



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

at the request of the Dutch Ministry of Finance under Articles 109l (2) and 109f (6) of the Treaty establishing the European Community and Article 5.3 of the Statute of the European Monetary Institute on a draft Act on the replacement of contractual reference rates of interest

1. On 21 August 1998 the European Central Bank (ECB) received a request from the Dutch Ministry of Finance for an ECB Opinion on a draft Act (hereinafter referred to as the “draft Act”) providing for:
 - regulations regarding the replacement of contractual references to the Amsterdam Interbank Offered Rate (AIBOR) and to other reference rates of interest; and
 - an amendment to the Act on the Supervision of Securities Trade 1995in connection with the participation of the Netherlands in Economic and Monetary Union.

2. In accordance with Article 109l (2) of the Treaty establishing the European Community (hereinafter referred to as the “Treaty”), the ECB has taken over the advisory functions of the European Monetary Institute (EMI), which went into liquidation upon the establishment of the ECB on 1 June 1998. The ECB’s competence to deliver an opinion is based on Article 1.1, fifth indent, of the Council Decision (93/717/EC) of 22 November 1993 on the consultation of the EMI by the authorities of the Member States on draft legislative provisions, as the draft Act contains provisions concerning the stability of financial markets and institutions. In accordance with Article 17.5, first sentence, of the Rules of Procedure of the ECB, this ECB Opinion has been adopted by the Governing Council of the ECB.

3. The aims of the draft Act are twofold:
 - First, with a view to ensuring the continuity of contracts under Dutch law, it accommodates the need for replacement rates for those contracts which refer to rates which will disappear as a result of the start of Stage Three of Economic and Monetary Union (the Amsterdam Interbank Offered Rate (AIBOR), the fixed advance rate of De Nederlandsche Bank and the discount on promissory notes). The ECB takes note that the Dutch Government intends to replace AIBOR by EURIBOR, the future euro area-wide indicator of interbank rates (provided that the levels of the two rates are very similar). The ECB also takes note that the Dutch Government intends to replace references to the fixed advance rate of De Nederlandsche Bank and the discount on promissory notes by a reference to the most relevant ECB rate, with corrections for differences. The determination of reference rates is not binding; parties may agree between themselves to use other reference rates. Whatever the case, reference rates replacing the fixed advance rate and the discount on promissory notes will cease to exist on 1 January 2002 when parties to contracts are expected to have the conditions of those contracts adjusted to the new circumstances. Finally, the determination of reference rates by the Dutch Government does not constitute a ground for the termination or amendment of contracts (with the exception of the previous reference rates).
 - Second, by amending the Act on the Supervision of Securities Trade 1995, the draft Act removes any uncertainty about the legal validity/enforceability under Dutch law of repurchase agreements relating to securities. Such uncertainty stems from fears among financial market operators that repurchase agreements may not constitute a valid legal basis for the transfer of ownership in the light of the prohibition on the fiduciary transfer of property as laid down in Article 84(3) of Book 3 of the Dutch Civil Code. This is an obstacle to the development of a market of repurchase agreements which may be affected by Dutch law and, as far as the European System of Central Banks is concerned, to the application of repurchase agreements in the execution of monetary policy operations and within the framework of the TARGET system if they may be affected by Dutch law.

4. The ECB welcomes the draft Act since it enhances the stability of financial markets and institutions and will serve to smooth the transition of the Netherlands from Stage Two to Stage Three of Economic and Monetary Union. The manner in which it is envisaged that the above aims will be achieved is consistent with existing Community legislation and practices adopted in Member States. The principle of the continuity of contracts was laid down in Article 3 of Council Regulation (EC) No. 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro, and measures similar to those which are currently contained in the

draft Act have already been taken in other Member States. The ECB supports in particular that AIBOR will be replaced by EURIBOR which conforms with the ECB's previous recommendations in this respect.

As far as the removal of uncertainties about the legal validity/enforceability under Dutch law of repurchase agreements relating to securities is concerned, this in general reflects the widespread use of this instrument in the financial markets. In particular, the draft Act removes an obstacle faced by Dutch counterparties in, and for the mobilisation of Dutch collateral for, ESCB operations to the extent that they will be executed through repurchase agreements. In this connection, it is noted that Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank requires the ECB and the national central banks to obtain "adequate" collateral from counterparties, a requirement which cannot be fulfilled if the legal instrument through which collateral is to be provided would be invalid/unenforceable. In addition, Article 9.1 of Directive 98/26/EC of the European Parliament and of the Council of 10 May 1998 on settlement finality in payment and securities settlement systems makes provision for the insulation of rights of holders of collateral security and, in particular, protects the ECB and the national central banks from the effects of the insolvency of the provider, irrespective of the legal method used to establish such collateral. If the provision of collateral security as referred to in that Directive through repurchase agreements were to be legally invalid/unenforceable under Dutch law, this would undermine the spirit of Article 9.1 of the Settlement Finality Directive.

5. The ECB confirms that it has no objection to this ECB Opinion being made public by the competent national authorities at their discretion.

Done at Frankfurt am Main on 16 October 1998.

The President of the ECB

[signed]

Willem F. Duisenberg