

'ACCOUNTABLE INDEPENDENCE' OF THE EUROPEAN CENTRAL BANK:

SEEING THE LOGICS OF TRANSPARENCY

Deirdre Curtin*

Abstract:

The ECB emerged from the financial crisis as not only as the institutional 'winner' but also as the most central - and powerful - supranational institution of our times. This article challenges the so-called 'accountable independence' of the ECB across the range of tasks it carries out. Citizens 'see' the ECB today especially for its anti-austerity role and its involvement as part of the troika and otherwise in the economic decision making of troubled Member States. Far from ECB monetary policy heralding a 'new democratic model' the ECB today suffers from a clear deficit in democracy. In between the grandiose concept of ECB 'independence' and the more performative ECB 'accountability' lies 'transparency'. Across the range of ECB practices there is a need to take the related concepts of 'transparency' and of (democratic) 'accountability' more seriously, both in conceptual terms and in their relationship to one another.

I. Introduction

'Seeing' the European Central Bank (ECB), a notoriously secretive and defensive institution, is not only a matter of newspaper reports, press conferences, formal powers and evolving practices, institutional and otherwise. It also crucially depends, for analysis, on the public availability of information. On the outside (much) more is known about the ECB and its operations than was previously the case. This is due to a combination of leaked information, parliamentary enquiries, Ombudsman activity and court cases. There are clear legal limits however. The ECB itself is moreover not only passively seen by others but also actively expresses voice through its own 'words'. Those words may be expressed in its annual reports, in speeches made by its President or members of its Executive Board (publicly and to parliaments), in interviews or speeches by members of its Governing Committee (largely

* Professor of European Law, European University Institute, Florence. Part of the research enabling this article was carried out while a Fellow at the *Wissenschaftskolleg* in Berlin (2014-2015). A series of interviews were held at the ECB in Frankfurt during 2015 and I am grateful to the ECB and its services for the information provided at that time. Earlier versions of this paper were presented at workshops in Berlin, Amsterdam, Paris, Salzburg and Florence in 2015 and 2016 and I am grateful to the participants for very helpful comments. I have greatly benefitted from further discussions with Vigjilence Abazi, Fabian Amtenbrink, Madalina Busuioc, Dieter Grimm, Maarten Hillebrandt, Claire Kilpatrick, Ida Koivisto, Paivi Leino, Tatevik Manchuryan, Albert Meijer, Christoph Möllers, Christy Petit, Uwe Puetter, Marijn van der Sluis, Agnieszka Smolenska, Bruno de Witte and Chiara Zilioli. I am very grateful to Silvia Steininger and also to Michal Krajewski for excellent research and editing assistance. Any errors or inaccuracies are only mine.

Presidents of national central banks). The discretion it enjoys over what to release, when and how is reinforced in the Treaty and in its own internal rules. The ECB enjoys by dint of precise Treaty formulation formal 'public access-free' status that can only be lifted by changing the Treaty.¹ The ECB's internal rules on the classification of documents further reinforce zones of secrecy and its autonomy in deciding what to release, to whom and when.

An often overlooked additional element in analysing the ECB is what may be termed its 'double government'.² This term refers to the unquestionably important role played by ECB economists and lawyers in giving voice both in terms of policy substance and economic analysis and in terms of its nature as an independent and (to some extent) autonomous institution. The 'words' used by the staff economists in particular are well known and often referred to by other economists. Less well known but particularly informative are the observations made by the Legal Service of the ECB before the CJEU in Luxembourg in a series of cases brought either by other institutions or by private citizens (seeking access to its documents). These observations are not publicly available however - not even long after the case was decided.³ Precisely in the wording used in these observations one can see a new actor on the European stage long in denial of its status and the formal application of general horizontal rules of the EU. Through on-going scholarship of its (leading) in house lawyers and through arguments made behind closed doors in Luxembourg, the case is made for an ECB that is not only visibly 'independent' (of national political influence) but also rather 'autonomous' in its exercise of its functions.⁴ The ECB lost the OLAF battle in 2003⁵ but not the war. The financial crisis in 2008 and the highly distinctive body of normative sources created or developed since then⁶ gave the ECB new - and incremental - ways of claiming autonomy in practice.

The ECB emerged not only as the institutional 'winner' in a variety of senses from the financial crisis but also as the most central - and powerful - supranational institution of our

¹ Article 15 TFEU only applies to ECB and CJEU 'documents of an administrative nature' and not more generally.

² See, Peter Conti-Brown, *The Power and Independence of the Federal Reserve* (Princeton University Press 2016) 84 *et seq.*

³ The ECB eventually provided me with a number of legal observations by the ECB in long-finished cases. This raises a more general point of judicial transparency in 2017: why should observations made by (all) public institutions and Member States not be immediately publicly available?

⁴ See in general, Barbara Dutzler, *The European System of Central Banks: An Autonomous Actor? The Quest for an Institutional Balance in EMU* (Springer 2003).

⁵ Case C-11/00 *Commission v ECB* [2003] ECLI:EU:C:2003:395. See too an earlier article arguing the ECB's case by (also) the (at that time) Deputy General Counsel at the ECB: Chiara Zillioli and Martin Selmayr, 'The European Central Bank: An Independent Specialized Organization of Community Law', (2000) 37 CML Rev 591-643.

⁶ For a very detailed and helpful analysis see Claire Kilpatrick, 'Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis: ECB Crisis Management and the Sovereign Debt Loans', in L Azoulay and M Cremona (eds), *EU Legal Acts: Challenges and Transformations* (forthcoming, 2017).

times. In response to the sovereign debt crisis, the ECB adopted non-standard measures reaching beyond the traditional scope of monetary policy.⁷ The Court of Justice gave its blessing to this practice,⁸ *de facto* broadening the ECB's hitherto narrowly defined constitutional mandate. In parallel, the ECB has been given new and assumed tasks with regard to macro and micro prudential supervision, emergency liquidity assistance and negotiating bailout programs. All of this has increased its discretionary power – unmitigated by the light-touch legality review as prescribed by the Court⁹ – amplifying concerns about the ECB's democratic deficit. Under President Draghi the ECB has for example kept on making use of some of its powers in ways that provide it with leverage beyond the concrete reasons why a specific power was originally granted to the ECB. This has clearly been the case with emergency liquidity assistance to Greek banks.¹⁰

Given the expansion of its powers, it comes as no surprise that the ECB has become a key object of study both for legal scholars and for those interested in evolving European politics more broadly.¹¹ My aim is to contribute to the existing literature by putting (aspects of) the institutional response to the financial crisis of its so-called 'accountable independence', first coined in this law journal in the early halcyon days of the ECB.¹² From today's perspective the idea that ECB monetary policy heralded a 'new democratic model' seems unduly simplistic, falling into the realm of wishful thinking. What needs more appreciation is the fact that in between the grandiose concept of ECB 'independence' and the more performative ECB 'accountability' lies 'transparency'. My argument is that both 'transparency' and 'accountability' need to be taken more seriously, both separately and in relation to one another. As the 2016 report of the Irish parliamentary enquiry into the banking crisis shows, it is precisely the lack of transparency coupled with the overly defensive attitude of the ECB and its (former) Presidents and Governing Council that very largely 'cause' the democratic deficit from which it is considered to suffer.¹³ That is what is

⁷ For instance the Outright Monetary Transactions (OMT program).

⁸ See Case C-62/14, *Gauweiler* [2015] ECLI:EU:C:2015:400.

⁹ See Case C-62/14, *Gauweiler*, para 68 and previous case-law cited therein. See also Case C-62/14 (opinion of AG Cruz Villalón), *Gauweiler* [2015] ECLI:EU:C:2015:7, para 111.

¹⁰ See further, Fitzpatrick, (n.6).

¹¹ See, for example, Thomas Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' (2013) 50 CML Rev 1579-1620; Daniel Wilsher, 'Ready to do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis' (2013) 15 Cambridge Yearbook of European Legal Studies 503-536; Dermot Hodson, 'De Novo Bodies and the New Intergovernmentalism: The Case of the European Central Bank' in C Bickerton, D Hudson and U Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015) 264-285. See, more generally, Martin Sandbu, *Europe's Orphan: The Future of the Euro and the Politics of Debt* (Princeton University Press, 2015).

¹² Paul Magonette, 'Towards 'Accountable Independence'? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model' (2000) 6 European Law Journal 326-340, 330.

¹³ See the (Irish) Joint Committee of Inquiry into the Banking Crisis, *Final Report* (Vol. 1., January 2016, , 356) <<https://inquiries.oireachtas.ie/banking/wp-content/uploads/2016/01/02106-HOI-BE-Report-Volume1.pdf>> accessed 13 July 2016.

seen from the perspective of national parliamentary democracy – a realm to which the ECB considers it owes ‘no accountability’.¹⁴ Does ECB transparency as it is interpreted by the ECB in 2016 suggest ‘a new paradigm of accountability’¹⁵ in the words of its top lawyer? The stakes are not small and the issue is hugely salient for the future of the EU in general and the Eurozone in particular (even more so with the political vista of further intensification and/or differentiation after the Brexit referendum result).

II. ECB Transparency as Communication

A. ‘Independent Accountability’ : Mind the Gap

One of the central challenges recognised in the scholarly literature on the ECB from the very beginning was the need to strike a balance between independence on the one hand and accountability on the other. Unlike other institutional contexts in the EU (e.g. for ‘independent’ agencies¹⁶) this balancing has not traditionally been seen as a catch 22 for the ECB. The literature more generally recognises that accountability and independence are not at all contradictory; quite the opposite in the sense that they can and should co-exist.¹⁷ As Zilioli, now the ECB chief legal advisor, put it pre-crisis, they are ‘complementary instruments for democracy.’¹⁸

As regards the specific accountability of the ECB vis-à-vis the EP, the Treaty stipulates a limited type of accountability in the form of a monetary ‘dialogue’.¹⁹ Magnette qualified these rules and the emerging empirical practices - already some 16 years ago - as revealing what he termed a new kind of democratic model emerging in the EU, namely the model of ‘accountable independence’.²⁰ This model in his view is based on the influence exerted by MEP’s in particular on central bankers rather than through traditional parliamentary

¹⁴ Except in the context of the specific provisions of the SSM regulation, Art. 21, see further below.

¹⁵ Chiara Zilioli, ‘The Independence of the European Central Bank and its New Banking Supervisory Competences’ in D Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (OUP 2016) 125-179, 132.

¹⁶ Madalina Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’ (2009) 15 *European Law Journal* 599-615; Paul Craig, *EU Administrative Law* (OUP 2012) 140.

¹⁷ Busuioc (n 15) 614. See, more generally, Giandomenico Majone, ‘Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe’ (1994) EUI Working Papers in Political and Social Sciences 1994/3.

¹⁸ Chiara Zilioli, ‘Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy? The Specific Case of the European Central Bank’ in G Vandersanden (ed), *Mélanges en hommage à Jean-Victor Louis* (Editions de l’Université de Bruxelles 2003) 395-422.

¹⁹ Article 284(3), second subparagraph, TFEU.

²⁰ Lastra discussed the notion of ‘accountable independence’ even earlier – in her 1992 publication ‘The Independence of the European System of Central Banks’ (1992) 33 *Harvard International Law Journal* 475-519, 481.

constraints. As a spin off, it may include making central bankers more sensitive to submitting their decisions to public debates, thus creating potentially more responsiveness.²¹ In terms of evolving political accountability relationships, the interaction of the ECB with the EP has grown and intensified over the years.²² Recent empirical work has shown some new evidence that it plays a significant role in informing and involving members of parliament and their constituencies.²³

Be that as it may, monetary dialogue is still a flawed form of ‘accountability’ given the fact that ‘parliaments are in an institutionally weak position to hold a central bank accountable.’²⁴ Monetary dialogue with the EP moreover very largely ignores the realities of the more ‘political’ involvement by the ECB in policies with considerable redistributive implications – debt assistance and financial and policy conditionality. Adopting - in 2016 - a holistic approach to the ECB as an institution of the EU one must take into account also the new (banking supervision) and the concealed (troika input and more) elements. Citizens ‘see’ the ECB today especially for its anti-austerity role and its involvement as part of the troika and otherwise in the economic decision making of troubled Member States. Images of burnt out cars and thousands of anti-austerity protestors from all over Europe demonstrating in front of the ECB’s glossy new building in Frankfurt²⁵ is after all not the kind of political and public attention one normally associates with central banks or with expert based institutions more generally.

Transparency is a buzzword of apparently global reach. Some authors even claim ‘the transparency turn’ has turned transparency into a ‘global norm’.²⁶ The very word transparency connotes visibility and the ability to see through; it implies a subject seeing as well as the object being seen. In this sense, it is a two-way street. In the words of Koivisto, ‘a

²¹ Magonette (n 12) 326.

²² On the evolving EP-ECB monetary dialogue, see Sylvester Eijffinger and Edin Mujagic, ‘An Assessment of the Effectiveness of the Monetary Dialogue on the ECB’s Accountability and Transparency: A Qualitative Approach’ (2004) 39 *Intereconomics* 190-203; Fabian Amtenbrink and Kees van Duin, ‘The European Central Bank Before the European Parliament: Theory and Practice after Ten Years of Monetary Dialogue’ (2009) 34 *EL Rev* 561-583; Stefan Collignon, *Central Bank Accountability in Times of Crisis: The Monetary Dialogue 2009-2014* (note prepared at the request of the EP Committee on Economic and Monetary Affairs, February 2014); Gregory Claeys, Mark Hallerberg and Olga Tschekassin, ‘European Central Bank Accountability: How The Monetary Dialogue Could Evolve’ (2014) (4) *Bruegel Policy Contribution*.

²³ Stefan Collignon and Sebastian Diessner, ‘The ECB’s Monetary Dialogue with the European Parliament: Efficiency and Accountability during the Euro Crisis?’ (2016) 54 *Journal of Common Market Studies* 6, 1296-1312.

²⁴ Marijn van der Sluis, ‘Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank’, in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 105-123, 115.

²⁵ See eg Claire Jones, ‘Anti-Capitalist Protesters Target ECB in Frankfurt’ *Financial Times* (18 March 2015).

²⁶ Anne Peters, ‘Towards Transparency as a Global Norm’, in A Peters and A Bianchi (eds), *Transparency in International Law* (CUP 2013) 534-607.

beholder and an object form a complex set of affairs.²⁷ The beholder may force the object to react to its 'gaze' and in this sense may be controlling. The ECB has struggled since its creation with the perceived tension between the need for greater openness or transparency on the one hand and the need to preserve its secrets on the other.²⁸ ECB transparency is however sandwiched in-between the concept of independence on the one hand and the concept of accountability on the other and is under-conceptualised.

Some authors - and policy makers - approach transparency as (only) communication. As such they accept that transparency is essentially mediated, and 'excessively simplified and thus is blind to the complexities of the contemporary state, government information and the public.'²⁹ The logic of communication is the core and original understanding of the ECB of transparency and reveals almost unlimited discretion as to what is revealed and what is kept secret. It is not the beholder controlling the object but rather the opposite.³⁰ Two other logics of transparency –of process and of public access are explored below (Parts III and IV) –they reveal an ECB less 'in control' and forced to assume a more reactive and defensive position by virtue of inter-actions with others (parliaments, the public, courts and the European Ombudsman).

B. ECB Rationale Transparency as Policy Tool

In a governance context, communication can be equated with the intentional release of information on the substance of decisions and of (some of) the facts and reasons on which they are based. Such release of information previously intentionally concealed, is (normally) to an outside audience, which may be affected by the decision but is not involved in the decision-making. It thus makes the outside actor (market, citizen or parliament) aware of the existence of what is not known, for example that deliberations, negotiations and votes and other elements of constituent decisions have taken place – but does not give transparency of the actual process and content of that decision making – at least not in un-redacted form. Communication can be understood as a form of transparency *in rationale*³¹ although others dispute that it is in fact a form of transparency that can lead to accountability with the secret keeper able to retain absolute control over what is released, when and how. The very word communication implies linearity of the process and passivity on the part of the beholder or recipient. Transparency *in rationale* enables the secret

²⁷ Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (2016) EUI Working Paper MWP 2016/09
<http://cadmus.eui.eu/bitstream/handle/1814/41166/MWP_2016_09.pdf?sequence=1> accessed 13 December 2016.

²⁸ See Fabian Amtenbrink, *The Democratic Accountability of Central Banks. A Comparative Study of the European Central Bank* (Hart Publishing 1999).

²⁹ Mark Fenster, 'Transparency in Search of a Theory' (2015) 18 European Journal of Social Theory 150-167.

³⁰ I am grateful to Agnieszka Smoleńska for this point.

³¹ On this qualification of transparency as rationale see Jane Mansbridge, 'A 'Selection Model' of Political Representation' (2009) 17 The Journal of Political Philosophy 369-398.

keeper to enjoy almost unlimited discretion to autonomously decide what to intentionally reveal and what not to reveal and with what slant to ‘communicate’ it. It may generate some legitimacy for the secret keepers, but it is also more vulnerable to manipulation.³²

The original understanding of ECB ‘transparency’ in the context of monetary policy was transparency in rationale through ‘communication’. This is in line with the worldwide tendency for central banks to weave an ‘economy of words’ through the medium of their communications.³³ Central banks communicate with outside audiences especially the market through (press) communiques.³⁴ They increasingly appreciate what language (‘mere words’) can accomplish in the context of public communication imperatives. Press conferences, the monthly bulletin, the annual report and the monetary dialogue are all mentioned as ECB *communication* tools.³⁵ From the beginning, the ECB followed a deliberate and autonomous strategy to assert its discretion and safeguard its independence while at the same time ensuring its version of transparency according to its own rules.³⁶ In its own words:

‘Transparency means not only releasing information, but also structuring that information in such a way that the public can understand it... . The ECB regards transparency as a crucial component of its monetary policy framework. Transparency requires central banks to clearly *explain* how they interpret and implement their mandates. This helps the public to monitor and evaluate a central bank’s performance. It also requires an explanation both of the analytical frameworks used for its internal decision-making and assessment of the state of the economy and of the economic rationale underlying its policy decisions. Transparency is strongly enhanced by means of a publicly announced monetary policy strategy.’³⁷

Communication with the markets contributes to the ECB’s objective of ensuring the effectiveness, efficiency and credibility of its monetary policy. It now includes ‘forward guidance’ for markets and economic actors – a communication instrument by which the ECB (and central banks more generally) conveys its monetary policy orientation going forward, conditional on its assessment of the economic outlook.³⁸ Communicating with the public

³² See Daniel Naurin, ‘The European Central Bank –Independent and Accountable?’ in S Gustavsson et al (eds), *The Illusion of Accountability in the European Union* (Routledge 2009) 126-140.

³³ Douglas R. Holmes, *Economy of Words: Communicative Imperatives in Central Banks* (University of Chicago Press 2013).

³⁴ See *ibid.*

³⁵ A more complete list of ECB’s communication tools includes: the annual report, the monthly bulletin, press releases, statistical information, testimonials before EP and NPs, interviews, public speeches, seminars, visitors, the ECB website, conferences, social media, and cultural days.

³⁶ Nicolas Jabko, ‘Democracy in the Age of the Euro’ (2003) 10 *Journal of European Public Policy* 710-739, 731.

³⁷ ECB, *Annual Report* (2003), 142.

³⁸ See further, Peter Praet, ‘Forward Guidance and the ECB’ (4 July 2013) <<https://www.ecb.europa.eu/press/key/date/2013/html/sp130806.en.html>> accessed 13 July 2016.

and with the media helps the ECB in giving full account of its actions. These dual objectives of the ECB's communication policy and the ECB's commitment to openness and transparency in its communication activities are reiterated in all its annual reports (from 2003 until 2015).

In December 2004, the ECB started making public on a monthly basis Governing Council decisions taken in addition to interest rate decisions.³⁹ The information released by the ECB does not concern the process (the positions and arguments taken by different members of the Governing Council during their discussions) but rather contains the reasoning of the collective ECB. This is presented as yet another way in which the ECB exceeds the reporting obligations imposed on it by the Treaties (in addition to publishing a Monthly Bulletin instead of a quarterly report and holding monthly press conferences even though it is not required to do so). The financial crisis triggered several important additional responses by the ECB. While it is still heavily focused on controlling its external communication, it developed a multi-faceted outreach policy in the post-crisis years. ECB officials (economists and lawyers) actively participate in a variety of academic activities including the ECB Forum Central Banking⁴⁰ and a new legal conference.⁴¹ Furthermore the ECB undertakes public consultations on important new initiatives.⁴² The ECB further counteracted the backlash against the expansion of its mandate by highlighting the need for openness while engaging in supervisory work⁴³ and by introducing a revised ECB confidentiality regime.⁴⁴ The logic of transparency in rationale applied to the new supervisory work of the ECB gives the citizen the possibility to understand and evaluate the ECB's supervisory work.⁴⁵ In 2015, both the ECB⁴⁶ as well as the SSM⁴⁷ installed a new website, which gathers all publicly available information.

³⁹ ECB, *Annual Report* (2004), 142.

⁴⁰ See ECB Forum on Central Banking <<https://ecbforum.eu/>> accessed 13 July 2016.

⁴¹ See *From Monetary Union to Banking Union: on the Way to Capital Markets Union. New Opportunities for European Integration* (ECB Legal Conference 2015, Frankfurt am Main, 1-2 September 2015).

⁴² For example on the Draft Regulation on the exercise of options and discretions granted in the EU framework for the prudential supervision of credit institutions - CRR/CRDIV <https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/reporting_options.en.html> accessed 13 Jul. 2016.

⁴³ ECB, *Annual Report* (2015) 94.

⁴⁴ Decision of the European Central Bank of 22 January 2014 amending Decision ECB/2004/2 adopting the Rules of Procedure of the European Central Bank (OJ L95 of 29.3.2014, p. 56-63)..

⁴⁵ See, explicitly, Chairperson Danièle Nouy, who emphasised the goal of transparency in announcing the six priorities for 2016, 'ECB Banking Supervision Publishes Priorities for 2016' <<https://www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr160106.en.html>> (6 January 2016) accessed 13 July 2016.

⁴⁶ <https://www.ecb.europa.eu/home/html/index.en.html>, accessed 13 July 2016.

⁴⁷ <<https://www.bankingsupervision.europa.eu/home/html/index.en.html>> accessed 13 July 2016.

III. ECB Transparency of Process

A. ECB Rules on Insiders

The concepts of secrecy and of transparency are to be considered in relation to one another and as each other's complement. Secrecy can be defined as the intentional concealment or withholding of information⁴⁸ and is marked by the paradox of being both an element of democracy and a threat to it.⁴⁹ Secrecy creates a form of opacity, which makes it 'hard to discover who takes the decisions, what they are, and who gains and who loses' – precisely the opposite of what transparency means to achieve. Control over openness gives power: it influences what others know and thus what they choose to do.⁵⁰ More generally, secret keeping endows secrets with value⁵¹ as it gives the person or institution enshrouded by the secret 'an exceptional position'.⁵² Secrecy is typically 'deep' when outsiders have no grasp of the type of information that they are being denied, and cannot estimate its size, magnitude and content.⁵³ More usual is a shallower form of secrecy. A secret-keeper may share a secret (for example, classified information) with limited groups of insiders (depending on security clearance for instance). There may or may not be leaks. A secret keeper may also share a secret with a restricted group of outsiders (for example a highly restricted group of parliamentarians, *infra part B. II*). Both types of sharing are relevant in the context of the ECB and its original and newer tasks.

One reason to traditionally preserve secrecy in the ECB context has been the desire to ensure that the independence of the members of the Governing Council is safeguarded from direct national pressure.⁵⁴ ECB secrets however consist not only of the actual (attributed or otherwise) minutes of Governing Council meetings, including individual positions and voting behavior, but also cover a host of other documents that are classified in one way or another by the ECB or by another originator of documents. This logic of secrecy relates to the process of decision-making.⁵⁵ The logic of secrecy in process is linked with ideas of 'professional

⁴⁸ Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (OUP 1989).

⁴⁹ On the more general logics of secrecy see Eva Horn, 'Logics of Political Secrecy' (2011) 28 *Theory, Culture & Society* 103-122.

⁵⁰ Georg Simmel, 'The Sociology of Secrecy and of Secret Societies' (1906) 11 *American Journal of Sociology* 441-498, 482.

⁵¹ *Ibid* 464.

⁵² *Ibid*

⁵³ David E. Pozen, 'Deep Secrecy' (2010) 62 *Stanford Law Review* 257-339, 265-275.

⁵⁴ National central bank governors in the context of Governing Council decision-making act in their personal capacity and make decisions that benefit the euro area as a whole: Article 130 TFEU. See also Point 3.2 of Code of Conduct for the Members of the Governing Council (OJ C 123 of 24.5.2002, p. 9-10), as amended by European Central Bank Memorandum of Understanding' (OJ C 10 of 16.1.2007, p. 6-7)..

⁵⁵ See Mansbridge (n 27).

secrecy' and the need for concealment in the interests of efficiency. The rules and practices of professional secrecy that have been in the ECB's internal rules and practices from the very beginning and in recent years have expanded to cover new organs and tasks. The confidentiality of ECB documents is still governed by Article 23 of ECB rules of procedure, which were adopted in 2004.⁵⁶ This original text was amended in 2014, following the conferral of supervisory tasks on the ECB. Article 23(1) of the new ECB rules of procedure⁵⁷ provides that not only the proceedings of the decision-making bodies of the ECB, or any committee or group established by them, but also those of the SSM Supervisory Board, its Steering Committee and of any its substructures of a temporary nature must be confidential unless the Governing Council authorises the ECB President to make the outcome of their deliberations public.⁵⁸ The recent special report by the European Court of Auditors on the SSM specifically notes the considerable difficulty the Court had in obtaining audit evidence from the ECB. In their own words, they were provided with "very little of the information we required to assess the operational efficiency of the management of the ECB's comprehensive assessments, the operational efficiency of JST's, the operational efficiency of the planning and implementation of supervisory activities, the decision-making process and the actual work done in the context of on-site inspections."⁵⁹ They were not provided with supervisory Board decision and minutes, as well as a host of other documents and information.⁶⁰

The current ECB Confidentiality Regime is publically available only since June 2015.⁶¹ Prior to that, the ECB Decision on the separation between its monetary and supervisory functions⁶² contained an excerpt from the Confidentiality Regime, which details on the ECB's five security classifications. These largely parallel those of the other EU institutions, in particular those of the Council⁶³ although there is no ECB-TOP SECRET category, and only two are

⁵⁶ ECB Decision 2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 080 of 18.3.2004, p. 33-41) as amended by ECB Decision 2009/5 (OJ L 3 of 7.1.2009, p. 4-5) and ECB Decision 2014/1 (OJ L 95 of 29.3.2014, p. 56-63)..

⁵⁷ *Ibid.*

⁵⁸ The members of all these bodies are also subject to the professional secrecy requirements under Article 37 of the ESCB and ECB Statute.

⁵⁹ European Court of Auditors, *Single Supervisory Mechanism – Good start but further improvements needed*, Special Report, No.29, Luxembourg, Publications Office of the European Union, 2016, at p.20.

⁶⁰ It appears that the Commission is also denied information in this context despite its duty, according to Article 32 of the SSM Regulation to provide comprehensive three yearly review reports on the application, appropriateness and effectiveness of the SSM's governance, accountability and financial arrangements. See further, para 92, ECA report, *ibid.*

⁶¹ See, annex to ECB institutional provisions (June 2015)
<<https://www.ecb.europa.eu/pub/pdf/other/ecbinstitutionalprovisions2015.en.pdf?a60e27e896604369bfa8b5e9266771ca>> accessed 13 July 2016.

⁶² ECB Decision 2014/39 of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (OJ L 300 of 18.10.2014, p. 57-62).

⁶³ See further, David Galloway, 'Classifying Secrets in the EU' (2014) 52 Journal of Common Market Studies 668-683.

tailored around a (strict) 'need to know': ECB-SECRET and ECB-CONFIDENTIAL, which require security clearances of staff and stringent storage arrangements. 'Restricted' is defined in the Council of the EU's security rules in very open terms as where the disclosure of a document would be 'disadvantageous' to the interests of the EU or a Member State. In the ECB Business Practice Handbook, this is expressed as 'a low negative impact on the ECB/ESCB.' Access to information classified as ECB-RESTRICTED or above will be granted only to staff (or contractors) having the appropriate security clearances. In November 2015 a Memorandum of Understanding on the provision of non-public information was concluded between the ECB and the Commission so that the latter could exercise its tasks under Article 32 of the SSM Regulation to provide a comprehensive three yearly review report.⁶⁴

The situation with regard to declassification procedures of the ECB is unclear although minimum standards are indicated with respect to ESCB/SSM information in internal 'common rules'. Where classification is made at the level of ECB-SECRET or ECB-CONFIDENTIAL, this classification 'should be maintained at that level only for as long as the information requires such a high level of protection. Whenever possible, the classification label should indicate when the document can be downgraded (e.g. on a certain date or at the occurrence of a specific event) and what classification would then apply...'.⁶⁵ The fact that there are such explicit rules on a declassification framework is designed to facilitate lower classifications or declassification in the future.

Unlike the general EU categories, no public information is available as to the numbers of documents held by the ECB in the various categories. However, pursuant to interviews conducted at the ECB and access granted to ECB-UNRESTRICTED statistics on the multi-annual (2008-2014) breakdown of document classifications in DARWIN (the ECB Document and Records Management System) it appears that the vast majority of sensitive ECB documents and those from other originators is in the category ECB-RESTRICTED (in parallel to the known situation with regard to EU-RESTRICTED).⁶⁶ What is unknown is the number of ECB documents that are classified by its officials and the numbers that are classified by external 'originators' of documents and controlled by them in terms of future release. Figures are available for other institutions that show for example that the Council of the EU is itself an original classifier in only a small fraction of the documents in the classified categories held by it.⁶⁷ Documents classified by other originators, including internal EU institutions and agencies as well as third countries and other international organisations (e.g. the IMF) will need to be released by those originators before any declassification can take place by the ECB (principle of originator control).

⁶⁴ See further on the difficulties this has entailed and the delays by the ECB, ECA Report (n. 59, para 92).

⁶⁵ *ECB Business Practices Handbook* (10th version).

⁶⁶ In 2014 more than 50% of ECB documents were in the RESTRICTED category. The ECB-CONFIDENTIAL category has also grown over the years and now amounts to more than 25% of all ECB documents. At the same time, there is a steady decline in the number and percentage of unclassified documents: in 2008 this category amounted to 38% of all ECB documents. By 2014 it had fallen to 1.37%.

⁶⁷ See Deirdre Curtin, 'Overseeing Secrets in the EU: A Democratic Perspective' (2014) 52 *Journal of Common Market Studies* 684-700, 690.

B. ECB Rules on (Inside) Outsiders: Accounting Banking Supervision to the EP

It has been widely accepted that the interaction of the EP with the ECB should be a qualitatively different one in the area of banking supervision compared to monetary policy. The relationships 'are more intense than those required for monetary policy decisions. Weak constraints are unacceptable in the supervisory context because a financial supervisor has the power to protect in profound ways the interests of individual financial institutions, of financial consumers and even of nation states; the accountability framework must be commensurate with the nature and the extent of these powers.'⁶⁸ That said the benefits of transparency are, in the view of the ECB, 'less clear' than with regard to monetary policy, 'due to the stigma effect of publicising overt assistance and the nature of bank runs (the belief in a panic are self-fulfilling).'⁶⁹

The result is twofold. First, reporting is due not only to the EP as with monetary policy⁷⁰ but also to national parliaments.⁷¹ Second, some sensitive (i.e. classified) information is shared with the EP, in particular its ECON committee but this is done in a highly restricted manner. At the time the SSM regulation was being adopted a specific 'inter-institutional agreement' was negotiated between the ECB and the EP containing more specific rules of the accountability game.⁷² Special confidential meetings may be held 'where necessary for the exercise of Parliament's powers under the TFEU and Union law', at the request of the Chair of the ECON committee – in writing, giving reasons.⁷³ The Chair of the Supervisory Board will divulge *sensitive information* –in 'confidential oral discussions behind closed doors' – and cooperate with EP investigations. Only the Chair and the Vice-Chairs of the ECON committee may attend such *confidential meetings* with the Chair of the Supervisory Board.⁷⁴ In its 2015 annual report on the banking union, the EP welcomed 'the efficient and

⁶⁸ Zilioli (n 15) 125, 159.

⁶⁹ Rosa M. Lastra, 'Accountability and Governance –Banking Union Proposals' (2012) 30 DSF Policy Paper 9.

⁷⁰ Under Article 20 of the SSM Regulation, the Chair of the Supervisory Board is required to present an annual report to the EP in plenary, reply to questions from MEPs and appear before the ECON committee upon request.

⁷¹ Ibid, Recital 56, Article 21.

⁷² EP-ECB Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism(OJ L 320 of 30.11.2013, p. 1-6).

⁷³ Ibid, section I.2, third paragraph.

⁷⁴ Ibid, Section I.2, tenth paragraph.

open way in which the ECB has so far fulfilled its accountability obligations towards Parliament'.⁷⁵

The inter-institutional agreement states that: 'No minutes or any other recording of the confidential meetings shall be taken. No statement shall be made for the press or any other media. Each participant to the confidential discussions shall sign every time a solemn declaration not to divulge the content of those discussions to any third person.' How can such restricted 'dialogue' still influence policy, one of the aims of the new reporting relationship? Strict confidentiality requirements make it difficult to assess the *de facto* accountability arrangements at the time of writing. Even though the Inter-Institutional Agreement provides room for more 'intense' accountability to the European Parliament compared to the pre-existing monetary dialogue, the extensive emphasis on secrecy and confidentiality with regard to all the information supplied by the ECB to the EP does not leave much room for *public* discussion or debate on this information in plenary or even in the ECON committee. This in turn removes the raw ingredients for accountability - information and deliberation - from public space, even after the fact. This equally seems to be the case for other accountability forums such as the Court of Auditors who are denied access to documentation on the ad-hoc exchange of views between the European Parliament and the Chair of the Supervisory Board.⁷⁶

The new ECB special arrangements are in line with existing practice in other areas where the EP has already been granted some access to classified information produced and circulated under the auspices of the EU (unless subject to the principle of originator control) on the Councils premises⁷⁷ and more recently on EP premises. The question whether this restrictive approach is justified in general and in the wider context of parliaments agreeing to non-public accountability processes is beyond the scope of this article.⁷⁸ A parliamentary confidential information provision may well provide only the appearance – rather than the reality – of a parliamentary check on matters of substance.⁷⁹ The EP is a collective body and there is nothing that a highly restricted group can do to stop or prevent any of the secret policies it is informed about from being executed. Limiting access in an extreme fashion creates different classes of legislators in a manner that is not necessarily limited in the public interest. The re-calibration of transparency and accountability mechanisms in the

⁷⁵ EP, Committee on Economic and Monetary Affairs, 'Report on the Banking Union- Annual Report 2015', 19 february 2016, para. 39.

⁷⁶ See further, ECA Report (n.58, para 19).

⁷⁷ Guri Rosén, 'Can You Keep a Secret? How the European Parliament Got Access to Sensitive Documents in the Area of Security and Defence' (2011) 22 RECON Working Paper.

⁷⁸ See further Deirdre Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 MLR 1-32.

⁷⁹ Kathleen Clark, 'Congressional Access to Intelligence Information: The Appearance of a Check on Executive Power' (2012) *Washington University Legal Studies Research Paper* (12 July 2002).

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context of banking supervision (and of banking resolution) is at best partial and leaves much to be desired in the view of the EP⁸⁰ and of academic commentators.⁸¹

IV. ECB Transparency Through Public Access

A. The ECB: A Public Access Free Zone?

The final logic of transparency (after rationale and process) is that of openness or of *public* access. This logic does not patronise the citizen but rather values the role that the public and the informed citizen can play in a wider democratic perspective. In this perspective transparency is seen as a fundamental citizen's right and as a means of securing public accountability. It implies that all arms of government – the executive, the entire public administration as well as parliaments – should be subject to the requirement of openness or public access.⁸² The deeper democratic meaning of why openness and transparency are important is on this logic that 'increased openness (...) enables citizens to participate more closely in the decision-making process and guarantees (...) greater legitimacy and is more effective and more accountable to the citizen in a democratic system.'⁸³

Under the fourth subparagraph of Article 15(3) TFEU, the Union's access to documents regime applies to the ECB *only* when it exercises its administrative tasks. However, the ECB has provided some public access to its documents since the beginning of its existence.⁸⁴ The first ECB decision on the subject was adopted on 3 November 1998.⁸⁵ It was repealed in 2004 when a new decision was introduced.⁸⁶ This was three years after the general regulation on access to documents entered into force.⁸⁷ The 2004 Decision follows the

⁸⁰ It appears that the EP is still not satisfied with the status quo that has been reached with regard to the SSM, see its report on the Banking Union: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0093+0+DOC+XML+V0//EN>

⁸¹ See eg Christopher Gandrud and Mark Hallerberg, 'Supervisory Transparency in the European Banking Union' (2014) Bruegel Policy Contribution 2014/1 < http://bruegel.org/wp-content/uploads/imported/publications/pc_2014_01_.pdf > accessed 13 December 2016..

⁸² Carsten Grønbech-Jensen, 'The Scandinavian Tradition of Open Government and the European Union: Problems of Compatibility?' (1998) 5 Journal of European Public Policy 185-199, 187.

⁸³ Joined Cases C-39/05 P and C-52/05 P *Turco v Council of Ministers* [2008] ECLI:EU:C:2008:374, para 45, reiterating the preamble of Regulation 1049/2001.

⁸⁴ Bernd Krauskopf and Christine Steven 'The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the First Ten Years of its Existence' (2009) 46 CML Rev 1143-1175, 1148.

⁸⁵ ECB Decision of 3 November 1998 concerning public access to documentation and the archives of the ECB (OJ L 110 of 28.4.1999, p. 30-32).

⁸⁶ ECB Decision 2004/3 of 4 March 2004 on public access to ECB documents (OJ L 80 of 18.3.2004, p. 42-44), as amended by ECB Decision 2011/6 (OJ L 158 of 16.6.2011, p. 37-38).

⁸⁷ Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43-48).

structure of the general EU law on access to documents⁸⁸ while seeking to protect the independence of the ECB and of the national central banks and the confidentiality of certain information that is specific to the performance of ESCB's tasks.⁸⁹ In applying the exceptions to the right of access provided for in Article 4 of the 2004 Decision, the ECB did not limit that right solely to documents falling within the exercise of its administrative tasks, as referred to in the fourth subparagraph of Article 15(3) TFEU. The ECB has however long resisted what it terms 'demand-driven' transparency – where the public rather than the ECB controls what information it has access to.⁹⁰ Public access to 'raw data' from the policy process is avoided as we have seen above in favor of the ECB explaining the rationale of policies and processes.⁹¹

In 2011 the 2004 ECB Decision was amended 'in order to take into account the new ESRB-related activities of the ECB'.⁹² This amendment reflects the fact that the ECB draws up and holds documents 'in the field of financial stability, including documents relating to its support to the ESRB, which qualify as ECB documents within the meaning of Decision ECB/2004/3. It provides that the ECB may refuse public access to ECB documents where their disclosure would undermine the protection of the public interest as regards the stability of the financial system in the EU.'⁹³ In a recent court application,⁹⁴ the applicant claims that the 2011 amending decision 'materially extended the scope of refusal grounds' set out in Article 4(1)(a) of the 2004 Decision. This claim was rejected by the Court.

With regard to its (new) supervisory functions, the ECB *is* subject to the general EU law on access to documents. This difference is probably due to the more direct effect of a supervisory decision on the Banks supervised than is the case with regard to monetary policy. Recital 59 of the SSM Regulation states that '[t]he regulation referred to in Article 15(3) TFEU [which is currently Regulation 1049/2001] should determine detailed rules enabling access to documents held by the ECB resulting from the carrying out of supervisory tasks, in accordance with the TFEU'. A revision procedure of the general EU law on access to documents is underway – without any success – for the past eight years. The current draft revision law is based on a 2008 (and later 2011) proposal by the Commission, and therefore,

⁸⁸ Ibid.

⁸⁹ Krauskopf and Steven (n 84), 1148.

⁹⁰ Otmar Issing, 'The Eurosystem: Transparent and Accountable or Willem in Euroland', (1999) 37 *Journal of Common Market Studies* 503-519.

⁹¹ See further, Naurin (n 32) 133.

⁹² ECB, *Annual Report* (2012) 165.

⁹³ The Legal Framework of the Eurosystem and the European System of Central Banks (version July 2014) <<http://www.ecb.europa.eu/pub/pdf/other/legalframeworkeurosystemescb2014en.pdf>> 73, accessed 13 July 2016.

⁹⁴ Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB* [2015] ECLI:EU:T:2015:361.

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does not take into account the changes brought about by the 2013 SSM Regulation.⁹⁵ The ECB decision on access to documents was in the meantime formally amended in January 21, 2015, in order to take into account the new supervisory activities of the ECB.⁹⁶

Rather extraordinarily, the Annual Report of the ECB does not contain any details regarding its access to documents regime and – unlike other EU institutions – the ECB does not produce an annual access to documents report with detailed information on who, why, when information is refused or provided. The position of the ECB is steadfastly that it is not subject to the requirements of the Treaty or of the Regulation in this regard and that its provisions in this regard are purely voluntary and specific. This is a missed opportunity. At the very least, the ECB should start publishing Annual Reports on the details and application of its own public access rules in a similar manner to other EU institutions. It is hard to avoid the overall conclusion that the ECB is neither pro-active nor transparent in applying its own public access regime. The failure to publicly document the application of its policies (even if partially ‘voluntarily’ assumed) seems to indicate a failure to take the public dimension very seriously despite the changes in the role and tasks of the ECB in recent years.

B. The ECB: A National Parliament Free Zone?

Despite the limited number of cases regarding the ECB’s legal framework, the question whether the limited public access policy of the ECB should nonetheless be further broadened voluntarily was raised in a public fashion by a number of ‘incidents’. One major incident raised the issue of ECB secrecy at the expense of national parliaments, citizens and public debate and is in many ways paradigmatic.

For the previous President of the ECB, Jean-Claude Trichet, letters were a frequent and distinctive form of ECB communication.⁹⁷ On November 19, 2010, Ireland’s Minister for Finance received a letter from Trichet. This letter was strongly worded and indicated to him

⁹⁵ Legislative Resolution of the European Parliament of 15 December 2011 on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast) (COM(2008)0229 – C6-0184/2008 – 2008/0090(COD)) (OJ C 168E of 17.6.2013, p. 45-54).

⁹⁶ ECB Decision 2015/529/EU of 21 January 2015 amending ECB Decision 2004/3 on public access to ECB documents (ECB/2015/1) (OJ L 84 of 28.3.2015, p. 64-66).

⁹⁷ Besides the most prominent Irish example, Trichet also revealed that he sent two other secret letters to the prime ministers of Italy and Spain on 5 August 2011, see e.g. Jean-Claude Trichet, ‘Letters to Two Prime Ministers’ *Nikkei Asian Review* (25 September 2014). These letters were sent immediately after the ECB started to buy Italian and Spanish bonds. Trichet implied that the support will not be continued unless Italy and Spain introduce indicated economic, fiscal and structural measures. Two days later he sent a letter to Greece, warning that Gree banks may be excluded from Emergency Liquidity Assistance from the Eurosystem if Greece persisted on its debt rescheduling. See Yannis Palaiologos, ‘How Trichet Threatened to Cut Greece Off’ *ekatherimini.com* (11 March 2014). Under Trichet’s successor, ECB President Draghi, the ECB also used its powers with regard to ELA beyond the reasons for which they were granted to get leverage in the negotiations between Greece and Eurozone in 2015. See Valentina Pop, ‘ECB ratchets up pressure on Greece’, *EU Observer* (5 February 2015) <<https://euobserver.com/political/127501>> accessed 13 December 2016.

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in forthright terms that Ireland should enter a bailout program.⁹⁸ Irish Minister Lehihan was adamant at that time that 'the major force of pressure for a bailout came from the ECB'.⁹⁹ In November 2011 when the dust had long settled and Ireland had entered the 'Economic Adjustment Programme', an Irish journalist sought public access to the secret Trichet letter under the EU public access regulation.¹⁰⁰

Both the Irish Ministry and the ECB refused to make the letters accessible. According to customary rules on secrecy the ECB as originator must give permission before the addressee can release it. The ECB claimed professional secrecy and the Governing Council of the ECB refused to grant any type of access to the letter in question.¹⁰¹ The case was first brought before the European Ombudsman in October 2012. She held that the refusal of the ECB was legal due to the invocation of a 'public interest', in particular the integrity and stability of the monetary and financial system. Nevertheless, she emphasised the ECB's commitment towards transparency and tried to encourage the ECB to voluntarily publish the relevant letters- given the time that had expired in the meantime and the fact that Ireland had since exited the bailout program.¹⁰² The ECB rejected this proposal and emphasised the on-going need for non-disclosure due to the still-critical state of the Irish financial system and post-programme surveillance.

On 7 May 2014, an Irish Parliamentary *Joint Committee of Inquiry* was established into certain aspects of Ireland's Banking Crisis.¹⁰³ One issue that came up very quickly in this parliamentary inquiry was the ECB letter. The view was taken that the Trichet letter would inevitably shed considerable light on the sequence of events in a matter that is of the greatest possible public importance in Ireland even five years later. Committees of inquiry just as parliaments are able to take measures to ensure the non-public debate of documents that are classified or where there is an imperative necessity to keep them secret. Even still, ex-President Trichet refused to appear before the Irish Banking Inquiry to answer questions

⁹⁸ The public letter from Trichet to Lenihan is available at <http://www.ecb.europa.eu/press/shared/pdf/2010-11-19_Letter_ECB_President_to%20IE_FinMin.pdf?31295060a74c0ffe738a12cd9139f578> accessed 13 July 2016.

⁹⁹ See, Karl Whelan, 'The ECB's Secret Letter to Ireland: Some Questions' *Forbes* (17 August 2012).

¹⁰⁰ Various people had already been unsuccessful in Ireland in obtaining access to the letter under the Irish Freedom of Information Act, which was refused by the Irish Ministry of Finance, see <<http://www.thejournal.ie/department-of-finance-foi-ecb-letters-573104-Aug2012/>> accessed 13 July 2016.

¹⁰¹ See Gavin Sheridan and Tom Lyons, 'ECB Refuses to Release 'Threat' Letter' *Independent.ie* (12 February 2012).

¹⁰² Decision of the European Ombudsman closing the inquiry into complaint 1703/2012/(VIK)CK against the European Central Bank (ECB) <<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54178/html.bookmark>> accessed 13 July 2016 and <<http://www.ombudsman.europa.eu/en/press/release.faces/en/53710/html.bookmark>> accessed 13 July 2016.

¹⁰³ Joint Committee of Inquiry of the Banking Crisis <<https://inquiries.oireachtas.ie/banking/>> accessed 13 July 2016.

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about what happened and the precise role of the ECB. He claimed professional privilege three years after he left the Bank.¹⁰⁴ Internal rules and the discretion of the ECB Governing Council meant that parliaments could not exercise their accountability function even after Ireland has re-emerged from the crisis. Ex-President Trichet was categorical in stating: 'I won't appear, it's not my responsibility'.¹⁰⁵ Only after a leak of the documents in the Irish media in the morning of November 6, 2014, did the ECB decide to publish the letters on the same day. This illustrates how disobedience and leaking can be a trigger for institutions to re-consider entrenched positions and the on-going necessity over time to keep secrets.¹⁰⁶

The Irish letter reveals a troubling account of the relationship between ECB and Ireland during the bailout in 2010 and contained an implicit threat that support for Ireland's banks was at risk.¹⁰⁷ According to the findings of the Irish parliamentary inquiry, the ECB actually 'contributed to the inappropriate placing of significant banking debts on *the Irish citizen*.'¹⁰⁸ Moreover, the ECB had 'direct involvement in terms of significant decisions taken by the *Irish Government*... in the period under investigation.'¹⁰⁹ Despite such far-reaching conclusions, the precise modalities of ECB participation in the troika and the information it gathers and feeds into the overall decision-making process in the context of debt assistance remains (largely) unknown¹¹⁰ and seems to exist outside of democratic accountability processes at any level of governance. In this regard the ECB is clearly more in control than under effective control. This has not gone unnoticed, also more structurally. The Court of Auditors in a recent report insists that formal arrangements be put in place in the case of financial assistance programmes.¹¹¹

¹⁰⁴ Letter from ECB president Mario Draghi to Ciaran Lynch, chairman of the Joint Committee of Inquiry into the Banking Crisis (15 December 2014) <<http://www.irishtimes.com/news/politics/ecb-letter-full-text-of-correspondence-from-mario-draghi-to-ciaran-lynch-1.2040152>> accessed 13 July 2016.

¹⁰⁵ Michelle Hennessy, 'Trichet: I Won't Appear Before Banking Inquiry – It's Not My Responsibility' *Business ETC - Economy, Technology and Companies* (7 May 2014). He subsequently gave a speech in Dublin, in April 2015, attended by members of the inquiry and in that public context did answer some questions. See '30/4/2015: Jean Claude Trichet – Former President of the ECB' <<https://inquiries.oireachtas.ie/banking/hearings/jean-claude-trichet-ii-ea-event-not-an-official-inquiry-hearing/>> accessed 13 July 2016.

¹⁰⁶ See in general Pozen (n 53).

¹⁰⁷ See Gavin Sheridan and Fred Logue, 'Right of Access to Public Data a Crucial Tool in Democracy' *Irish Examiner* (7 November 2014).

¹⁰⁸ Joint Committee of Inquiry into the Banking Crisis (n 13) 373 (author's italics).

¹⁰⁹ *Ibid* 356 (author's italics).

¹¹⁰ However, see ECB Response to EP Questionnaire on the Troika <https://www.ecb.europa.eu/pub/pdf/other/140110_ecb_response_troika_questionnaireen.pdf> accessed 13 July 2016.

¹¹¹ See European Court of Auditors, *Special Report no. 18/2015: Financial Assistance Provided to Countries in Difficulties* (26 January 2016) <<http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=35016>> accessed 13 July 2016.

V. ECB In Control Or Under Control?

The influence of novel functional and institutional developments in recent years on the traditional understanding of ECB independence and its accountability remains largely unexplored and limited to a rather formal account of both.¹¹² Yet as some prominent legal¹¹³ and political science¹¹⁴ scholars have stressed, the almost hidden nature of the ECB's evolving and 'autonomous' *de facto* powers is highly problematic from a more general viewpoint. The rhetoric of the ECB is pronounced when it comes to how its own transparency policy is a constituent element of its accountability. Yet the manner in which it reflects about its transparency is largely acclamatory and it views transparency as communication as largely synonymous with its own actual policy tools. Its self-understanding is strong and finds a visual counterpart in the language of the architecture of the ECB's new building in Frankfurt. The architectural construction of a glass atrium connecting twin towers can be considered a metaphor for the new ECB, at least in terms of its own ambition and self-presentation.¹¹⁵ The reality certainly does not enable the beholder to see straight through and there are significant shutters and blinds in place. Following Bovens transparency is a necessary but insufficient condition of accountability.¹¹⁶ Citizen accountability through transparency is often an illusion.¹¹⁷ On the other hand the media and other stakeholders can and do use transparency to force change in reality. Transparency also enables the media to work as fire-alarms triggering vertical (parliamentary) accountability.¹¹⁸

The ECB is not unlike central banks in many advanced economies where they have become very powerful and have acquired a host of highly political powers. The difference is that there is no economic counterpart at the supranational level unlike at the national political level (in Europe at any rate). The ECB certainly does not live in fear of what the EP (not to

¹¹² For example, Gijsbert Ter Kuile, Laura Wissink and Willem Bovenschen, 'Tailor-Made Accountability Within the Single Supervisory Mechanism' (2015) 52 Common Market Law Review 155-189; Donato Masciandaro, Marc Quintyn and Michael Taylor, 'Inside and Outside the Central Bank: Independence and Accountability in Financial Supervision: Trends and Determinants' (2008) 24 European Journal of Political Economy 833-848.

¹¹³ See Dieter Grimm, 'Europa: Ja – aber welches?' (2014) 12 Merkur 1045.

¹¹⁴ See Antoine Vauchez, *Democratiser l'Europe* (Seuil 2014); Naurin, (n 32).

¹¹⁵ European Central Bank, *New ECB Premises* (2014) 24
<http://www.ecb.europa.eu/ecb/premises/pdf/Brochure_New_ECB_premises_2014_EN.pdf> accessed 13 July 2016.

¹¹⁶ Marc Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447-468.

¹¹⁷ Vincent Mabillard and Raphael Zumofen, 'The Complex Relationship Between Transparency and Accountability: A Synthesis and Contribution to Existing Frameworks' (2016) Public Policy and Administration (*forthcoming*).

¹¹⁸ Albert Meijer, 'Transparency' in M Bovens, R E Goodin and T Schillemans et al (eds), *The Oxford Handbook of Public Accountability* (OUP 2015).

mind national parliaments) can do to it. There is also a growing inter-institutional dimension among old and new actors with many novel aspects needing further research and elaboration. For example, does the sharing of information about financial institutions and banks between a variety of actors, including the ECB, create a closed system of inter-institutional accountability between 'expert' institutions charged with different mandates? How does this sharing of information fit within a more public and political system of accountability in the EU legal and political order? We may well already be facing a less linear and more fragmented financial governance system within the EU with a host of new questions thrown up on the relationship between transparency, the limits of the need for confidentiality and outside accountability mechanisms. In the absence of Treaty level amendment, the ECB can make a start by proactively, cutting down its own vast discretion in ways that are less reactive and defensive than what it has done to-date. It will, after all, not be returning to its knitting anytime soon.¹¹⁹

¹¹⁹ Willem H Buiters, 'Central Banks: Powerful, Political and Unaccountable?' (2014) MPRA Paper No. 59477 <<http://willembuiters.com/BritishAcademylecture.pdf>> accessed 13 December 2016.