



EUROPEAN CENTRAL BANK

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DIRECTORATE GENERAL - LEGAL SERVICES

30 June 1999

**MINUTES OF THE 1ST INFORMAL AD HOC GROUPING OF EUROPEAN FINANCIAL
MARKET LAWYERS**

on 10 June 1999

PARTICIPANTS: The list of attendants is enclosed (see Annex1).

1. Introduction and approval of agenda, raison d'être of informal grouping

The first meeting of the informal ad-hoc grouping of European Financial Market Lawyers established by the European Central Bank ("the ECB") was held on 10 June 1999 on the premises of the ECB in Frankfurt, Germany.

The reasoning behind the establishment of the ad-hoc group was manifold. To give a brief insight into the background the introduction of the euro made a significant step towards the completion of a single financial services and wholesale banking market in the European Union. Hereby a single monetary policy and, by way of TARGET, a single money market evidenced in single market rate quotations (EURIBOR, EONIA) was established. The huge re-denomination of securities into euro, which took place on the changeover weekend, has created the basis for a European-wide securities market, further enhanced by the increased possibility of cross-border use and the existing and new links between securities settlement systems and organised markets.

However, the singleness of the financial markets is still hampered by the lack of a single set of legal rules. National legal systems divide the euro zone and the EU at large. Those participating in European markets on a pan-European basis still have to cope with the existence of fifteen different legal systems. The establishment of the ad-hoc group consisting of lawyers drawn from participants in the European financial markets took place in order to discuss the possibility of promoting initiatives that will lead to harmonisation in financial market activity.

2. Tour de table for general comments on grouping

The purpose underlying the grouping was welcomed. It was noted that there would be a benefit to all in discussing mutually issues of interest, and thus come to an understanding of the European legal and regulatory scene overall. Many of the agenda items were unlikely to be able to be moved forward without resort to legislative reform, which fell outside the ambit of the task of this grouping, however. It was agreed that nothing should be undertaken that already forms the subject of work being done by others. It was also accepted that this grouping was not intended to form part of the existing framework for ECB activities in the European legislative debate. It could, of course, usefully inform the ECB of what issues were of importance in the process of harmonisation of European financial markets. And this kind of grouping would help the ECB to be as well informed about private law issues as public.

3. Consideration of preliminary list of items

3(a) cross border use of collateral:

(i) Legal barriers to cross-border use of pledges and of pooling of collateral

This agenda point dealt with the legal difficulties of cross-border use of collateral European wide, which indeed creates practical and administrative impediments to a better and more smooth functioning mobilisation of collateral.

Securities will always gravitate to the place where their pledging is easiest. Disparities of ease of pledging were recognised as problematic, and that these problems involved aspects of private national law that could not easily be overcome. However, lack of transparency of legal construction is itself part of the problem, and could perhaps be considered as more susceptible to initiatives for improvement. The difference in legal regime for traded exchanges and for OTC markets was noted. The legal complexities create a high consumption of time and associated expense.

For these reasons, movement towards a pan-European method of taking pledges is necessary. Such a movement may need to avoid trying to change national bankruptcy laws.

(ii) Legal barriers to cross-border use of cash and claims (book debts) as collateral

An analysis was made in order to clarify whether or not any such legal barriers exist to the cross-border use of cash and/or claims as collateral and, if so, what the merits would be for setting up a common approach.

However, the grouping was not convinced that this matter merited further consideration. Even where statute allows for the pledging of debts interbank, such as in France, this is not highly used.

(iii) Ways to trade debt throughout the EU on a basis wholly consistent with computerised nature of the capital markets

Given the structure of the capital markets and the growing extent to which these are managed and are functioning in computerised form, guidance was sought as to what extent the group thought it necessary to uniform the computerised trade in Europe.

Whilst the aim of using technological improvements to their full potential was welcomed, and the need for a fully liquid EU-wide market in traded securities agreed on, the grouping was not convinced that this matter merited further consideration.

(iv) Different concepts of debt, debt instruments, securities, asset-backed securities

The nature of the national legal differences of the definition and concept of debt, debt instruments etc. to the fullest extent represent the whole range of legal impediments and difficulties connected with the lack of harmonisation within the financial markets of Europe.

This matter reflected differences between nations and markets that ran deep and where for that reason difficult to reconcile. Nonetheless, practical considerations suggested that something should be done, to analyse whether the existing differences represented a fetter on the full integration of the EU markets. Issues that arose in relation to rescheduling of debt informed this view also. It would make sense to analyse whether standards for national debt systems could be established. Traders buy and sell debt without considering the true nature of what they are buying. There may be hidden dangers in the process of integration continuing as if all EU debt were homogeneous when it is not. Normally arcane matters such as prescription periods and procedures for lost certificates fall into a new light when compared cross border, and no longer seem so exotic (questions of dematerialization and fiscal treatment were also mentioned in this context). The grouping felt this matter could usefully be considered further.

3(b) Legal documentation issues:

(i) The use and effectiveness of master netting agreements

The general question of the advantages and disadvantages of the use and the effectiveness of master netting agreements is currently being discussed intensively in the market, for which reason the thoughts of the members of the group were sought.

However, although there was a wide-ranging discussion of the comparative merits of master netting agreements and cross-product master agreements overall the grouping was not convinced that this matter merited further consideration.

(ii) Documentation for the EU fx spot market

In the same line the general appreciation of the grouping was sought as to whether initiatives should be taken in order to establish a master agreement for EU fx spot transactions.

The grouping noted that this matter triggered the information of the New York Fed's FMLG. Since then, however, it was felt that where parties wished to document their fx sport transactions they had resort more and more to existing market standard documentation. Therefore, the grouping was not convinced that this matter merited further consideration.

3(c) Wholesale banking practices:

(i) Practices in disclosing or identifying underlying principals when trading through agents and intermediaries

In some jurisdictions there seems to exist legal uncertainties in connection to the non-disclosure of underlying principals when trading through an agent or an intermediary.

A comparative discussion of national practices and legal systems revealed that this matter is of importance only for activities governed by common law. Overall, the grouping was not convinced that this matter merited further consideration.

(ii) The legal aspects of the existing movement to adopt harmonised market conventions

Amongst others as a consequence of the introduction of the euro the financial markets of Europe are harmonising conventions within different areas. The merits of identifying and analysing the legal aspects of this process, if any, were discussed.

The grouping was not convinced, however, that this matter merited further consideration.

(iii) The possibility of a pan-European definition of "business day" and/or "bank holiday"

The possibility of facilitating a harmonised definition of business day/bank holiday was discussed, as this area, at least in the past, has been a matter of some practical concern.

It appeared to the group that the changeover to the euro had been used by all segments of the market as an opportunity to adopt definitions that worked happily in the new era, and that the use by different market sectors of different phrasings had sound business grounding. Therefore, the grouping was not convinced that this matter merited further consideration.

(iv) The possibility of a pan-European definition of "force majeure" for use in financial market transactions

The scope of the definition of force majeure differs widely within the different European jurisdictions. This constitutes a current concern of the financial markets, as market players not knowing the extent and application of the concept in other jurisdictions than their own, may find themselves in difficulties when and if force majeure occurs. Therefore, a common definition might be warranted.

It was noted again that there were sound business reasons for the use by different sectors of the market of different phrasings. However, the product-linked approach might disguise hidden dangers since there were possibly legal systems where the full meaning of standard phrasing was untested. Thus, a comprehensive analysis of the applicable doctrines might be useful, especially with reference to comparatively untried legal systems, such as those of the accession countries. In this way, previously unidentified market risks might be revealed.

3(d) Means of payment:

(i) Possible solutions to problems arising from cross-border use of different legal payment instruments (for example, different legal status of cheques)

Given the very specific arrangements made to accommodate specific national traditions in terms of setting up a legal framework for different legal payment instruments, and given the change in the use of these instruments over the years, consideration was made on analysing the possibility of a more harmonised framework.

The grouping was not convinced that this matter merited further consideration.

3(e) Electronic commerce and banking:

Based on the rapid development within electronic commerce and banking over the past years not least due to the increasing use of the Internet for such purposes, the impact and importance of these new possibilities for the financial markets were discussed.

The grouping was not convinced that this matter merited further consideration.

4. Any follow-up work and future meetings

The discussion dealt with the need for a harmonised level of rules relating to EU-wide consumer protection, including definitions of types of counterparty (sophisticated investor etc.), and on the role generally of directives as a tool for financial market harmonisation. Overall, however, the grouping did not identify anything that merited further consideration.

Follow-up work

The grouping felt that there would be benefit in continuing the discussion and maintaining the forum, and thus to have another meeting.

The grouping had identified three matters where follow-up work might assist in the process of harmonisation of EU financial markets, each of which could be discussed further at the next meeting, which would be after the summer break.

These matters were:

- Achieving uniformity as far as possible in the way that pledges of securities are taken throughout the EU. Laurie Adams volunteered to co-ordinate taking this forward, with the assistance of the ECB Legal Services.
- Establishing a set of standards to harmonise as much as is necessary the legal nature of traded debt securities. Martin Thomas volunteered to co-ordinate taking this forward, with the assistance of the ECB Legal Services.
- Analysing the comparative legal concepts and definitions of concepts of force majeure. The ECB Legal Services volunteered to co-ordinate taking this forward.

Future meetings

The date for the next meeting will be [22 or 23 September 1999 – Philippa inquiring into available meeting rooms].

LIST OF ATTENDANTS

Chairman: Mr. Antonio Sáinz de Vicuña (ECB General Counsel)

Invitees

Mr. Dirk Vloemans	Belgium
Mr. Martin Bartels	Germany
Mr. Ulrich Bosch	Germany
Mr. Dimitris Tsibanoulis	Greece
Mr. Vicente Sánchez Murillo	Spain
Mr. Jean-Michel Bossin	France
Mr. Hubert de Vauplane	France
Mr. Bryan Sheridan	Ireland
Ms Marie-Paule Gillen	Luxembourg
Mr. J. W. Frits Bausch	The Netherlands
Mr. Kari Suominen	Finland
Mr. Krister Borg	Sweden
Mr. Laurie Adams	United Kingdom
Mr. Howard Trust	United Kingdom

Members of ECB Legal Services

Mr. Erwin Nierop (Head of the Financial Law Division)
 Ms Chiara Zilioli (Head of the Institutional Law Division)
 Mr. Romain Bardy
 Mr. Martin Benisch
 Mr. David Blache
 Ms Uta Elbers
 Mr. José María Fernández Martín
 Mr. Sergio Gonçalves do Cabo
 Mr. Philip Hanssens
 Mr. Christian Kroppenstedt
 Mr. Niall Lenihan
 Mr. Klaus Löber
 Ms Chryssa Papathanassiou
 Ms Katja Pedersen
 Ms Valérie Saintot

Mr. Manfred Skalitzky

Mr. Mikael Stenström

Mr. Pedro Gustavo Teixeira

Mr. Martin Thomas

Ms Petra Vospernik

Mr. Sakari Vuorensola