European Financial Market Lawyers Group

EFMLG

UP-DATE REPORT

THE MONEY MARKET:

LEGAL ASPECTS OF SHORT-TERM SECURITIES

15 December 2003

EXECUTIVE SUMMARY

One year has passed since the publication of the two consultative reports of the Euribor ACI and the EFMLG of 2 September 2002, on the short-term paper market in Europe and the legal aspects of short-term securities respectively. The purpose of the present report is to follow up these reports and to assess the extent to which the recommendations contained in them have been entirely or partially implemented or otherwise affected by EU and national legislative or regulatory developments over the last 12 months.

- The work undertaken in respect of the short-term European paper (STEP) project is an example of a market initiative intended to promote the integration of European short-term securities markets. In this respect and in the context of the on-going "post-Financial Services Action Plan" EU initiatives in the field of financial integration, it might be conveyed to the European Commission and the EU Financial Services Committee that the avenues explored so far in the context of the STEP project would constitute a valuable contribution to any policy action in the area of the short-term securities markets.

- Since last year, much additional work has been undertaken within the STEP project in order to prepare for the possible launch of STEP. The focus of this further work has been on issues related to:

  - the definition of minimum common features for the information memorandum for a short-term European paper wholesale market;
  - the definition of requirements for the calculation and release of the primary index, as well as for the publication of market statistics; and
  - the definition of user requirements with respect to settlement systems.

- As a result, a joint ACI and EFMLG working group, the ACI-EFMLG Working Group on the information memorandum for short-term European paper (the "Working Group"), prepared a report (the "ACI/EFMLG Report").[1] The ACI/EFMLG Report addresses not only the possibility of adopting a standardised information memorandum which would be submitted by issuers in order to obtain the STEP label, but also the adoption by market associations of a market convention which would deal with the conditions for obtaining the STEP label, and the related procedural aspects.

[1] The *Report on the information memorandum for short-term European paper* is available on the EFMLG's website together with the 2002 Report on the legal aspects of short-term securities and this update (www.efmlg.org).

- In the EFMLG's opinion, the STEP project, including in particular the adoption of a standardised format for European short-term paper, could contribute to the increased harmonisation of the features of domestic papers. These short-term papers are mainly traded on OTC markets but can also be dealt in on regulated markets within the meaning of the Investment Services Directive. It is the EFMLG's view that the still different conditions for admission to trading and listing in the EU Member States of these instruments should not give rise to regulatory arbitrage to the detriment of transparency for issuers and security for investors.

- In the EFMLG's view, Article 19 of the UCITS Directive should be transposed in a consistent manner across Member States. The EFMLG believes that the paper which meets the criteria for the STEP label as described in the ACI/EFMLG Report should in principle qualify as an eligible asset under the amended Article 19 of the UCITS Directive. The EFMLG encourages the UCITS Contact Committee[2] (or its successor as the case may be) to favour a consistent implementation of the UCITS Directive. The EFMLG welcomes in this respect the intention expressed by CESR to work on the issue *in conjunction with the STEP Task Force*[3] and any future possible co-operation with this Committee in this area.[4]

- The EFLMG welcomes the clarification in the Prospectus Directive[5] that money market instruments are excluded from its scope. However, this exclusion from the scope of the Prospectus Directive should not constitute an incentive for the adoption of diverging rules in terms of prospectus requirements between Member States. The EFMLG believes in this respect that the STEP project should contribute to the harmonisation of the domestic legal requirements applicable to money market instruments, in particular in terms of information disclosure.

- In its 2002 consultative report the EFMLG considered that central banks could be involved in organising and monitoring the market for short-term money market paper for a number of reasons detailed in the said report. The ACI/EFMLG Report, as recently updated indicates further the envisaged role that the ECB/ESCB might play in the context of the STEP project. In addition, the EFMLG notes the recent initiatives of some national authorities to clarify the allocation of responsibilities on the domestic markets for short-term securities.

- The adoption of a market convention for STEP, including a standardised information memorandum, would undoubtedly constitute important progress in terms of harmonisation of market documentation. The market associations might consider further studying the feasibility of

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[2] The functions of the Contact Committee, set up by the UCITS Directive alongside the Commission and composed of representatives of Member States and of the Commission, are in particular to facilitate the harmonised implementation of the amendments to the Directive through regular consultations on any practical problems arising from its application and to advise the Commission on additions or amendments to be made to it. In the post-Lamfalussy context, the functions of the UCITS Contact Committee should be allocated to the European Securities Committee and the Committee of European Securities Regulators (CESR). See in this respect the CESR press release of 30 October 2003.

[3] See in this respect the CESR consultation paper, "*The role of CESR in the regulation and supervision of UCITS and asset management activities in the EU*", CESR/03-378b, October 2003.

[4] It is noted that the notion of money market instruments within the meaning of the UCITS Directive is wider than the scope of the instruments currently covered by the STEP initiative.

[5] Not yet published in the EU Official Journal.

harmonisation and standardisation regarding other aspects which were not covered by the STEP project.

- Until very recently, there was no specific EC legislation regarding the withholding tax regimes for short-term money market paper. However, following the adoption on 3 June 2003 of Council Directive 2003/48/EC on taxation of savings income in the form of interest payments,[6] the EFMLG would recommend examining with the relevant fiscal experts the implications for the short-term paper market of some of its provisions relating to negotiable debt securities.

[6] OJ L 157, 26.6.2003, p. 38.

NOTICE

This Report is published by the European Financial Market Lawyers Group (EFMLG). All of the members of the EFMLG, whose names are set out in Annex 2, are experts in the field of financial markets law in the legal system of their Member State and have a high degree of practical experience. The members of the EFMLG participate in its work on a strictly personal basis. The views expressed in this paper are those of the EFMLG members and do not necessarily reflect those of their institutions or of the European Central Bank.

THE MONEY MARKET: LEGAL ASPECTS OF SHORT-TERM SECURITIES UPDATE (DECEMBER 2003)

INTRODUCTION/BACKGROUND

In its consultative report on the short-term paper market in Europe of 2 September 2002, the Euribor-ACI Short-Term European Paper Task Force (the "ACI Task Force") made several recommendations for the development of a pan-European market. They concern:

- the establishment of a standard format for the information memorandum for short-term European paper (STEP) available in English for all domestic European Union (EU) markets (Recommendation 1);
- the availability of this information memorandum at the European Central Bank (ECB) (Recommendation 2);
- the possible creation of a primary index and the collection and publication by the ECB of statistics on the STEP market (Recommendation 3);
- the eligibility of STEP as Tier 1 collateral for the purpose of monetary policy operations (Recommendation 4);
- the consistent implementation of the amended Article 19 of the UCITS Investments Directive (Recommendation 5);
- the exclusion of STEP from the scope of the new Prospectus Directive (Recommendation 6),
- same-day settlement as a medium-term objective for domestic and cross-border transactions (Recommendation 7);
- a common format for domestic legislation in the euro-zone (Recommendation 8).

Since last year, much additional work has been undertaken within the STEP project in order to implement some of these recommendations and to prepare for the possible launch of STEP. The focus of this further work has been on issues related to:

- the definition of minimum common features for the information memorandum for a short-term European paper wholesale market;
- the definition of requirements for the calculation and release of the primary index, as well as for the publications of market statistics; and
- the definition of user requirements with respect to settlement systems.

As a result, a joint ACI and EFMLG working group, the ACI-EFMLG Working Group on the information memorandum for short-term European paper (the "Working Group"), prepared a report (the "ACI/EFMLG Report"). The ACI/EFMLG Report addresses not only the possibility of adopting a standardised information memorandum which would be submitted by issuers in order to obtain the STEP label, but also the adoption by market associations of a market convention which would deal with the conditions for obtaining the STEP label and the related procedural aspects.[7]

In this context, it should be noted that some of the ACI recommendations, in particular Recommendations 1, 2, 3 and 7, are currently being considered in the context of the activities of the Working Group (see the ACI/EFMLG Report) and of the two ACI working groups on statistics and settlement. Some other ACI recommendations have a different time horizon and would imply specific developments, for instance of a legislative nature (e.g. Recommendation 8). Recommendations 5 and 6 mirror two corresponding EFMLG recommendations. As regards Recommendation 4, the ACI/EFMLG Report suggests that paper which meets the STEP criteria and obtains the STEP label should meet with favourable consideration by the ECB in determining whether it is an eligible asset for Eurosystem credit operations, provided that the established eligibility criteria are met.

In its report of September 2002 on the legal aspects of short-term securities, the EFMLG also made several recommendations concerning the increased integration of the short-term securities markets in Europe. In view of the rapid legislative developments during the last months, the purpose of the present exercise is to examine to what extent the recommendations of this report have already been completely or partially implemented.

[7] The *Report on the information memorandum for short-term European paper* is available on the EFMLG's website together with the 2002 report on the legal aspects of short-term securities and this update (www.efmlg.org).

IMPLEMENTATION OF THE EFMLG RECOMMENDATIONS: STATE OF PLAY

EFMLG Recommendation 1:

The EFMLG recommends that EU Member States adapt their legislation to the extent relevant in view of the common standards recommended by the Euribor ACI in its Preliminary Report. In addition, the European Commission may consider the common regime suggested by the Euribor ACI Preliminary Report as a basis for a Community legal act in the context of the Action Plan for Financial Services.

In its ACI/EFMLG Report, the Working Group made a distinction between different time horizons, considering that new legislation would require a fair amount of time to be prepared, adopted and implemented. It focused on what the market can achieve in the short term without such legislative change, which means that its proposals take account of the existing national legislation. On the other hand, the EFMLG's recommendation to adapt national legislation and to consider a Community legal act as well as ACI Recommendation 8 on a common format for euro-zone domestic legislation are still valid. The findings of the different working groups involved in the STEP project can hopefully promote a better understanding of the kind of legislation which may be appropriate.

The original EU Financial Services Action Plan (FSAP) of 1999 did not contain any specific initiative in the field of the money market and of short-term securities in particular. On 15 July 2003, the ECOFIN Council invited the Financial Services Committee (FSC) [8] to examine overall progress on financial integration and its economic benefits, notably in the context of the FSAP and its follow up, and to advise on those areas where progress needs to be made as a matter of priority in order to create a truly integrated financial services market in the EU.[9] In addition, in October 2003 the Commission set up some sectoral specialist groups composed of market practitioners, one of which is specifically devoted to the securities markets with a view to collecting proposals for policy action by Spring 2004. The terms of reference for the "securities business" sectoral group provide in particular that the group should assess progress in removing regulatory/legal barriers to the provision of services, the performance of financial transactions or the organisation of business on a cross-border basis.

The EFMLG considers that the work undertaken in respect of the STEP project contributes to the promotion of the integration of European short-term securities markets. It might be conveyed to the Commission and the FSC that the avenues explored so far in the context of the STEP project would constitute a valuable contribution to any policy action in the area of the short-term securities markets.

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[8] Now entitled the Financial Services Committee (FSC). Within today's framework the European Securities Committee may be well placed to consider the matter and any proposal for EU legislation.

[9] The FSC will report back on its work in order to prepare for a political debate in the ECOFIN Council during the spring of 2004 on priority areas for further action.

EFMLG Recommendation 2:

The EFMLG recommends that the legal qualification of the CP market(s) as either "regulated" or "non-regulated" markets should be clarified in legislation and be uniform across EU Member States.

None of the domestic commercial paper (CP) markets in EU Member States, nor the European commercial paper (ECP) market, today formally qualify as "regulated" within the meaning of the Investment Services Directive[10] or the proposed Financial Instruments Markets Directive (FIM) [11]. This is mainly due to the over-the-counter (OTC) nature of these markets, in a context where a "regulated market" is defined as "*a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments - in the system and in accordance with its non-discretionary rules - in a way that results in a contract, in respect of the financial instruments[12] admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III ('regulated markets')*".[13]

As highlighted in the EFMLG's report on the legal aspects of short-term securities, the legal regimes applicable to the domestic CP markets vary considerably from one country to another, and although most of are characterised by a certain degree of regulation and /or of organisation, a case-by-case assessment of these markets is warranted in order to determine their respective features.

Under Community law, in addition to the other features of money market instruments (liquidity, value which can be accurately determined at any time, low interest risk and low credit risk), one of their main characteristics is that they are normally traded on the money markets and not on regulated markets. There are however some exceptions to the latter rule. For instance, under French law, *titres de créances négotiables* (TCN) (French short-term instruments including French CP and certificates of deposits (CD)) are defined as "*negotiable debt securities issued at the issuer's initiative and traded on a regulated market or over the counter*"[14]. Among the recent market developments, the practice

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10 Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ L 141, 11.6.1993, p. 27.

11 See the political agreement reached on 7 October 2003 by the ECOFIN Council on a proposal for a directive of the European Parliament and of the Council 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.

12 The notion of financial instruments includes money market instruments.

13 Article 4(14) of the political agreement. A "Multilateral Trading Facility" is defined as "*a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments - in the system and in accordance with its non-discretionary rules - in a way that results in a contract, in respect of the financial instruments[13] admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title II.*" (article 4(15) of the political agreement).

14 Article L.213-1 of the French Financial and Monetary Code

increasingly adopted by credit institutions in particular of having their programmes listed on regulated markets (for instance ECP programmes listed on the Irish Stock Exchange) should also be mentioned. Money market instruments such as ECP can also be traded on platforms like TradeWeb.[15] According to the EFMLG, the STEP initiative will contribute, in particular with the adoption of a market convention and a standardised format for STEP information memoranda, to an increased harmonisation of the features of domestic paper in Europe. As regards the markets where these short-term papers are traded, it believes that the different conditions for admission to trading and listing should not give rise to regulatory arbitrage to the detriment of transparency for issuers and security for investors.

EFMLG Recommendation 3:

The EFMLG recommends that the amended UCITS Directive is implemented by Member States in a uniform manner regarding money market instruments, with the aim of exempting such instruments from the 10% ceiling established in Article 19(2)(a) of the UCITS Directive.

According to Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS,[16] (the "UCITS Directive"), Member States have to adopt measures to comply therewith by 13 August 2003, and to apply them by 13 February 2004.

In its report on the legal aspects of short-term securities, the EFMLG recalled the importance of avoiding any inconsistencies in the context of the implementation of the amendment to Article 19 of the UCITS Directive in Member States, in respect of the treatment by Member States of CP, ECP and other money market instruments, to the extent that they are equivalent. Similarly, Recommendation 5 of the ACI Task Force calls for the implementation of the amendments to the UCITS Directive in a harmonised manner so that "short-term paper" can be purchased without restriction by UCITS in every Member State.

(1) The 10% rule and UCITS investments in money market instruments

The conditions under which UCITS may invest in money market instruments, including CP, are set out in Article 19 of the UCITS Directive as amended. In particular, Article 19(2)(a) contains the so-called 10% rule which limits the possibility for UCITS to invest in certain categories of money market instruments. The Directive however gives Member States a certain margin of maneuver on the criteria that need to be fulfilled for the 10% limit not to apply.

[15] Other projects concerning platforms seem to be envisaged, for instance for the French TCNs: see Agefi, 28 August 2003.
[16] OJ L 41, 13.2.2002, p. 35.

Article 1(5) of Directive 2001/108/EC amends Article 19(1) of the UCITS Directive, *inter alia*, to add "*money market instruments other than those dealt in on a regulated market*" to the eligible investments. This means in practice that the 10% limit does not apply to money market instruments admitted to or dealt in or a regulated market within the meaning of the Investment Services Directive. Therefore, a Spanish UCITS can for instance invest 100% of its assets in ECP listed on a regulated market within the meaning of the Investment Services Directive (for instance, the Irish or Luxembourg stock exchanges).

Furthermore, the amended Article 19 of the UCITS Directive provides that, for the money market instruments which are not dealt in on a regulated market, the following conditions must be met:

- the issue or issuer of such instruments must itself be regulated for the purpose of protecting investors and savings, and
- they must be issued or guaranteed by one of four kinds of issuers described in the Directive[17].

(2) Money market instruments and the Implementation of the UCITS Directive: the French case[18]

The recent transposition of the Directive in France provides an illustration on the legal issues raised by the interpretation of Article 19 at the Member States level. Decrees implementing in France the amending UCITS Directive of 21 January 2002 (the Directive) were published in the French Official Journal of 22 November 2003[19]. In particular, Decree n° 2003-1103 (the Decree) specifies the conditions applicable to UCITS investment policies in eligible assets (including in money market instruments).

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17 Credit institutions or insurance companies (i.e. subject to prudential supervision); national or international public entities; corporates having securities dealt in on a regulated market; or other bodies belonging to categories approved by UCITS competent authorities.

18 The EFMLG does not have detailed information on the manner Article 19 of the Directive was transposed into the national legislation of Member States. On the basis of the information available, it seems that the national legislation in certain Member States mirrors without any further specification on the eligibility criteria of money market instruments the wording of the Directive (see, for instance, the implementation of the Directive in Luxembourg). In Portugal, the UCITS Directive was implemented through Decree-Law n. 252/2003, of October, 17. According to § 2 of article 45 of this Decree-Law, an UCIT may invest up to 10% of its net global value in securities and money market instruments different form those listed in § 1 of the same article, which replicates § 1 of article 19 of the UCITS Directive. The approach of the Portuguese legislator was therefore more stringent than the EU legislator, since it replaced the concept of "assets" for "net global value". In the absence of detailed provisions in the domestic legislation, a certain discretion is as a consequence left for national regulators in the interpretation of this provision.

19 Decree n ° 2003-1103 of 21 November 2003, amending the Decree n° 89-623 of 6 September 1989 taken in application of the law n° 88-1201 of 23 December 1988 regarding UCITS and creation of debt mutual funds (fonds communs de créances) and the Decree n° 2003-1104 of 21 November 2003 amending the Decree n° 89-624 of 6 September 1989 amended taken in application of the law n° 88-1201 of 23 December 1988.

The French provisions implementing the Directive regarding the conditions applicable to UCITS wishing to invest in money market instruments[20] mirror the conditions of Article 19(1) (h) with some adjustments taking into account the French legal framework. In addition, the Decree provides some interpretative criteria for the assessment of the eligibility of money market instruments (i.e., in the French law context, *negotiable debt securities* including commercial paper, certificates of deposit and medium-term notes).

The Decree provides that financial instruments which are eligible assets for an UCITS are either:

- admitted to trading on a regulated market; or
- admitted to trading on a regulated market operating regularly in a State that is neither a member of the EU nor a party to the Treaty on the EEA, provided that this market is not on a list of excluded markets established by the *Autorité des marchés financiers* (Financial Markets Authority)[21].

Furthermore, *negotiable debt securities* issued on the basis of French law or of foreign law are assimilated to "*assets admitted to trading on a regulated market"*. This means that they constitute eligible assets provided that:

- they are subject to specific public supervision having the aim of protecting the holders of these securities**;** and provided that
- they meet each of the following four conditions:

(i) prior to the first issue, the issuer shall draw up a document containing information having a bearing on its economic and financial circumstances and on the issue programme; it shall ensure that the document is updated at least annually and whenever a new fact is likely to have a significant bearing on the valuation of the issued securities or on the successful outcome of the programme;

(ii) the issue shall be supervised by an independent public authority[22], which shall in particular ensure that the issue complies with laws and regulations and with the issue programme, that the information document is made available to investors and shall also ensure regular distribution of statistical information on the issued securities;

(iii) the securities shall be registered in an account and be subject to procedures regulating their settlement, the security and smooth operation of which shall be supervised[23];

(iv) the issuer shall belong to one of five categories described in the Directive[24].

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[20] Under the UCITS Directive, money market instruments are defined as instruments normally dealt in on the money market which are liquid, and have a value which can be accurately determined at any time.

[21] Financial instruments admitted to trading on a regulated market shall include financial instruments that have been issued once a request for their admission to trading has been made. However, they shall cease to be so included one year after issue if at that date they have not been admitted to trading.

[22] The French official version reads as follows: "*L'émission est supervisée par une autorité publique indépendante, qui veille notamment à la conformité de l'émission aux lois et réglements et au programme d'émission*".

[23] The French official version reads as follows: "*(…) dont la sécurité et le bon fonctionnement sont contrôlés*".

The 10% restriction rule still applies for the assets which do not fulfil the above requirements (in accordance with Article 3 of the Decree).

The French Decree aims to clarify the ambiguities of the wording of Article 19(1) (h) of the UCITS Directive which deals with the conditions for the eligibility of money market instruments. The Directive provides in particular that "*the issue or issuer of such instruments must itself be regulated for the purpose of protecting investors and savings*". The Decree clarifies that "*negotiable debt securities issued on the basis of French law or of foreign law* [must be] *subject to specific public supervision having the aim of protecting the holders of these securities*". Furthermore, the Decree also defines the criteria for eligible money market instruments/negotiable debt instruments. These additional eligibility criteria can be summarised as follows:

- Submission by the issuer of an Information memorandum and mandatory up-date;
- Supervision of the issue by an independent public authority, compliance of the issue with laws and regulations and with the issue programme; availability of the information memorandum to investors; regular distribution of statistical information on the issued securities; and
- Registration of the securities in an account and procedures regulating their settlement, the security and smooth operation of which shall be supervised;
- Eligible issuers[25].

Whereas the criterion applicable to the types of eligible issuers merely constitutes a direct implementation of the UCITS Directive - Article 19(1)(h)-, the first three criteria reflect to a certain extent the parameters which have been identified by the draft ACI-EFMLG Report on STEP Information Memorandum as conditions to be fulfilled in order to obtain the STEP label. Other conditions imposed by the Decree such as the criterion of "*supervision"* are not identified as such by the ACI-EFMLG Report on Information Memorandum[26]. The EFMLG notes in this respect that the French Decree refers to different kinds of supervision: specific public supervision having the aim of protecting the holders of these securities; supervision of the issue by an independent public authority; supervised entities; supervision of the security and smooth operation of settlement.

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[24] (a) supranational entities, certain public entities, central banks; (b) an entity whose securities are traded on a regulated market; (c) an institution subject to prudential supervision (d) an issuer benefiting from certain types of public guarantees; (e) another entity belonging to a category included on a list drawn up by the Financial Markets Authority that is subject to investor protection rules (this concerns for instance a securitisation entity enjoying the benefit of a line of bank financing).

[25] See footnote 24

[26] Under the current provisions of the Decree, instruments such as Euro-CP might not meet all requirements applicable to *negotiable debt securities* as defined under French law. For instance, it seems that papers such as Euro-CP would not normally meet the requirements that the negotiable debt securities should be subject to specific public supervision having the aim of protecting the holders of these securities; and that the issue shall be supervised by an independent public authority.

The EFMLG encourages the UCITS Contact Committee[27] (or its successor as the case may be) to favour a consistent implementation of the UCITS Directive with a view to ensuring a level playing field across Member States. The EFMLG believes in this respect that the paper which meets the criteria for the STEP label as described in the ACI/EFMLG Report should in principle qualify as an eligible asset under the amended Article 19 of the UCITS Directive. The EFMLG also welcomes the intention expressed by CESR to work on the issue *in conjunction with the STEP Task Force*[28] and any future possible co-operation with this Committee in this area[29].

EFMLG Recommendation 4:

The EFMLG recommends that the still draft Prospectus Directive and national legislation exempt the issuers of money market paper of less that one year maturity from the obligation to adopt, register and update a prospectus.

This EFLMG recommendation was taken on board in the context of discussions on the new Prospectus Directive.[30]

The purpose of the Prospectus Directive, as adopted on 15 July 2003 by the ECOFIN Council is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.[31] For the purposes of this Directive, "securities" means

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27 The functions of the Contact Committee, set up by the UCITS Directive alongside the Commission and composed of representatives of Member States and of the Commission, are in particular to facilitate the harmonised implementation of the amendments to the Directive through regular consultations on any practical problems arising from its application and to advise the Commission on additions or amendments to be made to it. In the post-Lamfalussy context, the functions of the UCITS Contact Committee should be allocated to the European Securities Committee and the Committee of European Securities Regulators (CESR). See in this respect the CESR press release of 30 October 2003.

28 See in this respect the CESR consultation paper, "*The role of CESR in the regulation and supervision of UCITS and asset management activities in the EU*", CESR/03-378b, October 2003.

29 It is noted that the notion of money market instruments within the meaning of the UCITS Directive is wider than the scope of the instruments currently covered by the STEP initiative.

30 Directive 2003/ /EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC. Not yet published in the EU Official Journal.

31 The current Listing Particulars Directive (Council Directive 80/390/EEC of 17 March 1980 co-ordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, OJ L 100, 17.4.1980, p. 1) and the current Prospectus Directive (Council Directive 89/298/EEC of 17 April 1989 co-ordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public, OJ L 124, 5.5.1989, p. 8) are to be merged into a single text, i.e. the new Prospectus Directive. One of the main purposes of the new Prospectus Directive is to ensure full coverage of equity and non-equity securities offered to the public or admitted to trading on regulated markets as defined by the Investment Services Directive and not only of securities which have been admitted to official stock exchange listing.

transferable securities as defined in Article 1(4) of the Investment Services Directive **with the exception of money market instruments as defined in Article 1(5) thereof having a maturity of less than 12 months**. The Directive also provides that, for these instruments, national legislation may be applicable.

The EFLMG welcomes that money market instruments do not fall within the scope of the Prospectus Directive to the extent this exclusion serves the purpose of having specific and suitable disclosure requirements for these instruments. In this respect, the EFMLG believes that the STEP project, and in particular the adoption of a market convention including a standardised information memorandum, will contribute to the harmonisation of the domestic legal frameworks applicable to money market instruments in terms of disclosure requirements (see in this respect the ACI/EFMLG Report). The EFMLG also welcomes the efforts of the national authorities to clarify these requirements (for instance in France with the Law on financial security or in the UK with the process of dematerialisation of money market instruments). In the EFMLG's view, however, the fact that the Prospectus Directive does not cover money market instruments should not constitute an incentive for the adoption of diverging rules in terms of prospectus requirements between Member States.

EFMLG Recommendation 5:

The EFMLG recommends national and Community authorities, and the ECB, to consider the establishment of a common overseer, or at least a similar kind of overseer, across EU Member States, taking account of the above considerations.

The EFMLG notes that some Member States assimilate short-term money market instruments with securities, and subject such paper to the supervision of the securities markets regulators; that in others such supervision, or other kind of monitoring, is entrusted to the central bank;[32] and that in yet others there is no such specific regulation and the market is instead monitored by authorities entrusted with general financial markets supervision.[33] To achieve a level playing field in this respect, the EFMLG considered in its 2002 consultative report that central banks could be involved in organising and monitoring the market for short-term money market paper for a number of reasons detailed in the said report.

The ACI/EFMLG Report, as recently amended, indicates further the envisaged role that the ECB/ESCB might play in the context of the STEP project. In addition, the EFMLG notes the recent initiatives of some national authorities to clarify the allocation of responsibilities on the domestic markets for short-term securities.

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[32] For example, and most importantly, in France, where supervision is carried out by the Banque de France; other cases are Italy, Portugal and Ireland. In Finland the central bank is closely associated to the supervisory authority in this particular market.

[33] Germany, the United Kingdom and Belgium.

In France, the Law on financial security, published on 1 August 2003, clarifies, within the French Financial and Monetary Code, the respective roles and functions of the new market authority, i.e. the Financial Markets Authority (AMF) and the Banque de France as regards the rules on the organisation and supervision of the TCN market. For instance, Article L.213-4 of the said Code provides that the financial documentation is to be submitted, prior to the first issuance of TCNs, to the Banque de France, which is in charge of ensuring that issuers comply with the conditions of issuance laid down in Article L.213-3 of the Code.

Under the new provisions on TCNs, the AMF will only grant a visa for prospectuses in the (limited) cases of "*appel public à l'épargne*" (public offerings) since the TCN market is essentially between professionals. Moreover, a protocol will be concluded between the AMF and the Banque de France regarding the respective powers of the two authorities in respect of the surveillance of the TCN market.

In the United Kingdom, the Bank of England plays a decisive role in the formulation and implementation of the dematerialisation process of money market instruments and the future organisation of the market -see for instance the pro forma deed published by the Bank of England, terms for Eligible Debt Securities corresponding to CD/CP and the involvement of the Bank in the review of the British Bankers Association (BBA) Guidelines on CP and CD-[34].

EFMLG Recommendation 6:

The EFMLG considers appropriate that the possibility to standardise market documentation is pursued and that market associations may entrust a law firm covering the relevant financial markets with the task of further analysing market documentation and proposing such uniform market standards.

In its consultative report of September 2002 on the legal aspects of short-term securities, the EFMLG considered, despite the different national legal regimes, the possibility of standardising the market documentation used for CP. The Working Group also discussed the possibility of achieving a harmonised form for the notes used under various STEP programmes, as proposed in the EFMLG

[34] See the interim guide and compendium of documents prepared by the BBA, "*Preparing for the dematerialisation of money market instruments*", August 2003. On 16 October 2003, with the transfer of sterling Certificates of Deposit (CDs), the Bank of England and Crestco announced that the migration of all money market instruments (MMIs) from the Central Moneymarkets Office (CMO) to CREST had been completed. The migration process began on 15 September with the issuance of new money market instruments in CREST and ended on 13 October with the transfer of CDs, the last remaining category of MMIs to be moved out of the paper-based CMO system into dematerialised form in CREST. The market for short-term securities in the UK includes UK Treasury Bills, Bank Bills and Certificates of Deposit and is valued at approximately GBP 160 billion (EUR 225 billion). The secondary legislation to allow the dematerialisation of money market securities came into force in June 2003.

Report of September 2002. It was considered that such an exercise would, however, be time-consuming and should not be considered to be a priority at this point in time. It was also suggested that a common standardised approach to the issue of selling restrictions for products such as CP could be pursued. The Working Group finds that, although not a necessary condition for the introduction of the STEP regime, such harmonisation and standardisation of market documentation could be beneficial and, therefore, the market associations should consider the further study of the feasibility of such harmonisation and standardisation.

EFMLG Recommendation 7:

The EFMLG recommends to the Ministers of Finance of the EU that they agree to a common withholding tax regime for short-term money market paper in order to contribute to the integration of the money markets following monetary unification.

The EFMLG notes that national legislation imposes different regimes of withholding tax for interest payments on short-term money market paper, in some cases exempting payments from such withholdings and that there is no common EU regime in this respect. However, it should be noted that Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (the Savings Income Directive)[35] is of relevance in relation to negotiable debt securities. The purpose of this Directive is to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident for tax purposes in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State.[36] The notion of "debt claims" includes negotiable debt securities which benefit from some transitional measures according to Article 15 of the Savings Income Directive (see the box below). In the initial proposal for a directive,[37] the Commission clarified that the term "negotiable debt securities" in this context encompassed "*all types of debt security which may be traded freely on the secondary markets or which may be transferred by the holder of the security without the prior consent of the issuer. This includes all domestic and international bonds, but also other types of negotiable debt security such as* ***Euro commercial papers, Euro medium term notes*** *and 'bons de caisse'* ".

The EFMLG is of the view that the potential implications of the Savings Income Directive (and in particular its Article 15) on the short-term paper market should be further examined together with the relevant fiscal experts.

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35 OJ L 157, 26.6.2003, p. 38.

36 For the purpose of this Directive, "interest payment" means in particular "*interest paid or credited to an account, relating to debt claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and, in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attached to such securities, bonds or debentures…* ".

37 Proposal for a Council directive to ensure effective taxation of savings income in the form of interest payments within the Community, OJ C 270 E, 25.9.2001, p.259.

Article 15 (Negotiable debt securities) of the Savings Income Directive

1. During the transitional period referred to in Article 10, but until 31 December 2010 at the latest, domestic and international bonds and other negotiable debt securities which have been first issued before 1 March 2001 or for which the original issuing prospectuses have been approved before that date by the competent authorities within the meaning of Council Directive 80/390/EEC or by the responsible authorities in third countries shall not be considered as debt claims within the meaning of Article 6(1)(a), provided that no further issues of such negotiable debt securities are made on or after 1 March 2002. However, should the transitional period referred to in Article 10 continue beyond 31 December 2010, the provisions of this Article shall only continue to apply in respect of such negotiable debt securities:

- which contain gross-up and early redemption clauses and;

- where the paying agent as defined in Article 4 is established in a Member State applying the withholding tax referred to in Article 11 and that paying agent pays interest to, or secures the payment of interest for the immediate benefit of, a beneficial owner resident in another Member State.

If a further issue is made on or after 1 March 2002 of an aforementioned negotiable debt security issued by a Government or a related entity acting as a public authority or whose role is recognised by an international treaty, as defined in the Annex, the entire issue of such security, consisting of the original issue and any further issue, shall be considered a debt claim within the meaning of Article 6(1)(a).

If a further issue is made on or after 1 March 2002 of an aforementioned negotiable debt security issued by any other issuer not covered by the second subparagraph, such further issue shall be considered a debt claim within the meaning of Article 6(1)(a).

2. Nothing in this Article shall prevent Member States from taxing the income from the negotiable debt securities referred to in paragraph 1 in accordance with their national laws.

Annexes:

- Annex I: Composition of the EFMLG sub-group on short-term securities and of the ACI/EFMLG working group on the information memorandum for short-term European paper.

- Annex II: Composition of the EFMLG

Annex 1

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