the European Central Bank*, in *EUROPEAN EMU*, *supra* note 9, at 332.

44. Rosa María Lastra, *European Monetary Union and Central Bank Independence*, in *EUROPEAN EMU*, *supra* note 42, at 289, 305.

45. See *id.*

pose a one to one final exchange rate for the transfer of East Marks for German Marks at the time of the reunification of Germany in 1990.⁴⁶ Despite the Bundesbank's public opposition to giving the East Mark such a preferential rate, the Kohl government gave priority to achieving greater popular support for reunification in East Germany.

Certainly quite relevant in the academic debate is the view of Professors Lorenzo Bini Smaghi and Daniel Gros that central banks must enjoy functional credibility with financial and commercial enterprises in order to conduct satisfactorily their monetary policy operations.⁴⁷ There is considerable plausibility in the view that financial and other economic operators in the marketplace give more credibility to monetary policies set by an independent central bank than those determined by a central bank subject to political control or strong political influence.⁴⁸

After the creation of the ECB, a new debate developed concerning its constitutional or legal status within the EC (and indeed the European Union) with great relevance to the issue of the appropriate level of ECB independence, as well as to the *OLAF* judgment, as we shall see. Chiara Zilioli, Deputy General Counsel of the ECB, joined with a German academic, Martin Selmayr, in launching the discussion with a 1999 article on the ECB's role in external relations.⁴⁹ Subsequently in 2000 they provided a lengthy justification of their thesis in a prominent article,⁵⁰ followed by an extended treatment in their book on the ECB published in 2001.⁵¹

Essentially Zilioli and Selmayr contend that the ECB is "an independent specialized organization of Community law,"⁵² one that is "from a functional perspective . . . a new Community within the European Union's central pillar which stands on

46. See Rosa María Lastra & Geoffrey P. Miller, *Central Bank Independence in Ordinary and Extraordinary Times*, in CENTRAL BANK INDEPENDENCE, *supra* note 9, at 31, 45.

47. See BINI SMAGHI & GROS, *supra* note 9, at 149-51.

48. See *id.* at 118-19; see also Issing, *supra* note 16, at 337-40.

49. See generally Chiara Zilioli & Martin Selmayr, *The External Relations of the Euro Area: Legal Aspects*, 36 COMMON MKT. L. REV. 273 (1999).

50. See generally Chiara Zilioli & Martin Selmayr, *The European Central Bank: An Independent Specialized Organization of Community Law*, 37 COMMON MKT. L. REV. 591 (2000).

51. See ZILIOLI & SELMAYR, *supra* note 9.

52. See Zilioli & Selmayr, *supra* note 50, at 621. The two authors' book on the ECB recapitulates this contention. See ZILIOLI & SELMAYR, *supra* note 9, at 29.

equal footing with the original three Communities⁵³—i.e., the current European Community, the now expired European Coal and Steel Community, and the European Atomic Energy Community. Moreover, they argue that the ECB is “not dependent on the original [European Community], as it has received its tasks, powers and duties directly from the Member States, not from the Community institutions.”⁵⁴ This contention is presumably founded on the fact that the creation of the ECB and the grant of its powers and duties, stems from the Member States’ ratification of the Treaty of Maastricht, and not from any Community legislation. Further, “the ECB is not institutionally linked to the Communities [and] it never acts as financial instrument of the Community institutions or even for or on behalf of them . . . as this would be incompatible with both its independence and with its primary objective of price stability.”⁵⁵ While thus denying that the ECB is legally subordinate to the political institutions of the European Community, Zilioli and Selmayr accept that the ECB is “fully subject to the principles of primary Community law and to the jurisdiction of the ECJ.”⁵⁶

Based on this strikingly autonomous constitutional view of the ECB, Zilioli and Selmayr emphasize that its “new form of supranational central bank independence goes much further than that of any of the ECB’s historic ancestors,” because it is Treaty based, created by a “document of constitutional quality,” rather than through any Community legislation.⁵⁷

Not surprisingly, this rather absolutist theory of ECB autonomy and independence rapidly produced criticism from more traditional academic scholars. Professor Ramon Torrent made the first reply, contending that the ECB is simply “the Central Bank of the European Community, no more, no less,” not “outside the Community,” nor “outside the system of democratically organized political power.”⁵⁸ Professors Fabian Amtenbrink and Jakob de Haan provided a different kind of rebuttal, contending that the high level of independence accorded by the

53. See Zilioli & Selmayr, *supra* note 50, at 622.

54. *Id.*

55. *Id.*

56. *Id.* at 623.

57. *Id.* at 625.

58. Ramon Torrent, *Whom is the European Central Bank the Central Bank of?: Reaction to Zilioli and Selmayr*, 36 *COMMON MKT. L. REV.* 1229, 1231, 1233-34 (1999).

EC Treaty to the ECB did not represent any absolute “legal principle,” but rather a “conscious political choice.”⁵⁹ Without debating the precise constitutional status of the ECB within the Community, Amtenbrink and de Haan argue that in practice a central bank cannot be completely depoliticized and that its independence must be balanced by a high level of democratic accountability.⁶⁰

In any event, the thesis of Zilioli and Selmayr appears to have considerably influenced the legal arguments presented by the ECB in the *OLAF* case. The Court’s ultimate judgment, and even more the detailed opinion of Advocate General Jacobs, accordingly constitutes both a definitive legal assessment of the constitutional nature of the ECB, as well as its level of independence.

II. THE EUROPEAN COURT OF JUSTICE’S (“ECJ”) JURISDICTION WITH REGARD TO THE ECB

In view of the ECB’s vital role and great power in shaping monetary policy for the Euro-zone Member States, as well as the unusually high level of independence the EC Treaty accords to it, the drafters of the Maastricht Treaty naturally found it essential to set out within the EC Treaty text a well-balanced structure for the Court’s jurisdiction in Monetary Union, including judicial review of ECB acts and decisions.⁶¹ The Maastricht Treaty accordingly amended Article 230 to grant the Court’s jurisdiction over actions brought by Member States, the Council, the Commission or private parties against the ECB in order to review the legality of its acts.⁶² Similarly, under Article 232 the political institutions, Member States or private parties can sue the ECB for a failure to act to fulfill its duties.⁶³ In Article 230 the draft-

59. Fabian Amtenbrink & Jakob de Haan, *The European Central Bank: An Independent Specialized Organization of Community Law—A Comment*, 39 COMMON MKT. L. REV. 65, 69-70 (2002).

60. *Id.* at 73-76.

61. For a description of the Court of Justice’s jurisdiction in Monetary Union and its power of judicial review of ECB acts and decisions, see SMITS, *supra* note 9, at 106-10. For a brief summary, see Goebel, *supra* note 9, at 295-96. See generally Paul Craig, *EMU, the European Central Bank and Judicial Review*, in PAUL BEAUMONT & NEIL WALKER, *LEGAL FRAMEWORK OF THE SINGLE EUROPEAN CURRENCY* (1999) (providing an academic experts’ analyses on the topic).

62. See EC Treaty, *supra* note 4, art. 230, O.J. C 325/33, at 126 (2002).

63. See *id.* art. 232, at 127.

ers balanced this judicial review of the ECB by granting the ECB the power to sue the Community political institutions in order to protect its "prerogatives."⁶⁴ The Maastricht Treaty also amended Article 234 to include the acts of the ECB among those which may be the subject of questions referred to the Court of Justice by national courts.⁶⁵ Finally, the Court of Justice under Article 237(d) was given the power to review the compliance of national central banks with their obligations in the ESCB and to compel their compliance if necessary.⁶⁶

It is likely that private parties, even in the financial sector, would rarely have recourse to a legal challenge of an ECB regulatory decision (although appeals to the Court of Justice are now expressly provided for in certain regulatory legislation).⁶⁷ Also, the Court is certain to give a broad field of discretion to the ECB when it adopts monetary measures. Nonetheless, the possibility of review by the Court of Justice should serve as a restraint against arbitrary, poorly reasoned or inadequately justified rules or decisions, in line with well-established Court precedents on the need for a reasoned basis for Council, Commission and Parliamentary acts.⁶⁸ Although the Court of Justice has not yet had to decide any appeals of ECB decisions in the financial sector, the Court of First Instance has had occasion to review, and affirm, the ECB's dismissal of a staff member for misconduct.⁶⁹

In addition to any appeals of ECB regulatory decisions or measures, it was always likely that the Court of Justice might have to decide disputes over the extent of ECB competence or power

64. *See id.* art. 230, at 127-28.

65. *See id.* art. 234, at 127.

66. *See id.* art. 237(d), at 128.

67. *See, e.g.*, Council Regulation No. 2532/98, O.J. L 318/4 (Nov. 11, 1998) (concerning the powers of the European Central Bank to impose sanctions). Regulation 2532/98 regulates in Article 1 the maximum level of ECB fines or periodic penalty payments on undertakings that violate ECB regulations or decisions, sets various procedural rules in Articles 2-4, and prescribes judicial review by the Court of Justice in Article 5.

68. The Court of Justice's doctrine in this regard developed early. *See* *Commission v. Germany (Brennwein)*, Case 24/62, [1963] E.C.R. 63; *see also* *Groupement des Fabricants de Papiers Peints de Belgique v. Commission*, Case 73/74, [1975] E.C.R. 1491. The obligation to state sufficient reasoning applies also to Council regulations. *See* *Beus GmbH & Co. v. Hauptzollamt Munchen*, Case 5/67, [1968] E.C.R. 83.

69. *See* *X v. European Central Bank*, Case T-333/99, [2001] E.C.R. II-302. It is noteworthy that the Court of First Instance held that it had initial jurisdiction over cases involving the staff of the ECB even though Article 230 refers only to Court of Justice jurisdiction over the ECB.

in conflicts with Community institutions or national central banks or ministries of finance (such conflicts are sometimes called “turf battles”). Accordingly, that the Court should have to decide the constitutional nature of the ECB and the parameters of ECB independence in the *OLAF* proceeding is not really surprising.⁷⁰ As noted before, the ECB is certainly a powerful monetary institution or body (even if not formally made a Community institution by the EC Treaty), so that a conflict between the ECB and the Commission is inevitably of high significance.

The Court of Justice is keenly aware of the capital importance of its judgments in inter-institutional conflicts. If such conflicts could not be resolved by a neutral judicial forum, they would create the risk of ongoing combat between the institutions involved, handicapping each one’s operational efficiency and jeopardizing healthy collaboration. The Court regards its own role in finding an appropriate solution to inter-institutional combats as one flowing from its mandate under EC Treaty Article 220 to “ensure that in the interpretation and application of this Treaty the law is observed.”⁷¹

Although disputes between the Parliament and the Council over their respective prerogatives are undoubtedly more significant than the conflict between the Commission and the ECB in the *OLAF* case, the Court’s comments in the famous *Post-Chernobyl* judgment are quite relevant here:

The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance⁷²

70. See Goebel, *supra* note 9, at 295 (predicting such “turf battles,” even noting that “it is not inconceivable that the precise parameters of ECB independence may have to be settled by the Court.”)

71. EC Treaty, *supra* note 4, art. 220, O.J. C 325/33, at 122 (2006).

72. Parliament v. Council, Case C-70/88, [1990] E.C.R. I-2041, ¶¶ 21-23, [1992] 1 C.M.L.R. 91, 115 [hereinafter *Post-Chernobyl*] (paragraph numbers omitted).

III. THE OLAF JUDGEMENT: BACKGROUND

At the heart of the *OLAF* case is the question whether the ECB's Decision 1999/726,⁷³ creating its own internal procedures to combat fraud, violated the rules laid down in Regulation 1073/1999, which authorized the Anti-Fraud Office ("OLAF") to exercise its investigative powers in internal reviews of all Community institutions, agencies, and bodies.⁷⁴

Resolution of this rather technical question required Advocate General Jacobs and the Court to examine the constitutional nature of the ECB and the scope of its independence, as well as several related issues, notably the extent of its right to be consulted during the legislative process for measures that might affect it. Without any doubt, even though the ECB fully understood the desirability of effective anti-fraud action, it believed that its autonomous status and operational independence might be jeopardized if it subjected itself to OLAF investigations.

To fully understand the vigor of the Commission's challenge of the ECB position, one must realize that efforts to combat fraud and financial misconduct within the Community are not only important because of past wrong-doing⁷⁵ but also because of the political sensitivity of the subject. On March 16, 1999, President Santer and the entire Commission felt obliged to resign following a report by a Committee of Independent Experts which concluded that two Commissioners, Cresson and Wulf-Mathies, had engaged in favoritism and financial misconduct, and that the Commission as a whole had failed in its duty to properly supervise financial procedures, combat fraud and mismanagement, and police the conduct of its members.⁷⁶ It is

73. See European Central Bank Decision No. 1999/726/EC, O.J. L 291, at 36 (1999) [hereinafter ECB Anti-Fraud Decision].

74. See Council Regulation No. 1073/1999, O.J. L 136/1 (1999) [hereinafter OLAF Regulation].

75. For a description of the high level of fraud and corruption in Community operations, and the consequent Commission efforts to combat this fraud and corruption, see Reader, *supra* note 1, at 1521-22.

76. See EUROPEAN COMMISSION, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION 1999, at 403-04, ¶ 1032 (2000) [hereinafter GENERAL REPORT 1999]. The Committee of Independent Experts, directed by a Parliament resolution in January 1999, presented its First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Community on March 15, 1999. See *id.*, at 426-27, ¶ 1092; see also BERMANN ET AL., *supra* note 3, at 44; Reader, *supra* note 1, at 1522-24.

probable that the Parliament would have censured the Commission and forced its resignation if it had not resigned voluntarily.

The Commission, led by President Prodi, that the Member State political leaders chose to complete the final months of the Santer Commission's term and then the full 1999-2004 term, naturally considered efforts to combat financial misconduct and fraud a priority matter.⁷⁷ Moreover, Commission and other reports, since the late 1990s have indicated that fraud and corruption in connection with the grant of agricultural subsidies and the grant of regional and infrastructure aid, as well as in other fields, represents a constant ongoing problem, costing huge sums annually.⁷⁸

Accordingly, on April 28, 1999, by Decision 1999/352,⁷⁹ the Commission created OLAF to carry out the administrative investigations necessary to combat "fraud, corruption and any other illegal activity adversely affecting the Community's financial interests."⁸⁰ The Commission delegated its own antifraud powers to OLAF to achieve this. It is worth underlining that Article 3 of the Decision declared that OLAF should have "complete independence" from the Commission itself, as well as any other institution or any Member State.⁸¹

Recognizing the need to reinforce Community efforts to combat fraud and corruption, the Member States amended the EC Treaty through the Treaty of Amsterdam to insert Article 280(4)⁸² within the Title on Financial Provisions (which essentially dealt with the EC budget). Treaty Article 280(4) is a grant of power to legislate in the "fight against fraud affecting the fi-

77. See GENERAL REPORT 1999, *supra* note 74, at 427, ¶ 1093.

78. See, e.g., OLAF Supervisory Committee Progress Report No. 1/1999, O.J. C 360, at 1 (2000) (describing the history of fraud in the Community prior to the creation of OLAF). In his Opinion at paragraph three, Advocate General Jacobs cited an estimate that fraud and irregularities in 2000 exceeded two billion Euros. Opinion of Advocate General Jacobs, *Commission v. European Central Bank*, Case C-11/00, [1980] E.C.R. I-7155, I-7157, ¶ 3 (hereinafter A.G. Jacobs *OLAF* Opinion).

79. See Commission Decision No. 99/352/EEC, O.J. L 136/20 (1999) [hereinafter Commission OLAF Decision].

80. See *id.* at 21, art. 2(1)(a).

81. See *id.* at 21, art. 3.

82. See EC Treaty, *supra* note 4, art. 280(4), O.J. C 325/33 (2002), at 146. The EC Treaty as amended by the Treaty of Amsterdam, but prior to the Treaty of Nice, is published in consolidated form in O.J. C 340/173 (Nov. 10, 1997) (effective May 1, 1999).

nancial interests of the Community.”⁸³ With extraordinary rapidity, almost immediately after the Treaty of Amsterdam became effective on May 1, 1999, the Parliament and the Council, acting by codecision, adopted Regulation 1073/1999, popularly called the OLAF Regulation, providing OLAF with full powers to carry out anti-fraud and corruption investigations.⁸⁴

Article 1 of the Regulation authorized OLAF to exercise its investigative powers “within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties,” thus prescribing the fundamental scope for OLAF’s activities.⁸⁵ Article 4 on Internal Investigations stipulated that OLAF’s investigations should be carried out “under the conditions and in accordance with the procedures provided for in this Regulation and in decisions adopted by each institution, body, office and agency.”⁸⁶ Article 4 thus foresaw that the Community institutions (including the Court of Justice), as well as all Community agencies and bodies, would collaborate with OLAF to set out procedural arrangements for OLAF investigations. Article 4 also provided that OLAF should have “the right of immediate and unannounced access to any information held by the institutions, bodies, offices, and agencies, and to their premises,” a right to inspect accounts and take documents, and the power “to request oral information” from staff. Finally, each Community institution, agency or body must adopt a decision placing “a duty” upon its managers and staff to “cooperate with and supply information” to OLAF.⁸⁷

Although the ECB was well aware of the adoption in May of the OLAF Regulation, on October 7, 1999 the ECB adopted its own Decision 1999/726 concerning fraud prevention.⁸⁸ Manifestly, the ECB believed (presumably in good faith) that OLAF’s investigatory powers pursuant to the Regulation did not apply to it, and accordingly wanted to create its own internal anti-fraud procedures.

The ECB Decision authorized its Directorate for Internal Audit to carry out administrative investigations to combat fraud

83. *See id.*

84. *See* OLAF Regulation, *supra* note 74, O.J. L 136/1 (1999).

85. *See id.* at 3, art. 1(3).

86. *See id.* at 4, art. 4(2).

87. *See id.* at 4, art. 4(6)(a).

88. *See* ECB Anti-Fraud Decision, *supra* note 71, O.J. L 291/36 (1999).

and other financial misconduct. The Directorate was instructed to create a special ECB Anti-Fraud Committee consisting of three independent outside persons, appointed to three year terms by the Governing Council, who would have total independence from the ECB, as well as other Community institutions or bodies or any Member State government.⁸⁹ Article 5 of the ECB Decision required ECB staff to inform the Anti-Fraud Committee of any “fraud or illegal activities detrimental to the financial interests of the EC.”⁹⁰ The only reference to OLAF in the Decision is a provision requiring the Anti-Fraud Committee to maintain “relations” with the Supervisory Committee of OLAF.⁹¹

On January 14, 2000, acting on behalf of OLAF’s interests, the Commission sued the ECB to annul its Decision. The Commission, supported by the Council, maintained that the OLAF Regulation gave OLAF investigatory power over the ECB, just as it did over any other Community body or agency. The Commission further contended that the ECB Decision was incompatible with the provisions of the OLAF Regulation.

In its defense, the ECB contended that its Treaty-guaranteed status, in particular its guarantee of independence, insulated it from the jurisdiction of OLAF pursuant to Regulation 1073/1999. The ECB also maintained that the EC Treaty granted the ECB a legally autonomous status quite distinct from that of a Community agency or body, and that its budget, revenues and financial operations were quite separate and distinct from those of the Community, so that the Regulation simply did not apply to it. The ECB next argued at length that its Treaty-guaranteed independence would be violated by being subject to OLAF investigations. The ECB further maintained that its right to be consulted on Community acts “in its fields of competence” under EC Treaty Article 105(4) had been violated when the Parliament and Council had adopted the Regulation, which accordingly nullified the Regulation’s scope in its regard. Finally, even if the Court should find that the ECB was subject to OLAF investigations, the ECB contended that its fraud prevention Decision was not incompatible with the OLAF Regulation.

89. *Id.* at 36, art. 1.

90. *Id.* at 36, art. 5.

91. *Id.* at 36, art. 1(9).

Advocate General Jacob's Opinion of Oct. 3, 2002⁹² rejected all of the ECB contentions, decisively asserting that the ECB's constitutional nature is that of a Community organ or body within the European Community structure, not some sort of autonomous supra-national organization. He further reasoned that the Treaty grant of independence covers only the ECB's conduct of monetary policy and does not preclude the ECB's subjection to general Community rules to combat fraud, especially when carried out by OLAF, which is itself operationally independent of the political institutions. He also concluded that the ECB's right to be consulted under Article 105(4) during a Community legislative process would only arise when the draft legislation concerned the ECB's monetary policy-making and related operational tasks, or when its internal staff structure would be affected. Finally, Advocate General Jacobs also concluded that the ECB's anti-fraud procedures pursuant to its Decision would tend to frustrate the effective exercise by OLAF of its investigatory powers, so that the Decision must be struck down.⁹³ The Court plenary judgment of July 10, 2003, written by Judge Antonio La Pergola,⁹⁴ well known for his constitutional expertise, reached essentially the same conclusions as did Advocate General Jacobs, although more briefly and in more general terms.

IV. *THE OLAF JUDGEMENT: THE INTERTWINED ISSUES OF THE CONSTITUTIONAL NATURE OF THE ECB AND ITS INDEPENDENCE*

Undoubtedly, the most important issue of principle involved in the case was that of a possible violation of the indepen-

92. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [1980] E.C.R. I-7155.

93. This article will not deal with this final aspect of the *OLAF* case, nor with a number of procedural issues, such as admissibility, or the issue of proportionality. For discussion of this topic see Odudu, *supra* note 1, at 1078-80, 1083-91, and Reader, *supra* note 1, at 1509.

94. *OLAF*, Case C-11/00, [2003] ECR I-7147, I-7215. Judge Antonio La Pergola served on the Italian Constitutional Court before coming to the Court of Justice, serving as Advocate General from 1995 to 1999 and Judge since then. It is perhaps necessary to note that Court of Justice judgments are written by a Reporting Judge to reflect the views of the entire Court and are not the personal opinion of the author. Obviously, however, a Reporting Judge's opinion will heavily influence the entire Court's final judgment. Former Judge David Edward describes the deliberative process of the Court in formulating its judgment in David O. Edwards, *How the Court of Justice Works*, 20 *EUR. L. REV.* 539, at 555-57 (1995).

dence guaranteed by EC Treaty Article 108 to the ECB. To a considerable degree, this issue was intertwined with a preliminary consideration of the nature and status of the ECB within the constitutional order of the European Community.

A. *The Constitutional Status of the ECB*

The initial premise of the ECB was that it should not be deemed to be simply a “body” within the European Community. Rather, the ECB contended that the EC Treaty itself created the ECB and give it a legal personality distinct from the European Community. Further, the EC Treaty itself provided the ECB with “its own internal decision-making bodies [which] have been granted original powers under the Treaty to adopt legally binding measures.”⁹⁵ The ECB thus emphasized the autonomous policy and regulatory powers of its Governing Council and General Council. Finally, “the ECB is to act independently of the Community institutions in the execution of its tasks.”⁹⁶

Presumably this ECB proposed description of its nature owes considerably to the thesis of Zilioli and Selmayr that the ECB is a “supranational organization” distinct from the European Community.⁹⁷ Without necessarily fully accepting that proposition, if the Court were to accept that the ECB is not legally to be characterized as a “body” or “agency” within the Community, then it would escape coverage under the OLAF Regulation, because the Regulation is expressly stated to apply to Community institutions, agencies and bodies.

Advocate General Jacobs decisively rejected this view of the constitutional nature of the ECB. He began by observing that the Treaty draftsmen had deliberately inserted the Monetary Union provisions within the European Community Treaty, not in a distinct pillar within the Treaty on European Union.⁹⁸ Accordingly, “the ECB forms an integral part of the Community framework.”⁹⁹ For Advocate General Jacobs, the ECB is an organic constituent part of the Community:

95. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [1980] E.C.R. at I-7174, ¶ 55.

96. *Id.*

97. See *supra* notes 52-54 and accompanying text.

98. See A.G. Jacobs *OLAF* Opinion, Case C-11/00, [1980] E.C.R. I-7155, I-7174, ¶ 57.

99. *Id.* at I-7175, ¶ 60.

The ECB is subject to the general principles of law which form part of Community law and promotes the goals of the Community set out in Article 2 EC though the implementation of the tasks and duties laid upon it. It may therefore be described as the Central Bank of the European Community; it would be inaccurate to characterize it, as have some writers, as an organisation which is 'independent of the European Community', a 'Community within the Community', a 'new Community' or, indeed, as something falling outside the notion of a body established by, or on the basis of, the EC Treaty in Regulation No 10763/1999.¹⁰⁰

Dealing with this initial key issue concerning the constitutional nature of the ECB, the Court of Justice more laconically followed the analysis of Advocate General Jacobs, stating that "regardless of the distinctive features of its status within the Community legal order, the ECB was indeed established by the EC Treaty."¹⁰¹ Because the OLAF Regulation by its terms covered all the Community's "institutions, bodies, offices and agencies," it would also encompass the ECB.¹⁰²

Later we will reflect upon the significant consequences of the designation of the ECB as an integral component of the European Community. In passing we should briefly note that the ECB raised two other issues of Treaty interpretation that relate to its status.

First, the ECB argued that its budget, financial resources and expenses were totally autonomous, based upon grants of power under the EC Treaty or the Protocol on the Statute of the ESCB and ECB.¹⁰³ Article 280(4), which granted the Community the legal competence to adopt the OLAF Regulation, expressly authorizes action to combat "fraud affecting the financial interests of the Community." The ECB claimed that its revenue and expenditures are outside "the financial interests of the Community."¹⁰⁴

Certainly this view might be plausible if one accepted the ECB's initial premise of its autonomous character, but becomes

100. *Id.*

101. *OLAF*, Case C-11/00, [2003] E.C.R. I-7147, I-7246, & 64.

102. *Id.* at I-7247, ¶¶ 65-67.

103. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [1980] E.C.R. at I-7189-90, ¶¶ 113-14.

104. *Id.* at I-7189, ¶ 113.

implausible as soon as it is deemed to be a Community organ or body. Advocate General Jacobs observed that Article 280(4) should be construed in a broad sense to cover any financial interests of a Community body,¹⁰⁵ even if there exists “a degree of separation between the finances of the ECB” and the rest of the Community.¹⁰⁶ He concluded that “[s]ince it is a Community body, the financial interests of the ECB are part and parcel of the financial interests of the Community.”¹⁰⁷

The Court agreed with the Advocate General. In its analysis, the Court remarked notably that the ECB “falls squarely within the Community framework”¹⁰⁸ because its basic purpose is to further the objectives of Monetary Union, one of the key Community objectives in EC Treaty, Article 2. For the Court, the financial resources of the ECB represent “a particular and direct financial interest for the Community,” just as those of any other “body, office or agency [which] owes its existence to the EC Treaty”.¹⁰⁹

Secondly, the ECB contended that the OLAF Regulation could not be applied to it because the Parliament and Council had failed to consult the ECB during its drafting in violation of Article 105(4), requiring that the ECB be consulted on any proposed Community act in its field of competence.¹¹⁰ The ECB specifically contended that if the OLAF Regulation should be deemed to apply to it, then the ECB should have been consulted concerning the Regulation’s impact on the ECB’s power to organize its staff rules and other internal affairs.¹¹¹

In Advocate General Jacobs’s valuable analysis:

Article 105(4) EC must be interpreted as applying to proposed measures which are concerned with the issues covered by Article 105(2) EC (monetary policy, foreign exchange operations, management of foreign reserves and payment sys-

105. *See id.* at I-7191-92, ¶¶ 117-20. Advocate General Jacobs expressly rejected the ECB contention that Article 280(4)’s scope should be limited to the Community budget. *See id.* at I-7192, ¶ 120.

106. *Id.* at I-7192-93, ¶ 122.

107. *Id.*

108. *OLAF*, [2003] E.C.R. at I-7254, ¶ 92.

109. *Id.* at I-7253, ¶ 91.

110. *See* EC Treaty, *supra* note 4, art. 105(4), O.J. C 325/33, at 75-76 (2002) (ex Article 105).

111. *See* A.G. Jacobs *OLAF* Opinion, Case C-11/00, [2003] E.C.R. at I-7193-94, ¶¶ 126-27.

tems) and, perhaps, by Article 105(5) and (6) EC (prudential supervision) and Article 106 EC (issue of bank notes and coins).¹¹²

He added that:

The consultation envisaged by that provision aims, in my view, to ensure that the legislature is well informed when it adopts measures relating to subjects of which the ECB has particular knowledge or expertise, in particular, monetary policy. Thus, the involvement of the ECB under Article 105(4) EC seeks to enhance the quality of Community legislation to the advantage of the European polity as a whole; it is not designed to protect the interests of the ECB, or to give the ECB a voice over all measures which are capable of affecting its internal organization.¹¹³

Given this functional limitation of the sense of the phrase, “in its fields of competence,” the legislative adoption of the OLAF Regulation was manifestly too remote from monetary policy to have required ECB consultation.¹¹⁴ The Court approvingly cited the Advocate General’s opinion, noting that the purpose of Article 105(4) is to enable consultation concerning legislation whenever the ECB “by virtue of the specific function that it exercises in the Community framework . . . and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged.”¹¹⁵

B. *The Independence of the ECB*

We turn now to the most prominent issue of the *OLAF* case, namely, the nature and extent of the ECB’s independence. The

112. *Id.* at I-7196, ¶ 137. Advocate General Jacobs buttresses his view by noting that the draft text on monetary union proposed by the Commission in early 1991 to help the Intergovernmental Conference deliberations suggested that the ECB have a right of consultation whenever draft legislation concerned monetary, prudential supervision, banking or financial matters. *See id.* at I-7196, ¶ 138.

113. *Id.* at I-7197, ¶ 140.

114. *Id.* at I-7197, ¶ 141. Advocate General Jacobs added a helpful dictum concerning the value of informal consultation of the ECB, not rising to the level of formal consultation of the ECB Governing Council under Article 105(4), whenever legislative measures might affect the ECB’s internal organization. Noting the possible application of a “principle of institutional balance,” he observed that it would be sufficient if ECB staff would be offered an opportunity to express views before the measure would be adopted—which in fact happened during the drafting of the *OLAF* Regulation. *Id.* at I-7198, ¶ 144.

115. *OLAF*, Case C-11/00, [2003] E.C.R. I-7147, I-7258-59, ¶ 110.

Commission argued, not surprisingly, that the ECB's independence was strictly "functional" ("fonctionnel") in character, limited to achievement of its specific control of monetary policy.¹¹⁶ Investigations to curb fraud fall outside of ECB policy-making. Moreover, the Commission contended that the ECB had not provided any evidence that OLAF investigations of ECB internal practices would cause any effective inhibition of the ECB's policy making or decisional capacity.¹¹⁷

The ECB contended that its Treaty granted independence had an absolute character, enabling it alone to set its internal organization procedures and staff rules, which would include procedural measures to guard against fraud. The ECB asserted that EC Treaty Article 108 required that it be "shielded from all sources of external influence."¹¹⁸ The ECB followed through by contending that OLAF investigations would constitute "external influence" because they might create a risk of pressure upon ECB Governing Council members, thus "jeopardising their independence when taking decisions."¹¹⁹

The ECB added a rather subtle secondary argument concerning financial market risks that might be created by OLAF investigations:

Economic agents, who may not be familiar with the institutional structure of OLAF, might fear that the Commission is given the possibility of influencing the ECB by exercising the extensive powers of OLAF which . . . may be compared to those of a criminal investigation. Thus, the application of Regulation No. 1073/1999 might undermine the confidence of the financial markets in the ECB and in the euro.¹²⁰

Advocate General Jacobs' analysis of ECB independence is considerably more detailed than that of the Court and merits close attention. He began by "consider[ing] the purpose and the essential features" of the Treaty grant of independence to the ECB.¹²¹ He stressed that Article 108's bar to any "influence" on the ECB is with specific regard to "the performance of its tasks," leading to the conclusion that:

116. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [2003] E.C.R. at I-7199, ¶ 147.

117. *Id.* at I-7199-7200, ¶ 147.

118. *Id.* at I-7199, ¶ 146.

119. *OLAF*, Case C-11/00, [2003] E.C.R. at I-7268, ¶ 118.

120. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [2003] E.C.R. at I-7199, ¶ 146.

121. *Id.* at I-7200, ¶ 148.

[T]he independence thus established is not an end in itself; it serves a specific purpose. By shielding the decision-making process of the ECB from short-term political pressures the principle of independence aims to enable the ECB effectively to pursue the aim of price stability and, without prejudice to that aim, support the economic policies of the Community as required by Article 105(1) EC.¹²²

Within this more limited (implicitly functional) view of ECB independence, Advocate General Jacobs endorsed the analytic break down of the nature of ECB independence which the ECB itself proposed. First, the ECB is “institutionally independent,” mandated by the Treaty not to seek or accept instructions from any Community institution.¹²³ The ECB has totally autonomous regulatory and decision-making power within the monetary policy field set in EC Treaty Article 110 (subject, of course, to judicial review).

Secondly, the ECB Executive Board and Governing Council enjoy “a high level of personal independence.”¹²⁴ Executive Board members serve a non-renewable eight year term and national governors at least a five year term. Executive Board members serve a non-renewable eight year term and national governors at least a five year term. Both then have “[s]ecurity of tenure,” because Executive Board members can be removed for “serious misconduct” or incapacity only in a Court of Justice proceeding, and national Governors can be removed in national proceedings only under “[e]qually strict conditions.”¹²⁵ Third, the ECB is financially independent, setting its own budget and obtaining its assets from national central banks, as well as having its own autonomous accounting and audit procedures (the ECB also generates its revenues from its own lending and clearing-house operations, although the Advocate General does not mention this).¹²⁶

After this useful summary, apt to be picked up by future academics in appraising ECB independence, Advocate General Jacobs concluded:

As is evident from this summary, the Treaty and the Statute

122. *Id.* at I-7200, ¶¶ 149-50.

123. *Id.* at I-7200-01, ¶ 152.

124. *Id.* at I-7201, ¶ 153.

125. *Id.*

126. *Id.* at I-7201, ¶ 154.

confer upon the ECB a high level of independence which is equivalent to, or perhaps greater than, the independence of the national central banks which prevailed prior to the reforms undertaken at national level in order to comply with the requirements for entry into the Monetary Union. However, the principle of independence does not imply a total isolation from, or a complete absence of cooperation with, the institutions and bodies of the Community. The Treaty prohibits only influence which is liable to undermine the ability of the ECB to carry out its tasks effectively with a view to price stability, and which must therefore be regarded as undue.¹²⁷

Advocate General Jacobs continued by stressing the democratic accountability of the ECB. Pursuant to EC Treaty Article 113, the President of the Council and a Commission member may participate, without a vote, in Governing Council and General Council sessions, which implies that they “presumably have the right to speak in order to influence, within reasonable limits, the decision-making of the governing bodies of the ECB.”¹²⁸ Indeed, the Council President may even submit a motion for ECB deliberation. The Parliament also “may exercise a degree of influence on the decision-making of the ECB” through its debate on the ECB annual report and its committee sessions held to hear the views of the ECB President or other Executive Board members.¹²⁹

Note that the Advocate General does not hesitate to use the term “influence” to describe the effect that these Treaty-sanctioned Article 113 relationships might have upon the ECB, even though Article 108 of the EC Treaty expressly instructs Community political institutions “not to seek to influence the members of the decision-making bodies of the ECB . . . in the performance of their tasks.”¹³⁰ Advocate General Jacobs concluded by observing that the Treaty grants the Council and the Parliament legislative power in certain sectors that can regulate the subsequent exercise of ECB power in those sectors, e.g., the establishment of substantive and procedural limits for ECB penalties upon financial institutions, or the possible conferral of responsi-

127. *Id.* at I-7202, ¶ 155.

128. *Id.* at I-7202, ¶ 156.

129. *Id.*

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

bilities to the ECB in the sphere of prudential supervision of credit institutions.¹³¹

In view of this analysis, the Advocate General concluded that the ECB concerns about any undue influence upon its policy or decision-making are illusory. He stressed that OLAF itself has been given complete independence of the Commission and that consequently:

[Its] institutional and legal arrangements guarantee OLAF a substantial degree of operational independence although it is set up within the Commission's administrative and budgetary structures. There is therefore in my view very little if any, risk that OLAF could be used by the Commission, or by some other institution or body, as a vehicle for putting political pressure on the members of the governing bodies of the ECB.¹³²

With regard to the ECB concern that financial market "economic operators" might view OLAF investigations of the ECB as implicating undue influence over the ECB, the Advocate General balances this potential risk by noting that:

[O]ther operators might feel reassured to know that, albeit independent, the ECB is subject to the same system of external, specialised and independent control of its financial dealings as other Community institutions and bodies. Indeed, it would seem to me that the reputation of the ECB might suffer considerable damage if accusations of fraud directed at members of its management or staff could not be cleared through an investigation carried out by a body outside the ECB itself.¹³³

More decisively, even if the ECB could demonstrate that OLAF investigations "would reduce market confidence in the ECB to some extent," this would not warrant a finding that the ECB should escape such investigations, because "[t]he ECB [is] subject to the rule of law" which requires it to "conduct its affairs lawfully and without fraud detrimental to the financial interests of the Community. The application of Regulation No 1073/1999 to the ECB aims to, and will in my view, assist the ECB in its

131. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [2003] E.C.R. at I-7202-03, ¶ 157.

132. *Id.* at I-7205, ¶ 165. Advocate General Jacobs described aspects of OLAF's structure that reinforced its operational independence. *Id.* at I-7204, ¶ 163.

133. *See id.* at I-7206, ¶ 170.

efforts to ensure that that obligation is, and is seen to be, respected.”¹³⁴

The Court of Justice’s judgment analyzed the scope of the ECB’s independence in essentially the same manner as did Advocate General Jacobs. Recognizing the importance of the issue, the Court devoted several pages, thirty-two paragraphs in all, to the subject.¹³⁵ The Court initially set out the contentions of the Central Bank, noting in particular the ECB’s concern that OLAF investigations might bring “pressure” on members of the Governing Council or Executive Board, thereby “jeopardizing their independence when taking decisions.”¹³⁶ The Court also observed the ECB’s concern that even the appearance of possible pressure could reduce “the complete confidence of unstable financial markets.”¹³⁷

The Court’s findings began by stressing that “the draftsmen of the EC Treaty clearly intended to ensure that the ECB should be in a position to carry out independently the tasks conferred upon it by the Treaty.”¹³⁸ Then, however, the Court delimited the scope of ECB independence, specifically citing Advocate General Jacobs:

Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute.¹³⁹

The Court’s position can plausibly be read as endorsing the Commission’s contention that ECB independence is “strictly functional and limited to the performance of [its] specific [Treaty assigned] tasks.”¹⁴⁰

The Court expressly rejected any absolutist view of the ECB’s Treaty-granted or independence, declaring that:

[R]ecognition that the ECB has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Com-

134. *See id.* at I-7208, ¶ 174.

135. *OLAF*, Case C-11/00, [2003] E.C.R. I-7147, 7259-68, ¶¶ 113-45.

136. *Id.* at I-7261, ¶ 118.

137. *Id.* at I-7261, ¶ 119.

138. *Id.* at I-7264, ¶ 130.

139. *Id.* at I-7265, ¶ 134.

140. *Id.* at I-7263, ¶ 126.

munity law. The ECB is, on the conditions laid down by the EC Treaty and the ESCB Statute, subject to various kinds of Community controls, notably review by the Court of Justice and control by the Court of Auditors. Finally, it is evident that it was not the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature. . . .¹⁴¹

The Court also observed that the Community legislature has the power to adopt "legislative measures capable of applying to the ECB" whenever the Treaty authorizes them.¹⁴²

Turning specifically to OLAF's exercise of its investigatory power, the Court rejected the ECB contention that such investigations might undermine its independent control of monetary policy. The Court stressed OLAF's independence from the Commission and its limited power to investigate possible "fraud or corruption," rather than to carry out any broader form of financial control.¹⁴³ Finally the Court considered that any "economic operators" that would be "upset" by an appearance of any loss in ECB independence merely suffer from "a lack of information" or fail "to see the real picture."¹⁴⁴

V. REFLECTIONS UPON THE JUDGMENT AND ADVOCATE GENERAL JACOBS' OPINION

Consideration of the analysis undertaken by Advocate General Jacobs and the subsequent reasoning of the Court's judgment suggests to the present author several reflections or comments. The first is that the Court has implicitly, and the Advocate General expressly, rejected an absolutist view of ECB independence rooted in any highly autonomous "Community within the Community" theory of the ECB's nature and status. Secondly, the Advocate General has directly, and the Court implicitly, stressed the ECB's subordination to the rule of law within the Community. Third, both the Advocate General and the Court have defined the independence of the ECB as essentially functional in character, limited to its control of monetary policy and related tasks. They expressly rejected any concern

141. *Id.* at I-7265, ¶ 135.

142. *Id.* at I-7266, ¶ 139.

143. *Id.* at I-7267, ¶ 141.

144. *Id.* at I-7268, ¶ 144.

that OLAF investigations into internal affairs of the ECB pose any genuine risk to the ECB's role in functional monetary policy-making. Fourth, the Advocate General and the Court have provided a useful mode for evaluating when the ECB should have the right to be consulted during a Community legislative process. Finally, Advocate General Jacobs' opinion has promoted the value of legitimate democratic accountability of the ECB, endorsing appropriate, rather than "undue," influence from the EC political institutions.

The first reflection emphasizes the constitutional importance of the *OLAF* judgment. As indicated in the prior discussion concerning the recent debate on the constitutional nature and status of the ECB itself, Chiara Zilioli and Martin Selmayr have advocated an intrinsically autonomous constitutional status for the ECB, essentially "a new supranational organization" within the European Union, a "new Community" associated with but independent of the European Community.¹⁴⁵ Given the expertise of the authors and the strong tradition of respect for central bank autonomy among many members of the academic community, this theory has enjoyed considerable respect, even though vigorously contested by other academic commentators. To some degree, the fact that the detailed provisions governing Monetary Union and the status, powers and duties of the Central Bank were inserted into the text of the EC Treaty and related Protocols, rather than placing them in Community legislation, supports this sort of constitutional analysis.

The Court implicitly rejected this theory when it concluded that the ECB is a body within the European Community and subject to Community law, so that the OLAF Regulation's grant of power to OLAF to execute investigations in any Community body or agency would encompass internal investigations of the ECB.¹⁴⁶ Advocate General Jacobs rejected the theory in strong and clearly expressed terms, worth quoting again:

The ECB is subject to the general principles of law which form part of Community law and promotes the goals of the Community set out in Article 2 EC though the implementation of the tasks and duties laid upon it. It may therefore be described as the Central Bank of the European Community;

145. See *supra* notes 52-56 and accompanying text.

146. See *supra* notes 52-56 and accompanying text.

it would be inaccurate to characterize it, as have some writers, as an organisation which is 'independent of the European Community', a 'Community within the Community', a 'new Community' or, indeed, as something falling outside the notion of a body established by, or on the basis of, the EC Treaty in Regulation No 10763/1999.¹⁴⁷

The Court's judgment and Advocate General Jacobs' opinion accordingly place the ECB "squarely within the Community framework"¹⁴⁸ and legal order in a constitutional sense. This certainly agrees with the prevailing and most commonsense view of the status of the ECB.¹⁴⁹ Properly analyzed, the ECB is a Community organ, regardless of its unique power in monetary policy, and not some supranational autonomous body created by a direct cession of sovereignty from the Member States by terms of the EC Treaty. Although the ECB does derive its mandate, goal, structure and fundamental role from express Treaty provisions, rather than from Council and/or Parliament and Council legislation, other Treaty provisions clearly enable Community legislation or guidelines that provide structure or content to certain ECB operations or regulate the manner in which the ECB carries out operations.¹⁵⁰

The ECB itself, however, may well have begun to consider that it possessed the absolutist autonomy argued for in the "new supranational organization" or "Community within a Community" theory. That would be pernicious, because, as we shall further observe in discussing the democratic accountability of the Central Bank, it is vital that the ECB recognize that its monetary policy-making and regulatory powers should be exercised within the context of the Community political and legal structure.

In particular, even though under Article 105 the ECB's "primary objective [is] to maintain price stability," that Article also

147. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [2003] E.C.R. I-7155, I-7175, ¶ 60.

148. *OLAF*, Case C-11/00, [2003] E.C.R. at I-7254, ¶ 92.

149. Jean-Victor Louis, the eminent Belgian professor and former General Counsel to the Bank of Belgium, endorses Advocate General Jacobs' analysis, and the rejection of the theory advocated by Zilioli and Selmayr, in Jean-Victor Louis, *The Economic and Monetary Union: Law and Institutions*, 41 *COMMON MKT. L. REV.* 575, 599-602 (2004). He cites a major lecture by Rene Smits on June 4, 2003 as also situating the ECB as an organ within the Community. *Id.* at 600. Two of the case notes on the *OLAF* judgment applaud the rejection of the Zilioli and Selmayr thesis. See Lavranos, *supra* note 1, at 119-21; see also Odudu, *supra* note 1, at 1080-83.

150. See *supra* note 23 and accompanying text.

mandates the ECB to “support the general economic policies of the Community.”¹⁵¹ The Community political institutions—Parliament, Council, and Commission—naturally determine these “general economic policies.” We may yet see a certain evolution in the determination of the proper stress to be placed on “price stability” versus an economic policy concentration on achieving a better rate of GDP growth or a reduction in unemployment.¹⁵² The Euro-group, composed of the Finance Ministers of the Euro-zone States,¹⁵³ headed by their newly-chosen President, Prime Minister Junckers of Luxembourg,¹⁵⁴ would like to achieve some form of mutual consultation or collaboration with the ECB, linking the Euro-group’s coordination of its various States’ economic policies with the ECB’s control of monetary policy. The ECB’s reaction has been to emphasize its total autonomy.¹⁵⁵ We may yet see another “turf battle” arising out of some form of confrontation between the ECB and the Euro-group, especially if the draft Constitution or some other Treaty amendment should grant the Euro-group the power to adopt legally binding decisions or guidelines in the field of economic coordination.

Secondly, Advocate General Jacobs’ emphasis on the ECB’s subordination to “the rule of law,” implicitly followed in the

151. EC Treaty, *supra* note 4, art. 105, O.J. C 325/33, at 75 (2002).

152. The author has previously expressed the view that the Treaty of Amsterdam’s amendment of the EC Treaty to insert a Title on Employment, including an express mandate in Article 127(2) that “[t]he objective of a high level of employment” must be considered in all Community policies, might, and perhaps should, impact the ECB’s control of monetary policy within the Euro-zone. See Goebel, *supra* note 9, at 299-300.

153. The European Council meeting at Luxembourg in December 1997 authorized the Ministers of Finance of the States participating in the Euro-zone to meet informally within the Ecofin Council to discuss policy issues concerning them, but without any power to take legally binding decisions, which remains solely in the competence of the Ecofin Council. See E.U. BULL., no. 12, at 18 (1997). These Euro-zone Ministers of Finance are now commonly known as the Euro-group. It is worth noting that the draft Treaty establishing a Constitution for Europe would have significantly enhanced the role of the Euro-group Finance Ministers by granting them the power to adopt legally binding measures and economic guidelines within the Euro-zone. A Protocol would have authorized the informal Euro-group meetings and mandated the election of a President for the Euro-group for a term of two and a half years.

154. Optimistically anticipating the eventual ratification of the draft Constitution, in August 2004 the Euro-group Finance Ministers chose Prime Minister Juncker of Luxembourg, who also acts as his State’s Finance Minister, to serve as their initial President, presumably until the end of 2006.

155. See Ralph Atkins & Mark Schieritz, *ECB Warns Finance Ministers It Will Retain Sole Control of Euro*, FIN. TIMES (London), Sept. 27, 2004, at 6.

Court judgment, is worth underlining. This links directly to the status and role of the ECB discussed above.

Advocate General Jacobs addressed this topic twice. Initially, he dealt with the ECB contention that its Treaty-granted status is so distinct that the OLAF Regulation should not be considered to apply to it. The Advocate General replied that the Treaty draftsmen deliberately rejected the approach of making Monetary Union a separate and distinct pillar under the Treaty on European Union, but rather integrated it within the EC Treaty.¹⁵⁶ In his view, it follows that “the ECB is—in accordance with the principle of the rule of law enshrined in Article 6 of the Treaty on European Union—bound by Community law. . . .”¹⁵⁷ Accordingly, “[t]he ECB is subject to the general principles of law which form part of Community law.”¹⁵⁸

Later, Advocate General Jacobs makes use of this fundamental principle when rebutting the ECB contention that market operators might be concerned about any apparent diminution in ECB independence due to an OLAF investigation. Even assuming that an investigation “would reduce market confidence” (certainly not an implausible hypothesis), the Advocate General concludes this to be decisively outweighed because the ECB is “subject to the rule of law” and must “conduct its affairs lawfully and without fraud.”¹⁵⁹

This stress on the subjection of the ECB to the “rule of law” may well prove a valuable precedent in other contexts. As noted above in considering the nature of judicial review of ECB acts, the Court may well have occasion to examine the ECB’s level of discretion and obligation to provide a reasoned basis for its decisions in a regulatory context.¹⁶⁰ Also, in the long run, there may arise other “turf battles” between the ECB and Community political institutions, or the ECB and national governments or national central banks, in which the Court will have to ensure that the law is observed. It must always be remembered that even though the ECB is an extremely powerful technocratic body, its

156. *See supra* text accompanying note 98.

157. A.G. Jacobs *OLAF* Opinion, Case C-11/00, [2003] E.C.R. I-7155, 7174-75, ¶ 59.

158. *Id.* at I-7175, ¶ 60.

159. *Id.* at I-7208, ¶ 174.

160. *See supra* text accompanying note 68.

policies, acts and decisions are circumscribed by its subjection to the rule of law within the Community.

Third, Advocate General Jacobs and the Court manifestly limit the independence of the ECB to its functional or operational role in the determination of monetary policy, conduct of exchange rate operations, supervision of the Euro, promotion of payment systems and related matters.¹⁶¹ These are the “tasks” which the Treaty authorizes the ECB to execute in Articles 105 and 106.¹⁶² Accordingly, the independence accorded by Article 108 to the ECB is limited to the mode in which the ECB executes these tasks.¹⁶³ This teleological analysis of the ECB independence may not eliminate the risk of future debate concerning the demarcation of ECB independence,¹⁶⁴ but it certainly achieves considerable and valuable clarity.

Advocate General Jacobs’ analysis of ECB independence into the categories of institutional independence of its bodies, personal independence of its members, and budgetary and financial independence¹⁶⁵ is apt to be followed by academic commentators. Rene Smits and other earlier commentators analyzed ECB independence into somewhat different structural categories but are largely in accord.¹⁶⁶

Further, the Court’s definitive rejection of the ECB concern that OLAF investigations could somehow pose a risk to its monetary policy-making or regulatory decision-making merits some reflections. Neither Advocate General Jacobs nor the Court gave much credence to the likelihood that an anti-fraud investigation

161. See *supra* text accompanying notes 121-122, 138-139.

162. See *supra* note 20.

163. See *supra* text accompanying note 122.

164. For example, the Court of Justice might have to determine the degree of ECB independence in the conduct of foreign exchange operations under EC Treaty Article 105(2) in the event that the Council should decide to “formulate general orientations for exchange rate policies” pursuant to Article 111(2). This is by no means a totally unlikely hypothesis—suppose, for example, that at a time when the Euro rises sharply in value in comparison to the US Dollar, the Ecofin Council wants the ECB to intervene on the foreign exchange markets to moderate or retard the Euro’s rise, while the ECB Governing Council would prefer a non-intervention policy.

165. See *supra* text accompanying notes 123-126.

166. See AMTENBRINK, *supra* note 9, at 18-22 (categorizing ECB independence as institutional, functional, organizational and financial); see also SMITS, *supra* note 9, at 162-68 (analyzing ECB independence into categories of institutional, personal, functional and financial).

could ever pose such a risk.¹⁶⁷

More recent news developments in two national arenas suggest that the ECB might have some justification for its view. First, in early 2004 Ernst Welteke, President of the Bundesbank, was severely criticized following media revelations of his acceptance of a luxury hotel stay for four nights, costing US\$9330, paid for by a commercial bank.¹⁶⁸ Mr. Welteke contended that acceptance of the hotel accommodations during a bank-sponsored conference was not inappropriate.¹⁶⁹ The media revelations led to an investigation by Frankfurt prosecutors. When Welteke resigned, he asserted that “[t]he independence of the Bundesbank” had been “flouted” by pressure placed upon him to resign.¹⁷⁰ Note that the investigation, coupled with popular discredit in the media and pressure from the German Finance Ministry, induced Welteke to resign, even though the Bundesbank itself had not considered there were adequate reasons for Welteke’s dismissal.¹⁷¹ One can certainly hypothesize that at a time when a central bank governor might be pursuing unpopular monetary policies, the threat of an investigation for relatively minor financial misconduct or breach of internal administrative rules could be used to exert pressure for a shift in monetary policies.

An even better example of a governmental use of an investigation to try to influence a central bank is currently occurring in Poland. As a consequence of the merger between a large Italian bank, Unicredito, and a German bank, HVB, Unicredito would normally take over control of an HVB banking subsidiary in Poland. The recently elected populist government in Poland has vigorously opposed this, fearing that the Unicredito acquisition of the Polish bank would seriously augment the already high level of foreign control over the Polish banking sector.¹⁷² The Polish central bank exercises bank supervision powers. Its President Balcerowicz declared that the Banks’ Banking Supervisory

167. See *supra* text accompanying notes 132, 143.

168. See Bertrand Benoit, *Bundesbank Is Losing Last of Its Mystique*, *FIN. TIMES* (London), Apr. 8, 2004, at 10.

169. See *id.*

170. See Katrin Bennhold, *Bundesbank Chief Resigns Amid Scandal*, *N.Y. TIMES*, Apr. 17, 2004, at C3.

171. See *id.*

172. See Jan Cienski, *UniCredit Broke Polish Law, Says Treasury Minister*, *FIN. TIMES* (London), Mar. 8, 2006, at 12.

Commission would execute a totally independent review of the bank acquisition. The Polish government summoned Balcerowicz to Parliament to explain his conduct of the Commission's initial proceedings.¹⁷³ The government then announced that a Parliamentary inquiry would investigate the role and policies of the central bank ever since its creation.¹⁷⁴ This was widely interpreted as a barely hidden effort to exert pressure on President Balcerowicz and the central bank with regard to its review of the Unicredito's indirect acquisition of a Polish bank. Jean-Claude Trichet, President of the ECB, warned with "great, great gravity" that Polish central bank independence was of "extreme importance."¹⁷⁵ A Financial Times editorial even urged the Polish government, "Do Not Browbeat Your Central Bank, Warsaw."¹⁷⁶ Fortunately, the most recent news reports indicate that the Polish government and Unicredito appear to have arranged a compromise solution, but it is still uncertain what will happen to the Parliamentary inquiry.¹⁷⁷

If these instances tend to show that outside investigations could in particular instances be employed to exert influence on central bank decision-making, does that invalidate the analyses made in the Court judgment and Advocate General Jacob's opinion? No, because both stressed that OLAF was organically and functionally independent of the Commission, the Parliament and Council.¹⁷⁸ This demonstrates the wisdom of the initial Commission Decision creating OLAF as an absolutely independent body. It is certainly implausible that OLAF's executive board would have any motive to modify ECB policy or decision-making by undertaking, or threatening to undertake, an investigation. Hypothetically, however, if the Parliament should open a committee investigation into some allegations of misconduct by an ECB Executive Board member or members at a time when

173. See Jan Cienski, *Polish Conflict on Bank Merger Worsens UniCredit*, FIN. TIMES (London), Mar. 11, 2006, at 3.

174. See Ralph Atkins et al., *Europe Frets as Poland Heads Down Populist Path*, FIN. TIMES (London), Mar. 15, 2006, at 6.

175. Jan Cienski, *Polish Bank Chief Hits Back at Government Protectionism*, FIN. TIMES (London), Mar. 14, 2006, at 4.

176. Editorial, *Do Not Browbeat Your Central Bank, Warsaw*, FIN. TIMES (London), Mar. 20, 2006, at 12.

177. See Mark Landler, *Poland Averts Clash with Europe Over Italian Bank Deal*, N.Y. TIMES, Apr. 6, 2006, at C6.

178. See *supra* text accompanying notes 132, 143.

the Parliament's monetary committee is manifestly unhappy with current ECB monetary policies, the situation might be different. The coincidence in timing would raise a legitimate concern that the investigation might be motivated by a desire to pressure the ECB into modifying its policies.

Fourth, Advocate General Jacobs, followed by the Court, has provided useful guidance in determining when the ECB ought to be consulted during a Community legislative process. The record indicates that the ECB has indeed been properly consulted since 1998 whenever the Council has adopted measures relating either to Monetary Union or the introduction of the euro currency or coins.¹⁷⁹ The *OLAF* case thus represents the first "turf battle" in this context.

Although it is not particularly likely that the issue will arise again, the guidelines suggested by Advocate General Jacobs may well help to settle any debate between the Council and the ECB during the course of legislative drafting, thereby avoiding any Court proceeding. If, for example, a draft legislative measure in the financial sector were to limit or curb the prudential supervision over banks exercised by national central banks there might be some uncertainty whether the ECB ought to be consulted because of some indirect impact of the draft legislation upon the operations of the European System of Central Banks. Until the ECB actually has been given the power of prudential supervision of banks within the Euro-zone (which the Treaty authorizes the Council to grant to the ECB,¹⁸⁰ but without any Council action to date), the field of prudential supervision of banks is not within the ECB's competence. Hence, under Advocate General Jacobs' analysis, the ECB would not have to be consulted.

The final reflection to be made is that Advocate General

179. *See, e.g.*, the references to the ECB opinions obtained in the legislative procedure leading to the adoption of Council Regulation No. 2532/98 concerning ECB sanctions, *supra* note 67; *see also* Council Regulation No. 1338/2001, O.J. L 181/6 (2001) (adopting policies protecting the euro against counterfeiting); European Parliament and Council Regulation No. 2560/2001, O.J. L 344/13 (2001) (adopting rules to govern the transfer of money across Member States). Indeed, one might contend that the Regulation on cross-border Euro payments concerned only financial operations within the internal market, so that formal consultation of the ECB might not even have been compulsory. Of course, if the ECB had not been consulted, it might have challenged the procedure under Article 230 as a violation of its prerogatives. EC Treaty, *supra* note 4, art. 230, O.J. C 325/33, at 126 (2002).

180. EC Treaty, *supra* note 4, art. 105(6), O.J. C 325/33, at 76 (2002).

Jacobs has promoted the concept of the proper democratic accountability of the ECB. The Court of Justice did not have occasion to deal with this topic.

Although the ECB has an extraordinary level of autonomy in its control of monetary policy, it is by no means exempt from democratic accountability¹⁸¹—the obligation to explain and perhaps defend its actions and views to the political institutions, namely the Commission, the Ecofin Council and particularly the Parliament. This was foreseen early in the planning for EMU. The Delors Report mentions the need for modes of accountability immediately after its coverage of independence.¹⁸² The Commission in a March 1990 report urged that the central monetary body must be “democratically accountable [as] a necessary complement to its independence in order to make its policies acceptable to the public at large.”¹⁸³

What of the Parliament? On April 2, 1998, Parliament adopted a prominent resolution on the democratic accountability of the ECB.¹⁸⁴ Parliament stressed that “the independence of the future ECB will only meet with public acceptance if the ECB enjoys a high degree of legitimacy [which requires] full accountability of the ECB for its actions.”¹⁸⁵ The Parliament further noted that such accountability was essential to balance the independence of the ECB, which goes further than that of any prior central bank.¹⁸⁶

Even commentators who have strongly endorsed the highest level of independence for the ECB have recognized the need to balance this with democratic accountability. Thus, Rene Smits urged that the ECB should be subject to accountable independence, particularly in its relations with the Parliament.¹⁸⁷ Even Zilioli and Selmayr accepted that it is appropriate for the ECB to

181. See generally AMTENBRINK, *supra* note 9 (presenting the most detailed coverage of this topic, making an analysis of different aspects of accountability as such, and providing a comparative study of all leading central banks as well as the ECB).

182. DELORS REPORT, *supra* note 11, at 26-27.

183. European Commission, Working Paper on Economic and Monetary Union: Economic Rationale and Design of the System (Mar. 1990), summarized in E.C. BULL., no. 3, at 8-9 (1990).

184. See European Parliament Resolution on Democratic Accountability in the Third Phase of EMU of 2 April 1998, O.J. C 138/177 (1998).

185. *Id.* at 177, ¶ C.

186. See *id.* at 178, ¶ 4.

187. See SMITS, *supra* note 9, at 169.

strive to “promote transparency and accountability in its daily work,” notably citing the ECB’s voluntary appearance before Parliamentary committees every calendar quarter to report on ongoing monetary policy.¹⁸⁸

Academic commentators who are particularly disturbed by what is called the “democratic deficit” of the Central Bank (as I am) place even more stress on the necessity for strong forms of democratic accountability, particularly to the Parliament as the elected representative of the people.¹⁸⁹ Early on, Professors Gormley and de Haan forcefully contended that the ECB was not adequately subject to a high level of democratic accountability in order to justify its independence, stating “that the democratic accountability of the ECB is poorly arranged in comparison” to that of other central banks.¹⁹⁰ In their reply to the views of Zilioli and Selmayr, Professors Amttenbrink and de Haan contended that the “relationship between the democratically elected government and the central bank translates into a principal-agent relationship.”¹⁹¹ Accordingly, they argued that “delegation of powers to non-elected officials can only be acceptable in a democratic society if central banks are one way or another accountable to democratically elected institutions.”¹⁹²

The Central Bank itself has not denied the desirability of democratic accountability. To the contrary, its spokesmen, notably its initial President Duisenberg, have claimed that it strives for accountability and transparency.¹⁹³ Otmar Issing, the Executive Board member most noted for monetary expertise, has even claimed that the ECB is among the most transparent of all central banks, highly accountable to the Community, political institutions and the public, especially the financial sector.¹⁹⁴

188. See Zilioli & Selmayr, *supra* note 50, at 641-42.

189. See Goebel, *supra* note 9, at 294-95.

190. De Haan & Gormley, *supra* note 43, at 343, 352-53.

191. Amttenbrink & de Haan, *supra* note 59, at 66.

192. *Id.* at 73.

193. See Willem F. Duisenberg, Presentation of the ECB’s Annual Report 1998 to the European Parliament (Oct. 26, 1999), available at http://www.ecb.int/press/key/date/1999/html/sp991026_1.en.html. In this initial annual report, President Duisenberg devoted considerable space to describing the ECB modes of providing information to Parliament and the public under the heading, “Accountability and Transparency of the ECB.”

194. See Otmar Issing, *The Eurosystem: Transparent and Accountable or Willem in Euro-land?*, 37 J. COMMON MKT. STUD. 503, 505-06 (1999).

Nonetheless, those concerned about this issue may well feel that the ECB is strongly motivated to provide rapid and reliable information about its monetary policies, but not particularly enthused to receive, or apt to reflect earnestly about viewpoints or advice provided to it. In one famous exchange, after Oskar La Fontaine, then the German Minister for Economics and Finance, had urged that ECB monetary policy be more designed to promote growth and employment, President Duisenberg responded by saying that “[i]t’s normal for the political side to give suggestions or opinions, but it would be abnormal if these suggestions were listened to.”¹⁹⁵ Indeed, in reading the transcripts of the quarterly presentations made by Presidents Duisenberg or Trichet to the Parliament, one may well have the feeling that they answer questions, but do not listen sufficiently to the MEPs’ views when stated, or when they are implicit in the questions.

Within this context, Advocate General Jacobs’ observations on the proper dimension of the democratic accountability of the ECB take on considerable importance. Given EC Treaty Article 108’s interdiction of any “influence” on the ECB by Community political institutions, it may be hard in practice to draw the line between permissible advice and commentary and impermissible pressure.

Advocate General Jacobs effectively endorses legitimate “influence” by the Council President or a Commission member (usually the Commissioner responsible for the Economics portfolio) when they attend the ECB Governing Council sessions, as well as by MEPs during hearings of the ECB President or other representative.¹⁹⁶ Even if the views or comments are intended to affect or modify ECB decision-making, he considers them to be appropriate.

Advocate General Jacobs’ recognized expertise in legal analysis may thus serve to buttress the views of academic and media commentators who stress the desirability of greater influence upon the ECB by Community political institutions (or by the Euro-group of Ministers of Finance of Euro-zone States, to the extent it has acquired a customary status in coordinating economic policy among those States), and the desirability of a

195. See Edmund L. Andrews, *Hard Money for a Softer Europe; Leftist Politics Complicates the Job of the Euro’s Banker*, N.Y. TIMES, Nov. 5, 1998, at C1.

196. See *supra* notes 128-130 and accompanying text.

greater willingness of ECB members to listen with appropriate respect to these views.¹⁹⁷ The line between “due” and “undue” influence should, and perhaps may be shifted a bit in the direction of enhanced democratic accountability.

CONCLUSION

This Article’s primary purpose has been to focus attention on aspects of the *OLAF* judgment, and Advocate General Jacob’s opinion, that have advanced understanding of the constitutional nature of the ECB and of the parameters of its independence. In the academic study of Community law, Monetary Union is all too often viewed as the preserve of specialists—usually economists or political scientists—without any significant interest to a broader audience. The *OLAF* judgment merits wider attention for its constitutional features, not merely its operational consequences for the ECB.

The Article’s secondary objective, of course, has been to focus attention on the skill exhibited by a distinguished Advocate General, Francis Jacobs, breaking ground in a field remote from those in which he has acquired a reputation for his legal expertise. His excellent analysis in the *OLAF* proceeding not only greatly benefited the Court, but provides a valuable source of reflection and inspiration for academic commentators.

197. See Amtenbrink & de Haan, *supra* note 59, at 72-76.