



EUROPEAN CENTRAL BANK

## OPINION OF THE EUROPEAN CENTRAL BANK

of 7 June 2004

at the request of the Ministry of Finance of the Netherlands

on a draft Financial Sector Supervision Act

(CON/2004/21)

1. On 6 May 2004 the European Central Bank (ECB) received a request from the Ministry of Finance of the Netherlands for an opinion on the *Voorstel Wet op het financieel toezicht* (draft Financial Sector Supervision Act – hereinafter the ‘draft act’).
2. The ECB’s competence to deliver an opinion is based on the third, fifth and sixth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions<sup>1</sup>, as the draft act concerns national central banks (NCBs), payment and settlement systems and rules applicable to financial institutions in so far as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.
3. Previously De Nederlandsche Bank (DNB) was in charge of supervising credit institutions and investment firms, while the Pensions and Insurance Supervisory Authority Foundation (PVK) was in charge of supervising insurance companies and pension funds and the Authority for Financial Markets (AFM, previously STE) was in charge of supervising securities firms and markets. Under the new functional model introduced by the draft act, DNB and the PVK after being merged under the name DNB will be responsible for prudential supervision of the entire financial sector. The AFM will be responsible for conduct of business supervision and will focus on ensuring orderly and transparent financial market processes, clear relationships between market entities and that consumers are treated with due care.

The reforms proposed in the Parliamentary report are being implemented in two phases. The first phase involved adapting certain regulations and concluding covenants between the two supervisors to redistribute their respective supervisory responsibilities. This phase was completed in September 2002. In the second phase other laws will be amended to take account of this new situation. The first legal act to be proposed in this phase is the proposed law on provisions concerning the merger

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<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

of DNB and the PVK, on which the ECB was consulted in October 2003 (CON/2003/23)<sup>2</sup>. The ECB refers to this opinion with regard to the statements made on DNB's role in prudential supervision and protecting the quality of supervision while reducing administrative costs. In the current opinion the ECB addresses only issues raised by the section of the draft act on which it is consulted.

The draft act is divided into five sections. Section one sets out general provisions; section two covers prudential supervision; section three deals with market conduct supervision; section four concerns infrastructure supervision; and section five contains final and transitional provisions. Section two assigns responsibility for prudential supervision to DNB whereas responsibility for market conduct supervision is assigned to AFM under section three. Under section four infrastructure supervision is a shared competence of both DNB and the AFM. The current consultation of the ECB relates only to section one.

4. The ECB welcomes the fact that, having thoroughly considered the different approaches adopted in other Member States and elsewhere, the Dutch authorities have adopted a functional division of labour with regard to supervising the financial sector. In particular, the draft act envisages allocating regulatory and supervisory tasks on the basis of the functional approach as follows: DNB will be responsible for safeguarding financial stability and for the prudential regulation and supervision of the entire financial sector, while the AFM will be responsible for conduct of business supervision as described above. This allocation of tasks demonstrates a very good understanding of current financial system developments and addresses the supervision of this changing market effectively, fully acknowledging DNB's essential role in promoting the safety and soundness of financial institutions and the stability of the financial system as a whole.

The ECB welcomes the proposed institutional framework, in particular in so far as it pursues a functional model that organises the instruments and responsibilities of financial regulation and supervision around the two primary public objectives in this area, namely that: (i) DNB is mandated with a clear financial stability objective and entrusted with extensive supervisory responsibilities over individual financial institutions; and (ii) the AFM is entrusted with the main task of market conduct supervision. The new structure acknowledges the growing importance of financial groups that provide different types of financial services. In order to address the specific prudential concerns related to such groups and ensure an overall level playing field among competing intermediaries, an effective coordination between the supervisory policies and regulation in all sectors of financial activity is also required.

From the ECB's perspective, this approach recognises the distinct character of the two goals of financial stability and investor protection, taking into account that the nature and scope of systemic risk is widening due to the closer links between credit institutions, insurance companies,

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<sup>2</sup> The law on which the ECB was consulted concerned the formal merger of the two bodies into one authority. The scope of its non-ESCB related tasks remained to be formally defined in the draft Financial Supervision Act. The draft merger act is currently being discussed in Parliament.

investment firms and pension funds. At the same time, it should be noted that financial stability and investor protection are complementary objectives and must be pursued consistently by the authorities to which they are entrusted, with both authorities acting in close cooperation.

5. The ECB notes as a matter of general concern that the Minister of Finance's influence over the supervisory authorities is increased. The ECB welcomes the fact that supervisors are to be held accountable for their actions, as this will enhance their efforts to maintain the highest possible standards of supervision. The ECB understands that the role of the Minister will continue to be based on the principle of 'supervision at a distance'. This principle guarantees relative autonomy to the supervisors, implying that the Minister of Finance will only carry out an investigation into the Act's adequacy or the way in which the supervisor implements or has implemented it where his 'at a distance' responsibility requires it. The Minister of Finance monitors the exercise of the supervision and must be able to form a correct assessment of the manner in which the supervisor implements or has implemented the law. However, it should be acknowledged that such accountability cannot apply to DNB's ESCB-related functions. While it is recognised that the draft act in no way intends to affect these tasks, nevertheless, the ECB would welcome an explicit statement regarding the scope of this important principle. Furthermore, a similar qualification could usefully be introduced in Article 1(2)(1) of the draft act.
6. A number of important general definitions will be provided in Article 1(1)(a) of section one. The list of definitions is currently incomplete. The ECB notes that the explanatory memorandum states that only where definitions under the draft act need to differ from definitions provided in other legal acts will they be defined in the draft act. The ECB underlines that that all terms and definitions, e.g. electronic money, branch office, qualified holding and credit institution, should be in line with those already existing in EU Regulations or Directives such as, *inter alia*, the Consolidated Banking Directive<sup>3</sup>, the E-money Directive<sup>4</sup> and the Directive on Markets in Financial Instruments<sup>5</sup>.
7. Article 1(2) of section one details the budgetary framework for the supervisory bodies under the draft act. The draft act requires both supervisory bodies to submit their budgets, where these concern the supervisory tasks undertaken in accordance with sections two to four, to the Minister of Finance for approval. It should be noted that the 1998 European Monetary Institute (EMI) Convergence Report states that where third parties, in particular the Government, are in a position, directly or indirectly, to exercise influence on the determination of an NCB's budget, the relevant statutory provisions should contain a safeguard clause that this does not impede the proper performance of the NCB's ESCB-related tasks. The ECB considers it essential that approval from

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<sup>3</sup> Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, OJ L 126, 26.5.2000, p. 1.

<sup>4</sup> Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions, OJ L 275, 27.10.2003, p. 39

<sup>5</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1.

the Minister is restricted to the budget for prudential supervision tasks and would recommend including wording that specifically excludes approval of the budget for ESCB-related tasks of DNB.

Under Article 1(2)(1) the Minister of Finance has the authority to request any information required to assess the feasibility of general policy intentions and draft legal provisions, where these relate to the supervision to be carried out by the supervisor in accordance with the draft act. The ECB notes that a similar provision exists in current financial supervisory legislation. The ECB understands that this provision does not apply to DNB's ESCB-related tasks. Indeed, Article 18(2) of the Bank Act 1998 already lays down DNB's obligation to provide information to the Minister of Finance when so requested. However, here the obligation is qualified by the need to take into account the relevant provisions of the Treaty and the Statute of the European System of Central Banks and of the European Central Bank.

8. Article 1(2)(h) of section one requires any proposed amendment to the Statutes of the supervisory authorities be submitted to the Minister of Finance for prior consent. The current wording of this provision is incompatible with Article 108 of the Treaty in so far as it concerns DNB. Under Article 108 of the Treaty, when exercising the powers and carrying out the tasks and duties conferred upon it by the Treaty and the ESCB/ECB Statute, neither an NCB nor any members of its decision-making bodies will seek or take instructions from, *inter alia*, any government of a Member State or from any other body. The ECB recognises that the Government will be involved in any proposed amendment to DNB's Statute in its capacity as sole shareholder in DNB. However, this Article should not extend to amendments to provisions of DNB's Statute that concern DNB's ESCB-related tasks or both its ESCB-related and non-ESCB-related tasks.
9. The ECB understands that the provisions on international cooperation and confidentiality will provide that DNB may cooperate with other third country supervisors and pass on information on the basis of reciprocity, if all other conditions are met. The ECB understands that these provisions will be interpreted in accordance with the relevant provision of DNB's Statute and the Bank Act 1998, which ensure compliance with DNB's obligations under the Treaty and the ESCB/ECB Statute.

The ECB notes that the draft article 1(5)(1)(f) would allow DNB and the AFM to exchange confidential information with the ECB, a foreign central bank or other foreign institution, to the extent that this is conducive to fulfilling the ECB's, a foreign central bank's or other foreign institution's 'monetary task'. The drafting of the latter part of this Article appears to be insufficiently comprehensive. This term 'monetary task' could be narrowly interpreted as excluding the ECB's and EU NCBs' tasks in the field of 'the smooth operation of payment systems' and contributions 'to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system'. To ensure an optimal exchange of information in this area the ECB would recommend redrafting Article 1(5)(1)(f) so that it includes an explicit reference to all 'ESCB-related tasks'.

10. The ECB notes that due to the individual drafting schedules for the five sections of the draft act, it is not possible at this stage to provide a comprehensive opinion on the full scope of the restructuring of the supervisory framework. The ECB looks forward to being able to supplement this opinion when it is consulted on the other sections.
11. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion. This opinion will be published on the ECB's website six months after the date of its adoption.

Done at Frankfurt am Main, 7 June 2004.

*[signed]*

*The President of the ECB*

Jean-Claude TRICHET