BREAK WITH THE PAST
THE ORGANIC ACT OF DE NEDERLANDSCHE BANK N.V.

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ABSTRACT

L'Articolo 109 del Trattato costitutivo della Comunità Europea richiede che, al più tardi entro la data di costituzione del SEBC, la legislazione degli Stati Membri venga adeguata al fine di eliminare le incoerenze con il Trattato e lo Statuto del SEBC/BCE e di assicurare il necessario grado di integrazione delle Banche Centrali Nazionali degli Stati Membri del SEBC. Tale norma implicava che la legislazione e gli statuti delle Banche centrali nazionali di questi Stati Membri dovevano essere modificati al fine di limitare le incoerenze con il Trattato e lo Statuto del SEBC/BCE ed assicurare il necessario livello di integrazione delle Banche Centrali Nazionali degli Stati Membri del SEBC.
Per quanto riguarda i Paesi Bassi, ciò ha significato che il Bank Act del 1948, la legge organica della Nederlandsche Bank, dovesse essere modificato. Lo studio esamina le principali differenze tra il Bank Act del 1948 e il successivo, il Bank Act del 1998. Inquadrati nel rispettivo contesto storico, viene rilevato che il Bank Act del 1998 differisce sotto molti aspetti dal precedente testo normativo e che pertanto le differenze con il passato sono considerevoli.

INTRODUCTION

Under Article 109 of the Treaty establishing the European Community (Treaty)[1] each Member State of the European Community has a duty to ensure that its national legislation, including the articles of association of its national central bank, is, by the date of establishment of the European System of Central Banks (ESCB) at the latest, compatible with the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB). This was a direct instruction to revise the *Bankwet* (Bank Act) of 1948, the organic Act which laid down the duties, objectives, instruments and institutional provisions governing De Nederlandsche Bank N.V. before it was replaced by the current act, the 1998 Bank Act.[2] This article examines, against a historical background, in what ways the organic Act governing De Nederlandsche Bank N.V. (the Bank) differs, in its current form, from its predecessors.

The requirement that national legislation be compatible with the Treaty is one of the provisions ensuring that the ESCB is able to conduct a uniform monetary policy. Were the laws, rules and regulations in force in the Member States to differ, implementation of the policy set by the European Central Bank (ECB) would be impossible or, at any rate, inadequate. Bringing national legislation into line with the Treaty requirements relating to Economic and Monetary Union (EMU) – in particular with the laws governing the powers of the national central banks – was thus of considerable importance. This is also evident from the fact that upon transition to Stage Three of EMU it was necessary to ascertain to what extent the Member States satisfied this legal criterion.[3]

The establishment of EMU was agreed upon in the Treaty on European Union[4], also known as the Treaty of Maastricht, the place where the Treaty was signed at the end of 1991.[5] The Treaty of Maastricht amended the Treaty and provided that EMU should take place in three stages. The first stage, lasting from 1989 to 1994, was geared towards further coordination of economic and monetary policy. The second stage began with the establishment of the European Monetary Institute (EMI) on 1 January 1994 and was marked by further convergence of the economic and monetary policies of the Member States and preparations for the introduction of the euro. Stage Three, which began on 1 January 1999, is marked by the advent of Monetary Union among the participating Member States.[6]

1 Upon entry into effect of the Treaty of Amsterdam on 1 May 1999 the articles were renumbered; this was previously Article 108 of the Treaty. The Treaty of Amsterdam (OJ, 1997, C 340) was approved for the whole of the Kingdom of the Netherlands by way of the *Goedkeuringswet* (Act of Ratification) of 14 December 1998; (*Staatsblad* (Bulletin of Acts, Orders and Decrees) 1998, 737).

2 The *Bankwet 1998* (1998 Bank Act), the *Statuten van De Nederlandsche Bank* N.V. (Articles of Association of De Nederlandsche Bank N.V.), and the Statute of the ESCB can be found on the Bank's website at www.dnb.nl. The ECB's website contains, inter alia, the Statute of the ESCB and the ECB's legal instruments.

3 This obligation is laid down in Article 121 (1), (2) and (3) of the Treaty. It also applies to Member States which join at a later stage (see Article 122 (2) of the Treaty).

4 OJ 1992, C 191.

5 Ratified by way of *Rijkswet* (Kingdom Act) of 17 December 1992 (Bulletin of Acts, Orders, and Decrees 1992, 692).

6 11 Member States acceded to Monetary Union on 1 January 1999. Greece joined on 1 January 2001.

The transition to Stage Three of EMU was about implementing the *monetary provisions* of the Treaty; the economic leg of EMU had largely been implemented at the beginning of the second stage. The monetary provisions are geared towards the needs of the Community as a whole and not specifically to those of an individual Member State. The requirement of compatibility between national legislation and the Treaty was one of the reasons for completely revising the 1948 Bank Act. In the process of modifying the 1948 Bank Act, the starting point was to identify which of its provisions were in conflict with the Treaty and the Statute of the ESCB. Such provisions had to be either amended or repealed. Thereafter it was ascertained which provisions would have to be introduced as a consequence of the fact that the Bank was to be an integral part of the ESCB and would have to operate in line with the guidelines and instructions of the ECB.[7] This not only meant having to introduce a number of new provisions; it was also decided that the Act's provisions, structure and terminology should, as far as possible, be brought into line with those of the Treaty and the Statute of the ESCB, in order to ensure that there would be as few differences as possible with the agreed Community provisions. In addition, the revision of the 1948 Bank Act was used as an opportunity to adapt the Bank's non-monetary duties to the requirements of the times, with the consequence that some of the provisions of the Bank Act disappeared altogether, while others were re-written. The break with history is considerable – much greater than in the case of previous revisions of the Bank Act.

HISTORICAL BACKGROUND

A large number of articles contained in the 1948 Bank Act have their origin in other bank acts, i.e. those of 1937, 1918, 1903, 1888 and 1863; some even go back to the Bank's first *Octrooi* (Letter Patent) of 1814. This Letter Patent relates to the *Koninklijk Besluit* (Royal Decree) of 25 March 1814 whereby the Bank was established and, for a period of 25 years, licensed to carry out "only those activities conferred upon it". Thus the Letter Patent of 1814 encapsulates three principles which can also be found in the 1948 Bank Act:

- the Bank was to limit itself to banking activities; trading in goods was forbidden, with the exception of trading in coin material;
- the Bank could perform only those banking activities detailed in the Letter Patent;
- the issuing of unsecured credit was expressly forbidden.

The first and the third of these principles can also be found in the 1998 Bank Act (Section 8); they stem not so much from the Dutch tradition, but rather from the fact that the Statute of the ESCB contains corresponding provisions.[8] The principle that the Bank can perform only those banking activities expressly stipulated in the Bank Act – such as those transactions described in Section 15

7 See Article 14.3 of the Statute of the ESCB.
8 Article 18 of the Statute of the ESCB.

of the 1948 Bank Act – was, in conformity with Article 18 of the Statute of the ECSCB, abandoned.[9] These amendments are already an indication of the extent of the break with the past. The break is also evident from the absence of provisions which are contained in the 1948 Bank Act and can be traced back to the 1863 Bank Act, such as the provision of cashier services to the State *free of charge*[10], the power to invest its capital and reserves[11], the publication of a summary balance sheet[12] and the dropping of the function of Secretary on the Bank's Governing Board. Section 10 of the 1948 Bank Act provides that the Bank is authorised, *to the exclusion of any other party*, to issue banknotes. This article, too, has its origin in the 1863 Bank Act, Section 1 of which provides that:

> *No bank of issue can be established and no foreign bank of issue can put its banknotes into circulation in this country other than by virtue of a special law and on the basis, and pursuant to the provisions, of such a law.*

The article likewise provides that "Bank of issue refers to any institution whose purpose is to issue banknotes or put them into circulation". In addition, Section 2 of the 1863 Bank Act grants the Bank the right to act as a bank of issue for a period of 25 years after the expiration of the existing Letter Patent. As a result, in successive Bank Acts up to that of 1948 the Bank was continually granted a licence to act as a bank of issue for a specific period of time. This Letter Patent was not granted to other financial institutions, meaning, de facto, that up to the entry into effect of the 1948 Bank Act the Bank had the exclusive right to issue banknotes. The licence construct was abandoned in the 1948 Bank Act, by way of which the Bank was granted the sole right to issue banknotes for an unlimited period. Under Section 6 of the 1998 Bank Act the Bank is also authorised to issue banknotes. However, the Bank's right to do so is no longer exclusive; under Article 106 (1) of the Treaty and Article 16 of the Statute of the ESCB both the ECB and the national central banks have the right to issue banknotes as from the beginning of Stage Three of Economic and Monetary Union.[13] This means, on the one hand, that alongside the banknotes issued by the Bank, banknotes issued by other central banks can circulate in the Netherlands, and, on the other, that the banknotes issued by the Bank can enter circulation throughout the euro area. Thus, the break with tradition is evident here too. On the other hand, an old tradition is maintained: the legal form of the Bank remains that of a *naamloze vennootschap* (public limited liability company), and the Governing Board and the Supervisory Board remain the Bank's most important bodies.

9 However, the activities which the bank may carry out are clearly demarcated: only such activities as are necessary in order to carry out the tasks conferred upon it (Section 5) or those conferred upon it by Royal Decree (Section 9 c).

10 Section 19 (2), 1948 Bank Act.

11 Section 18, 1948 Bank Act.

12 Section 35, 1948 Bank Act.

13 Article 106 should be read in conjunction with Article 116 (3) and Article 122 (3) of the Treaty and Protocol No. 11 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland. From this it emerges that the Treaty article relating to the issuing of banknotes is not applicable to Member States which have not yet adopted the euro, to Member States with a derogation and to the United Kingdom for as long as it makes use of its opt-out right. Thus, in the context of EMU, the term "Community" refers to the Member States belonging to the euro area.

The substantial nature of the revision of the Bank Act is evident from the new form of the "*Gemeenschapselement*" (public welfare component)[14] in the Bank Act of 1998. From time immemorial there had always been a Royal Commissioner who was responsible for supervising the Bank's activities.[15] During discussions on the draft 1937 Bank Act in the *Tweede Kamer* (Lower House), various Members expressed the view that the relationship between the Government and the bank of issue was in need of revision. While not wishing to turn the Bank into a state bank, they were keen to ensure that its policies be geared towards promoting the public welfare. In their view the Bank should not only direct its own activities towards this objective, but also ensure that functions of the private banking sector be performed in a manner which best served the welfare of Dutch society. The State was to ensure that the Bank performed these duties properly and, if necessary, should issue an instruction to the Bank to act accordingly. Within the same framework the issue was raised of whether it would be appropriate and desirable for the Bank to conduct an active economic policy under the influence and supervision of the Government.[16] Ultimately, however, this line of thinking did not find expression in the 1937 Bank Act. Only after World War Two was a process embarked upon of strengthening the Bank's public welfare component alongside the function of the Royal Commissioner who supervised the Bank's activities on behalf of government. An important reason for this was that the Bank's monetary policy under the gold standard was more or less automatic in nature. Following the abandonment of the gold parity in 1936, it was repeatedly necessary to give substance to monetary policy, as the Bank's room for manoeuvre had increased. The then Dutch Minster of Finance, Pieter Lieftinck, remarked that:

> *Before the war, under the system of the international gold standard, the Bank's policy was to a large extent mechanical in character. The maintenance of the existing gold parity of the currency unit was the guiding objective, and monetary policy was subordinate to this objective, irrespective of the economic consequences. In the thirties we had learned what the consequences of such a policy can be. When the gold standard was abandoned the era of managed currencies began. The central bank faced a new task. I was of the opinion that its position and powers had to be brought into line therewith.*[17]

This occurred, in the first instance, by way of the Royal Decree of 1 October 1945[18], which not only stated that the 1937 Bank Act, which had been abrogated by the occupying powers, was once again declared effective, but also that, inter alia, the appointment of members of the Governing Board by the shareholders was to be subject to the approval of the government, that a *Bankraad* (Bank

14 This is the term used historically in the Netherlands as a way of referring to the public element in the workings of the Bank. It should be distinguished from the term "Community element" (capital "C"), a concept referring to the European Community.

15 First introduced in the 1863 Bank Act, Section 20.

16 A.M. de Jong, *De wetgeving nopens De Nederlandsche Bank: 1814-1958: een historische studie*, Nijhoff, 's-Gravenhage 1960, p. 259.

17 A. Bakker and M. M. P. van Lent, *Pieter Lieftinck 1902-1989: een leven in vogelvlucht*, Utrecht, 1989, p. 163.

18 Bulletin of Acts, Orders and Decrees F204.

Council) – an advisory body for the Minister of Finance and for the Bank's Governing Board – was to be established, and that the Minister of Finance could issue instructions to the Governing Board.

These public welfare components ultimately appeared, in somewhat modified form, in the 1948 Bank Act. In addition, in order to strengthen the Bank's public welfare component, all shares were transferred to state ownership by way of the Naastingswet (Nationalisation Act) of 23 April 1948[19], which entered into effect on 15 May 1948.[20] Private shareholders affected by the nationalisation process were compensated. Such compensation took the form of issuing those shareholders who surrendered their shares to the Bank with a declaration on the basis of which they could, per share of 1,000 guilders in the Bank, receive an entry of a nominal amount of 2,000 guilders in the national debt register, yielding interest at a rate of 2.5%.[21] The last private shares were surrendered to the Bank in 1958. The Bank remained a *vennootschap* (public limited liability company), as this legal form guarantees independence and because there are a number of administrative advantages associated with such a form as compared with that of a public institution. For example, in the case of a public institution, by contrast with a public limited liability company, business is conducted solely through the budget.[22] Moreover, Finance Minister Lieftinck considered it necessary to deviate from previous Bank Acts by incorporating a general description of an issuing bank's duties in Section 9. Under Section 9 (1) of the 1948 Bank Act the Bank had:

> *... the duty to regulate the value of the Netherlands' monetary unit in such a manner as will be most conducive to the nation's prosperity and welfare, and in so doing to keep the value as stable as possible.*

Thus it was established that the Bank's (monetary) policy was to be geared to the public interest, i.e. to promoting the welfare of the Dutch state. In the *Memorie van Toelichting* (Explanatory Memorandum) to the Bill the Minister of Finance made it clear that the direction of monetary policy was to be determined by the Government.[23] Accordingly, under Section 26 the Minister of Finance was granted the power to issue binding instructions with regard to the Bank's monetary policy, where necessary. The final part of Section 9 (1), added during the reading in the Lower House by way of an amendment proposed by Member E. Sassen, provides that the country's welfare is served by stabilising the value of the guilder to the greatest extent possible. This addition was striking in that it gave the Bank's monetary policy a direction at a time when views on the issue still differed widely. Some expressed a preference for price stability, others for smoothing cyclical fluctuations, for pursuing a neutral monetary policy

19 *Wet nopens de naasting der aandelen in De Nederlandsche Bank N.V.* (Act on the nationalisation of shares in De Nederlandsche Bank N.V.), (Bulletin of Acts, Orders and Decrees I 165).
20 By virtue of Section 2 of the Nationalisation Act and the enactment decree of 12 July 1948 (Bulletin of Acts, Orders and Decrees I 290).
21 Sections 3, 4 and 5 of the Nationalisation Act.
22 M. M. G. Fase, *Tussen behoud en vernieuwing, Geschiedenis van de Nederlandsche Bank 1948-1973*, Sdu Uitgevers, Den Haag 2000, p. 38.
23 *Bijlage Handelingen* (Appendix of Proceedings) II, 1946-1947, No. 488, 5, p. 11.

or for supporting an employment policy.[24] Ultimately the addition proved to be a very propitious one; in the 1970s and 80s the pursuit of price stability became the prevailing doctrine for central banks. In the case of the ESCB this objective is laid down in the Treaty.[25]

The public welfare elements laid down in the 1948 Bank Act were in part revised in the 1998 Bank. All shares remain – in conformity with the Nationalisation Act – in the hands of the State, and the President and Executive Directors of the Governing Board are appointed by the Government.[26] The Bank Council also remains as an advisory body under the 1998 Bank Act, albeit in a modified composition and size.[27] On account of the independence required by the Treaty, the Minister of Finance's right to issue instructions, as laid down in Section 26 of the 1948 Bank Act, has expired, as has government supervision of the Bank's activities by a Royal Commissioner. There is a weak allusion to the Royal Commissioner in Section 13 (2), in conjunction with Section 14, in the form of a Government-appointed Supervisor who is to provide the Minister of Finance with all information deemed necessary. In addition, the 1998 Bank Act also makes reference to a public welfare element. However, this no longer relates to the welfare of the *country*, but rather – as a result of the transfer of monetary policy to the European level – to that of the *European Community*; the Bank supports, without prejudice to the objective of price stability, the general economic policies in the European Community.[28] In this context, the President of the ECB regularly appears before the European Parliament's Committee on Economic and Monetary Affairs, where he accounts for the policy pursued by the ECB.

MOST IMPORTANT REVISIONS

DEMOCRATIC ACCOUNTABILITY

From the beginning of Stage Three of EMU, monetary policy (together with the other ESCB tasks) was conducted at the Community, and no longer national, level. For the Netherlands this means that responsibility for monetary policy no longer lies with the Dutch Minister of Finance and, accordingly, that the Minister is no longer accountable to the Dutch Parliament for such policy. Accountability now lies at the European level. The ECB compiles an Annual Report on the activities of the ESCB and on the monetary policy for the previous and current year for the European Parliament, the Council and the Commission, as well as for the European Council. The President of the ECB presents this report to the Council and the European Parliament, which may hold a general debate on the basis of thereof.[29]

24 De Jong, p. 411.
25 Article 105; Article 2 Statute of the ESCB.
26 Section 12 (2), 1998 Bank Act.
27 Section 15, 1998 Bank Act.
28 Article 2 (2), 1998 Bank Act.
29 Article 113 Treaty; Article 15 Statute of the ESCB.

LAPSING OF THE RIGHT TO ISSUE INSTRUCTIONS

The principle that it is the Government of the Netherlands that has the last word on monetary policy in the Netherlands was already incorporated into the Royal Decree of 1 October 1945. Its inclusion in the 1948 Bank Act was justified as follows in the Explanatory Memorandum to the Bill:

> *In view of the fact that the direction of monetary policy should be determined by the Government, the Minister of Finance must be able to issue binding instructions to the Governing Board of the Bank on matters of principle regarding which the Bank's policies might conflict with the monetary and financial policies of the Government.*[30]

It is ultimately the Dutch Government's responsibility to safeguard the general welfare of the country. However, when the draft Act was being read in Parliament, Minister of Finance Lieftinck stated that in normal circumstances the coordination of the policies of the Bank and the Government should take place through regular consultation. The issuing of instructions should be considered an *ultimum remedium*.[31] No Minister of Finance has made use of the right to issue instructions laid down in Section 26 (1) of the 1948 Bank Act. This was partly due to the inclusion by Lieftinck of a second sub-section in Section 26, which granted the Bank the right to appeal to the Government against instructions and the option, included in the fourth subs-section of Section 26, of making the instructions public. It is also worth noting here that the third sub-section determined that, contrary to the normal procedure, the Council of State, the highest advisory Government body, had no role to play in such appeals to the Government, the rationale being that the interests of the country would be best served by swift decision-making procedures in such matters. These provisions strengthened the Bank's position to conduct an independent policy and forced the Minister and the Bank to find an internal solution to possible differences of opinion regarding the monetary policy to be conducted. De facto, therefore, the degree of independence enjoyed by the Bank under the 1948 Bank Act was high.

At the time when the 1948 Bank Act was being drafted, there was no unequivocal view on the monetary policy to be conducted by a central bank. As stated above, there were differing views on whether the aim should be to strive for price stability, to conduct a cyclical or employment policy, or to adopt a neutral policy stance. This was also one of the reasons behind granting the Minister of Finance the right to issue instructions to the Bank; however, charging the Bank with the task, in accordance with the wishes of Parliament, of keeping the value of the monetary unit as stable as possible gave a clear direction to the policy to be conducted by the Bank, thereby reducing the need to issue instructions. Since that period, the views on the monetary policy to be conducted by a central bank

30 Appendix of Proceedings II, 1946-47, No. 488, 5, p. 14.
31 Appendix of Proceedings II, 1947-48, No. 488, 8, p. 22.

have, however, evolved. Today the prevailing view is that a central bank's monetary policy should be based on one primary objective. This is the view, developed by monetarists in the 1960s, that central banks must follow a fixed monetary growth rule based on trend growth of real national income.[32] Monetary policy must be based on combating inflation, not on regulating the real economy by means of discreetly dampening cyclical fluctuations. According to these monetarists, the latter, in which the money supply is geared to the economic cycle, will in the longer term lead to greater cyclical fluctuations, as lag factors will cause monetary actions to have procyclical effects. In the mid-1970s several central banks, including the Deutsche Bundesbank, adopted a more or less fixed growth rate for the money supply, which was made public in advance. Through the pegging of the Dutch guilder to the Deutsche Mark in March 1983, Dutch monetary policy was indirectly (i.e. via German monetary policy) geared to a policy of fixed monetary growth up to the third stage of EMU.

Related to this is the preference for a central bank which is independent of the world of politics. When a central bank is in a position to conduct an independent monetary policy, this will ensure that monetary policy is protected from the (short-term) policies of Government. Thus, paradoxically, the responsibility for the common interest, which should, in the first instance, be that of Government, is partly withdrawn from the political domain. The primacy of politics in this area (and thus part of the democratic control exercised by Parliament) makes way for the advantages of an independent central bank. The solid reputation of a number of independent central banks (in particular the Deutsche Bundesbank) in the area of combating inflation has strongly contributed to acceptance of this view – a view which has had a great influence on the formulation of the Statute of the ECB and the national central banks participating in the ESCB.

As a result of the requirement for monetary policy to be independent, as laid down in the Treaty and the Statute of the ESCB, the Minister of Finance's right to issue instructions under the Bank Act 1948 was not incorporated into the 1998 Bank Act. In this respect, the legal situation is thus the same as that prevailing at the time of the 1937 Bank Act.[33] However, the actual situation has always, even under the 1948 Bank Act, been one in which the Bank has had a high degree of independence. As noted above, the Minister of Finance never made use of the right to issue instructions and the Bank has been able to conduct a completely independent monetary policy on the basis of its authority, in good cooperation with the Minister of Finance and within the broad frameworks established by the political domain. Even under the 1948 Bank Act the Bank enjoyed the reputation of being an independent central bank. Thus, the amendment introduced by the 1998 Bank Act is, in fact, smaller than it may seem in legal terms. The amendment is smaller than the above suggests in another respect too: although the Bank's independence vis-à-vis the Minister of Finance may indeed

32 See, inter alia, M. Friedman and A. Schwartz, *A Monetary History of the United States, 1867-1960*, Princeton University Press, Princeton 1963.

33 The Royal Decree of 1 October 1945 (Bulletin of Acts, Orders and Decrees F 204) already contained, before the 1948 Bank Act, the Minster of Finance's power to issue instructions to the Bank.

have increased, this is balanced by the fact that the Bank is now obliged to follow the instructions issued by the ECB.[34]

EXPIRATION OF THE OFFICE OF ROYAL COMMISSIONER

When extending the Letter Patent of 1838 the Government intended to institute a Royal Commissioner, but in the end it refrained from doing so as a result of the Bank's resistance. Under the 1863 Bank Act, however, this wish on the part of Government was finally fulfilled. The institution of a Royal Commissioner was based on the rationale that the interests of the State and its citizens were greatly affected by the actions of the Bank and that the State had also entrusted the Bank with considerable financial interests.[35] Article 30 (1) of the 1948 Bank Act stated that the Royal Commissioner should supervise the Bank's actions on behalf of Government. In addition, the article stipulated that the Royal Commissioner could attend the meetings of the Bank's governing bodies and that he would be provided, by the Governing Board, with all information which he deemed necessary in order to adequately conduct his supervision. This extension of the powers of the Royal Commissioner was laid down by Royal Decree.[36] In addition to supervision of the Bank's actions, Section 31 of the 1948 Bank Act also provided for the Royal Commissioner to supervise the Bank's financial management.

The Royal Commissioner was no longer included in the 1998 Bank Act. A continuation of the Royal Commissioner's right to supervise the Bank's actions and financial management would have been incompatible with the requirement of independence laid down in Article 108 of the Treaty (Article 7 of the Statute of the ESCB). Government supervision of the Bank's actions has been abandoned, while supervision of the Bank's financial management under the 1998 Bank Act is, in accordance with company law, conducted by the Supervisory Board. Instead of the Royal Commissioner, there is now a Government-appointed member of the Supervisory Board.[37] In addition to the duties ensuing from his membership of the Supervisory Board, this Supervisor has a *trait d'union* function between Government and the Bank.[38] As can be seen from the extended powers of the Royal Commissioner, the latter's duties also consisted largely of a *trait d'union* function: he acted as the "eyes and ears" of the Minister of Finance by informing the latter of the Bank's actions and policies. Within the confines set by the Treaty, this function has been taken over by the Government-appointed member of the Supervisory Board.

INTEGRATION INTO THE ESCB

One of the most important changes compared with the 1948 Bank Act is that in the 1998 Bank Act the Bank's objectives, tasks and activities are completely

34 See Section 3 (3) of the 1998 Bank Act.
35 Appendix of Proceedings II, 1862-1863, No. CXIX, 3, pp. 1477-78.
36 Royal Decree of 27 October 1972, No. 82.
37 Section 13 (2) of the 1998 Bank Act.
38 Section 14 of the 1998 Bank Act.

modelled in accordance with the objectives, tasks and activities of the ESCB, and that the Bank's rights and duties are formulated in such a way that the Bank is fully integrated into the European System of Central Banks. The Bank's tasks are no longer exclusively national, but also European, insofar as they coincide with those of the ESCB. The European dimension is evident from several sections of the 1998 Bank Act. Section 1 (2) provides for the Bank to be an integral part of the European System of Central Banks as regards the tasks and duties conferred upon the ESCB under the Treaty. Section 2 (2) subsequently makes clear that the Bank, without prejudice to the objective of price stability, supports the general economic policies in the European Community. The European dimension is also apparent from the tasks assigned to the Bank in Section 3, which reflect the tasks of the ESCB, and from the provision included in this Section that, in implementing the Treaty, the Bank may seek and take instructions exclusively from the ECB. Finally, this European dimension is also clear from Section 12 (4), which states that, with a view to achieving the objective of maintaining price stability, the Governing Board shall respect the President's position as a member of both the Governing Council and General Council of the ECB.

MODERNISATION

The revision of the 1948 Bank Act, which had become necessary in order to bring the Act into line with the Treaty, was used to adapt the Bank's non-monetary tasks to the new requirements of the time. First, it was ascertained which provisions on the tasks and powers were still appropriate; outdated provisions were taken out. Subsequently, it was decided which provisions belonged in the Act and which provisions should be more appropriately included in either the Bank's corporate Articles of Association or a ministerial regulation.

The Explanatory Memorandum[39] provides two examples to illustrate the modernisation of the Bank Act. Articles 11 to 14 of the 1948 Bank Act dealt with the exchange, form, compensation and recall for exchange of banknotes issued by the Bank. In the 1998 Bank Act it was decided, on the basis of Section 27 (3), that these provisions should be laid down in a general administrative order.[40] This decision was made because this concerned operational activities in respect of which it was important that the relevant rules may, if necessary, be amended through a simplified procedure. The rules issued applied to banknotes denominated in guilders. Upon the introduction of the euro banknotes and coins, this Royal Decree was amended, as was Section 27 of the 1998 Bank Act.[41]

The second example refers to the activities that the Bank was allowed to conduct to implement its tasks. Section 15 of the 1948 Bank Act included an exhaustive

39 Explanatory Memorandum, Appendix of Proceedings II, 1997-1998, 25719, No. 3, p. 14-15.

40 Royal Decree of 27 July 1998 concerning the institution of rules in relation to the exchange, withdrawal from circulation and signing of banknotes by De Nederlandsche Bank N.V. and to the information to be provided to the public in this respect (Bulletin of Acts, Orders and Decrees 519).

41 The amendment is introduced on the basis of Section 27 (4) of the 1998 Bank Act, which states that the section or part thereof shall cease to have effect on a date to be determined by Royal Decree. In connection with the introduction of the euro banknotes and coins, the first sub-section of Section 27, which states that banknotes issued by the Bank denominated in guilders shall be legal tender, was amended.

list of the activities which the Bank was allowed to conduct. Under the 1948 Bank Act, the greatly outdated provisions were interpreted as broadly as possible in order to allow the Bank to conduct those activities that were expected of a central bank at the time in question. Thus, it was concluded in the past that the Bank would be allowed to participate in bridging loans provided to countries by the Bank of International Settlements (BIS), in anticipation of a promised loan from the International Monetary Fund (IMF) or the World Bank.[42] In addition, in the mid-1980s it was judged that the Bank would be allowed to accept "certificates of deposit" (CDs) en "commercial paper" (CP) as collateral.[43] In the 1998 Bank Act this provision was replaced by one which granted the Bank broad powers to conduct transactions in the financial markets.[44] This provision, stripped of outdated concepts, was formulated in an open (non-exhaustive) way and was derived from Article 18 of the Statute of the ESCB.

A final example refers to activities, not specified in the Bank Act itself, conducted by the Bank pursuant to Royal Decrees issued on the basis of Section 21 of the 1948 Bank Act. It was ascertained for which of these activities under the 1998 Bank Act a separate Royal Decree was still necessary. A number of these decrees were repealed because they were outdated or because the activities in question were carried out in accordance with the 1998 Bank Act or the Treaty. The activities assigned to the Bank by Royal Decree under the 1998 Bank Act have a dual legal basis. This is due to the strict distinction between tasks and activities under the new Act. Thus, under Section 4 (4), it is permitted, by Royal Decree, to conduct other tasks and, under Section 9, sub-section c, to perform other activities.

STRUCTURE OF THE 1998 BANK ACT

CONTENTS OF THE ACT

The 1998 Bank Act consists of various chapters dealing with the following subjects: Chapter I: Definitions; Chapter II: Objectives, tasks and activities of the Bank; Chapter III: Provisions on the management of the company; Chapter IV: Information and confidentiality; Chapter V: Amendment of other acts; and Chapter VI: Transitional and final provisions.[45]

TERMINOLOGY AND STRUCTURE

The 1998 Bank Act refers to *objectives, tasks and activities*, in accordance with the subdivision in the Treaty and the Statute of the ESCB. The 1948 Bank Act

42 The Bank's participation in such loans boils down to the Bank concluding a so-called "substition agreement" with the BIS, whereby the Bank, at the request of the BIS, enters into the BIS's obligations. This is basically a guarantee by the Bank to the BIS, authorised on the basis of Article 15 (6) of the 1948 Bank Act.

43 It was concluded that these instruments should be considered promissory notes to the bearer, which the Bank was permitted to accept as collateral on the basis of Article 15, (3) and (6) of the 1948 Bank Act.

44 Section 8 (1) of the 1998 Bank Act.

45 By the Act of 11 November 1999, amending the 1998 Bank Act (Bulletin of Acts, Orders and Decrees, p. 507), Chapters VII and VIII were renumbered Chapters V and VI.

referred only to *activities* and *tasks*, where the concept of *activities* was broadly defined and comprised both tasks and activities that the Bank was legally entitled to undertake. The 1948 Bank Act did not contain the concept of *objective*. The objectives of the Bank under this Act and also under earlier Bank Acts were implicit in the tasks assigned to the Bank. In line with the Treaty and the Statute of the ESCB, the interrelationship between the three above-mentioned concepts is as follows in the 1998 Bank Act: the Bank uses the activities which it is entitled to undertake to perform a task aimed at achieving an objective.[46]

As indicated above, the Bank is integrated in the ESCB under the 1998 Bank Act. Accordingly, it contributes to a number of tasks and activities assigned to the ESCB. When reference is made to ESCB activities, this is indicated in the text of the Act with the words: "*In implementation of the Treaty*". However, in addition to the tasks and activities that arise from its integration into the ESCB, the Bank also performs activities that ensue from the national tasks assigned to it. A clear distinction is made in the Bank Act between ESCB and non-ESCB activities. This distinction comes to the fore in Sections 2, 3 and 4. As with ESCB activities, the 1998 Bank Act subdivides non-ESCB activities into *objectives, tasks* and *activities*. In Section 2, the first two sub-sections set out the ESCB objectives, while sub-section 4 sets out the non-ESCB objective. Section 3 specifies the ESCB tasks and Section 4 the non-ESCB tasks. From the structure of the Act it follows that the objectives aimed at achieving ESCB tasks and objectives (the monetary objectives) and the non-ESCB objectives (the non-monetary objectives) are on a par: the first objectives are of the same order as the last objective, which ensures that when the Bank performs a task related to a particular objective, this task is not subordinate to a task performed under another objective. This is also reflected in Section 1 (2), which stipulates that, in implementation of the Treaty, the Bank's *objective* is to maintain price stability, whereas in the Treaty (Article 105(1)) reference is made to *primary objective*. The Treaty thus indicates that maintaining price stability is the main objective of the ESCB. Were this terminology to have been adopted in the 1998 Bank Act, however, this would have meant subordinating the non-ESCB objective to the maintenance of price stability. It should be borne in mind, however, that the national central banks of the euro area can only perform other functions if these do not interfere with the objectives and tasks of the ESCB (including the primary objective of price stability).[47] Thus, despite the fact that in the 1998 Bank Act the ESCB and non-ESCB activities are on a par, the latter activities must never interfere with the objective of price stability.

TRANSITIONAL PROVISIONS

Until the start of Stage Three of EMU, monetary policy was a national prerogative. Pursuant to Article 109 of the Treaty, however, each Member State had to ensure that, at the latest by the date of the establishment of the ESCB, its national legislation, including the statute of its national central bank, was

46 See Explanatory Memorandum, Appendix of Proceedings II, 1997-1998, 25719, No. 3, p. 9.
47 Article 14.4 of the Statute of the ESCB.

compatible with the Treaty and the Statute of the ESCB. This Treaty obligation aimed to ensure that all central banks would be independent by the time the ESCB was established.[48] Its purpose was to create the necessary distance between the ESCB and the political domain in the important preparatory phase leading up to the transfer of monetary policy authority to the European level. That is why the 1998 Bank Act had to contain at least two transitional regimes: a regime applicable as from the establishment of the ESCB until the Netherlands' accession to Monetary Union (the Bank is independent and monetary policy is a Dutch prerogative) and a regime applicable as from the moment of the Netherlands' accession to Monetary Union (the Bank is independent and monetary policy is a prerogative of the ESCB). In addition, the 1998 Bank Act provides for a third regime, whereby the possibility is taken into account that the 1998 Bank Act would come into force *prior to* the establishment of the ESCB (the Minister of Finance can give the Bank instructions and monetary policy is a Dutch prerogative). The latter regime has never applied, because the 1998 Bank Act came into force simultaneously with the establishment of the ESCB.

CONCLUSION

The organic Act of the Nederlandsche Bank has been amended many times in the past two centuries, albeit that such amendments to the Act always followed in the footsteps of earlier Acts. The 1998 Bank Act, however, follows a completely new pattern: this time not a Dutch, but a European one. It is for this reason that the 1998 Bank Act in many ways constitutes a significant break with the past.

48 On the basis of Protocol No. 11 (Article 5), the United Kingdom was exempted from this obligation.