European Financial Markets Lawyers Group

The Draft Common Frame of Reference

A Position Paper by the European Financial Markets Lawyers Group (EFMLG)

1 September 2009

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I. INTRODUCTION

The European Financial Markets Lawyers Group (EFMLG) is an international group of senior lawyers acting on behalf of the major commercial banking institutions of the European Union. It is committed to provide legal support to the historical task of achieving an integrated financial market in the European Union (EU). The EFMLG aims to examine legislative and regulatory issues and differing market practices that hinder the full development of a EU-wide single financial market and to identify the major barriers. In that regard, it provides advice and recommendations and identifies best practices with the aim of facilitating harmonisation and convergence in EU financial markets.

The Draft Common Frame of Reference (DCFR)[1] is an ambitious project. Indeed, its existing results – achieved thanks to the efforts of many academics, professionals and international officers – merit praise. The European financial services industry, increasingly confronted with a cross-border business model in which legal diversity in contract law operates as a barrier and a cost, has closely followed the endeavours of many to achieve a convergence of contract law in the EU, a mechanism considered likely to enhance interaction among European traders and economic agents.

The EFMLG would like to contribute to the European contract law project by highlighting some particular aspects of the DCFR that are relevant for the financial services industry. This paper focuses, therefore, on the potential impact of the DCFR on financial instruments and services (loans, deposits, bonds, purchase contracts and derivatives), settlement of debt obligations, and on certain credit risk mitigation techniques (collateral, set-off and netting, securitisation, guarantees and credit derivatives). In this regard, the EFMLG takes the view that further important work needs to be done for the DCFR (or the future Common Frame of Reference -CFR-) to comply with the legal fundamentals on which financial markets rely and the common practices usually applied in the financial services industry.

The wide scope of the DCFR and – having regard to the complexity and variety of national contract law – the relatively short period for response necessitates in this instance a cautious and modest approach by EFMLG members. Accordingly, the present paper has selected only certain aspects of the DCFR for comments, with additional thoughts and suggestions deferred for a later review. In that context, the EFMLG notes that the drafting groups of the DCFR have not yet published all the explanatory comments and notes available to support the interpretation and application of the DCFR.

II. SOME GUIDING PRINCIPLES WHEN REFERRING TO FINANCIAL SERVICES

The EFMLG considers that any regulation of the substantive law applicable to financial instruments and services should be governed by certain guiding principles:

(i) Financial services require dynamism and innovation, for which contractual parties should enjoy the necessary flexibility; limitations, overriding mandatory provisions or legal constraints to contractual freedom should be carefully assessed. In the light of today's global market for financial services, when compared with the features of non-

[1] Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition (2009). In this position paper, all references (including page numbers) are to the 2009 edition published by Sellier, European Law Publishers, Munich.

EU legal systems, especially those of US law, European contract law should not operate as a barrier to competitiveness.

(ii) A European contract law should be compatible with existing Community financial markets regulation (in particular, the Financial Collateral Directive[2], the Banking Directive[3], the Markets in Financial Instruments Directive (MiFID)[4], the Market Abuse Directive[5], the Prospectus Directive[6] and the Transparency Directive[7]) and with well-established industry practice, as represented by standard agreements used for some financial instruments traded in the financial markets as standardised commoditised products. In addition, the CFR should be consistent with the EU 'consumer *acquis*'.

(iii) As a consequence, it may be necessary in some cases to separate from general contract provisions the regime applicable to financial instruments and services (the 'commercial code approach'). Such distinction is already in practice today both at Community[8] and national level. We appreciate that the DCFR already provides for some rules and exceptions relating specifically to financial services[9]. However, having regard to the particularities of financial instruments and services, more special rules need to be considered.

III. SPECIFIC ISSUES

1. **Change of parties** (III.-5:101, p. 257 et seq.)

The provisions stipulated in Chapter 5 of Book III will impact on the securitisation of financial assets, in particular, in connection with the concept of a 'true sale' as this entails the replacement of the creditor. Similar implications will arise for factoring and forfeiting transactions. Chapter 5 could, in theory, also be relevant for collateral arrangements that provide for transfer of title to receivables. However, we note that in relation to assignments for the purposes of security, the provisions of Book IX apply and take priority over the provisions of Book III, Chapter 5. In May 2007, the EFMLG published a report on legal obstacles to cross-border securitisation in the EU[10],

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2 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, 27.06.2002, p. 43.

3 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, OJ L 177, 30.6.2006, p. 1.

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

5 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.04.2003, p. 16.

6 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, p. 64.

7 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38.

8 For example, the Financial Collateral Directive and the Settlement Finality Directive (Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45) are limited in scope to financial market participants.

9 Such special rules can be found, *inter alia*, in II.-5:201(4) (no right to withdraw from financial services negotiated away from business premises if fully performed); II.-9:410(2) (no unfairness test for clauses in standard terms providing unreasonable notice periods or the parties right to unilaterally adjust terms of a contract); IV.C.-1:102 (provisions on services do not apply to the provision of collateral or the supply of financial services) and IV.D.-1:101(6) (provisions on mandate do not apply to mandate contracts pertaining to investment services).

10 Available on the EFMLG's website at www.efmlg.org.

which outlines certain issues that the European industry faces in the area of assignments of receivables. The following comments also focus on securitisation.

<u>Position:</u> We welcome the fact that the DCFR allows for an assignment to take place with very limited formalities.

For securitisation transactions to be feasible, it is important, when, for example, a whole portfolio of claims is assigned from the originator to a special purpose vehicle (SPV), that such assignment can be effected without formalities. Furthermore, there need to be rules to ensure that there is legal certainty in relation to the validity and effectiveness of such assignment. In that context, certain draft provisions are particularly welcome:

- III.-5:104: Neither notice to the debtor nor the consent of the debtor to the assignment is required.

- III.-5.106: Future and unspecified rights: A future right to performance may be the subject of an assignment.

- III.-5:108: Assignability: effect of contractual prohibition: the contractual prohibition of, or restriction on, the assignment of a right does not affect the assignability of the right.

Moreover, for the purposes of securitisation of whole business lines, the DCFR provision (III.-5:106(2)) is welcome as it permits a number of future rights to performance to be assigned without individual specification, if, at the time when the assignment is to take place in relation to them, they are identifiable as rights to which the act of assignment relates.

<u>Position:</u> We propose introducing an exception to III.-5:108 in the case of financial institutions. For example, in order to preserve a right of set-off, a contractual prohibition of an assignment of a right must prevent the assignability of such right.

There are situations in which exceptions from general rules are necessary in order to accommodate other requirements of safe and efficient business transactions. One example is reflected in IV.G-3:108 which limits the right to transfer rights in case of an independent personal security on first demand (e.g., a guarantee). Other examples are contractual set-off and close-out netting arrangements (see also part III.2 of this paper below), important cornerstones of financial transactions. It is of fundamental importance that there are no contract law rules in place that could hinder their application. In order to preserve the rights of set-off and close-out netting in a case of assignment, an exception from III.-5:108 is required. By way of derogation from that rule, for the purposes of preserving a right of set-off, provision should be made that a contractual prohibition of the assignment of a right prevents the assignability of such right. The scope of such derogation should probably be limited to financial institutions.

<u>Position:</u> Where the parties to an assignment may chose the DCFR as the law governing that transaction, it must be ensured that some of its provisions are not disapplied by virtue of the Rome Regulation[11] designating other laws.

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[11] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

In general, consistency between the text of the DCFR and existing EU legislation is required. In the case of Chapter 5, for example, it is important to ensure consistency with the Rome Regulation. Certain provisions of that regulation govern the application of laws of given jurisdictions in a cross-border context. For example, Article 14 on voluntary assignment and contractual subrogation, Article 15 on legal subrogation, Article 16 on multiple liability and Article 17 on set-off designate the law of a particular jurisdiction to apply in matters covered by Book III of Chapter 5. In the interests of consistency and coherence, however, if the DCFR becomes a law that can be chosen by the parties to govern an assignment, provision is needed to ensure that some of its provisions are not disapplied by virtue of the Rome Regulation designating other laws.

2. **<u>Set-off and close-out netting</u>** (III.-3:502 and 503, pp. 244-5; III.-6:101 to 108, p. 269 et seq.)

In formalising the contractual relationships of market participants, contractual set-off and close-out netting agreements play a vital role in reducing risks and enhancing efficiency in the increasingly integrated European and global financial markets[12]. Furthermore, the enforceability of set-off and close-out netting agreements is essential in situations of winding-up or reorganisation procedures such as that resulting from the filing of a petition under Chapter 11 of the US Bankruptcy Code by Lehman Brothers Holdings Inc. and the appointment of Administrators of Lehman Brothers International (Europe).

<u>Position:</u> We propose introducing additional definitions and model rules for close-out netting arrangements.

The terms 'set-off' and 'close-out netting' are sometimes used interchangeably. However, they are widely regarded as overlapping but distinct legal concepts. In simple terms, 'close-out netting' is a multi-stage process by which, following an event of default or termination, (i) all open transactions entered into between the parties of the close-out netting arrangement are terminated or accelerated, (ii) each terminated or accelerated transaction is valued; and (iii) all termination values, together with any unpaid amounts, margin or collateral, are reduced to a single net amount owed by one party to the other. This last stage, the reduction of the termination values, may be regarded as completed set-off. However, there are also other legal concepts such as the compensation for damages or the flawed assets approach that may result in a single net amount.

The terms 'close-out netting' or 'netting' already exist in the *acquis communautaire*[13]. The most sophisticated definition, which reflects the market standard documentation for close-out netting agreements, can be found in Article 2(1)(n) of the Financial Collateral Directive. The issue is, however, that the definition is limited to close-out netting arrangements that form part of a financial collateral arrangement. Part 7 of Annex III to the Banking Directive uses the term 'contractual netting', but provides only for a very broad description of what should be achieved by such contractual netting (which creates a single legal obligation covering all included

[12] For further background see the joint EFMLG-ISDA letter 'Directive 2002/47/EC on Financial Collateral Arrangements – Proposal for a European Netting Directive' (April 2008) available on the EFMLG's website at www.efmlg.org.

[13] See the EFMLG reports 'Protection for the bilateral insolvency set-off and netting agreements under EC law' (October 2004) and 'The regulation of close-out netting in the new Member States of the European Union' (October 2005). These are available on the EFMLG's website at www.emflg.org.

transactions'). The term 'netting' is also defined in Article 2(k) of the Settlement Finality Directive[14], but it merely describes set-off of claims and obligations resulting from transfer orders. Article 25 of the Winding-up Directive[15] uses the term 'netting', but fails to define it.

<u>Position:</u> Parties should not be prevented from determining in standard terms what constitutes a fundamental obligation and the duration of a reasonable additional grace period for performance. It should also be possible to provide for termination without notice (automatic termination).

Termination clauses form an integral part of close-out netting agreements. From that perspective, the DCFR provisions on termination rights require particular scrutiny. These differentiate between failures to perform fundamental obligations and other failures. Although there is a definition of 'fundamental' (III.-3:502(2)), broad room for interpretation remains. Terminations for failure to perform non-fundamental obligations are permitted where the creditor gives notice fixing an additional grace period of 'reasonable length' for performance. In relation to contractual terms modifying those rules, a derogation from the rules on unfair terms is provided in II.-9:410(2). However, this is limited to certain financial services transactions only. In our view, parties to a close-out netting agreement should be able to define the obligations that they regard as 'fundamental' and the notice period they consider 'reasonable'. We note that III.-3:507 recognises automatic termination, i.e. termination without rendering additional notice where a notice fixing an additional period for performance so provides. However, we consider that parties to a close-out netting agreement should be able to broaden the scope of automatic termination to cover other events, for example, the bankruptcy of the other party.

<u>Position:</u> The scope and wording of III.-6:101(2) should be reconsidered.

We fully understand the rationale for not applying Chapter 6 (set-off and merger) in insolvencies. The conditions under which set-offs may be invoked during insolvency proceedings are usually governed by the insolvency law (and not the private law) of the jurisdiction in which such proceedings are opened. That principle is also reflected in the conflict of law rule in Article 4(2)(d) of the Insolvency Regulation[16]. However, to the extent that the *acquis communautaire* explicitly refers to the substantive private law of the relevant Member State – and this is the case in Article 25 of the Winding-up Directive, pursuant to which netting agreements are solely governed by the law of the contract which governs such agreement – III.-6:101(2) should provide for an exception. In addition, we propose that the word 'insolvency' in that provision is replaced with 'insolvency proceedings' (as defined in the Annex).

<u>Position:</u> The requirements outlined in III.-6:102 to 105 should not preclude any agreement between the parties that broadens the scope of set-off or close-out netting. In particular, it should be clarified that set-off and close-out netting arrangements may be governed by a contract or considered as some 'other juridical act' to which the principles on party autonomy (II.-1:102) apply. Such arrangements should also be excluded from the unfairness test established in II.-9.4.

Set-off, as defined in III.-6:101(1) of the DCFR, 'is the process by which a person may use a right to performance held against another person to extinguish in whole or in part an obligation

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[14] Above footnote 8.

[15] Directive 2001/24/EC of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125, 5.5.2001, p. 15.

[16] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.

owed to that person'. That provision presupposes, therefore, the existence of two parties, which owe obligations to each other. This requirement of 'mutuality' is a prevailing feature in the laws of the Member States. However, this is sometimes difficult to fulfil. For example, mutuality might not be present where (i) a trustee acts for the account of its trusts (see X.-1:102(1)), (ii) a life insurance company trades for the account of its technical reserves or its cover pool, (iii) an investment management company acquires financial assets for its mutual funds or hedge funds or (iv) one of the obligations included in the set-off or netting arrangements is encumbered by a pledge, lien or security interest granted to a third party.

Parties to a set-off or close-out netting agreement usually overcome these legal uncertainties by providing that the bilateral obligations emerging from such transactions are eligible for being set-off or netted, regardless of whether the 'trust', the 'segregated assets' or the 'funds' to which the bank's obligation is owed constitutes a legal entity or 'party'. It is also practice in financial markets to arrange for set-off of obligations owed between three or more parties. A good example is a cash clearing arrangement entered into with a parent company where the positive and negative balances on cash accounts maintained by the parent company and its subsidiaries are set-off on a daily basis.

The DCFR requirement that the obligations to be set off must be 'of the same kind' also raises concerns in relation to set-off and close-out netting arrangements. Whilst we welcome III.-6:104 permitting the conversion of payment obligations denominated in different currencies into a specified 'settlement currency' (a common feature in set-off and close-out netting arrangements), in practice, set-off but especially close-out netting may govern delivery obligations of different kinds. It is also common to agree on set-off or close-out netting including obligations that are not yet due, contingent or unascertained. Parties also waive the requirement to give notice to the other party (contrast the requirement of III.-6:105).

Set-off and close-out netting arrangements are usually based on market standard documentation supplied by the bank. If the requirements outlined in III.-6:102 to 105 are interpreted as reflecting the standard of 'good faith and fair dealing', any deviation from them in set-off or close-out netting arrangements could render them void or unenforceable.

The mechanisms provided for under close-out netting agreements are important, not only for the protection of the parties to such agreements from the default of its counterparty, but to protect it from the effects of an insolvency situation of a parent company, affiliate or credit support provider of its counterparty. Consequently, our position on the model rules applicable to set-off and close-out netting established under the DCFR is that such rules should not preclude the validity and effectiveness of set-off and of close-out netting agreements actually used in financial markets. The need for this type of agreement to be effective is widely recognised and supported by the protection given to such agreements by general or, in certain cases, specific insolvency legislation of the Member States. Supervisory and capital adequacy rules, such as those deriving from Basel II, also regulate the effects of close-out netting agreements. In our view, the position we have adopted here in relation to set-off remains compelling even in the face of new legislation regulating financial instruments and markets likely to be adopted as a consequence of recent market upheaval.

3. **<u>Unfair terms and the unfairness test</u>** (II.-9:401 and 402, p. 224 et seq.)

Financial instruments are substantially based on standardised documentation, which make them negotiable and comparable. Banking and trading associations have developed a broad variety of market standard documentation used by members for the origination of financial instruments (including securities, funds or money market instruments) as well as for related financial transactions in the secondary market (purchase contracts, derivatives, repos or lending transactions). All these market standard documentation fall within the scope of contract terms ‘which have not been individually negotiated’ and, hence, are subject to the unfairness test of Section 4. The provisions on unfair terms and the unfairness test are of a mandatory nature (II.-9:401). They include also the requirement that all standard terms (as defined in the Annex, p. 545) must be drafted and communicated in plain, intelligible language (II.-9:402, principle of transparency), an obligation which will have a major impact especially on structured and complex transactions.

<u>Position:</u> II.-9:406 should be amended in order to exclude contracts (i) between business parties and (ii) creating transferable securities.

In our view, there is no need to apply the unfairness test to financial services supplied to parties qualifying as a ‘business’ (as defined in the Annex). The MiFID already provides for a sufficient level of investor protection which is better balanced and more flexible than the ‘all-or-nothing’ approach established by II.-9:408. Moreover, a business can be expected to rely on its own expertise and experience, a principle that is better reflected in the MiFID. Exemption of transferable securities (for example, shares, bonds or notes) is justified by reason of the fact that they are tradable in the secondary market and, therefore, acquisition by consumers cannot be precluded. In the absence of an exemption, however, the same issue of securities could be both valid and enforceable if acquired by a business and void if held by a consumer, a wholly unsatisfactory situation. Further justification for such exemption is provided by the existence of investor protection under the MiFID and the specific disclosure requirements imposed by the Prospectus Directive.

<u>Position:</u> The list of exemptions established in II.-9:410(2) should be broadened to include subparagraphs (f), (l) and (q). The words ‘transactions in’ should be deleted also in order to clarify that the terms and conditions governing transferable securities are not subject to the unfairness test.

The unfairness test uses the vague and ambiguous term ‘good faith and fair dealing’ (II.-9:403 and 405); an unfamiliar concept, at least in common law jurisdictions. Whilst we note that the standard proposed is less onerous as far as contracts between businesses are concerned (II.-9:405) we question whether in financial markets (where businesses act on an equal footing with similar expertise and sophistication and where documentation is based on standards jointly developed by market participants) unfairness tests are at all appropriate. Moreover, although the existing DCFR exempts some clauses used in financial market standard terms from the unfairness test (II.-9:410(2)), in our view, that exemption is too narrow. We should like to see it considerably broadened, in particular, to allow banks to use exclusive jurisdiction (II.-9:409) and arbitration (II.-9:410(1)(p)) clauses. Many financial instruments (for example, derivatives, repos or securities lending transactions) provide for determinations made by calculation agents or determining parties, which can include a party to the agreement (contrast the requirements of II.-

9:410(1)(l)); they provide also that a buyer under a repo, the borrower under a securities loan or the pledgee under a collateral support annex is authorised to retransfer ‘equivalent’ securities or commodities (contrast the requirements of II.-9:410(1)(q)). Derivatives transactions, especially those with longer terms, also generally provide for optional termination clauses (break clauses) entitling the bank to terminate the transaction against payment of its fair value. These optional termination rights are used to mitigate or reduce credit risks. However, they could be found to conflict with II.-9:410(1)(f).

4. <u>Pre-contractual information duties</u> (II.-3:101 to 109, p. 187 et seq.)

The information duties established in II.-3:101 to 109 will have an impact on the marketing of financial services and products to consumers, the documentation of financial products which are to be sold to consumers and, almost any communication with consumers relating to financial services. This applies in particular to the rules established in II.-3:102 and 103.

<u>Position:</u> Financial services should be exempted from II.-3:101 to 109, at least to the extent that those services are regulated under the MiFID.

We appreciate that the DCFR provides for specific information duties for businesses marketing assets or services to consumers or concluding contracts with consumers. However, as stated above, we take the view that due account should be given to the fact that the MiFID already provides for a sufficient level of investor protection with regard to financial services. Compared to the information duties established in the DCFR, the MiFID rules are both more elaborate and more flexible. Thus, the MiFID provides, *inter alia*, for a sophisticated system of client classification determining the level of protection which is required for each type. The MiFID system of client categorisation is tailored to the specific needs and practices of the financial services industry. In contrast, the information duties set out in the DCFR do not allow for such a solution, as the DCFR simply differentiates between ‘businesses’ and ‘consumers’.

Therefore, to the extent that they are regulated under MiFID, financial services should be exempted from II.-3:101 to 109. This would also be in line with IV.C.-1:102 which excludes the supply of financial services from the application of Part C of Book IV (rules governing services).

5. <u>Force majeure</u> (III.-3:302(3)(a), p. 243; III.-7:303, pp. 272-3 and VI.-5:302, p. 408)

Whereas the DCFR employs the term ‘impossibility’ or ‘excuse’, the term ‘force majeure’ is used in every European legal system, and very frequently in financial services contracts.

<u>Position:</u> The vague term ‘impossibility’ or ‘excuse’ is insufficient. In general, this is a matter that would deserve a more extensive treatment in the DCFR.

In the light of the complex technology underlying financial systems and the frequent use of force majeure clauses in contracts between participants in financial services markets, the EFMLG devoted a number of resources to ascertain the scope of the concept throughout several European jurisdictions and was concerned about the differences that were discovered to exist. To overcome such differences, we recommend that a force majeure provision be included in the DCFR which is in line with the extensive case-law of the European Court of Justice on this matter. In that regard, the 2003 EFMLG Report on Force Majeure[17] may prove to be of assistance.

6. **<u>Method of payment / Currency of payment</u>** (III.-2:108 and 109, pp. 235-6)

Rules relating to the method of payments and the currency of payment are of crucial importance for the financial services industry. The DCFR governs those matters in III.-2:108 and 109.

<u>Position:</u> The EFMLG welcomes the approach of the DCFR in that it does not adopt the approach taken in several current (but rather old) European civil codes which refer to the settlement of debts by provision of legal tender. Instead, the DCFR recognises that settlement by provision of banknotes and coins is only one possibility, that other means are usual, and that settlement in cash should not be legally imposed on creditors in financial transactions.

However, III.-2:108(1) is vague, providing simply: 'Payment of money due may be made by any method used in the ordinary course of business'. In addition, III.-2:108(2) makes provision for the acceptance of cheques, a scriptural payment instrument of limited importance in today's market.

If one disregards payment by set-off, a common practice in the interbank market[18], an estimated 98% (by value) of monetary debts in the EU are settled by scriptural payments, with only the remaining 2% in banknotes and coins[19]. The DCFR should be redrafted to reflect that reality, giving legal discharge to debts paid by way of a final credit to the creditor's account.

The DCFR should start from the presumption of freedom of contract. Accordingly, monetary debts should be settled in the manner agreed between creditor and debtor, subject only to the operation of consumer protection legislation.

Scriptural payments

A scriptural payment is a crediting of funds to the creditor's account with a supervised credit institution ('bank'). In legal terms, it entails the replacement of the debt owed by the debtor to the creditor with a debt owed by the creditor's bank to the creditor[20].

<u>Position:</u> The DCFR should establish a rebuttable legal presumption that the opening of a bank account by a creditor implies his acceptance that payments made by his debtors by way of a final credit to that account operate to discharge their debts. The opening of a bank account implies the acceptance of the bank as a debtor in relation to monies held on deposit with that institution. This presumption assumes that banks are subject to prudential supervision aimed at ensuring solvency, liquidity, and a guarantee for deposits. The presumption should be rebuttable, however, by way

[17] Available on the EFMLG's website at www.efmlg.org.

[18] For example, at European level, the EBA's end-of-day netting payment system; at local level, clearing houses for cheques and bills of exchange.

[19] Use of cash varies from country to country, from sector to sector, and may depend on the economic situation. Naturally, in terms of number of operations, cash settlements are estimated to exceed scriptural payments. However, in terms of value, the position is reversed with the majority of B2B transactions settled scripturally. Trading in the financial markets is settled in scriptural money only, and processed through sophisticated payment systems.

[20] Where payments are made in cash, there is also a novation of an obligation: the debt of the debtor is replaced by a debt of the issuing authority (the central bank for banknotes, the State for coins) towards the holder of the cash.

of: (i) an agreement with the debtor on specific means of settlement and (ii) a simple notice by the creditor indicating its refusal to accept payments to its bank account.

The DCFR should also state that where a creditor has more than one bank account it has the right to nominate[21] a particular bank account for the settlement of specific monetary debts.

Importantly, the DCFR should state that final credit of the amounts owed to the creditor's bank account discharges the monetary obligation of the debtor. A credit should be regarded as final when it can no longer be revoked. On that point, the DFCR should cross-reference to the payments laws. .

Several methods are available to credit the bank account of a creditor. Regulation of those methods is best achieved through payments legislation[22] (although a cross-reference in the DCFR may be appropriate). The most common methods are:

- credit transfers: the debtor instructs his bank to transfer an amount to the creditor's account with his bank;

- direct debits: the debtor instructs his bank to allow debits from his account to reimburse the creditor's bank for amounts credited or to be credited to the creditor's account[23].

In the EU, only one civil code, the Dutch Civil Code of 1962, admits the discharging effect of scriptural payments[24]. The remaining civil codes, dating from the nineteenth century, continue to use the traditional concept of 'cash' when referring to legal tender for the discharge of monetary obligations. In our view, the DCFR should take inspiration from the Dutch Civil Code provision, including the possibility for ex-ante rebuttal by the creditor, and adapt it to current payment methods and instruments as summarised above, thereby revealing the true legal nature of payments as the novation of the debtor in a debt obligation. Encouragement of scriptural payments by provisions establishing their discharging effect in relation to debts may further also other public policy objectives (for example, the fight against corruption, the 'black economy', money laundering, and tax evasion).

Cash payments

The concept of 'legal tender' is not defined in EU law. An inter-institutional task force on the concept of 'legal tender' is currently working on having it defined for the purposes of euro banknotes and coins.

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[21] For example, in commercial correspondence or on invoices.

[22] For example, Article 4 of the Uniform Commercial Code (US); Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319, 5.12.2007, p. 1; legislation governing cheques, bills of exchange and promissory notes.

[23] This includes payments by credit and debit cards, cheques and new electronic forms (mobile telephone payment systems, Internet payment systems, etc.).

[24] Section 6:114: Payment through the banking system constitutes a valid means of discharge of a monetary debt unless the creditor has validly excluded this method of payment.

Position: The DCFR should establish basic principles on what constitutes 'legal tender' for the purposes of settling monetary obligations. In that regard, we propose that it should be guided by the following considerations:

- Cash payments operate to discharge a debt obligation :
  - where the parties have not agreed on other payment means, and
  - there is no default rule established through custom and practice; or
  - where consumer protection legislation imposes on creditors the obligation to accept cash in settlement of monetary debts[25].
- 'Legal tender' is constituted only by banknotes and coins having the specifications established by the competent monetary authority and duly issued by such authorities. 'Cash payments' having a discharging effect are those performed by the physical transfer to the creditor of cash which is 'legal tender'.
- This does not include:
  - the transfer of counterfeited banknotes and coins; this does not discharge a debt;
  - settlement by monetary tokens other than 'legal tender'; this requires the consent of the creditor;
  - settlement by stolen rough non-issued banknotes; these do not discharge a monetary debt, except where presented in good faith.
- 'Cash payments' have a discharging effect in relation to debt obligations, even if for public policy reasons[26] legislation requires the use of scriptural payments for specific monetary debts or places limits on the use of cash.

7. **Sales contracts** (IV.A-1.101, pp. 277 et seq.)

The rules governing sales contracts are of great importance to the financial markets. Spot contracts (including the purchase or sale of shares, bonds and other negotiable instruments), repurchase transactions, franchise and forfeiting agreements as well as many types of derivatives contracts (like forwards and options) are based on the concept of sales contracts.

Position: Financial services should be exempted from the rules governing sales contracts.

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[25] In some instances, consumer protection authorities have insisted on an consumer right to pay in cash, for example, in payment of road tolls in Italy, and on the principle of non-discrimination in that connection, hence their refusal to allow Dutch supermarkets to offer a discount for non-cash payments.

[26] These include the fight against money laundering, tax evasion, the funding of terrorism and corruption and in addition the proper functioning of the public administration. Use of coins to discharge monetary debts may be limited for functional reasons (for example, Article 11 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, OJ L 139, 11.5.1998, p. 1, which limits to 50 the number of coins which a creditor may be obliged to accept in a single transaction.

The provisions on sales contracts that apply to financial services are substantially based on the United Nations Convention on Contracts for the International Sale of Goods (CISG), which is not accepted in the financial markets. The remedies provided for failure to pay or deliver deviate considerably both from national laws and from the documentation standards used in the financial markets. The term 'goods' might even cover foreign currency. It is noted that the rules on sales contracts are not mandatory, but a deviation in a standard contract might fail the unfairness test.

8. <u>Loan contracts</u> (IV.F.-1:101, p. 364 et seq.)

The law on credit agreements is of major significance to the financial services industry. However, whereas both at European and national level a substantial component of that legislation relates to consumer credit contracts, the DCFR focuses only on business-to-business contracts. Consumer loan agreements are explicitly excluded from the scope of Part F of Book IV (IV.F.-1:101(1)(a)).

<u>Position:</u> The DCFR should incorporate also rules relating to consumer loan agreements. These rules should be consistent with the relevant directives.

We appreciate that the drafting groups of the DCFR did not include rules on consumer credit law because the Consumer Credit Directive[27] was adopted only in April 2008, allowing insufficient time to take account of its provisions[28]. However, given that consumer credit law is an area of extraordinary practical relevance, in our view, the CFR should incorporate provisions also on consumer loan agreements. Such rules should be compatible with existing Community law.

In substantive terms, the DCFR provisions on loan contracts, in part, do not reflect common practice in relation to the grant of commercial loans.

<u>Position:</u> We propose that the provisions on loan contracts be amended to take account of common practice applicable in the financial services industry. This concerns in particular the provisions on interest (IV.F.-1:104) and termination by a borrower (IV.F.-1:106).

For example, we regard it as problematic that under the DCFR in the case of loan contracts having a duration of more than one year and providing for a fixed interest rate a borrower may terminate the loan contract at any time on giving the lender three months notice (IV.F.-1:106(4) and (5)). Such a rule does not take into account the needs of the banking industry, where it is common practice for a bank to take out subordinated loans to strengthen its own regulatory capital base. In order for the subordinated capital generated through such loans to be recognised as regulatory capital, the loans must comply with certain minimum regulatory standards established under European and national law.

According to legislation on banking supervision, for example, the loans must have a minimum term of five years[29] (or in certain cases two years[30]), with prior termination by the borrower

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[27] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66.

[28] See paragraph 76 of the introduction to the DCFR.

[29] See Article 64(3) of the Banking Directive, above footnote 3.

[30] See Article 13(3) of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast), OJ L 177, 30.6.2006, p. 201.

possible only within narrow statutory limits[31]. The right of a borrower to terminate a loan at any time as envisaged in IV.F.-1:106(5), from which the parties may not derogate, is not compatible with this supervisory requirement and, hence, would have serious implications for the raising of subordinated capital. In our view, therefore, the rules establishing a borrower's right to terminate in IV.F.-1:106(4) and (5) should be revised at least to ensure that they are no longer mandatory, but optional.

The provisions on interest (IV.F.-1:104) should be amended also to take account of common practice in the lending sector. The provisions should be redrafted to allow the parties greater flexibility, for example, concerning the methods of interest calculation, use of compound interest and the date of interest payments. In practice, loan contracts requiring interest payments for periods of less than one year are relatively common, a situation not reflected in IV.F.-1:104(3). Admittedly, the provisions in IV.F.-1:104 may be intended simply as default rules; however, this needs to be explicitly stated.

<u>Position:</u> The scope of the rules on loan contracts should be broadened in order to cover securities loans and loans on commodities.

The current rules are limited to monetary loans and overdrafts, by which the borrower is obliged to repay the money obtained (IV.F.-1:101(2) and (3)). Securities loans are of great importance to the financial markets as they support the trading and the settlement of trades in securities and other financial assets. There is no reason to exempt them from the DCFR. However, as mentioned above, it is important that the rules governing loans take account of the common practice usually applied by the financial industry.

9. **<u>Proprietary security rights in movable assets</u>** (IX.-1:101, p. 447 et seq.)

The rules of Book IX refer, in part, also to collateral to which the Financial Collateral Directive (FCD) applies[32], i.e. to the extent such collateral represents security rights in movable property (see IX.-1:101(1). Financial collateral arrangements are widely used in the financial services industry in order to minimise credit risk. The FCD has introduced a Community framework for financial collateral, within a broader European legal framework for financial institutions and insolvency proceedings. The Directive provides for rapid and non-formalistic establishment and enforcement procedures in order to encourage cross-border business and competitiveness. It is important, taking into account the needs of the financial services industry, that there are no discrepancies between the DCFR and the objectives and key provisions of the FCD.

<u>Position:</u> In so far as the provisions established in Book IX are not in line with the FCD, they should be amended and clarified to take account of the objectives and key provisions of the FCD. In particular, it should be ensured that the creation, validity, perfection, enforceability and

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[31] Under Article 64(3) of the Banking Directive (above footnote 3), a loan agreement may not include any clause providing that in specified circumstances, other than the winding-up of the credit institution, the debt will become repayable before the agreed repayment date. Where maturity of the debt is not fixed, the loans involved may be repaid only subject to five years' notice unless the loans are no longer considered as own funds or unless the prior consent of the competent regulatory authorities is specifically required for early repayment. The competent regulatory authorities may only grant permission for the early repayment of such loans provided the request is made at the initiative of the issuer and the solvency of the credit institution in question is not affected.

[32] See the definition of 'financial collateral' as provided for in Article 1(4) in conjunction with Article 2(1) of the Financial Collateral Directive, above footnote 2.

admissibility of a financial collateral arrangement do not depend on the performance of any formal act.

We appreciate that the rules of Book IX already reflect, to a large extent, the provisions of the FCD. There are, however, some minor deviations and ambiguities. Thus, whereas according to Article 4(2) of the FCD, realisation by way of appropriation is possible if such appropriation has been agreed by the parties in the security financial collateral arrangement (opt-in) and the parties have agreed on the valuation of the financial instruments, the DCFR provides for a number of further restrictions with regard to the appropriation of encumbered assets, for example, by providing for certain publication and consent requirements with regard to third parties (see IX.-7:207(1)(c) in conjunction with IX.-7:216 and IX.-7:209). Such publication and consent requirements are not in accordance with the requirements and objectives of the FCD, the purpose of which is, *inter alia*, to limit the administrative burdens for parties using financial collateral. Admittedly, IX.-7:105 provides for a rule according to which a secured creditor is entitled to appropriate encumbered assets for the value of their market price. On the other hand, it is not clear, whether this rule generally allows for any appropriation of encumbered assets for the value of the market price if such appropriation has been agreed by the parties because IX.-7:105 explicitly states that such an appropriation is only possible where it is ‘allowed’ – without specifying whether the term ‘allowed’ only relates to statutory provisions or whether it also includes contractual provisions.

10. **Trusts** (X.-1:101, p. 501 et seq.)

The DCFR appears to reflect several legal sources in order to describe a system of trust law. While the inputs are not exclusively based on the common law heritage it does manage to address, in varying degrees, many of the principles derived predominantly from the English law of trusts. Recognition of the importance of trusts here is to be welcomed and its inclusion may deliver material benefits for those jurisdictions which currently lack a legal foundation for trusts. However, where such a foundation already exists, notably under English law (also Ireland and Malta), in our view, the default position should be to retain the status quo and exclude the DCFR’s trust framework. Of course, parties should be allowed to have the freedom to adopt the DCFR framework should they explicitly choose to do so.

Trusts are used extensively in the securities and financial markets and their usage is increasing. Many of the important investors and counterparties in the wholesale securities and financial markets are trustees of pension funds. To a significant degree, the predictability and reliability of the trust device is a critical element of the contemporary system for the international allocation of capital, the protection of security entitlements and the allocation of interests in securities.

For example, the Eurobond market is used by thousands of issuers comprising companies, financial institutions and sovereign entities to raise many hundreds of billions of euros (and other currencies) each year. For such issues of debt securities, a trustee is often appointed to protect the interests of bondholders and simplify the enforcement of rights. A key feature of trusts in these markets is to preserve rights in collateral for a changing pool of beneficiaries (bondholders) from time to time. In the area of settlements, trusts are used to protect participants from the credit risk of depositaries. The major institutional trustees and custodians typically act as common depositaries for the main clearing systems (e.g. Euroclear and Clearstream).

Another popular use of the trust is for collateral arrangements, where the benefit of a security interest over securities is held by a trustee for a changing group of secured creditors. Trust assets are not available to the general creditors of a trustee in its insolvency. The ring-fencing of unallocated intangible client assets in the hands of intermediaries is arguably more difficult to achieve under the general principles of continental civil law and so these systems may be more directly assisted by the DCFR's inclusion of its trusts framework.

As regards the trust rules as established in the DCFR, there are three chief concerns plus numerous other technical matters needing attention. The chief concerns are, first, the proprietary rights of beneficiaries, second, the ease of creating constructive trusts and, third, ambiguity concerning ‘segregation’ of trust property.

Proprietary rights of beneficiaries

<u>Position:</u> More clarity is needed on the beneficiary’s proprietary interest in the trust assets. While the trust property does not form part of the trustee’s estate (X.-1:202) there is no definition of the beneficiary’s rights *in rem* as opposed to *in personam* against the trustee (X.-1:205). This is a critical feature of trusts, namely, the allocation of a ‘legal’ proprietary interest to the trustee and a ‘beneficial’ proprietary interest to the beneficiary.

Constructive Trusts

<u>Position:</u> The DCFR provides that a non-gratuitous recipient of trust property becomes a constructive trustee if the transfer is in breach of trust and the recipient could reasonably be expected to know that the transferor is a trustee (X.-10:401). This provision is likely to impact negatively on banks and the wider financial system.

Given financial institutions have ‘deep pockets’ compared with many companies and individuals, and that much property, assets or cash liable to forming constructive trust property may be placed in bank accounts, this will either lead to a multiplication of claims against banks on the grounds of constructive trust and/or (more probably) simply increase red tape for consumers and reduce the efficiency of account opening and inter-bank payments due to the additional verifications that would be required to satisfy an objective ‘reasonable knowledge’ test. While case-law is difficult as it imports concepts of unconscionability, bad faith, fraud or similar subjective approaches, in our view, some element of subjectivity should be required here in order to result in a constructive trust being created.

Segregation of trust property

<u>Position:</u> There is some ambiguity concerning so called ‘segregation’ of trust property. This should be clarified.

Reference is rightly made to ‘segregation’ of trust property (X.-3:102) but this begs the question ‘segregated from what?’ Presumably, this is from the trustee’s other assets rather than assets of third parties, in which case that could be made clearer. Does the fact that a stipulation of trust will apply to the unsegregated part until segregation occurs (X.-3:103(2)(b)) imply that no trust can be created over undivided bulk (e.g. a part share in a shipment of grain)? And is no trust possible over contractual rights where there are multiple parties to the contract and those rights are to the benefit of one or more of the contracting parties (as in that case no segregation is possible)? The problems here overlap to a degree with the first point on the absence of clear rights *in rem*. If the proprietary rights of beneficiaries were improved then it might not be necessary to rely so critically on manipulating the concept of segregation.

Technical observations

In addition to the three chief concerns above, there are a number of additional technical observations, some of which are set out below.

- The mechanism for defining beneficiaries in terms of ability to 'dispose' of assets is too narrow (X.-1:206). Trust property can simply be 'held' (without disposal) by a trustee, for example, real estate occupied by beneficiaries, or may comprise income generated from assets (again, without disposal of the assets).

- There is no concept of a perpetuity period. Without a concept of a perpetuity period, it is theoretically possible for assets to be bound in trusts forever. This has for centuries been regarded as contrary to the public interest in English trust law, as a consequence of which the 'rule against perpetuities' has been developed.

- The obligation on the trustee to identify and notify beneficiaries (X.-4:203(1)) could be too onerous and impractical for broadly constructed discretionary trusts (unless, of course, such an obligation could be expressly excluded). Similarly the right of beneficiaries to inspect trust documents (X.-6:106) has now been limited in English case-law as it is too burdensome on trustees.

- Constitution of a trust seems to require a 'binding unilateral promise' by the settlor (i.e. the 'truster' in DCFR terminology) to transfer property to a trustee (X.-2:102), although in the English courts the principle has developed that an act which is 'intended to be done will be treated as if it is done', so that the beneficiary should have an immediate interest provided the property is identifiable (see also X.-3:103(2)). Moreover the method of constituting a trust by 'juridical act' (X.-1:203) or unilateral declaration (X.-2:101(a)) raises doubts as to how a trust is to be distinguished from a gift or constituted within a contract with multiple parties.

Annex 1

ADDITIONAL LEGAL COMMENTS ON THE DCFR

I.-1:108, p. 180, Annex and II.-5:201, p. 204 and IV.C.-1:102, p. 302 and IV.G-1:102, p. 368

Definitions

Position: In order to support efficiently the purposes of the DCFR, definitions should be harmonised with the existing *acquis communautaire*. This applies, *inter alia*, to the definitions of 'business' and 'consumer' which are of crucial importance but, in their current form, deviate from the existing *acquis*. It is also necessary to add new definitions ('financial services') and provide guidance in interpretation and application of certain vague and ambiguous terms ('good faith and fair dealing', 'fundamental', 'legitimate' and 'grossly').

Although we appreciate that the DCFR contains no provisions of an insurance contract law nature (since this is the subject of work by the Project Group 'Restatement of European Insurance Contract Law'), it is in our view still necessary also to define the terms 'insurance' and 'insurance contracts', in so far as such terms are used to define the scope of the DCFR itself (see, for example, II.-5:201, IV.C.-1:102, IV.G-1:102). In this context it should be noted that the definition of 'insurance contract' as stipulated in Article 1:201 of the Project Group's draft principles of 17 December 2007[33] is in our view too broad and not precise enough. That definition would, for instance, also cover credit default swaps which are generally not considered as insurance contracts (which again is also reflected by the fact that protection sellers under credit default swaps generally do not have an insurance licence).

I.-1:110, p. 181

Computation of time

Position: The definitions of 'public holiday' and 'working day' are substantially in line with the terms 'Banking day' or 'Business Day' used in financial market documentation. However, the definitions should not prevent banks from modifying the definitions, e.g., by referring to a Payment System or a specified market place. The definitions should also be added to the Annex.

I.-1:109 p. 180

Notices

Position: The provisions dealing with notices and the point in time they become effective is relevant for the exercise of termination rights, options or margin calls. They should also deal with situations where a party refuses or impedes acceptance of notices.

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33 See Project Group 'Restatement of European Insurance Contract Law', Principles of European Insurance Contract Law, Part One: Provisions Common to all Contracts Included in the Principles of European Insurance Contract Law, Status: 17 December 2007.

II.-1:108, p. 185	**Severability (partial invalidity of a contract)** <u>Position:</u> Severability is not known in common law jurisdictions. The principle established by the DCFR that severability is always given will impact, therefore, on documentation practices to the extent that they are based on common law (e.g., English law) principles.
II.-2:101, 2:103 and 2:105, pp. 186-7	**Non-discrimination** <u>Position:</u> The provisions on non-discrimination should not prevent banks from complying with mandatory rules, for example, on capital transfers or export restrictions and international embargos or boycotts. A bank should also be able to differentiate on grounds of creditworthiness or reputational risks (for example, in relation to gambling and table dance bars). The provisions establishing an exception (II.-2:103) and governing the burden of proof (II.-2:105) should be reconsidered.
II.-4:104(1), p. 196	**Merger clauses** <u>Position:</u> It should be possible to agree merger clauses in standard contracts.
II.-4:204(2) and 4:210, pp. 198-9	**Silence does not amount to acceptance** <u>Position:</u> It should be considered whether a derogation from this principle is required or justified in situations where an ongoing contractual relationship (e.g., a broker agreement) has been established.
II.-6:111, p. 208	**Unidentified principals** <u>Position:</u> It is common practice in agency lending agreements to specify that the agent under no circumstances becomes a party to the stock loan. Although disclosure of principal usually occurs on the business day after a stock loan was effected, the possibility cannot be excluded that (e.g., for operational reasons) the agent fails to disclose. It is also not clear what ‘reasonable time’ means in this context. The provision will, at least for documentation governed by English law, have an impact on current practice.
II—7:302, p. 214	**Gambling or gaming** <u>Position:</u> It should be clarified that the prohibition of, or limitation on, gambling or gaming, as stipulated in the laws of various EU Member States (as mandatory rules), does not render a contract eligible to be declared void if such contract relates to financial instruments or financial services.

II.-9:105 and 106, p. 221	**Unilateral determination and determination by third party** <u>Position:</u> Unilateral determinations or determinations by third parties are common practice in financial markets, especially in the area of derivatives. Examples are determinations made by calculation agents (who determine reference prices or whether certain disruption events have occurred) or valuation agents (who validate collateral). The reasonability test established in II.-9:105 and 106 burdens such determinations with uncertainty.
II.-9:107, p. 221	**Price source disruption** <u>Position:</u> The provision is appreciated. However, it should not prevent parties from agreeing more sophisticated mechanisms.
III.-3:708, p. 251	**Default interest** <u>Position:</u> The rule provided here (short-term lending rate to prime borrowers) is appreciated. However, banks should be able to provide for surcharges that account for credit spreads used in the market.
III.-5:201 and 301, pp. 265 and 268	**Substitution of debtor and transfer of contractual position** <u>Position:</u> The provision on substitution will have an impact on novation agreements used in derivatives market (e.g., based on the International Swaps and Derivatives Association Novation Protocol). The provision should not preclude banks from maintaining current practice.
III.-6:201, p. 270	**Merger of debts** <u>Position:</u> It should be clarified that bonds and other negotiable debts are exempted from this rule.
VIII.-1:201, p. 425	**Definition of ‘goods’** <u>Position:</u> The definition of ‘goods’ as established in VIII.-1:201 does not fully comply with the meaning given to that term elsewhere in the DCFR (see, for instance, IV.A.-1:201(b)). The term ‘goods’ should be employed in a consistent manner.

Annex 2

EFMLG TASK FORCE ON THE DCFR

Mr Moïse Bâ	BNP Paribas
Mr Tom Bartos	Barclays Bank
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Mr Wido Ganz	Bayerische Hypo- und Vereinsbank / UniCredit Group
Mr Holger Hartenfels	Deutsche Bank AG
Mr Otto Heinz	ECB
Ms Araceli Levya	CECA
Mr Antonio Sáinz de Vicuña	Chairman of the EFMLG and of the Task Force on the DCFR
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Annex 3

EFMLG MEMBERS

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Ms Helen Cockroft	Royal Bank of Scotland
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Ms Hanneke Dorsman	ABN Amro Bank NV
Mr Pedro Ferreira Malaquias	Portuguese Euribor banks
Mr Adolfo Fraguas Bachiller	Banco Bilbao Vizcaya Argentaria
Ms Marie-Paule Gillen-Snyers	Kredietbank Luxembourg
Mr Mark Harding; Alternate: Mr Tom Bartos	Barclays Bank
Mr Holger Hartenfels	Deutsche Bank AG
Mr Stéphane Kerjean	ECB, Secretary
Mr Antonio Maladorno	Unicredito Italiano Spa
Ms Helen Moran	AIB Group
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Ms Susan O'Malley	HSBC
Mr Ulrich Parche	HypoVereinsbank
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Mr Dimitris Tsibanoulis	Greek Euribor banks
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