

**GS/LD/97/307**

**OPINION OF THE EUROPEAN MONETARY INSTITUTE**

on a consultation from the Netherlands Ministry of Finance under Article 109f (6) of the Treaty establishing the European Community (the "Treaty") and Article 5.3 of the Statute of the EMI as elaborated in the Council Decision of 22 November 1993 (93/717/EC) (the "Decision") on a draft Bank Act 1998 (the "draft Act") containing new provisions on De Nederlandsche Bank NV (the "Bank")

**CON/97/08**

1. The above consultation was initiated by the Netherlands Ministry of Finance on 15 April 1997 which submitted the draft Act together with an Explanatory Memorandum in English to the EMI.
2. The EMI's competence to deliver an opinion is based on Article 1.1, second indent, of the Decision, as the draft Act contains a complete new set of provisions on the Bank with a view to the implementation of the Treaty and particularly Article 108 thereof.
3. The EMI welcomes the timely and accurate adaptation of the statute of the Bank. As mentioned in the EMI's 1995 and 1996 reports on "Progress towards convergence" (the "1995 and 1996 Convergence Reports"), timely adaptation is necessary to enable the EMI and other Community institutions to assess, pursuant to their reporting obligations under the Treaty, progress made towards the fulfilment of the legal requirements for Stage Three.
4. The EMI notes with particular satisfaction the Bank's independence will now be *de iure* formalised through a deletion of the Minister of Finance's right to give instructions to the Bank as from the date of the establishment of the ESCB/ECB. This is in line with the EMI's views on central bank independence as expressed in the 1995 and 1996 Convergence Reports.
5. The EMI also welcomes that the supervisory powers of a Government representative in the Supervisory Board and his/her ancillary competence to obtain information have been restricted to non-Treaty related activities of the Bank. However, this restriction has to be derived from the reference in Article 13, section 1, to Article 2, section 1, of the draft Act and may be less clear than intended. It seems, on the one hand, obvious that this reference, *inter alia*, embraces Article 3 but not Article 4. However, as both Articles refer to payment systems, it may, on the other hand, be questioned where the borderline of the Government representative's powers lies in this respect. Such uncertainty may be resolved through reference in Article 13, section 1, to

“activities performed in the framework of the ESCB” or similar words rather than to “activities performed in order to achieve the objective described in Article 2, section 1”.

6. Furthermore, the EMI notes with satisfaction that the recitals of the draft Act explicitly mention that the Bank will become an integral part of the ESCB. This is such an important observation that it might merit an explicit reference in the draft Act itself, for example in Article 2, Section 1, although, admittedly, the last sentence of Article 5 covers this point as well, but in a more general, less explicit sense.
7. An explicit reference to the integration of the Bank in the ESCB may also accommodate the following concern. As mentioned in the 1995 and 1996 Convergence Reports, there is no prescribed method of adaptation. Adaptations may range, in a spectrum, from deletions, to references to Treaty Articles, to incorporations of (parts of texts) of Treaty Articles into statutes of national central banks. The method which has been chosen in the present case has an advantage and a disadvantage. An advantage is that the draft Act provides for a full text of the new statute of the Bank without cross-references to Treaty Articles. This supports legal clarity. The disadvantage of this method is that it may sometimes seem that national legislators or national central banks would still have an own responsibility in areas which have actually been transferred to the competence of the ESCB/ECB. An example of this disadvantage might be Article 3, section 1a, of the draft Act which states that the Bank “in the implementation of the Treaty” shall, inter alia, “co-define and implement monetary policy”. With a view to the fact that in accordance with Article 12.1 of the ESCB/ECB Statute:
  - the Governing Council will define monetary policy;
  - the Executive Board will implement such policy; and
  - the national central banks may be involved in the execution of monetary policy operations,the words “co-define and implement monetary policy” may, certainly when read in isolation, be confusing. It is recognised that the level of confusion is expected to be low as the recitals, the first sentence of Article 3, Section 1, the last sentence of Article 5 and the Explanatory Memorandum are clear and unambiguous as far as the Bank’s status is concerned. However, legal clarity would nevertheless be supported if:
  - Article 2.1 would also refer to the integration of the Bank in the ESCB;
  - the word “co-define” in Article 3, Section 1(a), would be replaced by an expression which better reflects the actual situation; and
  - the last four words of Article 3, Section 1(a), would read “execute monetary policy operations”, it being recognised that the Dutch text of the draft Act already uses the word “execute” (“tenuitvoerleggen”) rather than implement.
8. Finally, the EMI notes that the draft law contains in Article 8, section 3, an obligation for the Bank to provide uncollateralised intra-day credit to Government. Although this is presently not in

contradiction with rules at a Community level and particularly not with the Council Regulation of 13 December 1993 (EC/3603/93), it may not be excluded that such rules will be amended in this respect in the future. Such an amendment would imply that Article 8, section 3, of the draft Act would have to be adapted. The need for such an adaptation may be avoided by deletion of Article 8, section 3, which would in any case not prevent Government and the Bank to act as they deem fit, provided that Treaty requirements are being respected.

9. The EMI confirms that it has no objection to this opinion being made public.

4 June 1997