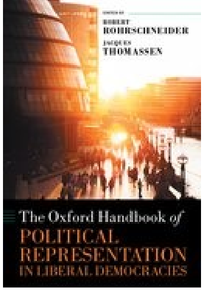

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CHAPTER

26 Non-majoritarian Institutions and Representation

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Abstract

Many public policies are delivered by non-majoritarian institutions (NMIs) in which sometimes powerful policy actors may take major decisions, decoupled from traditional democratic procedures of representation, scrutiny, and accountability. NMIs have to strike a balance between independence and democratic accountability. This chapter traces the evolution of NMIs in our time, discusses their ‘counter-majoritarian difficulties’, and various ensuing strategies to enhance their representational nature. From the perspective of democratic governance, many scholars have been concerned about the democratic deficits relating to NMIs. However, NMIs fit much better in more liberal, monitory notions of democracy. They can provide a series of checks and balances that prevent corruption, abuse of power, and protect the rights of minorities. In that sense, NMIs are often seen as challenges to democracy while they, simultaneously, may help to safeguard democracies and to sanitize the behaviours of elected officials.

Keywords: checks and balances, democratic accountability, governmental agencies, non-majoritarian institutions, regulatory authorities, representation checks and balances, democratic accountability, governmental agencies, non-majoritarian institutions, regulatory authorities, representation checks and balances, democratic accountability, governmental agencies, non-majoritarian institutions, regulatory authorities, representation

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Introduction: ‘Whatever It Takes’

ON 26 July 2012, in the midst of the financial crisis, Mario Draghi, the head of the European Central Bank, gave a speech in London on the future of the Euro.[1] In his speech he made a seemingly casual, but momentous remark: ‘Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.’ This remark was decisive in saving the euro. The financial markets calmed down immediately. As a follow up, in 2015, the ECB started an unprecedented programme of quantitative easing. The ECB has been buying government bonds and other assets from commercial banks as part of its non-standard monetary policy measures. The costs of this programme have run between 60 and 80 billion euro per month and the total expenditure has amounted to the mind-boggling sum of far over a trillion euro. Nobody really knows what its long-term consequences will be for the Eurozone. It is highly contested, because it provides a disincentive for southern European member states to balance their budget and has put the pension systems in the northern member states in jeopardy.

Mario Draghi has been the most powerful man in the European Union in the past decade—much more powerful than any treasurer or finance minister in any of the member states. Yet he is neither elected, nor accountable to any parliament, European or national. He is accountable to the Governing Council of the ECB, which consists of the members of the Executive Board, plus the governors of the national central banks of the nineteen euro area countries. However, these governors are not elected either. They are appointed, often for a fixed term, and cannot be removed by an elected body.

p. 512 The ECB is a prime example of a very powerful 'non-majoritarian' institution (NMI). Its policies are of the utmost political importance and are sometimes very controversial. Yet, its governing members are not elected, nor are they appointed by elected bodies, and their policies are not subjected to approval by elected representatives (Majone 2014). Non-majoritarian institutions, such as powerful central banks, do not sit well with traditional, majoritarian, and electoral notions of democracy. We will discuss the variety and rise of these NMIs, their 'counter-majoritarian difficulties', and various strategies to enhance their representational nature. However, NMIs fit much better in more liberal, monitory notions of democracy. They can provide a series of checks and balances that prevent corruption and the abuse of power, and protect the rights of minorities. This monitoring perspective on NMIs will be discussed in the final paragraph of this chapter.

Non-majoritarian Institutions

The concept of non-majoritarian institutions was first invoked by Majone in the context of regulatory agencies and it is also in this context that the concept is generally used. However, in line with Majone (1994: 2), we will refer more broadly to a range of public organizations for whom reconciling organizational and operational independence with democratic accountability is the central political problem. Non-majoritarian institutions come in a large variety: not only central banks, but also courts, regulatory and non-regulatory authorities, public service providers, quangos, bodies of oversight, and watchdogs such as courts of audit and ombudsmen qualify as non-majoritarian institutions. They have two things in common. On the one hand they exercise some form of public authority—they print money, they regulate or adjudicate, they make decisions on social benefits, licences, fines, subsidies, or permits, or they audit and control other public institutions. On the other hand they are not traditional ministries or municipal departments—they are neither headed by elected politicians, nor are they subject to direct control by elected representatives in parliaments or local councils.

A rather formal definition of non-majoritarian institutions is the one given by Mark Thatcher and Alec Stone Sweet (2002: 2): 'those governmental entities that (a) possess and exercise some grant of specialized public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials'. A more informal definition is provided by Frank Vibert (2007: 4–5): 'bodies in society that exercise official authority but are not headed by elected politicians and have been deliberately set apart, or are only loosely tied to the more familiar elected institutions of democracy—the parliaments, presidents and prime ministers'. Instead of the technical term non-majoritarian institutions, he uses the more colloquial term *unelected bodies*. Other terms used in the literature are 'quangos' (quasi-autonomous non-governmental organizations), arm's-length government bodies, non-departmental public bodies, or non-ministerial government departments.

p. 513 A crucial element in any of these definitions is the fact that they are non-*majoritarian* in character. The legitimacy of their power is not based on a majority of the votes of the electorate, either directly or via a representative body. Instead, they derive their legitimacy from expert decision-making at arm's length of elected politicians. For the purpose of this chapter, we will define non-majoritarian institutions as *institutions that exercise public authority which are neither headed by elected politicians, nor are subject to direct control by elected representatives.*

Frank Vibert, in his seminal book *The Rise of the Unelected* (2007: 20–9) distinguishes five broad categories of non-majoritarian institutions, which we paraphrase as follows:

1. *Service providers*: these are public bodies that are set up to provide services to the general public, such as central banking, broadcasting, statistics, public transport, research funding, and weather forecasts. Examples are the BBC, the ESRC, and the Office of National Statistics in the UK; the Federal Reserve System, NASA, AMTRAK, and the National Science Foundation in the US; and the ECB, Deutsche Bundesbank, KNMI, and ESF in Europe.
2. *Risk assessors*: these are public bodies that are set up to monitor and manage risks, for example in the

area of health, safety, food, water, and the environment. Examples are the Food Standards Agency, the Health and Safety Executive, and the Environment Agency in the UK; the Environmental Protection Agency, the National Transportation Safety Board, and the Food and Drug Administration in the US; and the Swedish Environmental Protection Agency (Naturvårdsverket), the Dutch National Institute for Public Health and the Environment (RIVM), and the Federal Institute for Risk Assessment (Bundesinstitut für Risikobewertung, BfR) in Germany.

3. *Regulatory authorities*: these are public bodies that regulate and oversee the protection of a series of public values, such as fair and free competition, privacy, non-discrimination, or consumer protection. Often they monitor the boundaries between private activities and public concerns. Examples are the Equality and Human Rights Commission, the Gambling Commission, and the Office of Communications in the UK; the Securities and Exchange Commission, the Equal Employment Opportunity Commission, and the Consumer Financial Protection Bureau in the US; the Competition Authority (Autorité de la Concurrence) in France, the Authority for Financial Markets (AFM) in The Netherlands, and the Federal Cartel Office in Germany.

4. *Auditors*: these are public bodies that monitor and control the spending of public money and the exercise of public powers. They are watchdog institutions that check, often on behalf of parliaments, whether public money is spent in compliance with financial regulations. Increasingly, they also evaluate the efficiency and effectiveness of government programmes. Examples are the local, national, and European audit offices, such as the National Audit Office in the UK, the Government
p. 514 Accountability Office in the US, and the European Court of Auditors in ↳ the EU. Other, more recently established, specialized auditors are the Care Quality Commission (CQC) in the UK, the US sentencing commission, or the European Anti-Fraud Office (OLAF) in the EU.

5. *Appeals bodies*: these are public bodies that citizens can appeal to when they feel that public bodies have infringed upon their rights, or have misused their powers. They provide venues for complaints and dispute resolution in addition to the traditional judiciary venues. Prime examples are the local, national, and European ombudsmen. But one can also think of a series of more specialized appeals bodies, such as the Employment Appeal Tribunal, or the Independent Office for Police Conduct in the UK, the Merit Systems Protection Board and the Office of Special Counsel in the US, or the Office of the Data Protection Commissioner in Ireland and the Data Protection Authority (GBA/APD) in Belgium.

Vibert's typology of unelected institutions is one of the various typologies which have been developed both in the academic world as well as in different national jurisdictions. In most democratic systems there are several types of non-majoritarian institutions, based upon different legal, political, and institutional traditions (Verhoest et al. 2012). Those formal-legal categorizations also tend to shift over time. As a consequence, it is difficult to compare the rise of unelected institutions across countries. Several scholars therefore illustrate rather than measure the rise of 'the unelected' (Vibert 2007), 'monitory democracy' (Keane 2009), and unelected institutions of 'global governance' (Koppell 2010). With long, non-exhaustive lists of relatively new institutions, they convincingly convey the message that there are 'many' non-majoritarian institutions. More generally, it has been claimed that these organizations now 'employ far more staff and spend far more money' than central government, as 'most of the real work of government is carried on through agencies' (Pollitt et al. 2004: 3).

There are, however, several comparative or additive inventories available that try to take stock of the fragmented world of non-majoritarian governance. An important source is Verhoest et al. (2012), providing an overview of 'government agencies' in thirty countries. The lion's share of those countries is in the Western world, yet there is, for instance, also information on countries such as Pakistan and Tanzania. Their overview suggests that all of those countries feature non-majoritarian institutions—mostly service providers and regulatory authorities—ranging from some tens in some countries to several hundreds in others. In another inventory, Hanretty and Koop (2009) aimed to gauge the number of independent regulatory authorities. They focused on the regulation of seven salient policy sectors—competition, energy, environment, financial markets, food safety, pharmaceuticals, telecommunication—and compiled a list of almost 500 independent regulatory authorities in almost 100 countries. This list was not exhaustive, but suggests that these sectors are globally, more often than not, regulated by independent regulatory authorities, albeit with varying levels of independence (Hanretty and Koop 2013). And the OECD (2017a) made a comparative inventory of advisory bodies aiming to contribute to the quality of governance and decision-making. All participating countries feature permanent, independent advisory bodies, ranging from six in Peru, to fifty in Lithuania and Sweden (OECD 2017a: 33).

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The Rise of the Non-elected

During the past decades these non-majoritarian institutions have gained prominence in many Western democracies. Particularly in the 1990s and 2000s, there were many analyses of the numerical growth of (quasi-)autonomous public sector service providers (Pollitt and Talbot 2004; Verhoest et al. 2012), regulatory agencies (Levi-Faur 2005), and audit bodies and auditing practices in the private and public sector (Power 1994; Hood et al. 1998). Hanretty and Koop (2009: 4) show that 85 per cent of the independent regulatory authorities in their sample were established in the 1990s or 2000s. Gilardi also shows that the rise of regulatory authorities is a relatively recent phenomenon, claiming that 'while only a few such authorities existed in Europe in the early 1980s, by the end of the twentieth century they had spread impressively across countries and sectors' (2005: 84). The same conclusion has been formulated for autonomous government agencies. Van Thiel (2012) studied for twenty-five common policy tasks in twenty-one countries whether they were performed by autonomous institutions, and when the autonomous institutions were created. It turned out that the great majority of those organizations had been created since 1990 and, again, most of those in the closing decade of the twentieth century. This testifies to how a radical shift in service provision from elected, majoritarian to unelected, non-majoritarian institutions occurred in the final decades of the twentieth century.

Since the turn of the century, the growth of the various non-majoritarian bodies has halted and has in some jurisdictions even reversed (O'Leary 2015; Van Thiel and Verheij 2017). However, unelected bodies are still prominent features of many democratic regimes. On the European continent, they have taken the place of neo-corporatist institutions, such as public industrial organizations, and departmental units that in the twentieth century performed a number of the functions nowadays performed by non-majoritarian institutions.

There are several driving forces behind this substitution. Neo-corporatist arrangements lost much of their legitimacy, due to depillarization and the decline of mass civil society organizations, such as unions and churches. Neo-corporatism as a blueprint for the institutional arrangement of society was displaced by New Public Management, the dominant public sector reform-theory from the end of the twentieth century. New Public Management emphasized privatization, marketization, and single-purpose organizations (Hood 1991). This led to the creation of numerous arm's-length public service providers in many countries, expected to operate more closely to the market. Strong markets however need strong rules. Hence the rise of independent risk assessors, regulators, and market authorities. New Public Management has been most influential in Anglo-Saxon countries, such as the US, the UK, and New Zealand. However, many of its institutions have been introduced in other countries too (Thatcher and Stone Sweet 2002: 12).

In the literature (Thatcher and Stone Sweet 2002; Thatcher 2002; Gilardi 2007) a variety of rationales is p. 516 offered for putting central banks, regulatory authorities, service ↳ providers, and risk assessors at an arm's length or more of elected politicians. First, a major rationale has been the increasing technical and legal complexity of regulating many policy fields. Creating level playing fields in liberalized markets for energy, public transport, telecom, banking, and finance requires highly sophisticated, specific expertise regarding economic models, technical feasibility, and requirements of due process. Public regulators often face very powerful private parties for whom the stakes are high and who are able and willing to invest large amounts of time, money, and expertise to influence policies and to contest decisions. Elected politicians and many departmental civil servants are generalists who lack the required technical or legal knowledge. Non-departmental institutions can build up and maintain expertise over time, without being disrupted by cabinet reshuffles or a departmental overhaul after elections.

Second, by creating independent institutions that are not subject to the political cycle, politicians can make credible commitments towards investors and consumers. Delegation to independent regulators and bodies of oversight will enhance the consistency and credibility of policies over time. Investors are assured that their long-term investments will pay off, because the chances of short-term, politically motivated interventions in the sector are diminished. Consumers are assured that food quality, environmental safety, or financial stability are not jeopardized by partisan concerns, nepotism, or political whims.

Third, it can be a rational strategy for calculating political agents to commit future majorities, particularly in volatile political environments. Delegating policy implementation, regulation and oversight to independent bodies makes it more difficult for future majorities to change current policies overnight. This would require the relatively longer and cumbersome legislative trajectory of reforming the statutes and legal frameworks that provide the bases for their operations.

From the perspective of elected politicians, delegating to non-majoritarian institutions also can be attractive because it offers many opportunities for blame management. To begin with, it shields them from pressures to make exemptions regarding the provision of services or the granting of permits. Also, NMIs can create a buffer between unpopular decisions and elected politicians. For example, politicians can shift the blame for controversial decisions regarding interest rates, currency devaluation, or solvency requirements for financials, to central banks and regulators. In areas with a risk of highly visible incidents, such as public transport or food safety, independent risk assessors and regulators can function as lightning rods that can absorb much of the political health in case of accidents and casualties.

Problems of Representation

The European Central Bank's unprecedented programme of quantitative easing is a prime example of the
p. 517 enormous political powers that non-majoritarian institutions ↳ may exercise. The ECB has been the most influential political actor in the Eurozone in the past decade, and yet its governing members are not elected, nor are they appointed by, or accountable to, elected bodies. The same has been true for many national central banks (Amtenbrink 1999) and for the bulk of the NMIs. As Levi-Faur (2005) boldly stated, we live in a second-level indirect representative democracy: citizens elect representatives who appoint non-majoritarian experts who regulate economies and societies.

The issue of independence from direct political control has been one of the major issues in the academic literature on NMIs and has inspired industrious academic work aiming to understand how independent and influential those NMIs really are. This has, however, so far not accumulated into a shared understanding. On the one hand scholars have shown that separating organizational units from central government diminishes political control and makes those organizations less responsive to their political principals (cf. Egeberg and Trondal 2009). Various measures for autonomy and independence have been developed with which scholars show that NMIs are indeed, albeit to varying degrees, independent. One of those measures for independence has been developed by a group of mostly European scholars investigating the relative independence of executive agencies (Verhoest et al. 2012). Another measure was developed by the OECD, ranking regulatory authorities on their relative autonomy (OECD 2017b).

Research on organizational autonomy invariably shows that autonomy is not an absolute and one-dimensional but a relative and multi-dimensional phenomenon. Part of the reason is that autonomy can relate to various dimensions of an institution's operations (Verhoest et al. 2004). An NMI may, for instance, be fully autonomous in taking key substantive policy or regulatory decisions, but may still be fully dependent on central government for finances and its legal framework. This curbs independence in practice. Furthermore, even when the organization is formally autonomous, the democratically elected government is often still the most important stakeholder for agencies. A survey in seven Western countries amongst chief executives of autonomous agencies found that they almost universally still consider central government to be its most important stakeholder, compared to many other potentially relevant stakeholders (Schillemans et al. 2019). The chief executives also generally accepted that they were accountable to the political centre. All in all, the empirical evidence sketches a mixed picture of independence and dependence for NMIs.

From a perspective of democratic representation, however, even constrained independence of bureaucratic organizations can be seen as problematic. First of all, there are general problems of democratic legitimacy. NMIs lack input legitimacy; they cannot legitimize their actions on the basis of electoral mandates, as can elected politicians. Their legitimacy relies in part on throughput legitimacy, on the impartiality, legality and technical soundness of their operations (Schmidt 2013). Most of all, they rely on output legitimacy, on the efficiency and effectiveness of their policies and operations. This is fine as long as they 'bring home the
p. 518 beef' and the economy is ↳ flourishing and their policies are uncontested. However, it is a rather feeble basis for legitimacy in times of crises and uncertainty.

Second, political legitimacy can be particularly problematic if the policies of regulators and the decisions of service providers, risk assessors, and bodies of oversight are not in line with the preferences of present political majorities. This is a well known problem of judicial review by supreme courts. Alexander Bickel (1962) has called this the 'counter-majoritarian difficulty'. He used the term to describe the argument that judicial review is illegitimate because it allows unelected judges to overrule the law making of elected representatives. A similar argument can be made against far-reaching decisions by other non-majoritarian institutions, such as central banks. The counterargument, as with the judiciary—compare Ely (1980), and Ackerman (1991)—is that NMIs are part of the institutional checks and balances that shape the democratic constitutional state (Vibert 2007; Keane 2009; Rosanvallon 2011). Delegation to NMIs creates new separations of powers that can help citizens and elected representatives to control the exercise of political power and to curb majoritarian tendencies. NMIs are independent information gatherers that provide informational checks and balances in an era gravitating towards fact-free politics and fake news.

A third cluster of representation problems has to do with the composition of many NMIs. NMIs are populated by highly educated technical experts—scientists, engineers, lawyers, and economists—and not at all representative of the general population. This, too, may jeopardize the legitimacy of their operations. This is particularly the case when NMIs have a role in regulating controversial political issues, such as commissions that set standards and adjudicate regarding issues of equal opportunity and racial discrimination. Education levels are not politically neutral nowadays (Bovens and Wille 2017). Strong educational gradients can be observed in political preferences relating to very salient cultural issues, such as the EU, immigration, taxation, and national identity. University graduates tend to accept social and cultural heterogeneity and favour, or at least condone, multiculturalism and EU unification. Citizens with medium or primary educational qualifications tend to be much more critical of the EU and multiculturalism and prefer a more homogeneous national culture. Given their one-sided composition, NMIs run the risk of being accused of contributing to biased political agendas. With regard to social cultural issues, policy incongruences may occur between these highly professionalized bodies and large parts of the electorate (Hakhverdian 2015).

A fourth cluster of problems relates to the political accountability of NMIs. Citizens cannot 'vote the rascals out', directly or indirectly, if they are dissatisfied with their policies and operations. Unlike ministerial departments and civil servants, NMIs are not part of the political chain of delegation and accountability. In many cases, their directors cannot be called to give an account in parliaments or councils. As we saw, this is part of the rationale for delegating to NMIs, but it does raise the question, how then are they to account for their exercise of public power and use of public funds?

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Non-majoritarian Political Representation

In response to these concerns about democratic representation and accountability, non-majoritarian bodies have developed several strategies to enhance their democratic legitimacy. NMIs are perhaps not representative in traditional terms, yet many NMIs actively seek to relate to their strategic environments. They can do so in a variety of ways.

Institutionally: First of all, NMIs can try to mimic traditional political institutions. They can enhance their own representativeness, for example by appointing or electing representatives from relevant stakeholders in boards or panels. This is a form of descriptive representation: they try to reflect the composition of their regulated sector in the composition of executive boards, supervisory committees, or advisory boards. A study of four major Dutch independent regulatory authorities shows that efforts have been made to make the governing boards descriptively representative of important stakeholder groups (Van Veen 2014: 172–4). Up to a third of the appointed board members had a background in the regulated domain. However, all of these came from corporations, producers, institutions, or providers—no board members came from consumer or patient organizations.

In addition, NMIs can enhance their representativeness by consulting stakeholders, such as corporations, producers and consumers, patients and practitioners, during the process of agenda setting, policy preparation, decision-making, and implementation. This to a large extent resembles parliamentary practices such as legislative hearings and consultations. In the study mentioned above, all four regulatory authorities included representatives of affected interests at various regulatory stages. However, here, too, end users such as consumers, customers, patients, and their interest groups were structurally under-represented (Van Veen 2014: 211–22). Some organizations tried to remedy this by performing surveys and installing consumer panels.

NMIs can also take steps to provide public scrutiny and political account-giving. Many NMIs have been found to create voluntary forms of accountability on their own (Koop 2014). Research on voluntary accountability suggests it can be quite effective, first and foremost as an appropriate practice or form of 'good governance' (Koop 2014) and also because it invokes learning processes (Schillemans 2011). Simultaneously, voluntary accountability has also been portrayed as a strategic response to reputational threats and as an attempt to boost organizational reputations in order to sustain independence (Busuioc and Lodge 2016).

An example of voluntary accountability is the monetary dialogues between the ECB president and the European Parliament (Bovens and Curtin 2016). The legal basis for the ECB's accountability to the EP is Article 284(3) TFEU, which provides that the ECB will send the EP an annual report on the activities of the
p. 520 ECB and on the monetary ↳ policy of both the previous and current year. Moreover, the President of the ECB is to present this report to the EP, which then may hold a general debate on the basis of this report. In addition, it is provided that the President of the ECB and other members of the Executive Board may be heard by the competent committees of the EP. This can be at the request of the EP, but also on their own initiative. In addition, the EP Rules of Procedure require the ECB President to appear before the ECON committee at least four times a year (Fasone 2014: 175). These appearances of the ECB President before the EP—in plenary and in the ECON committee—have become known as the Monetary Dialogues. They provide a good platform for an intensive debate with the President of the ECB. The Parliamentarians ask many questions of Draghi, and some forms of political debate have developed over the years. Some preliminary steps have been taken to also engage in a dialogue with national parliaments.

Substantively: the highly influential and widely cited theory of responsive regulation urges regulatory authorities to call on and listen to various relevant stakeholders (Ayres and Braithwaite 1995). Responsive regulation broadens the perspective from the dyadic relationship between regulator and regulatee to wider relevant stakeholders. A strategy of responsive regulation is flexible and is responsive to the specific signals received about regulated entities and the various social motivations present within regulated industries. Regulatory authorities can choose from various enforcement strategies. The theory intends to describe how regulators choose between different strategies of enforcement but also aims to make regulation more effective, efficient, and legitimate. It is the latter purpose of responsive regulation that is relevant for this chapter. Responsive regulation may enhance the legitimacy of the regulatory authority, often a NMI, in two ways. On the one hand, regulators are urged to focus on the different motivations for compliance that exist in an organization or business and to tailor their interventions to the specific setting. This should theoretically lead to more understanding and acceptance of the role and enforcement strategies of the regulator by the regulated businesses (Nielsen and Parker 2009). On the other hand, by consulting with important stakeholders, independent regulators become more transparent, open and accessible. This may in turn contribute to their legitimacy in the sector. It is then still not possible to 'vote the rascals' out, yet stakeholders may get to know them and may start understanding that they may not be rascals and may even find them legitimate and effective. Similar strategies of responsiveness and stakeholder-orientation have also been practised for other types of non-majoritarian institutions, such as courts of audit, quangos, and risk assessors. Also, critics have claimed that responsive regulation is often not really responsive in practice, which necessitates a strategy of *really* responsive regulation (Baldwin and Black 2008).

Discursively: NMIs can also try to enhance their representativeness and political legitimacy in a more indirect, discursive way. They can claim to act as representatives of the people, even when they are not elected (Saward 2006). Representation can be seen as a 'two-way street' (Saward 2006: 301). The represented people can elect a representative, which is the basic principle of most democracies. On the other
p. 521 hand, however, some agent or entity can make claims to represent a constituency and ↳ the constituency can accept this claim. This second way opens up opportunities for non-majoritarian bodies to represent constituencies without being elected. Expert public bodies can, for instance, claim to represent, secure, or advance the interests of the general public; an ambition symbolized in the names of some non-majoritarian bodies, such as defending 'human rights' or 'consumer interests'. This is not done through traditional political representation and partisan politics, but by virtue of their independent, non-partisan, non-majoritarian nature. Detached from specific interests and partisan concerns, they are better able to guard the general interest in volatile markets with high information asymmetries and uneven playing fields.

Van Veen (2014), in his study on Dutch independent regulatory authorities, shows how these representative claims are reflected both in the establishment laws of these authorities and in their public presentations. The legislature explicitly established them with the task to secure a series of public interests, such as universal service delivery, prevention of market power abuse, energy supply security, transparency of markets, and the protection of consumers. As a result, these regulators all promoted an image of being public- or consumer-interest representatives (Van Veen 2014: 219). In their public presentations they portray themselves as 'agents' or 'guardian angels' of the consumer.

Communicatively: in line with the discursive claim for representation, NMIs can also seek to increase their legitimacy via the media. Some non-majoritarian institutions feature prominently in the news and some of them invest substantial resources in media framing, communication, and campaigns (Schillemans 2016). The media attention is, in part, triggered by incidents or by the agendas of journalists, news outlets, or the unpredictable turmoil of social media. Simultaneously, however, some NMIs have active strategies to influence media attention, boost their reputation and picture themselves in specific frames in the news. NMIs mostly lack the personalized flavour and extravagance with which some elected politicians try to make it in the news and they are generally very reluctant to engage in the overt political contestations that are of interest to journalists and the people. But NMIs do have some qualities that may give them access to favourable news coverage. Many of these institutions 'own' the key facts and data about population statistics, meteorological developments, or economic growth, which still play a large role in public debate. As owners of those data, the NMIs may also seek favourable news coverage for themselves. Furthermore, regulatory authorities are often depicted as neutral and knowledgeable in news stories, which may serve their cause to represent specific interests. And some non-majoritarian institutions in complex policy fields invest considerable time in backgrounding journalists and explaining how the field operates. This may enable them to propagate a perspective on the field that is supportive of their position. The larger NMIs are found to be sensitive to reputational threats and to switch between responses (Rimkuté 2018). Sometimes they will position themselves as technical experts solving complex issues, which is one possible strategy of representation ('We are here to solve your difficult problem'). And sometimes they, rather, choose to stress that they guard specific important values of interests, which is a second available strategy ('We are here to protect this specific vulnerable issue').

Introduction: 'Whatever It Takes'

ON 26 July 2012, in the midst of the financial crisis, Mario Draghi, the head of the European Central Bank, gave a speech in London on the future of the Euro.[1] In his speech he made a seemingly casual, but momentous remark: 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.' This remark was decisive in saving the euro. The financial markets calmed down immediately. As a follow up, in 2015, the ECB started an unprecedented programme of quantitative easing. The ECB has been buying government bonds and other assets from commercial banks as part of its non-standard monetary policy measures. The costs of this programme have run between 60 and 80 billion euro per month and the total expenditure has amounted to the mind-boggling sum of far over a trillion euro. Nobody really knows what its long-term consequences will be for the Eurozone. It is highly contested, because it provides a disincentive for southern European member states to balance their budget and has put the pension systems in the northern member states in jeopardy.

Mario Draghi has been the most powerful man in the European Union in the past decade—much more powerful than any treasurer or finance minister in any of the member states. Yet he is neither elected, nor accountable to any parliament, European or national. He is accountable to the Governing Council of the ECB, which consists of the members of the Executive Board, plus the governors of the national central banks of the nineteen euro area countries. However, these governors are not elected either. They are appointed, often for a fixed term, and cannot be removed by an elected body.

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They can provide a series of checks and balances that prevent corruption and the abuse of power, and protect the rights of minorities. This monitoring perspective on NMIs will be discussed in the final paragraph of this chapter.

Non-majoritarian Institutions

The concept of non-majoritarian institutions was first invoked by Majone in the context of regulatory agencies and it is also in this context that the concept is generally used. However, in line with Majone (1994: 2), we will refer more broadly to a range of public organizations for whom reconciling organizational and operational independence with democratic accountability is the central political problem. Non-majoritarian institutions come in a large variety: not only central banks, but also courts, regulatory and non-regulatory authorities, public service providers, quangos, bodies of oversight, and watchdogs such as courts of audit and ombudsmen qualify as non-majoritarian institutions. They have two things in common. On the one hand they exercise some form of public authority—they print money, they regulate or adjudicate, they make decisions on social benefits, licences, fines, subsidies, or permits, or they audit and control other public institutions. On the other hand they are not traditional ministries or municipal departments—they are neither headed by elected politicians, nor are they subject to direct control by elected representatives in parliaments or local councils.

A rather formal definition of non-majoritarian institutions is the one given by Mark Thatcher and Alec Stone Sweet (2002: 2): 'those governmental entities that (a) possess and exercise some grant of specialized public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials'. A more informal definition is provided by Frank Vibert (2007: 4–5): 'bodies in society that exercise official authority but are not headed by elected politicians and have been deliberately set apart, or are only loosely tied to the more familiar elected institutions of democracy—the parliaments, presidents and prime ministers'. Instead of the technical term non-majoritarian institutions, he uses the more colloquial term *unelected bodies*. Other terms used in the literature are 'quangos' (quasi-autonomous non-governmental organizations), arm's-length government bodies, non-departmental public bodies, or non-ministerial government departments.

p. 513 A crucial element in any of these definitions is the fact that they are non-*majoritarian* in character. The legitimacy of their power is not based on a majority of the votes of the electorate, either directly or via a representative body. Instead, they derive their legitimacy from expert decision-making at arm's length of elected politicians. For the purpose of this chapter, we will define non-majoritarian institutions as *institutions that exercise public authority which are neither headed by elected politicians, nor are subject to direct control by elected representatives.*

Frank Vibert, in his seminal book *The Rise of the Unelected* (2007: 20–9) distinguishes five broad categories of non-majoritarian institutions, which we paraphrase as follows:

1. *Service providers*: these are public bodies that are set up to provide services to the general public, such as central banking, broadcasting, statistics, public transport, research funding, and weather forecasts. Examples are the BBC, the ESRC, and the Office of National Statistics in the UK; the Federal Reserve System, NASA, AMTRAK, and the National Science Foundation in the US; and the ECB, Deutsche Bundesbank, KNMI, and ESF in Europe.

2. *Risk assessors*: these are public bodies that are set up to monitor and manage risks, for example in the area of health, safety, food, water, and the environment. Examples are the Food Standards Agency, the Health and Safety Executive, and the Environment Agency in the UK; the Environmental Protection Agency, the National Transportation Safety Board, and the Food and Drug Administration in the US; and the Swedish Environmental Protection Agency (Naturvårdsverket), the Dutch National Institute for Public Health and the Environment (RIVM), and the Federal Institute for Risk Assessment (Bundesinstitut für Risikobewertung, BfR) in Germany.

3. *Regulatory authorities*: these are public bodies that regulate and oversee the protection of a series of public values, such as fair and free competition, privacy, non-discrimination, or consumer protection. Often they monitor the boundaries between private activities and public concerns. Examples are the Equality and Human Rights Commission, the Gambling Commission, and the Office of Communications in the UK; the Securities and Exchange Commission, the Equal Employment

Opportunity Commission, and the Consumer Financial Protection Bureau in the US; the Competition Authority (Autorité de la Concurrence) in France, the Authority for Financial Markets (AFM) in The Netherlands, and the Federal Cartel Office in Germany.

4. *Auditors*: these are public bodies that monitor and control the spending of public money and the exercise of public powers. They are watchdog institutions that check, often on behalf of parliaments, whether public money is spent in compliance with financial regulations. Increasingly, they also evaluate the efficiency and effectiveness of government programmes. Examples are the local, national, and European audit offices, such as the National Audit Office in the UK, the Government Accountability Office in the US, and the European Court of Auditors in p. 514 ↳ the EU. Other, more recently established, specialized auditors are the Care Quality Commission (CQC) in the UK, the US sentencing commission, or the European Anti-Fraud Office (OLAF) in the EU.

5. *Appeals bodies*: these are public bodies that citizens can appeal to when they feel that public bodies have infringed upon their rights, or have misused their powers. They provide venues for complaints and dispute resolution in addition to the traditional judiciary venues. Prime examples are the local, national, and European ombudsmen. But one can also think of a series of more specialized appeals bodies, such as the Employment Appeal Tribunal, or the Independent Office for Police Conduct in the UK, the Merit Systems Protection Board and the Office of Special Counsel in the US, or the Office of the Data Protection Commissioner in Ireland and the Data Protection Authority (GBA/APD) in Belgium.

Vibert's typology of unelected institutions is one of the various typologies which have been developed both in the academic world as well as in different national jurisdictions. In most democratic systems there are several types of non-majoritarian institutions, based upon different legal, political, and institutional traditions (Verhoest et al. 2012). Those formal-legal categorizations also tend to shift over time. As a consequence, it is difficult to compare the rise of unelected institutions across countries. Several scholars therefore illustrate rather than measure the rise of 'the unelected' (Vibert 2007), 'monitory democracy' (Keane 2009), and unelected institutions of 'global governance' (Koppell 2010). With long, non-exhaustive lists of relatively new institutions, they convincingly convey the message that there are 'many' non-majoritarian institutions. More generally, it has been claimed that these organizations now 'employ far more staff and spend far more money' than central government, as 'most of the real work of government is carried on through agencies' (Pollitt et al. 2004: 3).

There are, however, several comparative or additive inventories available that try to take stock of the fragmented world of non-majoritarian governance. An important source is Verhoest et al. (2012), providing an overview of 'government agencies' in thirty countries. The lion's share of those countries is in the Western world, yet there is, for instance, also information on countries such as Pakistan and Tanzania. Their overview suggests that all of those countries feature non-majoritarian institutions—mostly service providers and regulatory authorities—ranging from some tens in some countries to several hundreds in others. In another inventory, Hanretty and Koop (2009) aimed to gauge the number of independent regulatory authorities. They focused on the regulation of seven salient policy sectors—competition, energy, environment, financial markets, food safety, pharmaceuticals, telecommunication—and compiled a list of almost 500 independent regulatory authorities in almost 100 countries. This list was not exhaustive, but suggests that these sectors are globally, more often than not, regulated by independent regulatory authorities, albeit with varying levels of independence (Hanretty and Koop 2013). And the OECD (2017a) made a comparative inventory of advisory bodies aiming to contribute to the quality of governance and decision-making. All participating countries feature permanent, independent advisory bodies, ranging from six in Peru, to fifty in Lithuania and Sweden (OECD 2017a: 33).

p. 515 **The Rise of the Non-elected**

During the past decades these non-majoritarian institutions have gained prominence in many Western democracies. Particularly in the 1990s and 2000s, there were many analyses of the numerical growth of (quasi-)autonomous public sector service providers (Pollitt and Talbot 2004; Verhoest et al. 2012), regulatory agencies (Levi-Faur 2005), and audit bodies and auditing practices in the private and public sector (Power 1994; Hood et al. 1998). Hanretty and Koop (2009: 4) show that 85 per cent of the independent regulatory authorities in their sample were established in the 1990s or 2000s. Gilardi also shows that the rise of regulatory authorities is a relatively recent phenomenon, claiming that 'while only a few such authorities existed in Europe in the early 1980s, by the end of the twentieth century they had spread impressively across countries and sectors' (2005: 84). The same conclusion has been formulated for autonomous government agencies. Van Thiel (2012) studied for twenty-five common policy tasks in twenty-one countries whether they were performed by autonomous institutions, and when the autonomous institutions were created. It turned out that the great majority of those organizations had been created since 1990 and, again, most of those in the closing decade of the twentieth century. This testifies to how a radical shift in service provision from elected, majoritarian to unelected, non-majoritarian institutions occurred in the final decades of the twentieth century.

Since the turn of the century, the growth of the various non-majoritarian bodies has halted and has in some jurisdictions even reversed (O'Leary 2015; Van Thiel and Verheij 2017). However, unelected bodies are still prominent features of many democratic regimes. On the European continent, they have taken the place of neo-corporatist institutions, such as public industrial organizations, and departmental units that in the twentieth century performed a number of the functions nowadays performed by non-majoritarian institutions.

There are several driving forces behind this substitution. Neo-corporatist arrangements lost much of their legitimacy, due to depillarization and the decline of mass civil society organizations, such as unions and churches. Neo-corporatism as a blueprint for the institutional arrangement of society was displaced by New Public Management, the dominant public sector reform-theory from the end of the twentieth century. New Public Management emphasized privatization, marketization, and single-purpose organizations (Hood 1991). This led to the creation of numerous arm's-length public service providers in many countries, expected to operate more closely to the market. Strong markets however need strong rules. Hence the rise of independent risk assessors, regulators, and market authorities. New Public Management has been most influential in Anglo-Saxon countries, such as the US, the UK, and New Zealand. However, many of its institutions have been introduced in other countries too (Thatcher and Stone Sweet 2002: 12).

In the literature (Thatcher and Stone Sweet 2002; Thatcher 2002; Gilardi 2007) a variety of rationales is
p. 516 offered for putting central banks, regulatory authorities, service ↳ providers, and risk assessors at an arm's length or more of elected politicians. First, a major rationale has been the increasing technical and legal complexity of regulating many policy fields. Creating level playing fields in liberalized markets for energy, public transport, telecom, banking, and finance requires highly sophisticated, specific expertise regarding economic models, technical feasibility, and requirements of due process. Public regulators often face very powerful private parties for whom the stakes are high and who are able and willing to invest large amounts of time, money, and expertise to influence policies and to contest decisions. Elected politicians and many departmental civil servants are generalists who lack the required technical or legal knowledge. Non-departmental institutions can build up and maintain expertise over time, without being disrupted by cabinet reshuffles or a departmental overhaul after elections.

Second, by creating independent institutions that are not subject to the political cycle, politicians can make credible commitments towards investors and consumers. Delegation to independent regulators and bodies of oversight will enhance the consistency and credibility of policies over time. Investors are assured that their long-term investments will pay off, because the chances of short-term, politically motivated interventions in the sector are diminished. Consumers are assured that food quality, environmental safety, or financial stability are not jeopardized by partisan concerns, nepotism, or political whims.

Third, it can be a rational strategy for calculating political agents to commit future majorities, particularly in volatile political environments. Delegating policy implementation, regulation and oversight to independent bodies makes it more difficult for future majorities to change current policies overnight. This would require the relatively longer and cumbersome legislative trajectory of reforming the statutes and legal frameworks that provide the bases for their operations.

From the perspective of elected politicians, delegating to non-majoritarian institutions also can be attractive because it offers many opportunities for blame management. To begin with, it shields them from pressures to make exemptions regarding the provision of services or the granting of permits. Also, NMIs can create a buffer between unpopular decisions and elected politicians. For example, politicians can shift the blame for controversial decisions regarding interest rates, currency devaluation, or solvency requirements for financials, to central banks and regulators. In areas with a risk of highly visible incidents, such as public transport or food safety, independent risk assessors and regulators can function as lightning rods that can absorb much of the political health in case of accidents and casualties.

Problems of Representation

The European Central Bank's unprecedented programme of quantitative easing is a prime example of the
p. 517 enormous political powers that non-majoritarian institutions ↳ may exercise. The ECB has been the most influential political actor in the Eurozone in the past decade, and yet its governing members are not elected, nor are they appointed by, or accountable to, elected bodies. The same has been true for many national central banks (Amtenbrink 1999) and for the bulk of the NMIs. As Levi-Faur (2005) boldly stated, we live in a second-level indirect representative democracy: citizens elect representatives who appoint non-majoritarian experts who regulate economies and societies.

The issue of independence from direct political control has been one of the major issues in the academic literature on NMIs and has inspired industrious academic work aiming to understand how independent and influential those NMIs really are. This has, however, so far not accumulated into a shared understanding. On the one hand scholars have shown that separating organizational units from central government diminishes political control and makes those organizations less responsive to their political principals (cf. Egeberg and Trondal 2009). Various measures for autonomy and independence have been developed with which scholars show that NMIs are indeed, albeit to varying degrees, independent. One of those measures for independence has been developed by a group of mostly European scholars investigating the relative independence of executive agencies (Verhoest et al. 2012). Another measure was developed by the OECD, ranking regulatory authorities on their relative autonomy (OECD 2017b).

Research on organizational autonomy invariably shows that autonomy is not an absolute and one-dimensional but a relative and multi-dimensional phenomenon. Part of the reason is that autonomy can relate to various dimensions of an institution's operations (Verhoest et al. 2004). An NMI may, for instance, be fully autonomous in taking key substantive policy or regulatory decisions, but may still be fully dependent on central government for finances and its legal framework. This curbs independence in practice. Furthermore, even when the organization is formally autonomous, the democratically elected government is often still the most important stakeholder for agencies. A survey in seven Western countries amongst chief executives of autonomous agencies found that they almost universally still consider central government to be its most important stakeholder, compared to many other potentially relevant stakeholders (Schillemans et al. 2019). The chief executives also generally accepted that they were accountable to the political centre. All in all, the empirical evidence sketches a mixed picture of independence and dependence for NMIs.

From a perspective of democratic representation, however, even constrained independence of bureaucratic organizations can be seen as problematic. First of all, there are general problems of democratic legitimacy. NMIs lack input legitimacy; they cannot legitimize their actions on the basis of electoral mandates, as can elected politicians. Their legitimacy relies in part on throughput legitimacy, on the impartiality, legality and technical soundness of their operations (Schmidt 2013). Most of all, they rely on output legitimacy, on the efficiency and effectiveness of their policies and operations. This is fine as long as they 'bring home the
p. 518 beef' and the economy is ↳ flourishing and their policies are uncontested. However, it is a rather feeble basis for legitimacy in times of crises and uncertainty.

Second, political legitimacy can be particularly problematic if the policies of regulators and the decisions of service providers, risk assessors, and bodies of oversight are not in line with the preferences of present political majorities. This is a well known problem of judicial review by supreme courts. Alexander Bickel (1962) has called this the 'counter-majoritarian difficulty'. He used the term to describe the argument that judicial review is illegitimate because it allows unelected judges to overrule the law making of elected representatives. A similar argument can be made against far-reaching decisions by other non-majoritarian institutions, such as central banks. The counterargument, as with the judiciary—compare Ely (1980), and Ackerman (1991)—is that NMIs are part of the institutional checks and balances that shape the democratic constitutional state (Vibert 2007; Keane 2009; Rosanvallon 2011). Delegation to NMIs creates new separations of powers that can help citizens and elected representatives to control the exercise of political power and to curb majoritarian tendencies. NMIs are independent information gatherers that provide informational checks and balances in an era gravitating towards fact-free politics and fake news.

A third cluster of representation problems has to do with the composition of many NMIs. NMIs are populated by highly educated technical experts—scientists, engineers, lawyers, and economists—and not at all representative of the general population. This, too, may jeopardize the legitimacy of their operations. This is particularly the case when NMIs have a role in regulating controversial political issues, such as commissions that set standards and adjudicate regarding issues of equal opportunity and racial discrimination. Education levels are not politically neutral nowadays (Bovens and Wille 2017). Strong educational gradients can be observed in political preferences relating to very salient cultural issues, such as the EU, immigration, taxation, and national identity. University graduates tend to accept social and cultural heterogeneity and favour, or at least condone, multiculturalism and EU unification. Citizens with medium or primary educational qualifications tend to be much more critical of the EU and multiculturalism and prefer a more homogeneous national culture. Given their one-sided composition, NMIs run the risk of being accused of contributing to biased political agendas. With regard to social cultural issues, policy incongruences may occur between these highly professionalized bodies and large parts of the electorate (Hakhverdian 2015).

A fourth cluster of problems relates to the political accountability of NMIs. Citizens cannot 'vote the rascals out', directly or indirectly, if they are dissatisfied with their policies and operations. Unlike ministerial departments and civil servants, NMIs are not part of the political chain of delegation and accountability. In many cases, their directors cannot be called to give an account in parliaments or councils. As we saw, this is part of the rationale for delegating to NMIs, but it does raise the question, how then are they to account for their exercise of public power and use of public funds?

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Non-majoritarian Political Representation

In response to these concerns about democratic representation and accountability, non-majoritarian bodies have developed several strategies to enhance their democratic legitimacy. NMIs are perhaps not representative in traditional terms, yet many NMIs actively seek to relate to their strategic environments. They can do so in a variety of ways.

Institutionally: First of all, NMIs can try to mimic traditional political institutions. They can enhance their own representativeness, for example by appointing or electing representatives from relevant stakeholders in boards or panels. This is a form of descriptive representation: they try to reflect the composition of their regulated sector in the composition of executive boards, supervisory committees, or advisory boards. A study of four major Dutch independent regulatory authorities shows that efforts have been made to make the governing boards descriptively representative of important stakeholder groups (Van Veen 2014: 172–4). Up to a third of the appointed board members had a background in the regulated domain. However, all of these came from corporations, producers, institutions, or providers—no board members came from consumer or patient organizations.

In addition, NMIs can enhance their representativeness by consulting stakeholders, such as corporations, producers and consumers, patients and practitioners, during the process of agenda setting, policy preparation, decision-making, and implementation. This to a large extent resembles parliamentary practices such as legislative hearings and consultations. In the study mentioned above, all four regulatory authorities included representatives of affected interests at various regulatory stages. However, here, too, end users such as consumers, customers, patients, and their interest groups were structurally under-represented (Van Veen 2014: 211–22). Some organizations tried to remedy this by performing surveys and installing consumer panels.

NMIs can also take steps to provide public scrutiny and political account-giving. Many NMIs have been found to create voluntary forms of accountability on their own (Koop 2014). Research on voluntary accountability suggests it can be quite effective, first and foremost as an appropriate practice or form of ‘good governance’ (Koop 2014) and also because it invokes learning processes (Schillemans 2011). Simultaneously, voluntary accountability has also been portrayed as a strategic response to reputational threats and as an attempt to boost organizational reputations in order to sustain independence (Busuioc and Lodge 2016).

An example of voluntary accountability is the monetary dialogues between the ECB president and the European Parliament (Bovens and Curtin 2016). The legal basis for the ECB’s accountability to the EP is Article 284(3) TFEU, which provides that the ECB will send the EP an annual report on the activities of the p. 520 ECB and on the monetary ↳ policy of both the previous and current year. Moreover, the President of the ECB is to present this report to the EP, which then may hold a general debate on the basis of this report. In addition, it is provided that the President of the ECB and other members of the Executive Board may be heard by the competent committees of the EP. This can be at the request of the EP, but also on their own initiative. In addition, the EP Rules of Procedure require the ECB President to appear before the ECON committee at least four times a year (Fasone 2014: 175). These appearances of the ECB President before the EP—in plenary and in the ECON committee—have become known as the Monetary Dialogues. They provide a good platform for an intensive debate with the President of the ECB. The Parliamentarians ask many questions of Draghi, and some forms of political debate have developed over the years. Some preliminary steps have been taken to also engage in a dialogue with national parliaments.

Substantively: the highly influential and widely cited theory of responsive regulation urges regulatory authorities to call on and listen to various relevant stakeholders (Ayres and Braithwaite 1995). Responsive regulation broadens the perspective from the dyadic relationship between regulator and regulatee to wider relevant stakeholders. A strategy of responsive regulation is flexible and is responsive to the specific signals received about regulated entities and the various social motivations present within regulated industries. Regulatory authorities can choose from various enforcement strategies. The theory intends to describe how regulators choose between different strategies of enforcement but also aims to make regulation more effective, efficient, and legitimate. It is the latter purpose of responsive regulation that is relevant for this chapter. Responsive regulation may enhance the legitimacy of the regulatory authority, often a NMI, in two ways. On the one hand, regulators are urged to focus on the different motivations for compliance that exist in an organization or business and to tailor their interventions to the specific setting. This should theoretically lead to more understanding and acceptance of the role and enforcement strategies of the regulator by the regulated businesses (Nielsen and Parker 2009). On the other hand, by consulting with important stakeholders, independent regulators become more transparent, open and accessible. This may in turn contribute to their legitimacy in the sector. It is then still not possible to ‘vote the rascals’ out, yet stakeholders may get to know them and may start understanding that they may not be rascals and may even find them legitimate and effective. Similar strategies of responsiveness and stakeholder-orientation have also been practised for other types of non-majoritarian institutions, such as courts of audit, quangos, and risk assessors. Also, critics have claimed that responsive regulation is often not really responsive in practice, which necessitates a strategy of *really* responsive regulation (Baldwin and Black 2008).

Discursively: NMIs can also try to enhance their representativeness and political legitimacy in a more indirect, discursive way. They can claim to act as representatives of the people, even when they are not elected (Saward 2006). Representation can be seen as a ‘two-way street’ (Saward 2006: 301). The represented people can elect a representative, which is the basic principle of most democracies. On the other p. 521 hand, however, some agent or entity can make claims to represent a constituency and ↳ the constituency can accept this claim. This second way opens up opportunities for non-majoritarian bodies to represent constituencies without being elected. Expert public bodies can, for instance, claim to represent, secure, or advance the interests of the general public; an ambition symbolized in the names of some non-majoritarian bodies, such as defending ‘human rights’ or ‘consumer interests’. This is not done through traditional political representation and partisan politics, but by virtue of their independent, non-partisan, non-majoritarian nature. Detached from specific interests and partisan concerns, they are better able to guard the general interest in volatile markets with high information asymmetries and uneven playing fields.

Van Veen (2014), in his study on Dutch independent regulatory authorities, shows how these representative claims are reflected both in the establishment laws of these authorities and in their public presentations. The legislature explicitly established them with the task to secure a series of public interests, such as universal service delivery, prevention of market power abuse, energy supply security, transparency of markets, and the protection of consumers. As a result, these regulators all promoted an image of being public- or consumer-interest representatives (Van Veen 2014: 219). In their public presentations they portray themselves as 'agents' or 'guardian angels' of the consumer.

Communicatively: in line with the discursive claim for representation, NMIs can also seek to increase their legitimacy via the media. Some non-majoritarian institutions feature prominently in the news and some of them invest substantial resources in media framing, communication, and campaigns (Schillemans 2016). The media attention is, in part, triggered by incidents or by the agendas of journalists, news outlets, or the unpredictable turmoil of social media. Simultaneously, however, some NMIs have active strategies to influence media attention, boost their reputation and picture themselves in specific frames in the news. NMIs mostly lack the personalized flavour and extravagance with which some elected politicians try to make it in the news and they are generally very reluctant to engage in the overt political contestations that are of interest to journalists and the people. But NMIs do have some qualities that may give them access to favourable news coverage. Many of these institutions 'own' the key facts and data about population statistics, meteorological developments, or economic growth, which still play a large role in public debate. As owners of those data, the NMIs may also seek favourable news coverage for themselves. Furthermore, regulatory authorities are often depicted as neutral and knowledgeable in news stories, which may serve their cause to represent specific interests. And some non-majoritarian institutions in complex policy fields invest considerable time in backgrounding journalists and explaining how the field operates. This may enable them to propagate a perspective on the field that is supportive of their position. The larger NMIs are found to be sensitive to reputational threats and to switch between responses (Rimkuté 2018). Sometimes they will position themselves as technical experts solving complex issues, which is one possible strategy of representation ('We are here to solve your difficult problem'). And sometimes they, rather, choose to stress that they guard specific important values of interests, which is a second available strategy ('We are here to protect this specific vulnerable issue').

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Non-majoritarian Institutions as Guardians of Liberal Democracy

Non-majoritarian institutions are one of the more puzzling parts of contemporary democracies. They perform crucial functions, exist in various guises, and are integral to some of the most important policies, yet they do not sit well with normative theories of representative government. Most of the academic concerns about the increasing numbers of non-majoritarian institutions such as (quasi-)autonomous service providers, independent market regulators, and new audit and risk assessors were voiced around the 2000s. Since then, their numerical growth has halted somewhat. Yet, the issue of how these non-representative bodies fit in representative systems of government is more than likely to persist, as it has done for centuries. The first court of audit in Holland was, for instance, already installed in the fifteenth century and the first quango in 1575. This suggests that the issue of how unrepresentative, professional institutions relate to the more general democratic system, is likely to stay and invite reflection. This chapter has sought to identify some of the most pertinent topics in this respect.

So far, in line with much of the literature, we have treated non-majoritarian institutions as 'problems' in democracies on the grounds of their unelected nature. However, non-majoritarian institutions can also be understood as 'solutions', as guardians of representative democracies. Arend Lijphart (1999: 233), for example, has argued that giving central banks independent power is another way of dividing power. Independent central banks fit best within a consensus model of democracy, which, in the long run, provides 'kinder, gentler' forms of democracy (Lijphart 1999: 275). In his biography of the 'life and death of democracy', John Keane (2009) claims we are living in a post-Westminster democracy in which hundreds of independent bodies, including the five types identified by Vibert, but also civil society organizations, (social) media, and some businesses, have taken over the role of critical counterweights to government. In contemporary 'monitory democracies', Parliaments have lost some of their exclusive and acknowledged positions as representatives of the people and controllers of the executive to many other entities, including a host of NMIs. Some of the NMIs also explicitly guard and protect key democratic values and processes, such as the equal treatment of all citizens, fair and open elections, the rule of law, or principles of good governance and anti-corruption.

Furthermore, in situations where the elected rulers gravitate towards a tyranny of the majority or kleptocratic and autocratic rule, NMIs are often among the last to offer resistance and to protect the principles of liberal democracy. Somewhat paradoxically, then, unrepresentative and unelected NMIs can be crucial to foster and protect liberal democracies. This was already central to O'Donnell's (1998) call for 'horizontal accountability': powerful unelected bodies designed to keep the elected powers in check, protect p. 523 the rule of law, and prevent abuse of power. In a world in which stronger ↳ and more autocratic leaders are gaining ground, this democracy-protecting quality of NMIs may be of great importance.

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Note

1. Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012; https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

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Introduction: 'Whatever It Takes'

ON 26 July 2012, in the midst of the financial crisis, Mario Draghi, the head of the European Central Bank, gave a speech in London on the future of the Euro.[1] In his speech he made a seemingly casual, but momentous remark: 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.' This remark was decisive in saving the euro. The financial markets calmed down immediately. As a follow up, in 2015, the ECB started an unprecedented programme of quantitative easing. The ECB has been buying government bonds and other assets from commercial banks as part of its non-standard monetary policy measures. The costs of this programme have run between 60 and 80 billion euro per month and the total expenditure has amounted to the mind-boggling sum of far over a trillion euro. Nobody really knows what its long-term consequences will be for the Eurozone. It is highly contested, because it provides a disincentive for southern European member states to balance their budget and has put the pension systems in the northern member states in jeopardy.

Mario Draghi has been the most powerful man in the European Union in the past decade—much more powerful than any treasurer or finance minister in any of the member states. Yet he is neither elected, nor accountable to any parliament, European or national. He is accountable to the Governing Council of the ECB, which consists of the members of the Executive Board, plus the governors of the national central banks of the nineteen euro area countries. However, these governors are not elected either. They are appointed, often for a fixed term, and cannot be removed by an elected body.

 The ECB is a prime example of a very powerful 'non-majoritarian' institution (NMI). Its policies are of the utmost political importance and are sometimes very controversial. Yet, its governing members are not elected, nor are they appointed by elected bodies, and their policies are not subjected to approval by elected representatives (Majone 2014). Non-majoritarian institutions, such as powerful central banks, do not sit well with traditional, majoritarian, and electoral notions of democracy. We will discuss the variety and rise of these NMIs, their 'counter-majoritarian difficulties', and various strategies to enhance their representational nature. However, NMIs fit much better in more liberal, monitory notions of democracy. They can provide a series of checks and balances that prevent corruption and the abuse of power, and protect the rights of minorities. This monitoring perspective on NMIs will be discussed in the final paragraph of this chapter.

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Non-majoritarian Institutions

The concept of non-majoritarian institutions was first invoked by Majone in the context of regulatory agencies and it is also in this context that the concept is generally used. However, in line with Majone (1994: 2), we will refer more broadly to a range of public organizations for whom reconciling organizational and operational independence with democratic accountability is the central political problem. Non-majoritarian institutions come in a large variety: not only central banks, but also courts, regulatory and non-regulatory authorities, public service providers, quangos, bodies of oversight, and watchdogs such as courts of audit and ombudsmen qualify as non-majoritarian institutions. They have two things in common. On the one hand they exercise some form of public authority—they print money, they regulate or adjudicate, they make decisions on social benefits, licences, fines, subsidies, or permits, or they audit and control other public institutions. On the other hand they are not traditional ministries or municipal departments—they are neither headed by elected politicians, nor are they subject to direct control by elected representatives in parliaments or local councils.

A rather formal definition of non-majoritarian institutions is the one given by Mark Thatcher and Alec Stone Sweet (2002: 2): 'those governmental entities that (a) possess and exercise some grant of specialized public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials'. A more informal definition is provided by Frank Vibert (2007: 4–5): 'bodies in society that exercise official authority but are not headed by elected politicians and have been deliberately set apart, or are only loosely tied to the more familiar elected institutions of democracy—the parliaments, presidents and prime ministers'. Instead of the technical term non-majoritarian institutions, he uses the more colloquial term *unelected bodies*. Other terms used in the literature are 'quangos' (quasi-autonomous non-governmental organizations), arm's-length government bodies, non-departmental public bodies, or non-ministerial government departments.

p. 513 A crucial element in any of these definitions is the fact that they are non-*majoritarian* in character. The legitimacy of their power is not based on a majority of the votes of the electorate, either directly or via a representative body. Instead, they derive their legitimacy from expert decision-making at arm's length of elected politicians. For the purpose of this chapter, we will define non-majoritarian institutions as *institutions that exercise public authority which are neither headed by elected politicians, nor are subject to direct control by elected representatives.*

Frank Vibert, in his seminal book *The Rise of the Unelected* (2007: 20–9) distinguishes five broad categories of non-majoritarian institutions, which we paraphrase as follows:

1. *Service providers*: these are public bodies that are set up to provide services to the general public, such as central banking, broadcasting, statistics, public transport, research funding, and weather forecasts. Examples are the BBC, the ESRC, and the Office of National Statistics in the UK; the Federal Reserve System, NASA, AMTRAK, and the National Science Foundation in the US; and the ECB, Deutsche Bundesbank, KNMI, and ESF in Europe.

2. *Risk assessors*: these are public bodies that are set up to monitor and manage risks, for example in the area of health, safety, food, water, and the environment. Examples are the Food Standards Agency, the Health and Safety Executive, and the Environment Agency in the UK; the Environmental Protection Agency, the National Transportation Safety Board, and the Food and Drug Administration in the US; and the Swedish Environmental Protection Agency (Naturvårdsverket), the Dutch National Institute for Public Health and the Environment (RIVM), and the Federal Institute for Risk Assessment (Bundesinstitut für Risikobewertung, BfR) in Germany.

3. *Regulatory authorities*: these are public bodies that regulate and oversee the protection of a series of public values, such as fair and free competition, privacy, non-discrimination, or consumer protection. Often they monitor the boundaries between private activities and public concerns. Examples are the Equality and Human Rights Commission, the Gambling Commission, and the Office of Communications in the UK; the Securities and Exchange Commission, the Equal Employment Opportunity Commission, and the Consumer Financial Protection Bureau in the US; the Competition Authority (Autorité de la Concurrence) in France, the Authority for Financial Markets (AFM) in The Netherlands, and the Federal Cartel Office in Germany.

4. *Auditors*: these are public bodies that monitor and control the spending of public money and the

exercise of public powers. They are watchdog institutions that check, often on behalf of parliaments, whether public money is spent in compliance with financial regulations. Increasingly, they also evaluate the efficiency and effectiveness of government programmes. Examples are the local, national, and European audit offices, such as the National Audit Office in the UK, the Government Accountability Office in the US, and the European Court of Auditors in ↳ the EU. Other, more recently established, specialized auditors are the Care Quality Commission (CQC) in the UK, the US sentencing commission, or the European Anti-Fraud Office (OLAF) in the EU.

5. *Appeals bodies*: these are public bodies that citizens can appeal to when they feel that public bodies have infringed upon their rights, or have misused their powers. They provide venues for complaints and dispute resolution in addition to the traditional judiciary venues. Prime examples are the local, national, and European ombudsmen. But one can also think of a series of more specialized appeals bodies, such as the Employment Appeal Tribunal, or the Independent Office for Police Conduct in the UK, the Merit Systems Protection Board and the Office of Special Counsel in the US, or the Office of the Data Protection Commissioner in Ireland and the Data Protection Authority (GBA/APD) in Belgium.

Vibert's typology of unelected institutions is one of the various typologies which have been developed both in the academic world as well as in different national jurisdictions. In most democratic systems there are several types of non-majoritarian institutions, based upon different legal, political, and institutional traditions (Verhoest et al. 2012). Those formal-legal categorizations also tend to shift over time. As a consequence, it is difficult to compare the rise of unelected institutions across countries. Several scholars therefore illustrate rather than measure the rise of 'the unelected' (Vibert 2007), 'monitory democracy' (Keane 2009), and unelected institutions of 'global governance' (Koppell 2010). With long, non-exhaustive lists of relatively new institutions, they convincingly convey the message that there are 'many' non-majoritarian institutions. More generally, it has been claimed that these organizations now 'employ far more staff and spend far more money' than central government, as 'most of the real work of government is carried on through agencies' (Pollitt et al. 2004: 3).

There are, however, several comparative or additive inventories available that try to take stock of the fragmented world of non-majoritarian governance. An important source is Verhoest et al. (2012), providing an overview of 'government agencies' in thirty countries. The lion's share of those countries is in the Western world, yet there is, for instance, also information on countries such as Pakistan and Tanzania. Their overview suggests that all of those countries feature non-majoritarian institutions—mostly service providers and regulatory authorities—ranging from some tens in some countries to several hundreds in others. In another inventory, Hanretty and Koop (2009) aimed to gauge the number of independent regulatory authorities. They focused on the regulation of seven salient policy sectors—competition, energy, environment, financial markets, food safety, pharmaceuticals, telecommunication—and compiled a list of almost 500 independent regulatory authorities in almost 100 countries. This list was not exhaustive, but suggests that these sectors are globally, more often than not, regulated by independent regulatory authorities, albeit with varying levels of independence (Hanretty and Koop 2013). And the OECD (2017a) made a comparative inventory of advisory bodies aiming to contribute to the quality of governance and decision-making. All participating countries feature permanent, independent advisory bodies, ranging from six in Peru, to fifty in Lithuania and Sweden (OECD 2017a: 33).

p. 515
The Rise of the Non-elected

During the past decades these non-majoritarian institutions have gained prominence in many Western democracies. Particularly in the 1990s and 2000s, there were many analyses of the numerical growth of (quasi-)autonomous public sector service providers (Pollitt and Talbot 2004; Verhoest et al. 2012), regulatory agencies (Levi-Faur 2005), and audit bodies and auditing practices in the private and public sector (Power 1994; Hood et al. 1998). Hanretty and Koop (2009: 4) show that 85 per cent of the independent regulatory authorities in their sample were established in the 1990s or 2000s. Gilardi also shows that the rise of regulatory authorities is a relatively recent phenomenon, claiming that 'while only a few such authorities existed in Europe in the early 1980s, by the end of the twentieth century they had spread impressively across countries and sectors' (2005: 84). The same conclusion has been formulated for autonomous government agencies. Van Thiel (2012) studied for twenty-five common policy tasks in twenty-one countries whether they were performed by autonomous institutions, and when the autonomous institutions were created. It turned out that the great majority of those organizations had been created since 1990 and, again, most of those in the closing decade of the twentieth century. This testifies to how a radical shift in service provision from elected, majoritarian to unelected, non-majoritarian institutions occurred in the final decades of the twentieth century.

Since the turn of the century, the growth of the various non-majoritarian bodies has halted and has in some jurisdictions even reversed (O'Leary 2015; Van Thiel and Verheij 2017). However, unelected bodies are still prominent features of many democratic regimes. On the European continent, they have taken the place of neo-corporatist institutions, such as public industrial organizations, and departmental units that in the twentieth century performed a number of the functions nowadays performed by non-majoritarian institutions.

There are several driving forces behind this substitution. Neo-corporatist arrangements lost much of their legitimacy, due to depillarization and the decline of mass civil society organizations, such as unions and churches. Neo-corporatism as a blueprint for the institutional arrangement of society was displaced by New Public Management, the dominant public sector reform-theory from the end of the twentieth century. New Public Management emphasized privatization, marketization, and single-purpose organizations (Hood 1991). This led to the creation of numerous arm's-length public service providers in many countries, expected to operate more closely to the market. Strong markets however need strong rules. Hence the rise of independent risk assessors, regulators, and market authorities. New Public Management has been most influential in Anglo-Saxon countries, such as the US, the UK, and New Zealand. However, many of its institutions have been introduced in other countries too (Thatcher and Stone Sweet 2002: 12).

In the literature (Thatcher and Stone Sweet 2002; Thatcher 2002; Gilardi 2007) a variety of rationales is
p. 516 offered for putting central banks, regulatory authorities, service ↳ providers, and risk assessors at an arm's length or more of elected politicians. First, a major rationale has been the increasing technical and legal complexity of regulating many policy fields. Creating level playing fields in liberalized markets for energy, public transport, telecom, banking, and finance requires highly sophisticated, specific expertise regarding economic models, technical feasibility, and requirements of due process. Public regulators often face very powerful private parties for whom the stakes are high and who are able and willing to invest large amounts of time, money, and expertise to influence policies and to contest decisions. Elected politicians and many departmental civil servants are generalists who lack the required technical or legal knowledge. Non-departmental institutions can build up and maintain expertise over time, without being disrupted by cabinet reshuffles or a departmental overhaul after elections.

Second, by creating independent institutions that are not subject to the political cycle, politicians can make credible commitments towards investors and consumers. Delegation to independent regulators and bodies of oversight will enhance the consistency and credibility of policies over time. Investors are assured that their long-term investments will pay off, because the chances of short-term, politically motivated interventions in the sector are diminished. Consumers are assured that food quality, environmental safety, or financial stability are not jeopardized by partisan concerns, nepotism, or political whims.

Third, it can be a rational strategy for calculating political agents to commit future majorities, particularly in volatile political environments. Delegating policy implementation, regulation and oversight to independent bodies makes it more difficult for future majorities to change current policies overnight. This would require the relatively longer and cumbersome legislative trajectory of reforming the statutes and legal frameworks that provide the bases for their operations.

From the perspective of elected politicians, delegating to non-majoritarian institutions also can be attractive because it offers many opportunities for blame management. To begin with, it shields them from pressures to make exemptions regarding the provision of services or the granting of permits. Also, NMIs can create a buffer between unpopular decisions and elected politicians. For example, politicians can shift the blame for controversial decisions regarding interest rates, currency devaluation, or solvency requirements for financials, to central banks and regulators. In areas with a risk of highly visible incidents, such as public transport or food safety, independent risk assessors and regulators can function as lightning rods that can absorb much of the political health in case of accidents and casualties.

Problems of Representation

The European Central Bank's unprecedented programme of quantitative easing is a prime example of the
p. 517 enormous political powers that non-majoritarian institutions ↳ may exercise. The ECB has been the most influential political actor in the Eurozone in the past decade, and yet its governing members are not elected, nor are they appointed by, or accountable to, elected bodies. The same has been true for many national central banks (Amtenbrink 1999) and for the bulk of the NMIs. As Levi-Faur (2005) boldly stated, we live in a second-level indirect representative democracy: citizens elect representatives who appoint non-majoritarian experts who regulate economies and societies.

The issue of independence from direct political control has been one of the major issues in the academic literature on NMIs and has inspired industrious academic work aiming to understand how independent and influential those NMIs really are. This has, however, so far not accumulated into a shared understanding. On the one hand scholars have shown that separating organizational units from central government diminishes political control and makes those organizations less responsive to their political principals (cf. Egeberg and Trondal 2009). Various measures for autonomy and independence have been developed with which scholars show that NMIs are indeed, albeit to varying degrees, independent. One of those measures for independence has been developed by a group of mostly European scholars investigating the relative independence of executive agencies (Verhoest et al. 2012). Another measure was developed by the OECD, ranking regulatory authorities on their relative autonomy (OECD 2017b).

Research on organizational autonomy invariably shows that autonomy is not an absolute and one-dimensional but a relative and multi-dimensional phenomenon. Part of the reason is that autonomy can relate to various dimensions of an institution's operations (Verhoest et al. 2004). An NMI may, for instance, be fully autonomous in taking key substantive policy or regulatory decisions, but may still be fully dependent on central government for finances and its legal framework. This curbs independence in practice. Furthermore, even when the organization is formally autonomous, the democratically elected government is often still the most important stakeholder for agencies. A survey in seven Western countries amongst chief executives of autonomous agencies found that they almost universally still consider central government to be its most important stakeholder, compared to many other potentially relevant stakeholders (Schillemans et al. 2019). The chief executives also generally accepted that they were accountable to the political centre. All in all, the empirical evidence sketches a mixed picture of independence and dependence for NMIs.

From a perspective of democratic representation, however, even constrained independence of bureaucratic organizations can be seen as problematic. First of all, there are general problems of democratic legitimacy. NMIs lack input legitimacy; they cannot legitimize their actions on the basis of electoral mandates, as can elected politicians. Their legitimacy relies in part on throughput legitimacy, on the impartiality, legality and technical soundness of their operations (Schmidt 2013). Most of all, they rely on output legitimacy, on the efficiency and effectiveness of their policies and operations. This is fine as long as they 'bring home the
p. 518 beef' and the economy is ↳ flourishing and their policies are uncontested. However, it is a rather feeble basis for legitimacy in times of crises and uncertainty.

Second, political legitimacy can be particularly problematic if the policies of regulators and the decisions of service providers, risk assessors, and bodies of oversight are not in line with the preferences of present political majorities. This is a well known problem of judicial review by supreme courts. Alexander Bickel

(1962) has called this the ‘counter-majoritarian difficulty’. He used the term to describe the argument that judicial review is illegitimate because it allows unelected judges to overrule the law making of elected representatives. A similar argument can be made against far-reaching decisions by other non-majoritarian institutions, such as central banks. The counterargument, as with the judiciary—compare Ely (1980), and Ackerman (1991)—is that NMIs are part of the institutional checks and balances that shape the democratic constitutional state (Vibert 2007; Keane 2009; Rosanvallon 2011). Delegation to NMIs creates new separations of powers that can help citizens and elected representatives to control the exercise of political power and to curb majoritarian tendencies. NMIs are independent information gatherers that provide informational checks and balances in an era gravitating towards fact-free politics and fake news.

A third cluster of representation problems has to do with the composition of many NMIs. NMIs are populated by highly educated technical experts—scientists, engineers, lawyers, and economists—and not at all representative of the general population. This, too, may jeopardize the legitimacy of their operations. This is particularly the case when NMIs have a role in regulating controversial political issues, such as commissions that set standards and adjudicate regarding issues of equal opportunity and racial discrimination. Education levels are not politically neutral nowadays (Bovens and Wille 2017). Strong educational gradients can be observed in political preferences relating to very salient cultural issues, such as the EU, immigration, taxation, and national identity. University graduates tend to accept social and cultural heterogeneity and favour, or at least condone, multiculturalism and EU unification. Citizens with medium or primary educational qualifications tend to be much more critical of the EU and multiculturalism and prefer a more homogeneous national culture. Given their one-sided composition, NMIs run the risk of being accused of contributing to biased political agendas. With regard to social cultural issues, policy incongruences may occur between these highly professionalized bodies and large parts of the electorate (Hakhverdian 2015).

A fourth cluster of problems relates to the political accountability of NMIs. Citizens cannot ‘vote the rascals out’, directly or indirectly, if they are dissatisfied with their policies and operations. Unlike ministerial departments and civil servants, NMIs are not part of the political chain of delegation and accountability. In many cases, their directors cannot be called to give an account in parliaments or councils. As we saw, this is part of the rationale for delegating to NMIs, but it does raise the question, how then are they to account for their exercise of public power and use of public funds?

Non-majoritarian Political Representation

In response to these concerns about democratic representation and accountability, non-majoritarian bodies have developed several strategies to enhance their democratic legitimacy. NMIs are perhaps not representative in traditional terms, yet many NMIs actively seek to relate to their strategic environments. They can do so in a variety of ways.

Institutionally: First of all, NMIs can try to mimic traditional political institutions. They can enhance their own representativeness, for example by appointing or electing representatives from relevant stakeholders in boards or panels. This is a form of descriptive representation: they try to reflect the composition of their regulated sector in the composition of executive boards, supervisory committees, or advisory boards. A study of four major Dutch independent regulatory authorities shows that efforts have been made to make the governing boards descriptively representative of important stakeholder groups (Van Veen 2014: 172–4). Up to a third of the appointed board members had a background in the regulated domain. However, all of these came from corporations, producers, institutions, or providers—no board members came from consumer or patient organizations.

In addition, NMIs can enhance their representativeness by consulting stakeholders, such as corporations, producers and consumers, patients and practitioners, during the process of agenda setting, policy preparation, decision-making, and implementation. This to a large extent resembles parliamentary practices such as legislative hearings and consultations. In the study mentioned above, all four regulatory authorities included representatives of affected interests at various regulatory stages. However, here, too, end users such as consumers, customers, patients, and their interest groups were structurally under-represented (Van Veen 2014: 211–22). Some organizations tried to remedy this by performing surveys and installing consumer panels.

NMIs can also take steps to provide public scrutiny and political account-giving. Many NMIs have been found to create voluntary forms of accountability on their own (Koop 2014). Research on voluntary accountability suggests it can be quite effective, first and foremost as an appropriate practice or form of 'good governance' (Koop 2014) and also because it invokes learning processes (Schillemans 2011). Simultaneously, voluntary accountability has also been portrayed as a strategic response to reputational threats and as an attempt to boost organizational reputations in order to sustain independence (Busuioc and Lodge 2016).

An example of voluntary accountability is the monetary dialogues between the ECB president and the European Parliament (Bovens and Curtin 2016). The legal basis for the ECB's accountability to the EP is Article 284(3) TFEU, which provides that the ECB will send the EP an annual report on the activities of the
p. 520 ECB and on the monetary ↳ policy of both the previous and current year. Moreover, the President of the ECB is to present this report to the EP, which then may hold a general debate on the basis of this report. In addition, it is provided that the President of the ECB and other members of the Executive Board may be heard by the competent committees of the EP. This can be at the request of the EP, but also on their own initiative. In addition, the EP Rules of Procedure require the ECB President to appear before the ECON committee at least four times a year (Fasone 2014: 175). These appearances of the ECB President before the EP—in plenary and in the ECON committee—have become known as the Monetary Dialogues. They provide a good platform for an intensive debate with the President of the ECB. The Parliamentarians ask many questions of Draghi, and some forms of political debate have developed over the years. Some preliminary steps have been taken to also engage in a dialogue with national parliaments.

Substantively: the highly influential and widely cited theory of responsive regulation urges regulatory authorities to call on and listen to various relevant stakeholders (Ayres and Braithwaite 1995). Responsive regulation broadens the perspective from the dyadic relationship between regulator and regulatee to wider relevant stakeholders. A strategy of responsive regulation is flexible and is responsive to the specific signals received about regulated entities and the various social motivations present within regulated industries. Regulatory authorities can choose from various enforcement strategies. The theory intends to describe how regulators choose between different strategies of enforcement but also aims to make regulation more effective, efficient, and legitimate. It is the latter purpose of responsive regulation that is relevant for this chapter. Responsive regulation may enhance the legitimacy of the regulatory authority, often a NMI, in two ways. On the one hand, regulators are urged to focus on the different motivations for compliance that exist in an organization or business and to tailor their interventions to the specific setting. This should theoretically lead to more understanding and acceptance of the role and enforcement strategies of the regulator by the regulated businesses (Nielsen and Parker 2009). On the other hand, by consulting with important stakeholders, independent regulators become more transparent, open and accessible. This may in turn contribute to their legitimacy in the sector. It is then still not possible to 'vote the rascals' out, yet stakeholders may get to know them and may start understanding that they may not be rascals and may even find them legitimate and effective. Similar strategies of responsiveness and stakeholder-orientation have also been practised for other types of non-majoritarian institutions, such as courts of audit, quangos, and risk assessors. Also, critics have claimed that responsive regulation is often not really responsive in practice, which necessitates a strategy of *really* responsive regulation (Baldwin and Black 2008).

Discursively: NMIs can also try to enhance their representativeness and political legitimacy in a more indirect, discursive way. They can claim to act as representatives of the people, even when they are not elected (Saward 2006). Representation can be seen as a 'two-way street' (Saward 2006: 301). The represented people can elect a representative, which is the basic principle of most democracies. On the other
p. 521 hand, however, some agent or entity can make claims to represent a constituency and ↳ the constituency can accept this claim. This second way opens up opportunities for non-majoritarian bodies to represent constituencies without being elected. Expert public bodies can, for instance, claim to represent, secure, or advance the interests of the general public; an ambition symbolized in the names of some non-majoritarian bodies, such as defending 'human rights' or 'consumer interests'. This is not done through traditional political representation and partisan politics, but by virtue of their independent, non-partisan, non-majoritarian nature. Detached from specific interests and partisan concerns, they are better able to guard the general interest in volatile markets with high information asymmetries and uneven playing fields.

Van Veen (2014), in his study on Dutch independent regulatory authorities, shows how these representative claims are reflected both in the establishment laws of these authorities and in their public presentations. The legislature explicitly established them with the task to secure a series of public interests, such as universal service delivery, prevention of market power abuse, energy supply security, transparency of markets, and the protection of consumers. As a result, these regulators all promoted an image of being public- or consumer-interest representatives (Van Veen 2014: 219). In their public presentations they portray themselves as 'agents' or 'guardian angels' of the consumer.

Communicatively: in line with the discursive claim for representation, NMIs can also seek to increase their legitimacy via the media. Some non-majoritarian institutions feature prominently in the news and some of them invest substantial resources in media framing, communication, and campaigns (Schillemans 2016). The media attention is, in part, triggered by incidents or by the agendas of journalists, news outlets, or the unpredictable turmoil of social media. Simultaneously, however, some NMIs have active strategies to influence media attention, boost their reputation and picture themselves in specific frames in the news. NMIs mostly lack the personalized flavour and extravagance with which some elected politicians try to make it in the news and they are generally very reluctant to engage in the overt political contestations that are of interest to journalists and the people. But NMIs do have some qualities that may give them access to favourable news coverage. Many of these institutions 'own' the key facts and data about population statistics, meteorological developments, or economic growth, which still play a large role in public debate. As owners of those data, the NMIs may also seek favourable news coverage for themselves. Furthermore, regulatory authorities are often depicted as neutral and knowledgeable in news stories, which may serve their cause to represent specific interests. And some non-majoritarian institutions in complex policy fields invest considerable time in backgrounding journalists and explaining how the field operates. This may enable them to propagate a perspective on the field that is supportive of their position. The larger NMIs are found to be sensitive to reputational threats and to switch between responses (Rimkuté 2018). Sometimes they will position themselves as technical experts solving complex issues, which is one possible strategy of representation ('We are here to solve your difficult problem'). And sometimes they, rather, choose to stress that they guard specific important values of interests, which is a second available strategy ('We are here to protect this specific vulnerable issue').

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Non-majoritarian Institutions as Guardians of Liberal Democracy

Non-majoritarian institutions are one of the more puzzling parts of contemporary democracies. They perform crucial functions, exist in various guises, and are integral to some of the most important policies, yet they do not sit well with normative theories of representative government. Most of the academic concerns about the increasing numbers of non-majoritarian institutions such as (quasi-)autonomous service providers, independent market regulators, and new audit and risk assessors were voiced around the 2000s. Since then, their numerical growth has halted somewhat. Yet, the issue of how these non-representative bodies fit in representative systems of government is more than likely to persist, as it has done for centuries. The first court of audit in Holland was, for instance, already installed in the fifteenth century and the first quango in 1575. This suggests that the issue of how unrepresentative, professional institutions relate to the more general democratic system, is likely to stay and invite reflection. This chapter has sought to identify some of the most pertinent topics in this respect.

So far, in line with much of the literature, we have treated non-majoritarian institutions as 'problems' in democracies on the grounds of their unelected nature. However, non-majoritarian institutions can also be understood as 'solutions', as guardians of representative democracies. Arend Lijphart (1999: 233), for example, has argued that giving central banks independent power is another way of dividing power. Independent central banks fit best within a consensus model of democracy, which, in the long run, provides 'kinder, gentler' forms of democracy (Lijphart 1999: 275). In his biography of the 'life and death of democracy', John Keane (2009) claims we are living in a post-Westminster democracy in which hundreds of independent bodies, including the five types identified by Vibert, but also civil society organizations, (social) media, and some businesses, have taken over the role of critical counterweights to government. In contemporary 'monitory democracies', Parliaments have lost some of their exclusive and acknowledged positions as representatives of the people and controllers of the executive to many other entities, including a host of NMIs. Some of the NMIs also explicitly guard and protect key democratic values and processes, such as the equal treatment of all citizens, fair and open elections, the rule of law, or principles of good governance and anti-corruption.

Furthermore, in situations where the elected rulers gravitate towards a tyranny of the majority or kleptocratic and autocratic rule, NMIs are often among the last to offer resistance and to protect the principles of liberal democracy. Somewhat paradoxically, then, unrepresentative and unelected NMIs can be crucial to foster and protect liberal democracies. This was already central to O'Donnell's (1998) call for 'horizontal accountability': powerful unelected bodies designed to keep the elected powers in check, protect
p. 523 the rule of law, and prevent abuse of power. In a world in which stronger ↳ and more autocratic leaders are gaining ground, this democracy-protecting quality of NMIs may be of great importance.

Note

1. Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012; https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

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